The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography

*Peter Hilpold**

I. Introduction

Claims and counter-claims based on an alleged right to self-determination have heavily influenced the course of history of the last century. The concept of self-determination is intimately related to ideas such as liberty, democracy or equality that have exercised an irresistible appeal to the populace and that have changed the world-wide political landscape in a rapid and incisive way never seen before in history. It can be said that all these ideas are interwoven as they are based on the emancipation of the individual from the group, from pre-determined truths and from bonds inherited from the past. They are favouring a culture of change in which socio-cultural vinculations are continuously re-assessed and re-determined according to the aspirations of the present generation and, ultimately, of the single individuals composing the social group. However, each of these concepts also bears in itself its immediate negation. The liberty of one single individual can mean the oppression of another and a democracy can furnish the formal basis of its own suppression or the tyranny of the majority.[1]

While these developments are usually seen as pathological degenerations of concepts entirely positive in themselves, the situation is somewhat different in the case of the concept of self-determination. Though the right to self-determination is often invoked to improve a given political situation, the overall attitude towards this concept is mixed, more often even critical, as fears with regard to its inherent potentially disruptive forces prevail. The negative aspects of self-determination that show up with a certain regularity are simply more visible than the beneficial ones. In the following it will be shown that the concept of self-determination, if rightly understood, offers an enormous potential for the solution of pressing problems of our time. In order to fully grasp this potential, it seems appropriate to look back to different historic interpretations of this idea. It can thereby be evidenced that this idea has undergone a long development in a trial-and-error process and, as a consequence, it may in the meantime have become a controllable tool which can be employed for widely shared goals.

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* Professor of International Law, University of Innsbruck

1 *See* A. de Tocqueville, *Democracy in America* (1835, reprint by Vintage Books, New York 1954), in particular chapter XV (264 *et seq.*) and XVI. (281 *et seq.*); *see also* J.St. Mill, *On Liberty*, 7 (1956).

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Of essential importance is a change of perspective away from the collective dimension to a primarily individual one. This way, central contradictions inherent in this concept dissipate, and self-determination loses its disruptive connotation and nonetheless maintains its enormous potential for change and development. In the following, the primary focus will be laid on the historic roots of the law of self-determination. At the same time it will be tried to put into evidence the present-day relevance of these past experiences. It is argued here that the historic perspective can provide considerable additional information for the explanation of an otherwise elusive concept.[2]

II. Basic Steps in the Formation of the Concept in a Nutshell

In the 20th century three great events stand out in the process of the formation of this concept: The first one is World War I with the demise of the Austro-Hungarian and the Ottoman Empires which led to the creation of a plethora of new national states more or less along real or putative ethnic lines; the second one covers the process of decolonization during which the principle of self-determination 'hardened' to a right; and the third one refers to the various attempts to adapt this concept to a post-colonial setting and to transform it into an instrument that would find general application detached from a specific situation of crisis.[3] Each of these events revolutionized the concept of self-determination, as it created new hopes and disappointed previous ones. These events were not, however, expression of a linear, steady development according to which state sovereignty and integrity would gradually succumb to a new principle of order in international relations. In the aftermath, the impression could be gained that self-determination was no more than the battlecry for a resetting of national boundaries, for a redistribution of the cards, a provisional waiving of the conservative criteria aiming at the preservation of the traditional subjects of international law in their original shape. At the end of each of these steps of development, the principle of territorial sovereignty stood more firmly than before and it was most adamantly defended by the newcomers in the international society. Each time the principle of self-determination resurfaced this happened surreptitiously catching those off-guard who had considered this concept to be a relic of history. But over the last century the concept of self-determination has shown an extraordinary resilience and an amazing

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[2] For a focus on the present-day situation *see* P. Hilpold, "Self-determination in the 21st Century – Modern Perspectives for an Old Concept", 2006 *Israel Yearbook on Human Rights* 1, at 36.

[3] An important transitional step from the second to the third stage described here was the dissolution of Yugoslavia during which the concept of self-determination was, on the one hand, again re-interpreted to adapt it to an extraordinary situation in a European setting. On the other hand, the application of this concept outside the specific field of colonialism prepared its generalization.

capacity to adapt to new political and factual challenges. In an 'organic' perspective,[4] – and from an optimist viewpoint – it can be compared to an organism surviving under the most strenuous environmental conditions or – from a pessimist perspective – as a pernicious germ which rapidly adapts to each new antidote and becomes ever more contagious.

There is, however, a more sober explanation for the success story of the principle of self-determination. As a concept it is extremely flexible and it can be used for the most divergent uses. It has been used as a spearhead to herald progressive principles long before the time was ripe to give them autonomous life in international law.[5] On the other hand, it was also abused to countervail basic principles of international law such as the prohibition of the use of force.[6]

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4 Reference is made here to the so-called '*organische Staatstheorie*', an approach very popular in German public law literature of the second half of the 19th century. According to L.J. Gerstner, *Die Grundlehren der Staatsverwaltung, I. Einleitung in die gesamte Staatsverwaltungslehre* 53 (1862) the State is not only a historic product but also 'unity and totality', an organic creature wanted by God, presenting itself on a certain territory in a plurality of people according to the laws of nature and liberty as an independent power and subject which pursues the physical-material and the spiritual-ethical perfection of its members according to a highest authoritarian will and on the basis of certain provisions. In the public international law literature *see* A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* 41 (re-edited by H. Geffcken 1881) who stated the following (translation by the author):
'States are singular continous associations of people under a collective will for the satisfaction of ethical and external needs of the human nature. Their common purpose is the reasonable development of the human being in freedom and liberty. For the essence of the State is the man of genus. But there is no universal state. Would there be one everyone had to fight against this subject in order to dissolve it again in its national elements, in a construction of individual States which is the only entity where the human power can develop itself in the appropriate measure and proportion.'
The 'organic State theory' refers to the creation, the existence and the dissolution of States. As these phenomena are closely interrelated with the principle of self-determination the organic State theory could be applied also to this concept. For a critical discussion of the organic State theory *see* G. Jellinek, *Allgemeine Staatslehre* 148 *et seq.* (1922) who was of the opinion that this theory was of 'little scientific value', that it was 'insufficiently suited to gain substantial new insights' and that it posed the problem of 'false analogies'. All translations are by the present author.

5 This can be said of the principle of democratic government – a principle still not firmly established in international law which, however, can already be found in President Wilson's concept of self-determination.

6 As will be explained later, not all but only the most prominent manifestations of the principle (or right, respectively) of self-determination are associated with the use of some form of force. One has, however, to consider the clear wording of Art. 2(4) of the UN Charter. An open contradiction with the prohibition of the use of force, one of the most important tenets of international law, will be hard to justify except where the principle of self-determination has grown into a proper right, i.e. the fight against colonialism and foreign occupation.

In the meantime, as the decolonization process has come nearly to a close and the States resulting from the dissolution of Yugoslavia and the URSS appear to be more or less stable entities, the impression might be conveyed that also the heydays of the principle of self-determination are over and that this instrument can finally be relegated to the history of international law. This impression is, however, deceptive. First of all, the decolonization process may have been concluded for its greater part, but also the 'left-overs', intermingled with new neo-colonialist issues, such as in the case of the Western Sahara, are likewise not to be ignored. However, more importantly, there are new fields of application for this principle in the offing. Still, international law is widely perceived as a 'primitive law'[7] with many traits which do not correspond to moral or meritory standards permeating national law, especially with regard to public participation in the law-creating processes and – in a wider sense – with regard to the role democratic principles should play therein. Here, the principle of self-determination may indeed play a pioneering role.[8] Secondly, the principle of self-determination is strongly interrelated with human rights. While the exact contours of this relationship are not yet fully explored it seems that this principle is very well suited to give a strong boost to the whole human rights agenda and, on the other hand, it heavily benefits itself from the promotion of human rights.

