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SELF-DETERMINATION IN THE 21ST CENTURY – MODERN PERSPECTIVES FOR AN OLD CONCEPT

*By Peter Hilpold**

I. INTRODUCTION

Looking back it can be stated that the 20th century was the era of self-determination. The whole century was characterized by attempts to create new States, dismember old ones and to draw continuously new lines on the world map in the hope to finally carve out the definite boundaries of distinct societies which, taken singularly, should form ideal aggregations of human beings on a certain territory. The unifying bond could be of diverse nature: race, language, culture, a common history or the pursuit of a common national idea. At the same time, however, also the search for the individual identity gets more complex and answers found are of partial nature and restricted durability. The definition of identity is determined by a continuously growing number of elements.[1] Collective identities are overlapping and ever-faster evolving. When taken as the legal and moral foundation for a right to self-determination this concept itself is subject to continuously changing definitions creating unfulfillable hope and unnecessary delusions. In the following it will be shown that the concept of self-determination is an important instrument for change. It is an argumentative tool with an extraordinary capacity to provide legitimacy to calls for modifications of the existing international order. These modifications are in part essential for the survival of the international order; in part, however, they jeopardize the system itself. In the course of the 20th century a complicated system of rules has been carved out that seems to fulfil in a satisfactory way both the aspiration for stability as that for change. Exactly because of the dichotomy of the goals pursued looking out for an inherent fairness[2] of this system will lead to a disappointing result. Towards

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1 *See* T. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", 90 *A.J.I.L.* 359 (1996). There is extensive literature on the difficulties of identifying the identity of a nation. *See, e.g.*, E. Gellner, *Nations and Nationalism* (1983); E.J. Hobsbawm, *Nations and Nationalism Since 1780* (1990); *Nation and Identity in Contemporary Europe* (B. Jenkins *et al.* eds., 1996).

2 With regard to the principle of fairness in international law *see* T. Franck, *The Power of Legitimacy Among Nations* (1990).

the end of this contribution it will be shown, however, that there are ways to overcome this problem. The most important approach consists in fully integrating the right to self-determination in the human rights order created in the second half of the 20th century and making thereby self-determination both point of departure and point of arrival of all endeavours to foster human rights.

II. THE DEVELOPMENT OF THE LAW OF SELF-DETERMINATION

A. The Wilsonian Concept

In the political manifesto, to which the name Woodrow Wilson will always remain associated with, the so-called "Fourteen Points" presented to the US Congress on 8 January 1918, the term "self-determination" is not mentioned. Only more than a month later, on 11 February 1918, again in a speech before the Congress, Wilson made an explicit reference to the principle of self-determination:

> National aspiration must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril. [...] [P]eoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game [...] [A]ll well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.[3]

On the whole, this is a lesson in political expediency where it is hard to state in advance when a claim to self-determination is legitimate or not. In examining this issue the State Community maintains a far-reaching discretion and in any case the adequacy of a behaviour taken in this field will become evident only ex post. If further imprecisions of this statement, e.g., with regard to a possible conflict between the personal and the territorial component of the right to self-determination, are taken into consideration then this lofty new element of change in international law seems to lose altogether its consistency and therefore its relevance. Such a conclusion

[3] 56 *Cong. Rec.* 8671 (11 Feb. 1918), cited according to H. Hannum, "Self-Determination in the Post-Colonial Era", in *Self-Determination – International Perspectives* 12, 13 (D. Clark & R. Williamson eds., 1996).

would, however, surely be too far-reaching. Wilson statement is not a mere tautology but it contains two elements that cannot be simply neglected in accordance with the interpretation of a certain factual situation: the requirement that government be based on the consent of the governed and the interpretation of the principle of self-determination as a peace-creating instrument requiring the ponderation of all interests involved. In this sense, the meaning given by Woodrow Wilson to the concept of self-determination is surprisingly modern and seen from hindsight many struggles carried out under the banner of this concept appear to be based on a misconceived idea of self-determination and an aberration from the original Wilsonian thought.

B. The Aaland Case

That the concept of self-determination is open to wildly diverging interpretations has been demonstrated very impressively by the Aaland Islands case which is often cited as the first step towards the development of the modern law of self-determination. Briefly stated, the question to be solved was the following: Did the Aaland Islands which were inhabited mainly by a people culturally very close to Sweden have the right to secession from the newly constituted State of Finland and to aggregate themselves to Sweden? The Committee of Jurists which had first to deal with this controversy denied the existence of an independent right to self-determination in the form of a right to secession but recourse to the principle of self-determination as a problem-solving device should be possible when national sovereignty has not yet fully been constituted as was purportedly the case with Finland. Taking up this lead, the Commission of Rapporteurs which was subsequently asked to devise a program of action proposed the Salomonic solution to uphold on the one hand Finland's sovereignty and required on the other hand this country to grant a meaningful autonomy to the Aaland Islands.[4] By this carefully built approach an ingenious balancing of interests could be achieved to which the concept of self-determination provides the aura of international legitimacy. In this sense, it could even be argued that the principle of self-determination also benefited from the fact that reliance has been made on it in this case as it gained the status of a successful problem-solving device where such hotly disputed matters as territorial conflicts with a nationalist background were at issue.

[4] *See* T. Modeen, "Aaland Islands", 1 *Encyclopedia of Public International Law (E.P.I.L.)* 1 (R. Bernhardt ed., 1992); L. Hannikainen & F. Horn, *Autonomy and Demilitarization in International Law: The Aaland Islands in a Changing Europe* (1997); A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal* (1995); J. Crawford, *The Creation of States in International Law* (2nd ed., 2006).

If we ask what the Aaland case can tell us today, two aspects come to mind even though the surrounding legal framework after more than eighty years has, of course, largely changed:

– The concept of self-determination necessarily enters into conflict with traditional international law which derives its essential basis from the existence of sovereign States. Therefore, even those who should deny the concept of self-determination the quality of a right will probably find it easier to accept the concept of self-determination as a guiding principle when sovereignty is in abeyance.[5]

– A further lesson that can be learnt from a careful consideration of this case regards the paramount importance which has to be given to the context of the individual problem if an adequate solution shall be achieved. Again, this tenet can be split into two sub-elements. The first one encompasses a warning against over-generalization from past experience as a specific context rarely repeats itself in history even in its most important elements. The second element refers back to the considerations made above with regard to human rights. If the context is taken seriously and not only in its factual but also in its legal sense, then today central attention has to be given to the human rights issue. Therefore, reliance on self-determination for the primary goal of attaining independent statehood can find no place in international law if this should be detrimental to the specific human rights situation.[6]

Interestingly enough, there is a third element to the Aaland case to which great attention has been given, especially in later times: Reference is made here to the statement according to which minorities, though normally not bearers of the right to self-determination, in altogether exceptional situations can even claim a right to secession as a last resort if they are victims of severe discrimination and oppression.[7]

5 *See* N. Berman, "Sovereignty in Abeyance: Self-Determination and International Law", 7 *Wis. Int'l L. J.* 51, 104 (1988).

6 *See*, with regard to the central importance of human rights considerations in all struggles for self-determination, H. Hannum, "The Right to Self-Determination in the Twenty-First Century", 55 *Wash. & Lee L. Rev.* 773 (1998).

7 With this clarity, this statement can be found only in the report presented by the Commission of Rapporteurs (League of Nations, Report Presented to the Council of the League by the Commission of Rapporteurs, Council Doc. B7/21/68/106, 16 Apr. 1921, at 28). For the Committee of Jurists the consequence of events of this kind was merely to transform a minority issue from a purely internal matter to a matter of international concern. *See* Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion on the Legal Aspects of the Aaland Islands Questions, *L.N. Off. J.*, Special Supp. No. 3, at 5 (Oct. 1920).

C. The Interwar Period

While the concept of self-determination had, at least as an argumentative tool, enormous importance for the conceptualization of the immediate after-war order, once the new order was established, the desirability of change diminished visibly. On the contrary, it can be said that the newly established entities were strongly interested in stability and denying the concept of self-determination the force to change border lines no matter how persuasive the arguments for change should be. This was particularly true for those States which had profited from the changes the First World War had brought about while the losers, especially Germany and Austria, constituted an exception to this rule.

On a political level, the perception for the people in Germany that the concept of self-determination has been a motor for territorial change to their detriment led, in the later years of the interwar period when Germany had become authoritarian while becoming stronger to the conviction that this instrument can also be used in the opposite direction, *i.e.*, to re-acquire territories once lost or even to enlarge this country with territories never possessed before.[8] In this way Germany had grown considerably in size by the year 1939 but alongside this process the concept of self-determination had been tarnished, especially if it were minorities which wanted to take reliance on it to alter the course of national boundaries. This episode nearly caused the death of minority protection for a time after World War II and it allowed the rebirth of self-determination only in a very altered form.

8 On the tactical way Germany has made reference to the principle of self-determination *see* the contribution by P. Kluke in *Inhalt, Wesen und Gegenwärtige Praktische Bedeutung des Selbstbestimmungsrechts der Völker* 79 *et seq.* (K. Rabl ed., 1964).

D. The UN Experience[9]

At the time the Charter of the United Nations entered into force and for a long time after it was by no means clear what specific role should be attributed to this principle. By the equation of this principle mentioned in Article 1(2) as well as in Article 55 of the Charter with that of sovereign equality of Article 2(1)[10] this concept lost most of its autonomy and justification for existence in its own right. For a long time it was contended that the Charter of the United Nations does not speak of a *right* to self-determination anywhere;[11] in fact the term "principle" is seeming used to refer to a far more generic legal construct[12] which for some did not constitute a legal rule but only a political or moral guideline.[13] In any case, it is widely held that the concept of self-determination has undergone a dramatic development since 1945 and that this development was originally not foreseeable.[14] To say that the views on this concept have changed and that a far-reaching development has occurred may, however, be of no great help as long as the exact contours of this new concept are not defined. In fact, as has been shown in literature, if we do not want this concept to become absolutely futile self-determination – as long as it remains a group related concept – it cannot mean "self-determination for all" in its most radical sense but the implementation of this principle requires a careful ponderation

9 On the contribution of the United Nations to the development of the law of self-determination, there can be found countless studies. Among them, *see especially* for the developments in the first decades: J.L. Kunz, "The Principle of Self-Determination of Peoples", in *Inhalt, Wesen und Gegenwärtige*, *supra* note 8, at 128; D. Thürer, *Das Selbstbestimmungsrecht der Völker; mit einem Exkurs zur Jurafrage* (1976); M. Pomerance, *Self-Determination in Law and Practice – The New Doctrine in the United Nations* (1982); E. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (1977); A. Cassese, *Self-Determination of Peoples - A Legal Reappraisal* (1995); H. Quane, "The United Nations and the Evolving Right to Self-determination", 47 *I.C.L.Q.* 537 (1998). For a detailed account of the historical background of this contribution *see* E.A. Laing, "The Norm of Self-Determination, 1941-1991", 22 *Cal. W. Int'l L. J.* 209 (1992).

10 This was the interpretation given by H. Kelsen in his first commentary on the law of the United Nations, *The Law of the United Nations* 52 *et seq.* (1951).

11 *See* Kunz, *supra* note 9, at 129.