There is neither the place nor the need to give a full account of the law of self-determination, the more so as the object of this article is to highlight some of the most contentious issues of the concept of self-determination and to elucidate those tendencies that might characterise the further development of this concept. It will be shown that exactly these tendencies are the most contested ones as there is a strong interest by a considerable part of the international community to preserve the status quo. Self-determination is usually idolized in hindsight by the winners of a successful struggle as an important instrument which, however, has become part of history in

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7 *See* P. Guggenheim, *Traité de droit international public,* Vol. I, 22 *et seq.* (1967); L. Henkin, *How Nations Behave* 314 (1979). For a critical examination of this qualification *see* A. Verdross/B. Simma, *Universelles Völkerrecht*, § 40 *et seq.* (1984); A. Bleckmann, *Völkerrecht*, § 9 *et seq.* (1984). For a recent critical statement with regard to this concept *see* R.Y. Jennings, "Book review: The Spirit of International Law by David J. Bederman", 97 *AJIL* 725, at 726 *et seq.* (2003). *See also* K. Zemanek, "The Legal Foundations of the International System. General Course on Public International Law", 266 RdC (1997) 9, 36 para. 24.

8 In this sense, the concept of self-determination could be interpreted as an important instrument to overcome the 'primitivity' of international law. Interestingly, the purported primitivity of societal orders in what is now the Third World has in the past been a welcome pretext to justify colonialism. *See*, for example, F. Suarez, *De iure belli hispanorum in barbados* (1539), and F. Schiller in his inaugural lecture at the University of Jena, "Was heißt und zu welchem Ende studiert man Universalgeschichte?" (1789), who said the following: '[Es] zeigen uns Völkerschaften, die auf den mannichfaltigsten Stuffen der Bildung um uns gelagert sind, wie Kinder verschiednen Alters um einen Erwachsenen herum stehen, und durch ihr Beyspiel ihm in Erinnerung bringen, was er selbst vormals gewesen, und wovon er ausgegangen ist'. *See* K. Ipsen, *Völkerrecht* 31 (1999).

the meantime. From a future-oriented perspective, it is firmly rejected by those who might loose from such claims and who are interested to make the slogan of the 'end of history' become reality.[9] From a political point of view, therefore, the account of past developments of this principle will often amount to a politically correct and politically appreciated *'Staatsroman'* in the sense that it rehearses the processes of nation-building in the context of existing states. On the contrary, dealing with open questions with regard to this issue or assessing possible new lines of development can amount to touching upon 'prohibited fields'.

III. The Development of the Law of Self-determination

A. The Basis of Self-determination

Commonly, the accounts on the development of the law of self-determination depart with the American Declaration of Independence of 1776 and the French Revolution of 1789[10] which decisively shaped this concept.[11] From a philosophical point of view, a great part of the credit is given to the earlier era of enlightment. In reality, the very

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[9] While the concept of self-determination as such is not the main focus in Fukuyama's *End of History* it can very well be associated with the main themes treated therein. In fact, the end of the conflict between East and West has cut off a main source of energy for keeping alive the traditional concept of self-determination. Many conflicts of self-determination, mainly in the third world, were fuelled primarily by the opposition of the two great ideological blocks. With the demise of the Eastern block it was at least arguable that a number of the struggles for self-determination would disappear or that the concept of self-determination would have to change totally its face in order to remain in some way relevant. On the other hand, as will be shown later, talk about the 'end of history' entails risks for a democratic society which is never perfect but should always struggle to improve. It may be true that a stand-still in social processes could be beneficial to some groups of a given society but it is improbable that this is also the case for the society as a whole. The call for preservation reveals, therefore, an anti-democratic element and this in an even more pronounced manner if an inter-temporal perspective is adopted as this will mean that future generations are pre-empted from self-determination.

[10] *See* A. Cassese, *Self-determination of Peoples – a Legal Reappraisal* 11 (1995). For a historical analysis of the principle of self-determination *see also* I. Brownlie, "An Essay in the History of the Principle of Self-Determination", in Alexandrowitz (ed.), *Grotian Society Papers. Studies in the History of the Law of Nations* 90-99 (1968); F. Ermacora, "Ursprung und Wesen des Selbstbestimmungsrechts der Völker und seine Bedeutung bis zum zweiten Weltkrieg", in K. Rabl (ed.), *Inhalt, Wesen und gegenwärtige Bedeutung des Selbstbestimmungsrechts der Völker* 50-75 (1964). *See also* D. Thürer, *Das Selbstbestimmungsrecht der Völker. Mit einem Exkurs zur Jurafrage* (1976).

[11] For earlier traces of the idea of self-determination, reaching back to the birth of the nation-state, *see* H. Gros Espiell, The right to self-determination, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) at 48 *et seq. See also* G. Decker, *Das Selbstbestimmungsrecht der Nationen* 73 *et seq.* (1955).

essence of this concept can be traced back much further in the past. It can be argued that its philosophical underpinnings are essential elements of the Western civilization beginning with the Greek city states and deeply rooted in Jewish and Christian religion.[12]

Though self-determination presents many faces, a modern central understanding of this concept is closely associated with the ideas of individualism and liberalism which both may be seen as both a precondition and consequence of self-determination. Viewed from this perspective, the ultimate goal is to achieve a societal situation which is best suited to human nature and aspirations – always interpreted from an individualistic viewpoint.[13] If this approach shall be translated into a feasible concept it becomes clear, however, that the interests and the destiny of the individual are intimately related to that of other people and larger collectives. How, then, to define the 'self'? Who should be responsible for the decisions which come into play here? In fact, up to the present day, the history of self-determination knows various attempts to attribute at least partial subjectivity or legal personality to collective entities.[14] Even if the collective entity is not identified as an autonomous holder of rights it still remains open to debate whether this entity should be granted at least an instrumental role to foster individualistic interests. In theory, widely diverging concepts of self-determination are conceivable and these concepts depend on the philosophical position adopted, on the role one tends to attribute to the relationship between the group and the individual for defining the identity of the individual and on the instrumental role the group assumes in the struggle for the interests of the individual. As history has shown, the concept of self-determination can be used to provide legitimacy to virtually any claim to change a given societal setting. At its core stands the fight for a more efficient participation of previously excluded groups. The search for self-determination can also be the im-

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[12] The principle of individual responsibility in the quest for one's own redemtion, a principle central to the Christian religion even though its rigour is somewhat put in question by the potentially unlimited divine mercy, presupposes and requests (individual) self-determination. It has been argued that those claims for self-determination that have been voiced prior to the French Revolution have been motivated primarily by religious considerations. *See* H. Ambruster, "Selbstbestimmungsrecht", in H.- J. Schlochauer (ed.), *Wörterbuch des Völkerrechts*, Vol. 3, 250, 251 (1962).

[13] In this, the modern idea of self-determination has an important root in contractarian individualism as developed by Hobbes and Locke. There is also a consistent number of political philosophers approaching the issue of self-determination primarily from a liberal, individualist perspective. *See* S. Tierney, "The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination", 13 *EJIL* 941, at 946 (2002), with reference for example to H. Beran, "A Liberal Theory of Secession", 32 *Political Studies* 21 (1984); *id.*, *The Consent Theory of Political Obligation* (1987); A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991).

[14] Even in the field of minority rights, which in the second half of the 20th century have been clearly structured according to an individualistic design, certain collective elements cannot be ignored, especially if the rights of indigenous people are concerned.

mediate consequence of a newly developed collective or 'group-consciousness' and the nature and the direction of the struggle for self-determination heavily depend on the group design chosen. At the end we will see that in individualistic societies the group is finally relegated to a secondary role and it becomes instrumental for the promotion of the immediate interests of the individual. We can, therefore, identify some features which are common to all self-determination issues, however different the definition of the relevant 'self' may be and notwithstanding the fact that the underlying interests of the various struggles for self-determination may be overlapping, conflicting or outrightly irreconcilable. The struggle for self-determination is one for participation in the political process, be it in an direct, unrestricted way or indirectly, i.e. through the group and in accordance with other groups. Such a right to self-determination must necessarily be of a permanent nature but this does not mean that this right must be exercised in an explicit way discontinuously and repeatedly anew. In fact, depending on how one defines participation. It can and it has been argued that a single structural change in the decision-making process of a given society may suffice if it permanently brings a previsously excluded group to power.[15] This is, however, not the position taken here as it ignores the relativity and transitoriness of groups and thus insufficiently considers the interests of the individual, the ultimate holder of the right of self-determination in an individualistic society. Self-determination is in any case a formidable concept to legitimate the request for change and for redefining what should be understood as legitimate government. Traditionally, self-determination has been seen as an instrument to pursue various goals, however differently they may be defined, and therefore not as an end in itself, but as a means to an end. The prevailing view has always been that it is an instrument to achieve change, and if it does not represent an autonomous goal it is often not even the only or decisive force behind this process. The requalification of the 'self(s)' that should be the primary bearers of power is often induced by socio-economic processes where the call for self-determination is needed only to make the results of these developments generally evident and final. In the following, the basic elements of this conception of self-determination as an instrument to achieve change in order to fulfil new needs of participation shall be tested against the main manifestations of self-determination in history. Towards the end of this article it will be shown that perhaps even one of the most basic assumptions of the traditional theory on self-determination regarding the instrumental nature of this concept can be put into doubt. If self-determination is personalised, i.e. if it is conceived primarily as an attribute of the individual and not of an 'imagined community',[16] it becomes an element of central importance for the full realization of human dignity and remains instrumental for the attainment of other human rights.

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[15] This is, as will be shown, the position assumed by the advocates of socialist self-determination or self-determination in colonial countries.

[16] *See*, with regard to this concept, R.B. Anderson, *Imagined Communities* (1999).

B. The Main Manifestations of Self-determination in History

1. The Roots of the Concept

From the foregoing it becomes clear that it would be too simplistic to qualify the last quarter of the 18th century as the watershed where the foundations were laid for the triumphal march of self-determination towards the 20th and the 21st century.[17] Self-determination as a historic concept includes several perspectives. On the one hand, up to the very recent past it has been conceived as an instrument or a tool, and its value has been rather political than legal. Self-determination as a process, on the other hand, is rather a reflection of socio-economic change than an autonomous motor of disruption. Self-determination as a result, finally, lends itself not to an evaluation in absolute but only in relative terms where the aspirations of the members of a society in a given context have to be taken into account. Therefore, even in a feudal system authoritarily ruled by an aristocracy it does not seem justified to state a priori that the remnant members of this system are denied self-determination if these people wholly identify with this order. Only when adopting more qualified standards typical of newer, Western-style conceptions of self-determination, the basis on which such an identification is formed can be put into question and the result will probably be that the formation of the popular will has been subject to manipulation and distortion in such a manner that the result is not authentic.

This relativistic approach also has to be adopted when evaluating the socialist conception of self-determination. The task itself may appear to be mainly an exercise in legal history given the severely reduced importance of socialism as a government system after the changes of 1989/1990. However, even the now dominant, Western conception of self-determination has been strongly influenced by the former socialist perception, especially through the cooperation of Western and Eastern countries in the relevant international law-making institutions.

2. The Socialist Approach to Self-determination

Socialist self-determination evidenced all the contradictions and ambiguities of communism or, respectively, of the way in which communist rule should be attained on a world-wide scale. Nonetheless, the content of the modern concept of self-determination and its potential for further development can be grasped only if this (partial) paternity is not altogether denied as has been partly the case in the past.[18]

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[17] On early historical manifestations of the idea of self-determination *see* I. Brownlie, *supra* note 10; U.O. Umozurike, *Self-Determination in International Law*, 3 *et seq.* (1972).

[18] This selective perception has been denounced especially by socialist authors. *See*, for example, the introductory statement to R. Arzinger, *Das Selbstbestimmungsrecht im allgemeinen Völkerrecht der Gegenwart* 11 (1966): 'Die moderne bürgerliche Völkerrechtslehre verfälscht die Geschichte des Selbstbestimmungsrechts in vielfältiger Weise'.

The right to self-determination was attributed by Lenin and by Stalin both to States and to nations in an ethnic sense. As the abandoning of Finland and the inclusion of a right to secession in the Soviet constitution has shown, the espousal of the concept of self-determination by socialist doctrine did not remain without consequences for the process of nation-building of the Soviet Union, at least in the beginning.[19] With the years to come it became clear, however, that self-determination as an instrument for change was directed primarily against Western states in general and colonial powers in particular. With regard to her own position, the USSR referred to the right to self-determination as pertaining to the whole state and transformed it into a strong defense of her own sovereignty. With regard to the internal dimension a detailed system of nationality law was created to offer an alternative to secession. This law of nationalities, though forcefully promoted, should only be of a transitional nature as the final goal was the melting of all people to a world-wide unitary people under communist rule.[20] As a consequence, also the creation of the Sovjet Union should only be a transitional step towards the formation of a class-free society[21] which should become reality in a more or less deterministic process. However, the alleged transitoriness of the existence of the USSR stood in apparent contrast to the insistence with which she defended her sovereignty and emphasized the insignia of her statal powers giving an extremely static impression.

On the other hand, the USSR was the main promotor of the insertion of a right to self-determination into the two United Nations Covenants of 1966.[22] In hindsight, it appears somehow like an irony of history that what was meant to be one of the most important spearheads against Western bourgeois countries first showed its effects in the third world only to have its most disruptive consequences in the former Eastern socialist countries themselves. As the case of Chechnya shows, the concept of self-determination as it stands now, i.e. as a mixture of legitimating elements for nationalist, secessionist and democratizing struggles, still poses one of the most important challenges to Rus-

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[19] The 'right to self-determination' proclaimed in the wake of the Bolshevist revolution (*see* the *Declaration on the rights of the peoples of Russia* of 2 November 1917, reprinted in a German translation in G. Decker, *supra* note 11, at 358) was taken literally also by other peoples of the crumbling peoples of the Russian empire such as the Armenians, Georgians, Bjelorussians and Ucrains. These attempts were, however, crushed by the Bolshevists in the years 1920/1921. *See* K. Rabl, *Das Selbstbestimmungsrecht der Völker* 96 (1973), and W. Heidelmeyer, *Das Selbstbestimmungsrecht der Völker* 57 *et seq.* (1973).

[20] *See* B. Meißner, "Die sowjetische Stellung zum Selbstbestimmungsrecht der Völker", in K. Rabl (ed.), *supra* note 10, at 96 *et seq.*

[21] Daniel Thürer wrote that 'the right of self-determination in Soviet doctrine exists only for cases where it serves the cause of class conflict and so-called socialist justice: it is only a tactical means to serve the aims of world communism and not an end in itself'. D. Thürer, "Self-Determination", in *Encyclopedia of Public International Law*, Vol. IV, 364, at 364 (2000).

[22] *See* M. Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll – CCPR-Kommentar*, n. 9 (1989).

sian Federation, the continuator state of the USSR. In fact, it is the combination of the wildly different strands of thought portraying the right to self-determination as a nearly all-encompassing device of problem solution that made this instrument so dangerous to rigid concepts of state sovereignty. On the other hand, constitutional orders based on the principle of democracy where not so exposed to the challenge of self-determination since democracies in themselves possess mechanisms for change.