12 *See*, for a source of more recent times, K.J. Partsch, "Self-Determination", in *United Nations: Law, Policies and Practice* 1171, n. 11 (R. Wolfrum ed., 1995).

13 *Id.* As H. Hannum writes Britain, France and Belgium, the great colonial powers at the end of World War II, would not have adhered to the Charter had this document at that time included a right to self-determination. *See* Hannum, *supra* note 6, at 775.

14 *See, in particular*, R. Higgins, *Problem and Process, International Law and How We Use It* 111 *et seq.* (1994); R. Higgins, "Postmodern Tribalism and the Right to Secession", in *Peoples and Minorities in International Law* 29 (C. Brölmann *et al.* eds., 30).

of all interests involved and, in the end, a political decision to determine which interest should be sacrificed and which should prevail.[15]

As this principle is spelled out in the Charter only in rudimentary form the task to transpose it into a workable concept without falling into arbitrariness seemed almost impossible. Famous, and often cited, is the statement by Sir Ivor Jennings that letting the people decide is ridiculous because someone must first decide who is the people.[16] Practically all the problems associated with this concept are hinted at by these few words: on the one hand further concretization is needed, on the other this implies a risk of abuses and, eventually, of a total relativity of the interpretation.[17]

The identification of the self which should be the bearer of this right *in statu nascendi* stands at the core of the whole issue. If we assume that this "self" is not to be equated with the existing nation-States as Hans Kelsen has suggested then the dimensions of the ensuing disruptive effects have to be determined. Should the term "people" be interpreted in a sociological sense so as to comprise ethnic groups, indigenous peoples or even minorities? How should conflicting claims between these groups be dealt with? Which weight should be given to territorial aspects in the sense that existing territorial delimitations (external and internal boundaries) are a preferential reference point for the identification of a people entitled to self-determination? Is this entitlement of a people to be measured only against its actual consistency or are historic developments also to be taken into consideration? What role should be attributed in this field to past violations of human rights?

15 In this context M. Pomerance ["The United States and Self-Determination: Perspectives on the Wilsonian Conception", 70 *A.J.I.L.* 1, at 26 (1976)] stated eloquently the following: "Unless the 'self' of 'self-determination' is reduced to the individual 'self' of the formula's metaphysical origin, it is necessary to determine which people *are* embraced within the self and which are *not*".
On the problems associated with the implementation of the right to self-determination, *see also* J. Packer, "Considerations on Procedures to Implement the Right to Self-Determination", in *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 Nov. 1998* 149 (UNESCO Division of Human Rights, M.C. van Walt van Praag & O. Seroo eds., 1999).

16 I. Jennings, *The Approach to Self-Government* 56 (1956).

17 *See also* the following statement of Fitzmaurice:

> The initial difficulty is that it is scarcely possible to refer to an entity as an entity unless it already is one, so that it makes little juridical sense to speak of a claim to become one, for in whom or what would the claim reside?

G. Fitzmaurice, "The Future of Public International Law and the International Legal System in the Circumstances of Today", in *Evolution et Perspectives du Droit International* 233 (*Institut de Droit International*, 1973).

Even if it were possible to find answers to all these questions (and to the many more issues associated with the definition of the "people") it would still be necessary to state what this right entails for its bearers. Here, too, the possible answers cover an extremely wide spectrum, ranging from provisions designed to assure effective participation to a right to secession guaranteeing independent nationhood. The uncharted waters do not end at this point. Once both the bearer of this right and its content are identified it still has to be implemented. As it is known, implementation is often characterized as one of the weakest points of international law, the very Achilles heel in its competition to be recognized as true law.[18]

While this quality can no longer be reasonably denied in this set of norms,[19] it remains uncontested that international law still relies on very particular instruments to become effective. In this context, concepts such as reciprocity, good faith, international reputation and the fear of retorsions or reprisals plays a dominant role.[20] With regard to the right to self-determination the discussion about possible instruments for implementation have concentrated primarily on the most radical tools with particular attention to issues such as the right to self-determination and the use of force while the ordinary, much more subtle ways in which the right to self-determination is or could be implemented on a day-to-day basis have received far less attention. Even if a general theory of implementation could be devised in this field, further questions would immediately arise. In particular, it is not clear whether the act of self-determination is a once-and-for-all-decision or whether it can be repeated in time. Two extreme positions can be discerned in this field: According to representatives of the first, the right to self-determination expires once it has been exercised and it never comes to life again barring new developments that constitute autonomous justifications for such a right. According to the adherents of the other group, the right to self-determination is exercised on a day-to-day basis. Speaking with Ernest Renan[21] we could say in this case that the act of self-determination is repeated continuously by the way of a permanent plebiscite

18 Brief discussions of these problems can be found in numerous manuals on public international law. *See, e.g.,* O. Kimminich & S. Hobe, *Einführung in das Völkerrecht, A. Francke* 17 *et seq.* (1997). For an extensive elaboration on the compliance problem *see, e.g.,* A.A. Handler Chayes, *The New Sovereignty* (1995).

19 *See* P. Malanczuk, *Akehurst's Modern Introduction to International Law* 6 (1997), who describes this question as a "moot point".

20 *See* H. Neuhold, "Die Einhaltung des Völkerrechts in Einer außenpolitischen 'Kosten-Nutzen-Analyse'", 19 *German Y.B. Int'l L.* 317 (1976); H. Neuhold, "The Foreign-Policy 'Cost-Benefit-Analysis' Revisited", 42 *ibid.*, 84 (2000).

21 *See* E. Renan, "Qu'est-ce qu'un Nation?", in *Conference faite en Sorbonne* (11 Mar. 1882).

in which options can be expressed continuously anew for an ever-varying political status. Still further questions pertain to the relationship between the right to self-determination and the principle of democracy.

Over decades, decolonisation has been a core issue for the main UN organs even though the UN Charter is by no means explicit on a relative obligation of the Member States.[22] Of crucial importance was the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly on 14 December 1960,[23] which mentions three forms in which the right to self-determination can be exercised: the establishment of a sovereign and independent State; the free association with an independent State or the integration into an independent State. The option for the association with or the integration into an independent State required special precautions to assure that this decision corresponds to the true will of the population.[24] By the so-called "Friendly-Relations-Declaration"[25] which was passed at a time when the decolonisation process had already reached a good point and its end was more or less foreseeable, the UN Member States reiterated consensually their determination to fight colonialism. In this context, self-determination was presented again mainly as a decolonisation issue.

It shall not be denied that all this criticism against a narrowly defined concept of self-determination (*i.e.*, as an instrument which finds its justification merely in the fight of colonialism) could also be countered to a certain extent. If we view, for example, the international order from the perspective of the year 1960, to limit a right to self-determination to the field of anti-colonialism is not necessarily to be condemned as there can hardly be discerned a higher ranking principle inherent to the structure of international law imposing the development of a generally applicable right to self-

22 *See* Partsch, *supra* note 12, at 1173. According to Pomerance, the creation of the "New UN Law of Self-Determination" was the expression of "an attempt to revise the Charter in a binding manner"; *supra* note 11, at 11.

23 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), 15 *UN GAOR*, Supp. (No. 16) at 66, UN Doc. A/4684 (1960).

24 *See* Principle IX(b) of Res. 1514 (XV), *ibid.*:

> The integration should be the result of the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

25 Declaration on Principles of International Law Governing Friendly Relations and Co-Operation between States, UN G..A. Res. 2625 (XXV) (1970), repr. in 9 *I.L.M.* 1292 (1970).

determination. The most important cases in this regard were those of Western Sahara and of East Timor.

a) With regard to Western Sahara, a Spanish colony up to the year 1975, the UN General Assembly, the Security Council and the International Court of Justice have clearly and consistently qualified this problem as one of decolonisation and pointed out that the population of this territory has the right to self-determination to be exercised through a free and fair referendum.[26] Nonetheless, Morocco and in the first years also Mauritania have blatantly ignored the will of the International Community by occupying this territory with force. When Mauritania in 1979 could no longer afford the war against the liberalisation army POLISARIO, it withdrew from the occupied territories renouncing all territorial claims. The abandoned territories were immediately occupied by Morocco. A strong UN involvement with the agreement of a cease-fire, the deployment of peacekeeping troops and various plans for a referendum that would implement the right to self-determination followed. While the cease-fire and the peacekeeping troops helped, in the end, to stabilize the factual Moroccan control on the Western Sahara, it was not possible to agree on a concrete plan for a referendum as there was no consensus on the identification of eligible voters.[27] It could be sustained that the Western Sahara conflict evidences only the fact that the concept of self-determination is still contradictory and that in contentious cases it is still not possible to identify the "self" in an objective way. It could, however, also be argued that those criteria adopted in other cases of decolonisation to overcome comparable impasses were strangely enough not applied to the Western Sahara case. It is true that a strict orientation on the Spanish census of 1974 would have been a rather approximate approach and unjust in many cases. Of all the possible

[26] *See, in this regard, in particular* Advisory Opinion on Western Sahara, [1975] *I.C.J. Rep.* 68, which insisted on the applicability both of the Declaration on the Granting of Independence to Colonial Countries and Peoples (*supra* note 23), and the principle of self-determination on the Western Sahara question.
With regard to the Western Sahara issue *see, for example*, T. Franck, "The Stealing of the Sahara", 70 *A.J.I.L.* 694 (1976); B.G. Ramcharan, "Recourse to the Law in the Settlement of International Disputes: Western Sahara", [1998] *African Y.B. Int'l L.* 205; T. Marauhn, "Sahara", 4 *E.P.I.L.* 283 (2000); K. Oellers-Frahm, "Western Sahara (Advisory Opinion)", *ibid.*, 1463.

[27] For the POLISARIO the Spanish census of 1974 should have been the basis for the identification of the eligible voters. Morocco, on the other side, insisted on a far larger voting base including numerous individuals who in the meantime have moved from Morocco or Mauritania to the Western Sahara territory. Accepting this request would have made more or less sure that in the referendum to be held a majority would have opted for an integration of Western Sahara into Morocco.

approaches it would have been, however, probably the fairest one and, in any case, it would have been very well in line with the strategy of generalization so typical to the decolonisation process.

b) The second important case where the principles developed during the decolonization process were overtly set aside regards East Timor.[28] The Eastern part of the Timor Island had been under Portuguese control since the later part of the 16th century. After World War II Portugal tried in vain to impede East Timor being set on the list of non-self-governing territories; this happened officially in 1960.[29] From then on, the pressure on Portugal to decolonise East Timor (together with its other colonies) was continuously augmented. Finally, Portugal was confronted with bloody insurgencies in its colonies, a fact which contributed to turmoil in the metropolitan country, too. The revolution in Portugal of 1974 marked the beginning of the definite breakdown of the Portuguese colonial empire. Portugal was, however, not able to complete the decolonisation process of East Timor, as this territory was occupied by Indonesian troops in December 1975. An assembly in Dili, the capital of East Timor, requested its integration into Indonesia. As this request was, however, orchestrated by Indonesia, it was not a valid act of self-determination as required by international law. A bloody war of secession ensued, and the brutality displayed by the Indonesian troops compared to that witnessed only in the worst colonial wars. About a third of the East Timor population died as a direct or an indirect consequence of these acts of oppression.