3. The Wilsonian Concept and the Inter-war Period

At this point, some words on the democratic elements of the idea of self-determination may be appropriate. This approach to the concept of self-determination is usually identified with the Wilsonian perspective although its roots date back far further in history and, on the other hand, its content has gained much of its substance during the course of the 20th century. Pivotal for the understanding of the Wilsonian concept of self-determination is the idea that government should be based on the 'consent of the governed',[23] a requirement already argued by philosophers of the enlightment era and which has a contractualist background.[24] It found expression in the American and in the French revolution and it was (and still is) a decisive factor in the formation of the self-perception of the United States.[25] It had tremendous legitimating force for the participation of the United States in World War I and served as a seemingly objective criterion for the redrawing of allegedly national boundaries along ethnic lines in the aftermath of the war.

On this occasion, however, the principle of self-determination, as it was understood at that time, revealed all its ambiguities and failures both as a concept and as a political programme.[26] As a concept it was not clear how the democratic elements of the Wilsonian principle of self-determination could be reconciled with its interpretation as

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[23] *See* M. Pomerance, *Self-determination in Law and Practice – The New Doctrine in the United Nations*, 1 *et seq.* (1982); A. Cassese, *supra* note 10, at 19.

[24] *See*, for example, the writings by J. Locke, *Two Treatises of Government* (1690, reprint 1992) or J.-J. Rousseau, *The Social Contract* (1762, transl. 1968).

[25] It could be argued that it also motivated the invasion of Iraq and the overthrow of the Saddam Hussein regime. While this war has come to be seen in many countries as expression of a hegemonic attitude of the US and as a clear violation of international law there can be no doubt that a strong commitment to Wilsonian principles was an important force in determining the US government to carry out this operation. For two conflicting viewpoints on this war *see* Ch. Tomuschat, "Multilateralism in the Age of US Hegemony", in R.St.J. Macdonald/D.M. Johnston (eds.), *Towards World Constitutionalism* 31-75 (2005), and R.F. Turner, "American Unilateralism and the Rule of Law", in *ibid.*, at 77-101 (2005).

[26] In accordance with the result of its implementation it was also referred to as 'patchwork Wilsonism', *see* H. Nicolson, *Peace-making 1919* 70 (1934). *See also* A. Whelan, "Wilsonian Self-Determination and the Versailles Settlement", 43 *ICLQ* 99-115 (1994).

an instrument designed to foster the national idea.[27] In other words, it was the delimitation of the 'self' that showed its crucial importance already at that time and it soon became clear that no definite answer to this question could be given as the solution depended on the approach chosen. In order to be qualified as a principle the concept of self-determination should be generalizable. In reality, however, the application of this concept was restricted to the territory of the defeated countries, and even there it found consideration only in an extremely haphazard way. Though being an instrument often abused in history[28] and suscetible to deliver meaningful results only if applied with appropriate precautions, plebiscites would have appeared to be an ideal instrument to solve territorial disputes or to assess the genuineness of self-determination claims. In practice, however, plebiscites were rather the exception than the rule.[29] While a contradictory practice does not necessarily put into question the validity of the respective principle it must not be forgotten that not even the underlying political programme was consistently formulated by Woodrow Wilson.

The multidimensional facets of this concept came visibly to the fore in the Aaland case.[30] First of all, there was the question whether it was within the responsibility of

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[27] *See* on this issue in general R.A. Miller, "Self-Determination in International Law and the Demise of Democracy?", 41 *Columbia Journal of Transnational Law* 601-648 (2003).

[28] It is generelly held that the plebiscites of Nice and Savoy of 1860 are examples for such abuse. On the issue of plebiscites *see* S. Wambaugh, "La prâtique des plébiscites internationaux", 18 *RdC* 149-258 (1927/III); *id.*, *A Monograph on Plebiscites* (1920); *id.*, *Plebiscites since the World War*, 2 Volumes (1933); H.-J. Uibopuu, "Plebiscite", in *Encyclopedia of Public International Law*, Vol. 3, 1049-1054 (1997).

[29] One of the most spectacular violations of the principle of self-determination was the annexation of South Tyrol by Italy on the basis of a secret agreement between Italy, France and the United Kingdom of 1915. It is not yet fully clear which element was decisive for American connivance to this act: ignorance of the facts, indifference towards the cause or a decision based on mere political calculations. The denial of self-determination to the population of South Tyrolian after World War I was, however, not yet the end of the story and it could be argued that the further development of the concept of self-determination in its internal, democratic fashion during the 20th century has influenced also the successful search for a peaceful accomodation of the ethnic groups living in this country today. *See* P. Hilpold, *Modernes Minderheitenrecht* (2001). Virtually at the same time the South Tyrolians were denied a right to self-determination the same lot fell to the Kurds. While the Treaty of Sèvres of 1920 seemed to lay the foundations for a process of nation-building finally leading to an independent State of Kurdistan, the successive re-invigoration of Turkey dispelled all hopes and with the Treaty of Lausanne of 1923 not even autonomy remained an issue. Contrary to the situation in South Tyrol, the Kurdish region could not even benefit from a general process of democratization granting finally a kind of internal self-determination. On this basis, the Kurdish question can be qualified as a perduring testimony of the imperfect, ambiguous, and contradictory nature of self-determination after World War I.

[30] *See* T. Modeen, "Aaland Islands", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I, 1-3 (1992); L. Hannikainen, *Cultural, Linguistic and Educational Rights in the Aland Islands* (1992); L. Hannikainen/F. Horn, *Autonomy and Demilitarization in International Law: The Aaland Islands in a Changing Europe* (1997); P. Hilpold, *supra*

an international organisation like the League of Nations to decide on the possible application of the principle of self-determination. As a decision in favour of such a claim normally encroaches on sovereign rights of an existing state the League of Nations[31] found a very prudential solution. This power should only be granted in transitional situations where sovereignty has not yet been fully constituted. As is well-known, in this case a right to self-determination in the sense of a right to secession was denied to the people of the Aaland islands by the League of Nations. On the other hand, Finland was required to grant these islands an autonomy thereby giving practical relevance to the principle of self-determination in a way that proved to be enormously beneficial to the population of Aaland. Once the new frontiers in Europe had been drawn and the legal situation had somewhat stabilized it was, of course, in the immedite interest of the many winners of the war to 'pull out the teeth' of the principle of self-determination and to oppose its inherent disruptive force. These countries rather emphasized national sovereignty which afterwards should be qualified as the 'external self-determination'.[32]

On the other hand, countries that had suffered considerable losses of territory and people in the post-war peace settlements – in particular Germany and Austria – took a totally different approach and cultivated or even idiolized the principle of self-determination in the years to come. A mirror image of the conflicting interests in this field can be noticed indirectly, yet nonetheless impressively, in legal literature. During that time, decisive contributions to the legal analysis of this concept came exactly from these two countries. The loss of sizeable territories in evident contrast to the Wilsonian concept of self-determination – used at the same time to legitimize the new postwar order – was a traumatic experience for both countries and inspired writers there to take up this concept, to further develop it and to put into evidence that the Wilsonian idea of self-determination had been betrayed to their detriment.[33] This particular historic conditioning of the approach in doctrine to the concept of self-determination lasted well beyond the interwar period and could be noticed also after World War II[34]

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note 2, at 3 *et seq*.; J. Crawford, *The Creation of States in International Law*, 108 *et seq.* (2006).

31 As is well-known, the relevant investigations were undertaken by a Committee of Jurists of the League of Nations and by a Commission of Rapporteurs, respectively. *See* A. Cassese, *supra* note 10, at 27 *et seq.* On the Aaland Islands *see also* L. Hannikainen, *Autonomy and Demilitarisation in International Law: the Aland Islands in a Changing Europe* (1997); M. Suksi, *Alands konstitution* (2005).

32 *See* on this concept, A. Cassese, *supra* note 10, at 71 *et seq*.