The position the United Nations has taken in the East Timor case viewed from the perspective of a potential bearer of the right to self-determination, is both daunting and encouraging. It is daunting if we consider that the Security Council required a withdrawal of the Indonesian troops only twice in the immediate aftermath of the Indonesian invasion and has remained

[28] With regard to the East Timor case *see, for example*, R.S. Clark, "The 'Decolonization' of East Timor and the United Nations Norms on Self-Determination and Aggression", 7 *Yale J. World Pub. Order* 1 (1980); Ch. Chinkin, "East Timor Moves into the World Court", 4 *E.J.I.L.* 206 (1993); P. Lawrence, "East Timor", II *E.P.I.L.* 3 (1995); P. Hilpold, *Der Osttimor-Fall* (1996); P. Hilpold, "Das Selbstbestimmungsrecht der Völker vor dem IGH – der Osttimor-Fall", 53 *Z.A.O.R.V.* 263 (1998); C. Chinkin, "East Timor: A Failure of Decolonisation", 20 *Australian Y.B. Int'l L.* 35 (1999); D.C. Turack, "Towards Freedom: Human Rights and Self-Determination in East Timor", in *Asia-Pacific J. Hum. Rts. and the Law* 55 (2000/2); C. Drew, "The East Timor Story: International Law on Trial", 12 *E.J.I.L.* 651 (2001).

[29] Transmission of Information Under Article 73e of the Charter, UN G.A Res. 1542 (XV), 15 *UN GAOR*, U.N. Doc. A/RES/1542 (1960).

silent afterwards for a quarter of century.[30] It was daunting also to see that the support in the General Assembly for the right to self-determination of the people of East Timor diminished continuously: From 1975 to 1982 eight Resolutions were adopted which continuously mustered less support. Afterwards, all related efforts were abandoned as it was no longer sure that initiatives of this kind would obtain a majority. This development reflected pure *realpolitik*: For the West Indonesia was economically and militarily an important ally; in the Third World it has long been one of the most important advocates of self-consciousness and self-reliance of the developing countries. In this sense, the East Timor case can be considered a very good example of the fact that in a self-regulating society as the international one issues such as self-determination or human rights are often not considered on their own merits alone – like comparable issues would be treated in national law – but under parallel consideration of various other factors among which national interests rank very high. At the same time, the handling of the East Timor case through the United Nations is, notwithstanding all its shortcomings, also very encouraging. In fact, East Timor has remained on the list of the non-self-governing territories, notwithstanding the dwindling support for this cause in the General Assembly and in the Security Council. Already this fact exercised continuous pressure on Indonesia and guaranteed in a subtle way that this case would not go away. The next important step on the way to a solution of the East Timor question was set by the International Court of Justice in 1995. In this controversy between Portugal and Australia the immediate object was a treaty between Australia and Indonesia on the exploitation of the East Timor continental shelf which, according to Portugal, violated the right to self-determination of the people of East Timor. As it is known, the Portuguese claims were dismissed on procedural grounds but nonetheless the ICJ took the opportunity to confirm *obiter* the right to self-determination of the people of East Timor.[31] This judgement was much criticized because it was considered as not going far enough and in any case left open how the asserted right to self-determination should be implemented. In hindsight, however, the confirmation of this right alone through one of the most authoritative institutions constituted to interpret international law proved to be of great value. In fact, by its finding the ICJ conferred final and undisputable legitimacy to the struggle for self-determination of East Timor, a legitimacy which previously threatened to dwindle as States no longer found it to be politically expedient to sustain the cause of the oppressed. Retrospectively, one may be left to wonder how it

[30] *See East Timor*, UN S.C. Res. 384, *UN SCOR*, 30th Sess., 22 Dec. 1975, at 10 and S.C. Res. 389, *UN SCOR*, 31st Sess., 22 Apr. 1976, at 18.

[31] Case Concerning East Timor, [1995] *I.C.J. Rep.*, paras. 31, 37.

was possible that the interest in the cause of East Timor did not totally die out in the two decades from 1975 to 1995. Apart from the activities of Portugal, there was a continuously growing number of NGOs that kept the interest in the East Timor cause alive and which managed to influence public opinion especially in Western democracies thereby indirectly exerting pressure also on the relative governments.[32]

The information the public obtained about the situation in East Timor regarded primarily the mass violation of human rights such as the massacre committed on the participants of a Christian burial ceremony in Dili in 1991. Associated with the fact that the people of East Timor were one of the few people to whom the right to self-determination in a colonial setting had been denied this situation called for action. Shortly after the judgement of the ICJ, in 1996, the attention of public opinion was drawn again to East Timor by the assignment of the Nobel Prize to two representatives of the East Timor cause, Bishop Belo and Mr. José Ramos-Horta. One year later, an unlikely ally for this cause, the South-East-Asian financial crisis, hit and it proved to be, in the end, the final blow for the Indonesian dominance on East Timor. The International Community called to the rescue also of Indonesia could now exert pressure on this country and make aid dependent on the respect of basic human rights – an ideal case to study the efficacy of conditionality.[33]

As it became more and more clear that the disastrous economic and financial crisis of Indonesia was not only due to exogenous factors but also – and perhaps in the first place – to endemic corruption and mismanagement President Suharto, one of the staunchest opponents of more autonomy or outright independence for East Timor had to resign. The ensuing period of transition constituted the most fertile ground for the right to self-determination to be implemented effectively. After terror and coercion, proposals for greater autonomy and the insistence of local leaders on independence an arrangement was finally found – a referendum on the future of this territory would be held on 30 August 1999 under UN control. The

[32] On the important role NGOs are playing in the creation and the implementation of international law, *see, e.g.*, Malanczuk, *supra* note 19, at 96 *et seq.*

[33] On the issue of conditionality *see* various contributions in: *The EU and Human Rights* (P. Alston ed., 1999); P. Hilpold, "EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance", 7 *Eur. Foreign Aff. Rev.* 53 (2002); P. Hilpold, "Konditionalität in den Beziehungen zwischen der EU und den AKP-Staaten: Menschenrechte, Demokratie, Rechtsstaatlichkeit und verantwortungsvolle Regierungsführung", 5 *Z.E.S.* 239 (2002). Recent econometric studies have, however, shown that human rights conditionality plays still a rather small role in the allocation of aid, especially because aid is usually made dependent from a variety of factors. *See* E. Neumayer, "Is Respect for Human Rights Rewarded? An Analysis of Total Bilateral and Multilateral Aid Flows", 25 *Hum. Rts. Q.* 510 (2003).

ballot which was considered to be fair by international observers resulted in an overwhelming majority for the independence option. This result led to violent action by pro-Indonesian groups and to a chaotic situation the Indonesian forces could no longer control so that the Security Council had to authorize the intervention of multilateral forces to restore order. This task was achieved and though the final struggle was again enormously costly in terms of lives and material damage, the option for independence could no longer be reversed. East Timor became independent on 20 May 2002 and is therefore the 192nd State.

For many years it seemed that the International Community would become more and more willing to accept the annexation of East Timor by Indonesia. Though such an annexation was already contrary to international law as it existed before World War II (Stimson Doctrine), the Indonesian government had been prudent enough to arrange for a fake act of self-determination in 1976 which resulted in a request for integration. Most striking was the fact that, looking at the behaviour of the UN Members in the General Assembly or in the Security Council, the passage of time seemed to heal the original sin of an unlawful territorial acquisition, a fundamental challenge to basic values of modern International Law. It was the International Court of Justice which, in albeit timid language and form, deferential to State sovereignty, inadvertently set a deadly blow to Indonesia hope in this field. The affirmation of a right does not yet equal, however, its implementation. The danger was real that again the passing of time would operate against the East Timor people and that their claim for self-determination would weaken as over the years, a new factual situation becomes reality.[34]

III. SELF-DETERMINATION AND HUMAN RIGHTS

In the 60s of the 20th century, it was not yet clear whether the decolonisation struggle could be won fully and whether this would be possible in an acceptable period of time. Only a short time after the UN Charter entered into force, in an era loaded with moral rhetoric, a fierce struggle between three systems (the Western capitalist, the Eastern socialist and the "third way" of the developing countries for economic and politic leadership) commenced and it soon became clear that the Western bloc was most vulnerable with regard to their colonial empires. A second field where Western democracies were purportedly inferior regarded the treatment of

[34] This could be seen as the result of the "normative power of facts" or as an extinctive prescription. *See, in this context*, C.A. Fleischhauer, "Prescription", 3 *E.P.I.L.* 1105 (1997).

their minorities: While the so-called class free systems in the East were able to define this problem away, the Western democracies were accused of exacerbating the disadvantaged position of minorities through their systematic exclusion from all decision processes made possible through the strict application of the majority rule. A formally liberal decision rule could therefore lead, so it was said, to the permanent exclusion of sizeable groups of society from political participation. In the Cold War between East and West where the Third World more often than not sided with the East, the insistence on a rapid decolonisation and on the introduction of wide-ranging minority rights became political demands towards which the West was ill-at-ease. In this all-out-struggle between the blocs, the call for self-determination to be recognized as an autonomous right was not only a tool to further the interests of the people in non-self-governing territories but it became also a powerful mechanism to weaken the West and this instrument was employed on all possible levels. The endeavours to build up a solid set of instruments for the international protection of human rights opened an additional forum in which this struggle could again take place. While the existence of large common ground between the blocs on the human rights issue can, of course, not be denied, the creation of new rules whose essence was the restriction of governmental behaviour could, at the same time, exercise unforeseeable influence on the final shape of the obliged governments' societal orders. The human rights issue was therefore a natural field of competition between East and West and North and South, a competition which regarded, in a positive perspective, the moral leadership in the creation of a new international order and, in a more sober sight, the attempt to secure the eventual prevalence of a certain societal system. In view of such colliding and functionally similar interests, a common regulatory system could be nothing other than a package deal, a compromise from which each antagonist party had both to hope and to fear. The insertion of a right to self-determination through the equally-worded Article 1 of the two International Human Rights Covenants of 1966 [International Covenant on Economic and Social Rights (ICESCR)[35] and International Covenant on Civil and Political Rights (ICCPR)[36]] was a concession by the Western States, a concession largely rewarded, for example, in the field of civil rights.

If we have recourse to the historic circumstances under which the two human rights Covenants have been created, some insight into the meaning of the two Articles 1 can be gained. The *travaux preparatoires* evidence that

[35] 999 *U.N.T.S.* 171.
[36] 993 *U.N.T.S.* 3.

the term "peoples" should primarily apply to peoples in colonial countries taken as a whole. This wholistic approach meant furthermore that in principle self-government should be granted to a people territorially delimitated by the colonial boundaries (*uti possidetis* principle) and that a right to secession was to be excluded. It is, however, known that the historic roots of an international treaty are only of subsidiary importance for its interpretation[37] though in practice this rule is not always obeyed. Primarily the interpreter should adopt a textual, objective approach.[38] Does this mean that the concept of self-determination has in any case to keep its importance after the decolonisation process has come more or less to an end as there is no textual restriction of self-determination to the colonial area? This would surely be a mistaken view. A concept that has fulfilled its role has not to be kept artificially alive only because it is written neutrally into a treaty and because it is suited for different interpretations which may still be of importance in present days. A rule can become obsolete if the parties to a treaty into which it is written consensually no longer want to stick to it. With regard to the common Article 1 of the two UN Covenants this has, however, not been the case. It may have been the flexibility and the adaptability of the concept of self-determination that prompted interpreters continuously anew to give a new meaning to self-determination in postcolonial times. In recent times, the concept of self-determination seems to have become acceptable in its new "free-standing meaning" also for the State Community though it regularly remains couched in a tortuous wording which acts as a strongly restricting factor.

How is the relationship between self-determination and human rights exactly to be defined in present day? In its General Comment No. 12 of 1984, the Human Rights Committee interpreted the right to self-determination primarily as an "essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". This is an absolutely traditional perspective and can well be brought into line with the original function the right to self-determination was intended to have: For countries under colonial domination or foreign rule it was of pivotal importance to exercise first their right to self-determination in order to later improve the human rights situation. Though not even here the relationship between the concept of self-determination and human rights was strictly linear in the sense that the human rights issue should be tackled even while foreign rule prevails, logically, a certain priority for self-determination can be assumed in order to

[37] *See* Art. 32 of the Vienna Convention on the Law of Treaties, 1969, 1155 *U.N.T.S.* 331.
[38] *See* I. Brownlie, *Principles of Public International Law* 604 (2003).

be able to address the human rights issue effectively afterwards. Once colonial or foreign dominance is no more an issue, the question arises as to what sort of relationship shall exist between the newly defined concept of self-determination and human rights. In this situation it is much more difficult to treat the right to self-determination as a precondition for the full respect of human rights as long as the essence of this right remains unclear under so many aspects. As the concept of self-determination is not fully self-explanatory but seems to need further integration from related institutes other approaches have been suggested to devise a meaningfully structured relationship between this concept and the field of human rights. One author, Antonio Cassese[39] tried to describe this relationship in the context of the ICCPR in an inverted perspective. According to him, self-determination "presupposes freedom of opinion and expression (Article 21), the freedom of association (Article 22), the right to vote (Article 25 (b)), and more generally the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25(a)). Whenever these rights are recognized for individuals, the people as a whole enjoy the right of internal (political) self-determination; whenever these rights are trampled upon, the right of the people to self-determination is infringed".

In this way, the concept of self-determination becomes the mirror image of the human rights situation in that area of the public sector that in a large sense is commonly associated with the political life of a society. Self-determination understood in this sense would largely be coterminous with what has been called internal self-determination. While the concept of external self-determination refers primarily to the rights of a people as a whole with respect to other peoples – thereby including the discussion about the much disputed "right to secession" – the right to internal self-determination refers to the interior structure of a people's society and concentrates on the question of whether all elements of a society can effectively participate in a meaningful political process. Here, advanced participatory forms of democratic government come into play. Even if the concept of self-determination, understood in this way, is defined in its content only by reference to other rights also mentioned in the Covenants it does not become superfluous. In fact, the whole is more than the sum of its parts and by reciprocally integrating the various rights mentioned to a new right of a prestigious though not fully transparent pedigree the single elements of this new concept could gain in terms of enforceability. There are various other attempts to give a new meaning to the relationship between the

[39] A. Cassese, "The Self-Determination of Peoples", in *The International Bill of Rights* 92, 97 (L. Henkin ed., 1981).

right to self-determination and human rights. It has been said that starting from the assumption that the right to self-determination nowadays, *i.e.*, in a post-colonial setting, applies to all peoples in all situations where they are subject to oppression in the form of subjugation, domination and exploitation by others the human rights approach opens a formidable avenue to find a balanced solution sensitive to all interests involved.[40] In fact, it is known that a great part of human rights can be restricted and limited and thereby adapted to competing needs. The particular value of this approach consists of the fact that it can help to overcome some of the main defects of the right to self-determination as it has been understood in the past. This is in particular true of situations where there are competing, prima facie irreconcilable claims to self-determination or where there is the risk that an unrestricted exercise of a right to self-determination could lead to an escalation of violence and therefore, to a worsening of the situation. This approach is, therefore, helpful to answer potentially disruptive claims with an instrument that furthers compromise and the search for sustainable solutions.

In fact, the definitorial problem seems to be solved here. True, there is still no universally recognized minority definition in international law[41] but the efforts so far undertaken in this field have yielded results that come very close to such a definition and the main open points pertain to questions that are of no immediate importance for the discussion on the issue of self-determination.[42]

Ulterior evidence suggesting that the concept of self-determination and the protection of minorities are two intimately related subjects can be drawn from a "description" for a people elaborated by an UNESCO Group of

40 *See* R. McCorquodale, "Self-Determination: A Human Rights Approach", 43 *I.C.L.Q.* 857 (1994).

41 *See* M.N. Shaw, "The Definition of Minorities in International Law", in *The Protection of Minorities and Human Rights* 1 (Y. Dinstein & M. Tabory eds., 1992); N. Lerner, "The Evolution of Minority Rights in International Law", in *Peoples and Minorities in International Law* (C. Brölmann *et al.* eds., 1993); P. Hilpold, "Minderheitenschutz – Die Definition des Schutzgegenstandes", in *Juristische Ausbildung und Praxis* 203-206 (1992/1993); O. Andrysek, "Report on the Definition of Minorities in International Law: A Problem Still Looking for a Solution", 52 *R.H.D.I.* 321 (1999); Pentassuglia, *Defining "Minority" in International Law: A Critical Appraisal* (2000); P. Hilpold, "Der Schutz der Minderheit in der Minderheit im Völkerrecht", in 1 *Migralex* 3 (2003).

42 The most important point which is still open regards the question whether the so-called "new minorities" are entitled to protection under traditional minority rights instruments. It seems that a differentiating approach which distinguishes between single rights is the most appropriate one to take regarding the needs of new minorities. *See* P. Hilpold, "Das Problem der neuen Minderheiten im Völkerrecht und im Europarecht", 42 *Archiv des Völkerrechts* 80 (2004).

Experts.[43] The elements which, according to this description, are evidence that a group constitutes a people are the following:
(a) a common historical tradition;
(b) racial or ethnic identity;
(c) cultural homogenity;
(d) linguistic unity;
(e) religious or ideological affinity;
(f) territorial connection;
(g) common economic life.[44]

The conclusions drawn from this apparent resemblance should, however, not be carried too far.[45] Intentionally Articles 1 and 27 of the ICCPR were kept clearly distinct in the structure of the treaty and also from the subsequent treaty practice; a tacit change of this understanding cannot be deduced. On the contrary, States were very careful not to intermingle these concepts.

Among the plethora of documents on the protection of minorities issued by international bodies in particular after the end of the conflict between East and West, there is no one that would grant a right to self-determination to minorities. The norms on the protection of indigenous peoples apparently only form an exception to this rule. It is true that these groups starting with ILO Convention 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries were characterized as "peoples" and that the UN draft Declaration on the Rights of Indigenous Peoples which will probably be adopted in 2004 recognizes an outright "right to self-determination".[46] On the other hand, it has to be kept in mind that this set of norms has been created with the precise understanding that they will not find application outside the limited field they were created for. The norms on the protection of indigenous peoples are typical exceptional norms not suited for analogous application. Therefore, in this special field of human rights the terms "peoples" and "self-determination" have a totally particular meaning which is not of any help for the elucidation of the general meaning of these terms.

43 *See* International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, convened by UNESCO, Paris, 27-30 Nov. 1989, SH-89/CONF. 602/7. Deliberately this group stopped short of calling the elements of this description in their entirety a definition, thereby making clear that it was neither intended to give a definite answer to this old question nor to block further discussion of it.

44 *Ibid.*, para. 23.

45 *See*, in this sense, *also* P. Thornberry, "The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism", in *Modern Law of Self-Determination* 101 (C. Tomuschat ed., 1993).

46 *Id. See, furthermore*, P. Hilpold, "Zum Jahr der indigenen Völker - eine Bestandsaufnahme zur Rechtslage", 97 *Z.V.R.* 30, 52 *et seq.* (1998).

This choice of terms could be criticized as equivocal but on the other hand there are also good arguments for a defense. In fact it is known that these peoples are in a very precarious position and that they are facing the imminent risk of losing their cultural identity and disappearing altogether. In this situation only the most powerful instruments and concepts can – perhaps – help to make a difference. On the other hand, exactly because of their weakness and lack of influence indigenous peoples pose no real danger to State sovereignty even if offered a set of qualified instruments of protection otherwise forbidden to "ordinary" minorities. This is especially true if the particular, subjectively and objectively restricted meaning of these concepts can be deduced directly from the instruments containing these provisions.

This exactly this seems to be the case for the right to self-determination which has taken a very particular meaning within the field of indigenous rights.[47] Much emphasis has been given in this article to the need of a contextual reading of the right to self-determination;[48] for the area of indigenous rights context is paramount. In principle it can be said that wherever a right to self-determination is granted to indigenous peoples the meaning of this right has to be found within this specific area of law and the result of this interpretation process cannot lead to an analogous application of this concept outside the field for which it has been formulated.[49] In a more general perspective, however, some elements for the general concept of self-determination can be obtained also from the usage of this term within the field of indigenous rights.

In fact, in a world which is characterized both by the coming up of new groups at an ever-accelerating pace as well as by the willingness to grant due recognition to these new identities, the right to self-determination can hardly be an absolute, exclusive right whereby in the case of conflicting claims

47 *Id.*

48 *See, further*, M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", 43 *I.C.L.Q.* 241, 249 (1994).

49 *See, in particular*, Art. 31 of the Draft United Nations Declaration on the Rights of Indigenous Peoples of 23 Aug. 1993:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

See also Hilpold, "Zum Jahr der indigenen Völker", *supra* note 46, at 52 *et seq.*

winners and losers would result. What is rather needed is an instrument that provides for group accommodation.[50]

IV. IS THERE A RIGHT TO SECESSION?

Outside the specialists' field, the right to self-determination is often equated with the right to secession which is a field of rather marginal importance and of dubious legal credentials. Secession shall here be understood in its narrower, more typical sense excluding the decolonisation process as well as the phenomenon of a consensual dissolution of a country into two or more parts.[51] There can be no doubt that international law, not being the order of a suicide club, in general does not foresee such a right but finds its pre-eminent function in the preservation of the existing States. The decisive question is whether there is an exception to this rule, maybe of more recent date because the international order has undergone a transformation from a State centered law of co-existence to an order which puts the well-being of the ultimate component of the international society, the human being, in the middle of its attention.[52] The existence of such a transformation and – of such an exception – is maintained by a sizeable though not prevailing part of the literature.[53] As a legal basis for this claim[54] the so-called "saving clause"

50 *See*, for a seminar contribution to this issue, A. Eide, "Protection of Minorities. Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities", UN Doc. E/CN.4/Sub2/1993/34 of 10 Aug. 1993.

51 The dissolution of Czechoslovakia into the Czech Republic and the Republic of Slovakia in 1993 is a typical example of a consensual dissolution of a country into two parts where it does make little sense to speak of secession as this institute has been created to describe the factual consequences of a struggle in a country drifting apart.

52 The slogan of the "changing structure of international law" for many has come to design the open, ever-modernizing nature of this legal order. Of pivotal importance in this regard has been W. Friedmann, *The Changing Structure of International Law* (1964).