33 *See*, for example, A. Verdross, "Die rechtliche Lage Deutsch-Südtirols", in H. Voltellini *et al.* (eds.), *Deutschsüdtirol*, 5-26 (1926); H. Wintgens, *Der völkerrechtliche Schutz der nationalen, sprachlichen und religiösen Minderheiten*, 40 *et seq.*, 100 *et seq.* (1930); G.H.J. Erler, *Das Recht der nationalen Minderheiten*, 111 *et seq.* (1930).

34 *See*, for example, E. Reut-Nicolussi, *Sind die Südtiroler eine geschützte Volksgruppe?* (1950); G. Decker, *supra* note 11, at 108 *et seq.*; F. Ermacora, *supra* note 10, at 50 *et seq.*; *see also* the numerous writings by the Austrian lawyer Theodor Veiter on this issue.

as the territorial question was still unresolved for both countries and – in the case of Germany – became even aggravated.[35] As a result, the overall attitude towards this concept was overfriendly and a process of reciprocal confirmation of the legal nature and of the far-reaching extent of this right separated more and more the discussions in the German-speaking area from those in the Anglo-American countries. As will be shown below, it took a very long time until the concept of self-determination could again find application in the field of the protection of ethnic and national specificities.[36]

4. The Creation of New Rules by the UN[37]

With the coming on the scene of the UN the law of self-determination immediately regained popularity. First, as a principle enshrined directly in the UN Charter, subsequently as a right proper. As it is known, even when the principle of self-determination

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[35] To Austria, the denial of the right to self-determination to South Tyrol was evidence of a lasting incoherence in international law or at least in international politics. Germany was not only confronted with further territorial losses in obvious conflict with the principle of self-determination as was demonstrated in particular by the mass-deportations from the Eastern territories, but also by the separation of the two countries against the will of an overwhelming part of the population.

[36] To this end, also factual developments were helpful. For Germany it was the process of reunification which led to final considerations of the 'German question' from the viewpoint of the right to self-determination – *see*, in particular, E. Klein, *Das Selbstbestimmungsrecht der Völker und die deutsche Frage* (1990) – while afterwards the interest in this issue diminished sharply. Due to the progressive extension of autonomy for South Tyrol, the separation of Tyrol was no longer discussed as an issue of self-determination. The 1992 *Declaration on the resolution of the conflict* on the dispute over South Tyrol, which had been pending between Austria and Italy before the General Assembly of the United Nations since 1960, can be seen as the conclusive act of a process aimed at offering internal autonomy as an alternative to secession. *See* on this issue P. Hilpold, *supra* note 29. Of great importance in this field was also the fact that German writers started to follow the Anglo-American mainstream viewpoint on this issue and to publish in English language. *See*, for a collective writing in English by German-speaking authors which has been very well accepted in the English-speaking world Ch. Tomuschat, (ed.), *Modern Law of Self-Determination* (1993).

[37] There are countless studies on the contribution of the United Nations to the development of the law of self-determination. Among them *see*, especially with regard to the developments in the first decades, J.L. Kunz, "The Principle of Self-determination of Peoples", in K. Rabl (ed.), *supra* note 10, at 128-170; M. Pomerance, *supra* note 23; E. Ofuatey-Kodjoe, *The Principle of Self-determination in International Law* (1977); A. Cassese, *supra* note 10; D. Clark/R. Williamson, *Self-Determination – International Perspectives*, (1996); H. Quane, "The United Nations and the Evolving Right to Self-determination", in 47 *ICLQ* 537-572 (1998); E. McWhinney, *The United Nations and a New World Order for a New Millennium* (2000). For a detailled account of the historical background to this contribution *see* E.A. Laing, "The Norm of Self-Determination, 1941-1991", in 22 *California Western International Law Journal* 209-308 (1992).

developed into a right in the 1960ies, new questions arose including the following:[38] Who is the people?[39] What relevance has to be given to the territorial aspect? Should past injustices – leading for an example to a partition of the territory or of the population – be taken into account when the validity of a present day claim is to be assessed? Once such a right to self-determination is formally attributed, in which way can it be implemented in practice? Is the recourse to force allowed? Is the right to self-determination a continuous right or can it only be exercised once?

In literature, the attempts to give an answer to these and many other questions have filled libraries, and we are still far away from definite solutions. It would be unfair, however, to deny that the last decades have brought about many clarifications at least to the effect that the awareness of the problems associated with the concept of self-determination has grown. It has, of course, to be mentioned that the practice of United Nations has given substantial contributions to the elucidation of one particular field of self-determination, that is, self-determination in the context of the decolonization process. For several decades, these two concepts have been considered as largely corresponding and mutually communicating. The rules designed to permit peoples under foreign colonial rule to achieve independence were considered to constitute the legal core of this concept while all other possible interpretations were largely retained to be merely political demands.

For the concept of self-determination to be equated by and large with the claim of colonies to freely determine their political status it had both advantages and drawbacks. The great advantage was the fact that for the first time it had been possible to rely on the concept of self-determination as a legal concept and not as a mere political statement. Unfortunately, the decolonization process evidenced so many peculiarities, flaws and deficiencies that this phenomenon was to little avail for the promotion of a general concept of self-determination. While the label of 'self-determination' was a powerful slogan to provide legitimacy to the struggle of people under foreign colonial rule, it cannot be sustained that the episode of decolonization provided further legitimacy and strength to a general concept of self-determination that was also applicable beyond the decolonization context.[40] In fact, the decolonization process seemed to betray the democratic roots of the concept of self-determination as described above on several gounds:

It was not conceived as an ongoing, lasting process but as a one-time-affair. As a consequence, it was not designed to furnish durable democratic structures to colonies the moment they became independent, but it was mainly directed at terminating foreign

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38 *See* in detail P. Hilpold, *supra* note 1, at 7.

39 In this context the famous statement by Sir Ivor Jennings can be cited according to whom it is ridiculous to let decide the people because first someone must decide who is the people. *See* I. Jennings, *The Approach to Self-Government* 56 (1956).

40 *See* M. Pomerance, *supra* note 23, at 75, who wrote the following: '[T]he "New UN Law [of Self-Determination]" exploits the democratic penumbra and respectability of "self-determination" while scorning the essence of the democratic credo.'

subjugation. Foreign (white) domination was considered to be an evil as such. There was no means to 'heal' colonial dominance from its original sin no matter how the specific situation of the governed people in the colonies was to be assessed. Once a colony had become independent the lack of democratic guarantees could not be remedied through reliance on the right to self-determination. For the people in the former colony this could result in a situation that was subjectively even worse than before. The right to self-determination should, however, not be among the few instruments available to these peoples as foreign colonial rule was considered objectively, i.e. without further examination, to be an international wrong while the consequences of an undemocratic government in general had to be judged on a case-by-case basis and, in view of its disruptive effects, self-determination was considered an unproportional instrument to counter this problem.

The 'self' empowered to newly determine its destiny was not defined along ethnic lines or an ancient common history but mostly on the basis of borderlines haphazardly determined by the colonial rulers.[41] The most important justification for this approach refers to the stability it can guarantee while abandoning the *uti possidetis* principle would cause never-ending frontier conflicts. This argument seems plausible but at the same time it appears strange that the individual 'selfs' advancing claims of self-determination against European rulers derived their identity to a considerable extent from arbitrary measures (first of all with regard to the drawing of the borderlines) of their colonial masters, while pre-existing identities were not only disregarded in most cases but, moreover, their claims to self-determination even were rebutted forcefully. Two examples for secessionist attempts based on separate identities which can be traced back undeniably to distinct historic and cultural developments were those of Katanga from Zaire and those of Biafra from Nigeria. In both cases the restoration of an autonomous self with ancient roots in Africa's history and probably supported by a broad consensus among the respective people was not only considered not to be based on the principle of self-determination, but it was even sustained that these attempts violated the right of self-determination of the larger nation.