53 Of seminal importance has been, in this regard, the contribution by L.C. Buchheit, *Secession – The Legitimacy of Self-Determination* (1978). The procedural model developed by this author to determine in which case access should be given to so-called "remedial self-determination" has heavily influenced great part of later contributions to this issue.

Further authors sustaining the existence of a right to remedial self-determination are, for instance, U.O. Umozurike, *Self-Determination in International Law* (1972); A. Heraclides, *The Self-Determination of Minorities in International Politics* (1978); V. Nanda, "Self-Determination Under International Law. Validity of Claims to Secede", *Case W. Res. J. Int'l L.* 251 (1981); L. Brilmayer, "Secession and Self-Determination. A Territorial Interpretation", *Yale J. Int'l L.* 177 (1991); M.H. Halperin, *Self-Determination in the New World Order* (Washington, D.C., Carnegie Endowment for International Peace, 1992); M. Eisner, "A Procedural Model for the Resolution of Secessionist Disputes", *Harv. Int'l L. J.* 407 (1992/2); L.M. Frankel, "International Law of Secession:

with regard to the provisions on self-determination in the Friendly Relations Declaration of 1970[55] is usually cited. This clause states as follows:

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

At first glance it seems that from this clause it can be deduced *e contrario* that the territorial integrity or the political unity of a State are not guaranteed if the representation of the whole people without distinction as to race, creed or colour is not given. Interpreted in this way, the right to internal self-determination would have found its definite basis in international law and for those States which do not respect minimum requirements of legitimacy, the menace of secession or dismemberment would be looming. It has, however, been shown in literature that such a reading of this provision is not only in total contrast to actual international practice, but does not stand up to closer scrutiny as an abstract principle neither. First of all, the negative formulation of the clause gives rise to the question of whether an *e contrario* interpretation is admissible when there is no other provision in the whole Declaration warranting it and such an interpretation would actually

New Rules for a New Era", *Hous. J. Int'l L.* 521 (1992); D. Turp, "Le Droit de Sécession en Droit International Public", 20 *Canadian Y.B. Int'l L.* 24 (1982); F.L. Kirgis, "The Degrees of Self-Determination in the United Nations Era", 88 *A.J.I.L.* 304 (1994); A. Tancredi, *La Secessione nel Diritto Internazionale* (2001).

54 It has to be added that there is also growing philosophical and political scientist literature that maintains the existence of such a right. For various approaches to justify secession from a pre-eminently philosophical and political point of view *see, e.g.*, A.E. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991; D. Philpott, "In Defense of Self-Determination", 105(2) *Etics* 352 (1995); M. Walzer, "The New Tribalism", 39 *Dissent* 164 (1992); W. Kymlicka, "Is Federalism a Viable Alternative to Secession?", in: *Theories of Secession* 111 (P.B. Lehning ed., 1998); U. Schneckener, *Das Recht auf Selbstbestimmung – Ethno-nationale Konflikte und Internationale Politik* (1996); D.L. Horowitz, "Self-Determination: Politics, Philosophy and Law", 36 *Nomos* 421 (1996).

55 *Supra* note 25.

structurally change the declaration with regard to its position towards self-determination.[56]

What is more, even in the case that such a far-reaching scope should be attributed to this clause, it would not demand secession in the cases mentioned above or sustain it through further instruments, but only permit it.[57] On the other, hand there is no international norm prohibiting secession and therefore it is difficult to see an actual need for such a norm. Of course, it would provide legitimacy to such claims and render it easier for other States to intervene in favour of the secessionists but still it would not make much sense to speak about a "right to secession". In a historic interpretation it has been shown that the contorted language of the clause here under examination is due to the conflicting interests between North and South as well as East and West and to a poor drafting process of the Friendly Relations Declaration.[58] The ingenious criterion developed by Buchheit according to which the permissibility of a claim for secession is judged on the basis of an evaluation according to which the internal merits of the claimants' case have to be balanced against the justified concerns of the international community on the basis of a calculation of the disruptive consequences of the situation[59] has heavily influenced a consistent part of the subsequent attempts to come to grips juridically with this factual event and appears still to be unmatched by all attempts of refinement. *De lege lata* this criterion does, however, not seem to be applicable as this would mean widely overrating the means of the international order and also for the foreseeable future a change in this direction appears to be improbable.[60] With very few exceptions, international law is still interpreted and applied decentrally and international controversies are bilateral and dominated by the principle of reciprocity while the objective application of the criterion mentioned would require the establishment of central institutions and create (or presuppose) an *erga omnes* interest in a fair solution of any single secession issue. Beside these technical and structural objections that regard the feasibility of such an evaluation procedure even *de lege ferenda*, there is the more substantial question of whether criteria of this kind are desirable at

56 *See* O. Corten, "A propos d'un désormais 'classique': Le droit à l'autodétermination en dehors des situations de décolonisation, de Théodore Christakis", 32 *Rev. Belge D. Int'l* 329 (1999).

57 *Id.*

58 *See* Cassese, *supra* note 9, at 108 *et seq.*

59 *See* L.C. Buchheit, *Secession – The Legitimacy of Self-Determination* 238 *et seq.* (1978).

60 For a detailed criticism of this approach *see* P. Hilpold, "Sezession und Humanitäre Intervention – Völkerrechtliche Instrumente zur Bewältigung Innerstaatlicher Konflikte?", 54 *Z.A.O.R. V.* 529 (1999).

all. As has been shown in a diverse though related context,[61] the development of criteria to evaluate the legitimacy of a claim is not as such a neutral approach as it implies that the basic question of whether a juridical examination of this issue is possible in principle has already been answered in the affirmative. In fact, usually each criterion is vague enough to open new space for uncertainty and in the end it is far from improbable that an abusive intent is effectively hidden behind a seemingly objective procedure. From a practical viewpoint, even if general consensus could be found for the enactment of such a procedure, its application in specific cases of attempted secessions may be hard to achieve.[62] Of course, as a moral-political criterion for the evaluation of a secession, crisis remedial secession is a valuable argument in what has to be in any case a broad discussion on the search of constructive solutions.[63] But here we are already outside a legal framework, however large it may be defined and it cannot be stated whether the normative framework will ever develop in this direction.[64]

V. THE SO-CALLED "RIGHT TO DEMOCRATIC GOVERNANCE"

As has been shown, the development of human rights has considerably influenced the emancipation of the concept of self-determination from its post-World-War decolonisation roots even though decolonisation has been the foremost motivation for including the right to self-determination into the

61 *See* P. Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", *E.J.I.L.* 437 (2001).

62 *See* O. Schachter, "Micronationalism and Secession", in *Festschrift Bernhardt* 179, 186 (1995), who has written the following on the procedural approach to secession:

> The [...] question is whether an international quasi-judicial process for hearing and mediating separatist demands has a serious chance of acceptance. It may seem naive to think so in the light of the intransigence and the brutalities that we have witnessed in conflicts over secession

63 *See* in this regard the Report of Eide, *supra* note 50. In para. 84, Eide states as follows:

> Only if the representative of the group [living compactly in an administrative unit of the State or dispersed within the territory of a sovereign State] can prove, beyond reasonable doubt, that there is no prospect within the forseeable future that the Government will become representative of the whole people, can it be entitled to demand and to receive support for a quest for independence. If it can be shown that the majority is pursuing a policy of genocide against the group, this must be seen as very strong support for the claim of independence.

The entitlement mentioned by Eide seems to be primarily a political one.

64 *See, in this regard*, Thornberry (*supra* note 45, at 118), who is citing a detailed catalogue of criteria for the recourse to remedial self-determination, stated the following: "Even this cautious and careful account of criteria appears as possibility rather than probability in terms of normative development of general international law".

relevant instruments. But there is a second element common to all these instruments which has contributed to further the idea of self-determination, at least in its internal dimension: As has been noted,[65] it has been a common feature of human rights instruments beginning with the 1948 Universal Declaration of Human Rights and continuing afterwards in various regional and global documents to grant a right to political participation and to periodic and genuine elections.[66] The full potential of these provisions could long not be grasped as their pronounced political connotation made them an ideal subject for ideological controversies inspired by the East-West conflict. The end of this conflict meant that it was necessary to undertake a catch up in this field by which decades lost in the development of these rights had to be made up in a very short period of time. Therefore, in the years 1989/1990 the impression of a pivotal change was created. All these developments could be interpreted as the final confirmation that the long disputed right to internal self-determination was finally established. For some commentators, a "right to democratic governance" was on the horizon[67] but in the meantime some disillusionment has come up as this fundamental change which purportedly at the beginning of the 1990s was on the verge of taking place, a decade later still was far away from having fully materialized. At a closer look, however, it seems that the expectations at the outset may have been exaggerated and the upheaval too abrupt to allow any prediction of the exact direction of further developments in this field while the tendency as such, in the sense of a fundamental change in international relations, was rightly forecasted.

65 *See* G.H. Fox, "Election Monitoring: The International Legal Setting", 19 *Wis. Int'l L. J.* 295 (2002); Hannum, *supra* note 6, at 776; T. Christakis, *Le Droit à l'Autodetermination en Dehors des Situations de Décolonisation* (1999). In German literature the idea of remedial secession has found many followers mainly referring to D. Murswiek, "Offensives und defensives Selbstbestimmungsrecht – Zum Subjekt des Selbstbestimmungsrechts der Völker", 23 *Der Staat* 523 (1984); K. Doehring, "Self-Determination", in *The Charter of the United Nations – A Commentary* 47 (B. Simma ed., 2nd ed., 2002).

66 *Ibid.*, 297 *et seq.*

67 Of fundamental importance was, in this regard, T.M. Franck, "The Emerging Right to Democratic Governance", 86 *A.J.I.L.* 46 (1992). *See further* G.H. Fox, "The Right to Political Participation in International Law", in *A.S.I.L. Proc.* 249 (1992); G.H. Fox, "The Right to Political Participation in International Law", 17 *Yale J. Int'l L.* 539 (1992).
For rather prudent approaches to this issue *see* A. Rosas, "Internal Self-Determination", in *Modern Law of Self-Determination*, *supra* note 45, at 225; J. Salmon, "Internal Aspects of the Right to Self-Determination Towards a Democratic Legitimacy Principle?", *ibid.*, 253.

It has to be kept in mind that democracy is both procedure and substance.[68] The exact mixture that is required by international law is open to discussion and it could happen that a specific situation in a certain moment in time does not correspond to some standards of democracy. It has rightly been said that on the universal level, international law points less at a particular outcome that internal political processes should guarantee than at the genuineness and fairness of the related processes.[69] It is, therefore, possible that the outcome of a formally democratic process may give rise to doubts about the sense of international controls per se as they prove to be ineffective. Should thereby the impression be created that the original development of an international democratic rights movement is dying down or is giving, in any case, totally unsatisfactory results, this impression is wrong. It should rather be attempted to improve the procedural mechanism for the realization of these guarantees. Furthermore, the development of an international right to democratic government cannot do without the requirement of a minimum of substantial content. While there may be a broader spectrum of acceptable solutions, also in accordance with the fact that the circumstances for the application of this principle are widely diverging,[70] it has to be taken care that procedure is not becoming pretext and void in its meaning.[71]

VI. FURTHER DEVELOPMENTS OF THE IDEA OF SELF-DETERMINATION – THE UNIVERSAL PERSPECTIVE

In fact, seen in a broader perspective, on an international scale, the elements furthering the democratization process seem clearly predominating and the recent developments inconclusive as they may appear at first sight, at a

[68] *See* J. Crawford, "Democracy and International Law", LXIV *B.Y.B.I.L.* 113 (1994), at 132: "[Democracy] is a procedural principle which embodies a substantive value ...".