The conceptualization of colonialism as a historic phenomenon where the acting, law-violating party was necessarily a European country was in clear contradiction to the egalitarian and humanitarian wording in which its evolving legal basis, especially in the UN area, was couched. While reliance on this wording was certainly useful to provide legitimacy to claims for self-determination it also implied obligations to the effect that self-determination should become a generally applicable concept in the same way the indicated principles were expressions of generally applicable ideas. This, however, did not happen, and the impression left was of a biased, contradictory concept, of a lofty principle used abusively. Colonialism was not understood as a sociological phenomenon loathsome for its substantial essence and potentially replicable in its most

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[41] The most notable exceptions to this rule were the divisions of British India and of Rwanda-Burundi.

important elements but as a historically unique phenomenon not comparable to other forms of oppression. This singularity prohibits an application beyond the present area of the instruments conceived for this specific problem.

Though not made explicit by the drafters of the relevant documents it was clear from the beginning that as anti-colonialism was perceived to be a struggle that should end sooner or later, so should the era of self-determination come to an end. In order to clearly delimit the forms of colonialism the fight was directed against new qualifications that were subsequently introduced: 'salt-water'-colonialism to evidence that the colonial master should come from overseas (i.e., Europe)[42] or 'pigmentational colonialism' to cover also those forms of oppression in Rhodesia or in South Africa which have to be attributed to white people without any clear support by their European countries of origin.[43] As is generally known, the so-called Belgian thesis, according to which colonial situations should be seen as a factual problem and fought wherever its elements show up – independently from the geographical location – found no majority among the members of the United Nations. Even though the motivation behind this move was not as noble as it seemed to be on the face of it,[44] this was the first attempt to fight not only traditional colonialism but also the new plague of neo-colonialism.[45]

On the other hand, the use of equivocal wording in the relevant documents which seems to imply a general applicability of this concept is problematic as it not only creates hopes that can never be fulfilled but it may furthermore encourage action that might lead to the escalation of conflicts to the detriment of all parties involved. It could, however, be argued that adopting a tolerant and forbearing – not to say cynical – position might be an usual strategy in politics, an expedient to find diplomatic support for a project that is biased in a way many other norms in international law are. There comes, however, a point where the most indulgent intepreter has to draw a line. This point is reached when the purpose pursued with this reasoning is not only incompatible with the more far-reaching goals purportedly aimed at but when even the more immediate, real aim seems to be unattainable. In the present context this happened when self-determination claims, genuinely brought forward against a colonial background, where betrayed.

This clearly happened in the *East Timor* case.[46] East Timor was set on the UN list of non-self governing territories in 1960, but when Portugal was prepared to grant

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[42] From this it follows that overland acquisitions are not considered as a colonial phenomenon. *See* G.J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", 32 *Stanford Journal of International Law* 255, at 273 (1996).

[43] *Ibid*., citing Ali Mazrui, *Towards a Pax Africana* 14 (1967) as the author of this term.

[44] The intention behind this Belgian proposal was to overstretch the concept of self-determination and thereby to eliminate it altogether.

[45] *See*, for example, Z. Skurbaty, *As if Peoples Mattered* 216 *et seq.* (2000).

[46] With regard to the *East Timor* case *see* Ch. Chinkin, "East Timor Moves into the World Court", 4 *EJIL* 206 (1993); P. Hilpold, *Der Osttimor-Fall* (1996); *id*, "Das Selbstbestim-

territorial independence to this country in 1974/1975 it was invaded by Indonesia. After a fake referendum, East Timor was integrated into the Indonesian State. Over years the inhabitants of this country were subject to brutal oppression by Indonesian military forces. A former colony which had gained independence through a fierce struggle directed at the implementation of the principle of self-determination now opposed and factually impeded the recourse to this right by a people which according to the restrictive criteria then in place would evidently have such a right. In 1995, however, the ICJ confirmed the existence of this right and when Indonesia was hit by a major economic and political crisis towards the end of the century the people of East Timor finally managed to exercise this right.

What can be learnt from the East Timor case? Judged only by the final outcome it could be sustained that this case was a typical decolonization case set apart from other like cases only by an illegitimate and finally unsuccessful attempt of territorial conquest. The qualification of the events as described above cannot be outrightly rejected, but it needs some specification. In fact, the perspectives for the implementation of the right of self-determination of the people of East Timor was rather weak. There was even the danger that this right would be trumped by the principle of effectivity operating in favour of Indonesia.

The financial and economic crisis of Indonesia, which shattered this country in its foundations, was an unforeseeable event and, as described above, of crucial importance for the final prevalence of East Timor's claim for self-determination over Indonesia's territorial integrity. Looking at this situation, a striking parallel to the Aaland case comes to mind. There, as noted earlier, the Committee of Jurists, when asked to examine the merits of the Aaland's claim to self-determination, attributed much importance to the fact that in its view a situation of transition has come into being in the relevant geographic region in the aftermath of World War I. While the League of Nations has elevated the existence of such a situation to the rank of a legal precondition for the examination of the question whether a right to self-determination can (possibly) apply at the end of the 20th century, a weakened sovereignty is still a formidable advantage for a people attempting to exercise its claim of self-determination *in concreto*. If this were true only on a factual level it would furnish a good example for the structural weaknesses of international law, especially its non-implementation, but nothing more.

On a closer look, however, the described situation also seems to influence the legal perception of the claim *per se*. At least in a colonial context the existence of a legal claim of this kind should not be contested, but it is nonetheless surprising to see that the international community remained largely silent over nearly two decades when

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mungsrecht der Völker vor dem IGH – Der Osttimor-Fall", 53 *Zeitschrift für Öffentliches Recht* 263 (1998); Ch. Chinkin, "East Timor: A Failure of Decolonisation", 20 *Australian Yearbook of International Law* 35 (1999); R.S. Clark, "The 'Decolonization' of East Timor and the United Nations Norms on Self-Determination and Aggression", 7 *Yale Journal of World Public Order* 2 (1980).

confronted with the *East Timor* case. In the face of Indonesia's crumbling political strength and national cohesiveness; the uncompleted decolonization process in East Timor came again to the forefront of many governments and was finally solved according to international law. It is true that the *East Timor* case was not a typical case of decolonization as the new colonial master was itself a former colony which had created the (weak) appearances of a free act of self-determination. It could therefore be argued that the exceptional circumstances in which the claim for self-determination for East Timor was advanced required that sovereignty be weakened in order to be finally successful. Apart from clear cases of decolonization – and those of forceful occupation[47] – in the conflict between territorial sovereignty and self-determination through secession, the community of states seems still to give preference to the former as long as the 'coat of sovereignty' remains intact. Once a government is no more in full control of its territory, claims for self-determination have their chance. It is at this moment that it has to be assessed whether a legitimate claim for self-determination exists, and it is possible that the community of state yields to this claim. Modern claimants of self-determination find themselves in a much better situation than the people of the Aaland Islands in the first quarter of 20th century. It is no longer contested that a *right* to self-determination does exist; the real challenge is now to determine its nature and scope. However, there have been various attempts to demonstrate that a right to self-determination in the form of a right to secession can also prevail outside the colonial context when national sovereignty is still fully intact. In the following it will be examined whether such positions are tenable.

IV. The Human Rights Approach

The human rights approach to self-determination finds its definite legal basis in common article 1 of the two United Nations human rights Covenants of 1966 although the role these provisions play in the respective context is highly disputed. There is broad agreement that the right to self-determination applies not only in the colonial context but on a general level. It has been said that this right applies to all peoples in all situations where they are subject to oppression in the form of subjugation, domination or exploitation by others, and this would open a formidable avenue to find a balanced solution sensitive to all interests involved.[48]

It is beyond doubt, however, that this perspective is not sufficient to build an all-encompassing, definite theory of self-determination. In other words, this approach furnishes an important procedural element that may help to make the concept of

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[47] On this specific issue which will not be further elaborated on in this contribution *see* A. Cassese, *supra* note 10, at 90 *et seq.*

[48] *See* R. McCorquodale, "Self-Determination: A Human Rights Approach", 43 *ICLQ* 857-885 (1994).

self-determination modern enough to survive in a complex present-day society where the number of rights requiring specific protection is continously growing – with all resulting conflicts and with the ensuing necessity to continously find anew compromises between reciprocally incompatible positions. What self-determination really means and who the holders of this right should be still remains to be clarified. One attempt to bring the right to self-determination and human rights together and which has a rather long history, especially in German-speaking literature,[49] relates to the endeavour to promote minority rights through the concept of self-determination.[50]

At first glance it cannot be denied that this approach has a certain appeal as it furnishes an additional and powerful instrument for the defence of rights that are, on the one hand, developing very rapidly but which are, on the other hand, still highly contested in many countries.[51] At a closer look, however, it becomes clear that not much is gained if these two legal areas with contested boundaries and content are associated. First of all, it can be said that international minority protection law, notwithstanding

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[49] *See*, for example, Th. Veiter, *Nationalitätenkonflikte und Volksgruppenrecht* 175 (1977): 'Der Ausdruck *peoples* in den beiden Menschenrechtspakten bezieht sich seiner ganzen Herkunft und Formulierung nach auf Völker im ethnischen Sinne.' *See also* O. Kimminich, *Rechtsprobleme der polyethnischen Staatsorganisation* 123 (1985); F. Ermacora, *Der Minderheitenschutz im Rahmen der Vereinten Nationen* 72 *et seq.* (1988); D. Blumenwitz, *Minderheiten- und Volksgruppenrecht* 32 (1992) stated: 'Die Interpretation des Begriffes "people", der sich in diesem Zusammenhang in der Satzung der Vereinten Nationen und in einigen Resolutionen der Generalversammlung findet, wurde allmählich erweitert. Es ist heute gesichert anzusehen, dass das Selbstbestimmungsrecht der Völker auch Volksgruppen zusteht.'

[50] It is amazing to see how early in history German-speaking doctrine became interested in issues of self-determination. In part this may be explained by the experience of the German division, in part it was surely the (indirect) result of two lost wars in the aftermath of which large groups of people of German language or ethnicity were denied the right to take influence on the drawing of the German borders or were outrightly expelled from their homeland in order to extinguish all claims for this land. This problem was countered by several German and Austrian writers through the advocacy of the right to return. *See*, for example, P. Hadrossek, *Stand und Kritik der rechtstheoretischen Diskussion zum natürlichen Recht auf die Heimat* (1969); Th. Veiter, "Le droit des peuples a disposer d'eux-memes et a leur foyer natal", in *Studi in onore di Manlio Udina* 826 (1975); D. Blumenwitz, "Das Recht auf die Heimat – Bilanz nach 50 Jahren", in D. Blumenwitz/G. Gornig (eds.), *Rechtliche und politische Perspektiven deutscher Minderheiten* 113 (1995); D. Blumenwitz (ed.), *Recht auf die Heimat im zusammenwachsenden Europa – Ein Grundrecht für nationale Minderheiten und Volksgruppen* (1995); O. Kimminich, *Das Recht auf die Heimat* (1996). While this concept deserves attention and sympathy from a humanitarian point of view or, put in more abstract terms, from the perspective of fairness in international law, the related endeavours brought only mixed results since practice, with all its political bias, was not on their side.

[51] Among the extensive literature on this issue *see*, for example, P. Thornberry, *International Law and the Rights of Minorites* (1991); A. Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* (1997); N. Lerner, *Group Rights and Discrimination in International Law* (2003).

the many uncertainties associated with it and the still missing definition for the very subject of this branch of law has become an important and very dynamic field of international law.[52] The question whether a certain group constitutes a minority gives less and less rise to controversy as the subjective approach to the defintion of minorities prevails and the position of certain States, which categorically deny the existence of minorities on their soil even when the factual evidence is to the contrary, has become increasingly untenable in the last years.

Furthermore, it has become clear that only an predominantly individualistic approach provides for a realistic chance that this subject will be further developed. To associate it openly with the law of self-determination could even be detrimental because this could provoke fears that have stood in the way of a broader recognition of minority rights for a long time. The interwar experience with the League of Nations system of minority protection has shown that even an individualistic system of protection can meet with massive resistance by the respective governments if the group becomes too visible.[53] Nothing is gained if a conflictual model is adopted according to which single groups are encouraged to fight out their concurring claims and the final outcome of this struggle will reveal which group or groups will be successful in enforcing its interests and thus to prevail also on the legal level.

This is also true in the field of indigenous rights, a subject where minority rights and the law of self-determination are indeed closely interrelated.[54] Although here the issue of self-determination is openly addressed it has to be kept in mind that the concept of self-determination assumes a particular meaning in this context.[55] The real challenge is

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[52] In Europe, an important contribution to this development was given by the Framework Convention on the Protection of National Minorities and, in particular, by its control and implementation mechanism. *See*, in this regard, M. Weller (ed.), *Minority Rights in Europe* (2005).

[53] On this protection system *see* A. v. Balogh, *Der internationale Schutz der Minderheiten* (1928); J. Robinson et al., *Were the Minorities Treaties a Failure?* (1943); P. de Azcárate, *League of Nations and National Minorities* (1945). Of course, the reasons for the demise of this system were diverse. First of all, it must be noted that there was no general system of human rights protection in force on which such minority protection could have been grounded. Furthermore, the states which had assumed obligations in this field were generally hostile towards this system. *See* extensively on this questions P. Hilpold, "Minderheitenschutz im Völkerbundsystem", in Ch. Pan/B.S. Pfeil (eds.), *Zur Entstehung des modernen Minderheitenschutzes in Europa, Handbuch der europäischen Volksgruppen*, Vol. 3, 156 (2006).

[54] *See* P. Hilpold, "Zum Jahr der indigenen Völker – eine Bestandsaufnahme zur Rechtslage", 97 *Zeitschrift für vergleichende Rechtswissenschaft* 30 (1998).

[55] *See*, in particular, Art. 31 of the Draft United Nations Declaration on the Right of Indigenous Peoples of 23 August 1993, UN Doc. E/CN.4/Sub.2/1993/29/Annex I (1993), which provides:

> '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,

to achieve group accomodation in a society that provides spaces for different cultures and interests without one group being trumped by another. In the field of indigenous rights the success of this balancing act is of pivotal importance for the ability of the endangered groups to survive. The instruments for the protection of indigenous rights already entered into force or in the process of being adopted attempt to carve out exactly such spaces without endangering stability in the respective societies.

Furthermore, if it has been possible to demonstrate within the ambit of indigenous rights that the concepts of 'peoples' and 'self-determination' are suited for a differentiated application also in other situations, it should be possible to adapt these concepts to particular needs. This does not mean recommending these concepts to be relativized and adapted to all possible interests as this would, in the end, render them meaningless. Rather, this is to suggest that the peculiarities we find in a very pronounced form in the field of indigenous rights with respect to general human rights and which have led to a very unique construction of these concepts can be discerned also in general, though in a perhaps less pronounced form.

There are probably no cases in the history of self-determination outside the colonial context that are fully identical with each other. Therefore, if the instrument of self-determination is to fulfill a meaningful function against the background of ever-changing societal structures and group compositions it has to show a certain amount of flexibility.

In a third general sense, the enthusiasm with which the concept of self-determination is employed in the field of indigenous rights has demonstrated possible ways of further development for this concept. In particular, the distinction between the external and the internal right to self-determination so dear to the great majority of authors dealing with the right to self-determination becomes blurred or outrightly untenable in this area. For indigenous peoples this distinction makes little sense unless it is again re-interpreted. Indigenous peoples, as a rule, surely do not aspire at external self-determination in the traditional sense. Nor does the concept of internal self-determination give a satisfactory description of their aspirations. Their goals are lying rather somewhere in between these typified forms of self-determination. They want to be recognized as specific groups and emphasize the elements distinguishing them from other groups, but at the same time they want to be integrated into a greater self with which they identify, too. Their specific claims brought forward under the generic heading of self-determination are, therefore, of a variegated nature: under some aspects they require affirmative action, under other aspects equal treatment is sufficient for them, and in still other matters they simply desire to be left alone.