[69] *See, in this sense*, V. Grado, *Guerre Civili e Terzi Stati* 254 (1998); M. Zambelli, "La démocratie: principe universel et fondamental de l'ordre juridique international?", in *A.J.P./P.J.A.* 667 (2001/6). *See also* M.C. van Walt van Praag, "Self-Determination in a World of Conflict – a Source of Instability or Instrument of Peace?", in *Reflections on Principles and Practice of International Law* 265, 280 (T.D. Gill & W.P. Heere eds., 2000).

[70] *See* Reports on Democratization, Supp. UN Doc. A/51/761, 20 Dec. 1996, at 3, para. 4.

[71] *See* S. Wheatley, "Democracy in International Law: A European Perspective", 51 *I.C.L.Q.* 225 (2002), referring to the affirmation by the UN Secretary General according to whom democracy is "not a model to be copied but a goal to be attained" (at 235). *See* UN Secretary General, *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, UN Doc. A/52/513, 21 Oct. 1997, at 5, para. 27.

closer look can only confirm this finding. In fact, it may be true that the impetus that could be registered in the years 1989/1990 has calmed down but the flame ignited in those years has not completely died out. Instead, the activities to promote the idea of democracy on a universal level have continued without real interruption and the result was a solidification of the concept as a whole. In the ambit of this process, the protection of human rights, the furthering of the idea of democracy and the general acceptance of the concept of internal self-determination has become ever more interwoven, interdependent and partly even interchangeable. This impression can already be gained if we look at the Declaration adopted at the Human Rights Conference of Vienna in 1993 where we find the following statement:

> Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.[72]

In this paragraph the most important elements usually associated with the concept of internal self-determination are mentioned but nonetheless the right to self-determination is treated separately, in paragraph 2 and therefore in a more prominent position:

> 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.

Considered isolately, this provision seems to grant an all-encompassing right to self-determination, both in its external and internal dimension. The following paragraphs, however, evoke a more traditional understanding of the concept of self-determination, mainly concerned with the lot of peoples under colonial or foreign domination and eager to forestall any impairment of the territorial integrity:

[72] A/CONF. 157/23, 17 July 1993, at 8, repr. in 32 *I.L.M.* 1666 (1993).

> Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.
>
> In accordance with the Declaration with the Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

In the decade which has passed since the adoption of this Declaration, the relationship between the concepts of human rights, democracy and internal self-determination has been further strengthened on a universal or nearly universal level in manifold ways.

First of all, the practice of the Human Rights Committee is to be mentioned, according to which in the examination of the State Reports presented on the basis of Article 40 of the ICCPR, Article 1 stating the right to self-determination is to be read in close relation to Article 25 guaranteeing a right to political participation.[73] The record of State Practice anticipating this relationship and therefore giving spontaneous information on the ways the single Member State has fulfilled its obligation to guarantee internal self-determination by the establishment of democratic structures[74] further strengthens this relationship.

Then there are initiatives by single States which resemble on the one hand a grass-roots movement and are, on the other hand, driven by the peer pressure of a handful of States which aspire, for different motives, to assume a leading role in the universal democratization process. One of the most important examples in this regard is the Community of Democracies Conference which took place on June 26-27, 2000 in Warsaw.[75] There, the

[73] *See* Wheathley, *supra* note 71, at 232.

[74] *Ibid.*, 231 *et seq.*

[75] This Conference was organized by a Convening Group composed of such diverse countries as Poland, Chile, the Czech Republic, India, the Republic of Korea, Mali and the United States. The importance of this Conference for the promotion and the further development of the notion of democracy is also highlighted by Zambelli, *supra* note 69, at 672.

representatives of 107 countries committed themselves to a democratic path. In particular, they agreed "to intensify coordination and cooperation among their governments to strengthen support for democracy by and within international and regional organizations; to share best practices regarding long-term challenges; to respond to interruption of, and immediate threats to, democratic rule; and to coordinate democracy assistance".[76]

The concluding document of this Conference seems to be singular in the respect that it appears to elevate the concept of democracy to the paramount principle and that it does not even mention human rights. Upon a closer look at the text of this document, however, beneath the surface of ostensibly technical language, the issues of human rights and internal self-determination immediately reappear. In fact, the human rights organizations constitute an ideal forum where efforts in support for democracy can be coordinated. The threats to democratic rule against which the participating States agreed to respond will probably immediately touch upon human rights and participatory rights. Best practices regarding long-term challenges will most likely give pivotal importance to questions of human rights and the building of institutions assuring comprehensive participation of all members of a given society. Most clearly, the interrelatedness of democracy with other concepts and instruments appears in the statement where the participants committed themselves "to encourage international financial institutions and other appropriate economic agencies to consider the benefits of good governance, transparency, rule of law and accountability in their deliberations".[77] As will be shown later on, these elements have acquired central importance in the endeavours of the European Union to identify measures for an effective promotion of human rights and democracy.

Finally, and most importantly, any effort to describe the *status quo* of the purported universal trend towards the establishment of an entitlement to democratic government has to take into account the relevant developments on the UN level. In this context, both the Security Council and the General Assembly have made important contribution to the establishment of a right to democracy. With regard to the activities of the Security Council, there are indications that the support of democracy becomes an autonomous justification for intervention on the basis of Chapter VII of the UN Charter. This has been said to be the case for Resolution 940 (1994) concerning the situation in Haiti although there have also been strong critical voices

[76] Final Communique of Community of Democracies Conference, para. 8.

[77] *Ibid.*, para. 8.

pointing at the fact that the Security Council has also on this occasion highlighted the exceptional circumstances of the case.[78] Security Council Resolution 1132 allowing intervention in Sierra Leone to re-establish a democratic order lends itself far more easily to an interpretation according to which the assurance of democracy has become an autonomous goal of the United Nations as the right to intervene is no more derived from the transborder (international) effects of a civil war.[79] For the moment, however, this case still seems to be an isolated one and no clear trend in this new direction can be discerned.[80] The UN General Assembly and the Commission on Human Rights have taken a more pronounced stance in this regard.[81] Thus, the Commission on Human Rights in Resolution 2002/72 of 25 April 2002 affirmed and recognized, *inter alia*,

> – that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing, and that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives;
> – that democracy, respect for all human rights, including the right to development, transparent and accountable governance and administration in all sectors of society, and effective participation by civil society are an essential part of the necessary foundations for the realization of social and people-centered sustainable development;
> – that a democratic and equitable international order fosters [also] the full realization of all human rights for all.

These are only a few excerptions of a Declaration designed to evidence the intricate relationship between democracy, human rights and self-determination. In this declaration no clear hierarchy between the values mentioned is perceptible and it is not clear which value should be realized first in order to attain the most effective result. At the present time, each of

78 *See* H. Endemann, Kollektive Zwangsmaßnahmen zur Durchsetzung Humanitärer Normen (1997); H.-J. Heintze, "Völkerrecht und Demokratische Staatsordnung. Zur Wiederherstellung der Demokratie in Haiti", in *Verfassung und Recht in Übersee* 6-30 (1996); Zambelli, *supra* note 69, at 672.

79 *Ibid.*, 673.

80 *See, e.g.*, UN S.C. Res. 1497 (2003) authorizing the establishment of a Multinational Force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement.

81 *See, inter alia*, the Comm'n on Human Rights Res. 2001/65 of 25 Apr. 2001 and 2002/72 of 25 Apr. 2002 as well as the UN G.A. Res. 56/151 of 24 Dec. 2001 and 57/213 of 25 Feb. 2003.

these concepts remains still autonomously identifiable and they are satisfying, at least partly, different aspirations.

On the whole, how should Franck's prophetic vision about an emerging right of democracy be judged at a distance of over a decade? While the euphoria engendered by the revolutionary changes of the years 1989/1990 led to somewhat overoptimistic expectations at least with regard to the rhythm the predicted democratization should materialize, it can be said without doubt that the trend as such has been correctly forecasted.[82] The fight for democratic structures is no longer felt to be the special mission of a small group of mostly Western States but a matter of concern for the International Community. In the ambit of this fight, diverse instruments have been created among which the most advanced and trenchant is surely the institute of election monitoring[83] although it cannot be contested that this is still an exceptional instrument.

The cited General Assembly Resolutions are setting the goals far higher. It is true that these principles are still awaiting concretization but aside from that, it is very important that they have been spelled out as this has given further legitimacy and impetus to the universal struggle for more democracy. For the first time in history, the quest for self-determination no longer pits one group of States against the other or try to advance one ideology at the cost of the other but seems to be the result of a universal development and the final result of struggles that have characterized the whole 20th century.

How should these developments be seen in view of the few – but notwithstanding very famous – pronouncements of the International Court of Justice on this issue? As it is known, the ICJ in the *Nicaragua* case[84] has taken the position that for States there is no international obligation to adopt

82 This is reflected in the number of governments that can be qualified as democratic. While only a decade ago the majority of States was still non-democratic, this has clearly changed in the meantime. It may be difficult to state in singular cases whether a specific government is to be qualified as democratic or not as this judgment is dependent on the definition of a democracy adopted; according to the American perspective 117 States are democratic. *See* http://www.state.gov/g/drl/democ/, cited according to Wheatley, *supra* note 71, at 233, n. 62.

83 *See, e.g.*, Heintze, *supra* note 78; Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1998); J. Hartland, "The Right to Free Elections – International Election Observation as a Mean Towards Implementation", in *Karel Vasak Amicorum Liber* 243 (1999); G.H. Fox, "Election Monitoring: The International Legal Setting", [2002] *Wis. Int'l L. J.* 295.

84 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), [1986] *I.C.J. Rep.* 14.

a democratic government, thereby remaining totally coherent with respect to its earlier jurisprudence:[85]

> However the regime in Nicaragua be defined, adherence by a State to any political doctrine does not constitute a violation of customary international law, to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.[86]

In this judgment the ICJ identified a merely passive, reactive interest of international law for the internal structure of the single States: Only when the internal structure influences the external behaviour of a State and this behaviour violates basic principles of the international law of co-existence, an internally adopted ideology becomes (indirectly) a matter of concern for international law. This pronouncement was already suitable for criticism at the moment it was issued[87] and at the beginning of the 21st century it seems definitely dated. It seems arguable that the ICJ would now, if confronted again with a similar issue, take a different, and in any case far more differentiated stance which would have to consider, first of all, the revolutionary changes of the years 1989/1990 and the ensuing developments. In light of these events, the pre-existing international legal obligations, in particular those resulting from ICCPR, would also have to be re-interpreted.

VII. THE EUROPEAN PERSPECTIVE

It has already been stated that geographically seen, Europe has always been the focal point for the development of the concept of self-determination:
– It has been one of the most important breeding grounds for the philosophical underpinnings of this concept;
– Europe has been throughout the whole 20th century a central experimental fields for its realization;

85 *See, in particular*, the Western Sahara Case, where the ICJ stated that the variety of existing government structures is, in itself, proof of the lack of an international rule requiring the adoption of a democratic system; *supra* note 26, in paras. 43-44.

86 *Supra* note 84, at 133, para. 263.

87 As Crawford has pointedly formulated, the self-proclaimed inability of the ICJ to find an "instrument with legal force [...] whereby Nicaragua has committed itself in respect of the principle or methods of holding elections" was due to the fact that it did not look very hard; *supra* note 68, at 121.

– the countries of this region have been the main opponents for the universal application of the right to self-determination and they have made important contributions to the adaptation of this concept to the needs of the 21st century.

To say "Europe" means various regional organizations composed exclusively or predominantly of European States such as the Council of Europe, the CSCE/OSCE or the European Union. Much attention has been given in literature to the contributions of the first two organisations, especially for their activities in the aftermath of the dramatic changes of 1989/1990.[88] The European Community seemed first to approach this issue with some restraint as here competences in the field of human rights were unclear[89] and a Common Foreign Policy in the form of a European Political Cooperation was only in an embryonic stage.[90] In the first years, one of her most important contributions in this field was surely the fixing of "Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union".[91] While a conditional recognition policy is not new in international law[92] the approach chosen by the European Community is exceptional in its reach and thoroughness. It has given a new meaning to the concept of self-determination both in its external and its internal dimensions. With regard to the first dimension, it has taken a basically positive attitude

88 *See, e.g.*, Thornberry, *supra* note 45; Wheatley, *supra* note 71; *Europarat und Menschenrechte* (M. Nowak ed., 1994); H. Klebes, "Demokratieförderung durch den Europarat", in *50 Jahre Europarat* (U. Holtz ed., 2000); E. Klein, "50 Jahre Europarat – Seine Leistungen beim Ausbau des Menschenrechtsschutzes", 39 *A.V.* 121 (2001); *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (W.A. Kemp ed., 2001).

89 On the development of the European Union's human rights policy *see, for example, EU Law, Texts, Cases* 363 *et seq.* (P. Craig & G. de Búrca eds., 2003); A.V. Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", 37 *Common Market L. Rev.* 1307 (2000).

90 On the development of the Common Foreign Policy *see, for example*, P.J.G. Kapteyn & P. V. van Themaat, *Introduction to the Law of the European Communities*, 27 *et seq.* (1998). *See also* M. Fouwels, "The European Union's Common Foreign and Security Policy and Human Rights", 15 *Netherlands Q. Hum. Rts.* 291 (1997).

91 *Repr. in* 4 *E.J.I.L.* 72 (1993). *See* on this subject, *inter alia*, R. Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", 4 *E.J.I.L.* 36 (1993); and P. Hilpold, "Die Anerkennung der Neustaaten auf dem Balkan – Konstitutive Theorie, Deklaratorische Theorie und Anerkennungsrelevante Implikationen von Minderheitenschutzerfordernissen", 31 *A.V.* 387 (1993).

92 The most notorious case may be Art. 34 of the Berlin Agreement of 1878 in which the recognition of Bulgaria, Montenegro, Romania and Serbia was placed under the condition that religious minorities be protected. On the law of recognition *see* H. Lauterpacht, *Recognition in International Law* (1948); P.K. Menon, *The Law of Recognition in International Law* (1994).

towards acts of secession happening in Europe and has given authority to the *uti possidetis* principle as a criterion for the territorial delimitation of competing "selves" also in Europe. In a long-term perspective, however, the guidelines for the recognition of new States may have even been of major relevance with reference to the issue of internal self-determination. In fact, on the whole, the conditions set for the recognition of new States aimed at stabilizing the recognition seeking countries by imposing on them minimum standards in the field of human rights, democratic government and protection of minorities that would allow for a friction-free integration of these countries in a community of States renowned for its highly developed standard of individual rights.

While the strengthening of the human rights protection within the European Union is a hotly debated issue to which the Member States have only lately tried to give an adequate response by adopting the Charter of Fundamental Rights[93] and by the drafting of a European Constitution[94] the various attempts to promote human rights, democracy and good governance coalesced much earlier into a coherent strategy even if public opinion has taken far less notice of this development.[95] The growing importance of human rights also within the European Union has given further impetus to the consolidation of these endeavours. Put briefly[96] the European Economic Community has recognized early in time that development cooperation policies can be effective only if they take place in an ordered setting of rights. In this context, the EEC has given priority to human rights as the one area of national legal systems where developing countries were least in the position to take recourse to the sovereignty exemption. Step by step the most important development cooperation project of the EEC, the Lomé-Agreements with the ACP countries[97] was transformed into a framework

93 The Charter of Fundamental Rights was proclaimed on 8 Dec. 2000 on the occasion of the European Council of Nice.

94 As it is known the attempt of the Italian Presidency to find an agreement for a new European Constitution failed in late 2003. The relative attempts will, however, also continue in the future.

95 On this issue *see The EU and Human Rights*, *supra* note 33; K. Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (2000); Hilpold, "The Cotonou Agreement", *supra* note 33, at 53-72; P. Hilpold, "Human Rights Clauses in EU-Association Agreements", in *External Economic Relations and Foreign Policy in the European Union* 359 (S.S. Griller & B. Weidel eds., 2002).

96 For a detailed account of these developments in the European External Relations *see, e.g.*, my articles cited in the preceding note.

97 The first Lomé Agreement (Lomé I) was concluded in 1975. In a five-year rhythm these agreements were further developed. Finally, with the termination of Lomé IV-bis in 2000 the whole human rights approach, which had become highly sophisticated in the meantime, was totally abandoned and substituted by the Cotonou Agreement.

where aid and cooperation was made conditional on the respect of basic human rights. On an even more far-reaching level, human rights based conditionality criterions were also applied for the concession of trade preferences in the ambit of the General System of Trade Preferences (GSP).[98]

Soon, however, it was recognized that a merely reactive system meeting out punishments in the case of violations of commonly agreed human rights principles had its limits and could easily be misunderstood as a new device designed to impose Western standards on formerly dependent countries. Great efforts were therefore undertaken to switch from the so-called "negative" approach to a "positive" one where incentives are given to those countries that respect certain criteria and, therefore, make abuses less probable to happen.[99] This policy change also implied, therefore, a preference for pro-active measures over re-active ones. A further result of the first years of experience with human rights conditionality was the insight that requiring the respect of certain human rights was often pointless if these guarantees were not anchored in a solid legal frame. To use a picture, there had to be a nail where these rights could be fixed and this nail had again to be supported by a broader structure, the legal order as a whole. Therefore, the attempt to devise an effective strategy for conditionality continuously furnished new insights into the prerequisites of human rights protection. One of the most important results of this inquiry consisted in the evidencing of the intimate interdependence between the protection of human rights and the existence of a democratic system.[100] At first glance, this result may appear to be trivial, but at a closer look the consequences were enormous and the ensuing questions were of extraordinary intricateness. What is meant under a democratic system? It is clear that democracy does not consist alone in the application of the majority rule but what further guarantees are required? A closer investigation of this issue reveals very soon that something similar to effective participation is meant here and thereby we come very close to the concept of internal self-determination as described above, even though the European Union development cooperation schemes upon the first look seem to be tailored for more complex and, at the same time, unique situations. Even though in principle a substantial (and not merely a procedural) definition of the concept of democracy was adopted, the European Union

98 *See* P. Hilpold, "Das neue Allgemeine Präferenzschema der EU", in [1996] *Europarecht* 98.

99 On the advantages of ""positive" measures over sanctions, *see* B. Simma *et al.*, "Human Rights Considerations in the Development Co-operation Activities of the EC", in *The EU and Human Rights*, *supra* note 33, at 578 (with further references).

100 The single steps of this inquiry have been described in my articles cited *supra* note 39.

had to recognize that this concept, when applied to developing countries, had to operate under such different conditions in respect to a European reference situation that this could also have repercussions on the way this concept should be structured in order to achieve the best possible results.

It is perhaps no coincidence that the concept of good governance was first employed by an international financial institution, the World Bank.[101] For a long time the international financial organizations have grappled to identify instruments and concepts that would bring profligate borrowing countries back to the way of stability and growth. Experience has shown that the most detailed and stringent obligations developing countries have had to assume in the ambit of Structural Adjustment Programs in order to continue to be eligible for financial aid remained unsuccessful if no active, committed participation of the respective governments could be achieved. The governments of the borrowing countries should, in other words, be convinced to adopt policies that would prevent the unfolding of a crisis and therefore make adjustment policies superfluous. But what is meant by "good governance"? This concept does not lend itself to an easy explanation and herein lies both the attractivity and danger. In a Communication by the EU Commission to the Council and the European Parliament of 1998[102] good governance is defined as the management of public affairs in a transparent, accountable, participative and equitable manner showing due regard for human rights and the rule of law: "It encompasses every aspect of the State's dealing with civil society, its role in establishing a climate conducive to economic and social development and its responsibility for the equitable division of resources". This Communication contains a long list both of aspects of good governance and of goals to be attained by the application of this principle.[103] The nature of the causality is, however, not always

[101] It was precisely the 1989 World Bank Report where this concept was first brought up. *See* Simma, *supra* note 99, at 571-626.

[102] COM (1998) 146 final.

[103] *See*, in this context, the following statement contained in the Communication cited *ibid.*:

> Equity and the primacy of law in the management and allocation of resources call for an independent and accessible judicial system that guarantees all citizens basic access to resources by recognising their right to act against inequalities. In the specific context of governance, this involves establishing a legal and regulatory framework that encourages private enterprise and investment.
>
> The institutional capacity to manage a country's resources effectively in the interests of economic and social development implies an ability to draft, implement and supervise policies addressing the needs of the people. The government and civil society must be able to implement an equitable development model and guarantee the judicious use of all resources in the public interest. Building public and private institutional capacities is vital because it directly determines economic and social development, and especially the effectiveness of development co-operation.
>
> Transparency, which entails being accountable and organising effective procedures and systems for monitoring the management and allocation of resources, implies that resource management is open to scrutiny and subject to controls. It is both a key factor in establishing trust between the various agents of development and a guarantee of institutional integrity.
>
> Public participation in the decision-making processes concerning the management and allocation of resources. Development without the participation of civil society is inconceivable. Participation calls for the various agents of development to exchange views on major decisions relating to the management and allocation of resources and development programming. This dimension also concerns the scope to be given to private initiative, enterprise and civil society in development.

convincing as some goals could easily be qualified also as prerequisites and *vice versa*. Thus it appears to be evident that there is still much to do to clarify this concept so that it can wield the importance some documents try to attribute to it. On the other hand, the attempts of clarification undertaken up to this moment put into evidence that the core understanding of the concept of good governance is strongly related to the prevailing interpretations that are given to the institute of internal self-determination. Both concepts may not be in all aspects synonymous, especially because their exact content is – in both cases – still to be determined and, may be, under certain aspects, continuously in a flow. Both aim, on the other hand, at the fostering of democracy, human rights and the participation of the broadest possible part of the population in the political decision-making processes. The most noticeable difference between them probably lies outside the concepts themselves: It is the way they are politically qualified that distinguishes them most. While the concept of internal self-determination has gained somewhat in reputation, diffidence towards it is still great and the attempt to demand unilaterally that other countries respect this principle will regularly be qualified as interference in internal affairs, however broad the basis in international law may be to justify such a claim. On the other hand, the concept of good governance is relatively new and has been conceived favourably in the ambit of development cooperation. It may therefore be that the European Union (and the international financial institutions where they take recourse to it) can achieve much of what makes internal self-determination through a new concept, that of good governance, encountering thereby far less resistance than along the traditional way. Of course, the concept of good governance will not totally replace that of internal self-determination. It will, also in the future, have its most important field of application in development cooperation. But it can make an important contribution to the realization of a sizeable part of the values self-determination stands for and thereby maybe help to allow for a definite breakthrough in the idea as a whole on an international level.

VIII. CONCLUSIONS

At the end of this study the conviction may have taken hold that the issue of self-determination is a subject where enormous gaps lie between reality and potential developments, between both hopes and fears unleashed since the very creation of this concept and the factual achievements of those who relied on it. In this sense, the "golden age" of self-determination always lies before us, while the past is usually described as a time of missed opportunities and disappointing expectations. Only a few episodes, such as the decolonisation process, stand out in this overall picture while the great challenges still lie ahead. At the same time, care must be taken to make sure that the changes induced by the call for self-determination remain controllable and do not end up in a total disruption of the system. In this sense, self-determination fulfills a catalytic function for all hopes and desires to continuously improve the collective picture of the great social subdivision of mankind in fairly independent entities, the States and, at the same time, it counters fears that change would signify destruction and not merely evolution of the system. Interpreted in this way, the burden of enormous expectations lies in the concept of self-determination. Which direction do these aspirations go and will it be possible to satisfy the concomitant hopes? Before trying to give an answer to these questions we should attempt to summarize briefly the *status quo*. It has been shown that a proper right to self-determination is given to a colonial people against a colonial power and to the people of an occupied territory against the occupying power. On the other hand, a right to secession cannot be derived from international law and – according to the opinion held by this author – this is even true in the case of widespread, massive human rights violations which for some authors give rise to the so-called right to remedial self-determination. This said, it may already seem that a great part of the expectations often associated with the term self-determination have to be disappointed and it is curious to see that notwithstanding this limitations the concept of self-determination is attracting continuously more interest. First of all, it has to be said that in the discussion about self-determination there is much political rhetoric and the accompanying claims for a right are not always supported by a true *opinio juris*. There are perhaps few fields in international law where political and legal elements are so intertwined that political and legal reasoning become nearly inextricable. On the other hand, the strong political overtone of the whole discussion which appears to be inevitable should not be considered a hindrance to an objective confrontation with this issue. In fact, the political element provides the dynamic which may be conducive to the further development of the international community according to a Kantian ideal. The outcome of this discussion is, of course, not foreseeable but as long as

the presence of both elements, the legal and the political one, is openly acknowledged and therefore an abusive recourse to this instrument avoided, the discussion on self-determination is to be welcomed as an instrument to improve the international order according to the values enshrined in the UN Charter such as peace, cooperation, human rights and development. As long as this discussion is conducted on the background of the UN Charter values, self-determination can be transformed into a valuable tool to promote these very values and at the same time the potentially disruptive elements inherent in this concept can be reined in.

The multidimensionality of the discussion on self-determination entails a great advantage: The State Community cannot be neatly divided between advocates and opponents of self-determination but the attitude towards this concept differs in dependence from the specific dimension of self-determination that is at issue. At least under one perspective, each State is always in favour of self-determination, namely insofar as it is considered to be equivalent to State sovereignty. This reciprocally legitimizing and sustaining effect of the various aspects of self-determination operates also along the great dividing line between internal and external self-determination. In view of the overall conceptual unity, the claim for internal self-determination has also benefited from the great legitimacy the concept of external self-determination, or at least some aspects of it, have acquired. Thereby, on the whole, discussion on external self-determination enhances the vitality of the concept as such. In fact, there can be no question that today internal self-determination is the real contentious issue within the broader concept of self-determination and it is here where the future of this concept lies. At first glance, this shifting of the perspective should also imply a profound change of attitude towards the role of States or, respectively, their integrity on the face of demands for change. As explained above, the claim for self-determination has always found many, in part diverging, expressions but on a whole viewed from the very effects of these claims, this concept has been more in support of the integrity of States than a real threat to it.[104] This was mainly due to the fact that the antithesis to State conservation, the right to secession which should counterbalance the interpretation of self-determination as a defense of sovereignty, has essentially remained a chimera, a carrot providing the perspective of change on legal grounds but in reality denying final satisfaction. On the contrary, the recognition of a right to internal self-determination was widely opposed exactly because it was perceived as a challenge to statehood. Popular sovereignty, thought to the end, could also put at the disposal the structure wherein this sovereignty is

[104] *See* Koskenniemi, *supra* note 48, at 251.

exercised. Here again we can see that the line of separation between internal and external self-determination is, at the end, artificial and that paradoxically, it is internal self-determination where the main force for external change resides. On the whole, an increase of importance of internal self-determination as it seems to be in the offing could therefore be interpreted as a development of a potentially disruptive effect. At a closer look, however, it appears that the modern right to internal self-determination, or, more exactly, that aspect of this right that has found international recognition, has radically changed its character; it has been "domesticated" and it is no longer challenging but rather buttressing the international order.

As has been shown in this article, there are many arguments that can be brought forward in support of such a position, especially with reference to the clear tendency to grant ever-broader participatory rights, be that on the basis of international instruments, customary law tendencies or a simple factual practice. Participation exercises a strong force of cohesion and, on the contrary, the denial of participatory rights can lay the roots for a violent expression of dissent and finally to attempts of secession as the case of Yugoslavia has shown. Whether the many elements hinting at an "evolving right to democratic governance" will really materialize an international right to democracy is still not clear. In fact, the existence of a right to democracy seems to imply that we have already attained the best of all possible orders – or are at least close to it if we speak of an "emerging right" – an ideal referring to the more distant future and suggesting that the job is far from being done. Perhaps the ideal never becomes reality but the real goal is less the final attainment of a fixed ideal in the sense of an "end of history" as the continuous strife for the approach to a principle the content of which can be re-adapted over the time. By the adoption of such an approach the attainment of the ideal can be partly anticipated, at least with regard to its procedural component.

What is new, is that the State in this process is partly relegated to an instrumental role. The State and self-determination within this State has become a tool to assist the individual in his search for his actual true identity which can be a mixture of elements taken from home and abroad in varying compositions. According to the individual preferences of the bearers of this right, the result reached may be more or less stable in time. As stability and security are important values for the individual – whether alone or in association with others – there is no danger that such a conception would threaten the existing international order based on sovereign States. Adopting this change in perspective would imply the recognition that the driving force behind self-determination as an instrument of change should not be the will of a mythical group but that of the individual. The group is a mere forum where this will can be better expressed and aggregated. The results of this

ongoing search for self-determination may be perceived as incomplete and in some ways unsatisfactory but this outcome corresponds to a social reality composed of imperfections and representing a continuous "work in progress".

To interpret self-determination that way would also allow for elegantly overcoming the old dilemma described above that consists of how to make it an instrument of human rights protection. As the respective analysis has shown, there is no doubt that the right to self-determination from its very embedding in the two UN Human Rights Covenants fulfills exactly this purpose but, on the other hand, it is still not clear how a group oriented approach should consistently be put at the service of individual rights if there is no consensus on how to define the group and on how to make sure that the formation of a common will within the group sufficiently respects the interests of the individual. If self-determination is, on the contrary, interpreted as a right and attribute of the individual – and it has always been a central tenet of human rights protection that the individual person is the immediate bearer of human rights – then this dilemma could easily be solved. Furthermore, he is not only the object of these protective measures but he is the subject of this entire system in the sense that it is he who decides how and where to exercise these rights. It is still true that the Covenants with regard to the right to self-determination speak of a right of *peoples* and that, therefore, the prime reference should be the collective but international law does only take note of the fact that human society is organised in entities that have to be accepted as a reality. This does not detract from the fact that within these entities a balance has to be struck between individual and collective elements and as a rule in an individualistic order, as the human rights order is, the individual perspective has to prevail. Admittedly, this approach is a very demanding one. It moves away from the easy answers the traditional understanding of the concept of self-determination seemed to provide and leads to partially uncharted waters. Allowing the recourse to violence in cases of actual discrimination or as an instrument of *revanche* for past wrongs a group has suffered would have been a rule easy to understand and of appeal to many, however destructive the consequences were. Interpreting self-determination as a pre-condition to allow the effective exercise of human rights is a far more difficult approach which will yield success only in the longer run. This process comes to a real conclusion as it requires the creation of instruments that permit the individual to defend, live and develop its human dignity in the best possible way and under continuously changing circumstances. The act of self-determination would not lose its group-relatedness as the term "personal" or "individual self-determination" might suggest. In fact, also in a genuinely individualistic rights system the individual defines his identity to a

considerable extent through the group, be that group a social reality or a mere imaginative one. But in any case it is no more the group – or whoever is pretending to act for it – that determines the individual.[105] Interpreted this way, the right to self-determination would become in its structural essence, though not in its content, very similar to the corpus of minority rights.

Adopting this approach could help to bridge the gap between the individualistic and the group-related perspective as it makes clear that these two positions are only two sides of the same coin both of which are evidencing a distinctive characteristic of the concept as a whole and both of which are closely dependent on each other. While the adoption of the still dominant group-oriented approach leads to the inconsistencies described above, switching to the other extreme of an exclusively individual right to self-determination which disregards all group affiliations of the individual would again lead to a practically useless concept. In fact, it is the combination of the two sides that would confer on the right to self-determination the more prominent role in international law it has deserved for a long time but was never able to acquire because of the many uncertainties related to its nature and because of the fears originated by the restrictive perspective adopted in its interpretation.

The right to self-determination would no longer be a strange bedfellow of human rights but a particularly efficient instrument to further them and to create a framework where they could be firmly fixed providing a stable framework from where new challenges could be affronted. It is not yet clear whether this concept will prevail but at the end the true question is not one of terminology but of substance. In other words the International Community has to decide which way it wants to make use of a multifaceted concept that has fulfilled the most diverse functions in the course of history and that has now come into close contact with human rights. The hopes of the past that it could provide a rational criterion for the territorial delimitation of nations have vanished. Now the time has come to decide whether these attempts should further be pursued or whether it would be better to open up new avenues and to transfer this concept definitively in the realm of human rights. Notwithstanding serious periodic setbacks, the idea of human rights is thriving. Now a potential opponent to this concept which in the past has all too often pitted one nation against the other and thereby contributed to large scale human rights abuses could be turned into an important ally.

[105] In this sense, the famous dictum of Judge H. Dillard in his Separate Opinion in the Western Sahara Case (*supra* note 26, at 122), according to which it is for the people to decide over the territory and not for the territory to decide over the people could be paraphrased: It is for the individual to determine collectively the will of the group and not for the group to encroach upon the rights of the individual to implement a higher will.