On the whole it can be said that in the context of indigenous rights, the concept of self-determination has been successfully adapted to the very particular needs of groups that stand out in international human rights law for their many specifities which distinguish them in the realm of this branch of law. While the particularities in other

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social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways for financing these autonomous functions.'

areas of international law in which the right to self-determination is applicable may not be so pronounced, the scope and meaning of this claim will always have to be adapted to the specific needs of each situation as otherwise the whole concept may be inappropriate or ineffective in some cases and even outrightly pernicious in others since it may result in an escalation of a situation where moderation and compromise is badly needed.

V. Turning our Eyes from the Past to the Present

It is argued here that the concept of self-determination can be turned into a useful instrument for the present if its historic development is kept in mind. Thereby the many wrong tracks taken as well as the dangers inherent in this concept are made evident and can be avoided in the future. It should also be recalled that as yet, no right to secession exists.[56] The considerations having led States to oppose such a right in the past are still valid today. Even the attempts to construe an argument for a right to secession as a measure of last resort in the case of extreme human rights abuses – the so-called remedial secession theory –[57] fails to convince in the end.[58] According to the present writer, two points of criticism are essential in this regard. First of all, no satisfactory legal basis for such an alleged right can be evidenced. Secondly, the threat of an abusive recourse to this concept can in no way be sufficiently addressed.[59] It is for

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[56] Of course, it can be said that this is true only outside the colonial context and that of alien subjugation and domination. On the other hand, it could be questioned whether it is correct to speak of secession in these cases.

[57] The basic theoretical foundations for this approach were laid by L.C. Buchheit, *Secession – TheLegitimacy of Self-Determination* (1978). In Europe, this position was adopted in particular in the German literature by K. Doehring, "Self-Determination", in B. Simma (ed.), *The Charter of the United Nations – A Commentary* 47 (2002), and D. Murswiek, "Offensives und defensives Selbstbestimmungsrecht der Völker", 23 *Der Staat* 523 (1984).

[58] This aspect is treated extensively in P. Hilpold, "Self-determination in the 21st Century – Modern Perspectives for an Old Concept", *supra* note 2, and in earlier writings by this author. *See also* P. Hilpold, *Der Osttimor-Fall* (1996) and *id.*, "Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?", 54 *Zeitschrift für Öffentliches Recht* 529 (1999).

[59] In the end, this question was left open even by the Supreme Court of Canada in *Reference re Secession of Quebec*, 161 D.L.R. (4th) 385 (Supreme Court of Canada, 1998) when it concluded at 138 the following way:

> 'In summary, the international right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec

these reasons that the related attempt to introduce a right to humanitarian intervention is also opposed by this author.[60]

In sum, it may be said that secession is nothing more than a factual process the furthering of which does not lie in the interest of the State Community.[61] Once brought, however, to a successful end, it is again in the interest of the international community of State to take notice of the effective situation and to integrate the newcomer. Although there are many modern attempts to give a 'new lease of life' to self-determination outside the colonial context, no one comes near to a new concept that would introduce a right to secession, even in situations of extreme human rights abuses. The most evolved understanding of the right to self-determination heads rather for preventing those situations that have been considered as pre-condition for the recourse to secession by the authors cited above. The prevailing perception seems to be that the community of states should not react to massive human rights abuses by furthering territorial changes as this would not provide any solution to the immediate problem. It could even enhance violence as territorial changes would appear to be a satisfaction guaranteed and lead to an ultimate catastrophe which could be avoided if resort is made to substantial autonomy. One of the most important contributions to the theory of self-determination was made in the wake of the fall of the iron curtain in the form of a claim for a 'right to democratic governance'. The theoretical foundations for the

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under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international, to secede unilaterally from Canada.'

Particular attention has to be given here to the words 'at best'. They reflect the circumstance that Professor James Crawford, acting as legal counsel for the Government of Canada, in his report 'State Pratice and International Law in Relations to Unilateral Secession' took a very cautious stance in this regard. He wrote that even if the Friendly Relations Declaration of 1970 and the 1993 Vienna Declaration of the United Nations World Conference on Human Rights were read in a way as to allow for secession in cases of (extreme) discrimination of a people by its own government, it would be doubtful whether these documents reflected international practice. The comments by Professor Luzius Wildhaber to the Crawford report seemed to be more in favour of the existence of such a right.

60 *See* P. Hilpold, "Humanitarian Intervention: Is there a Need for a Legal Reappraisal?", 12 *EJIL* 437 (2001). *See also* K. Zemanek, "Basic Principles of UN Charter Law", in R.St.J. MacDonald/D. Johnston, *supra* note 25, at 414 *et seq.*, who is critical as to the existence of such a right for the moment but who sees state practive operating towards the (possible) coming into being of such a right.

61 James Crawford wrote the following:

'There is strong international reluctance to support unilateral secession or separation, and there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory. In principle, self-determination for peoples or groups within the State is to be achieved by participation in its constitutional system, and on the basis of respect for its territorial integrity.'

J. Crawford, *supra* note 30, at 417.

development of this approach were laid by Thomas Franck.[62] After more than one and a half decades since the groundbreaking events of the years 1989/1990 it can be said that the trends foreseen at that time have largely materialized in the meantime, even though not at the pace and with all the results then predicted.[63] While specifically in the field of electoral rights there is a consistent body of international rules and monitoring mechanisms,[64] there are still large strongholds of authoritarian, antidemocratic systems defying the claim that a general rule on democratic government does exist. Also the famous dictum by the ICJ in the Nicaragua case, according to which 'adherence by a State to any political doctrine does not constitute a violence of customary international law'[65] has not yet been reversed although it can be assumed that the ICJ would now take a different position.

It is interesting to note that subsequently, *Thomas Franck* has pushed less the idea of international democracy rather than that of personal autonomy or individual self-determination.[66] In later publications, he has tried to demonstrate that the identity of people in modern globalizing societies becomes increasingly multilayered, in the sense that people no more define themselves through a certain nationality but, instead, through a multitude of relationships and loyalties. He rightly points out that multiple loyalty references also existed in medieval times. After being reduced to a one-dimensional reference system through the Westphalian order, multiple loyalties have become *en vogue* again and they are clearly different from those of medieval times in that they are not imposed but the outcome of personal choice.[67] Whether we are really facing a *Weltbürgertum* advocated by *Friedrich Schiller* and *Immanuel Kant* may again be

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62 T. Franck, "The Emerging Right to Democratic Governance", 86 *AJIL* 46 (1992). *See* further G.H. Fox, "The Right to Political Participation in International Law", 1992 ASIL Proceedings 249; *id.*, "The Right to Political Participation in International Law", 17 *Yale Journal of International Law* 539 (1992).

63 For more details *see* P. Hilpold, *supra* note 2.

64 *See* B. Conforti, *Diritto internazionale* 26 (2002); J. Hartland, "The Right to Free Elections – International Elections Observation as a Means towards Implementation", in *Karel Vasak Amicorum Liber* 243 (1999); G.H. Fox, "Election Monitoring: The International Legal Setting", 19 *Wisconsin International Law Journal* 295 (2001).

65 Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 133, para. 263.

66 *See*, for example, the following contributions by T. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", 90 AJIL 359 (1996); *id.*, "Community Based on Autonomy", 36 *Columbia Journal of Transnational Law* 41 (1997, Essays on International Law in Honor of Professor Louis Henkin); *id.*, "Personal Self-Determination: The Next Wave in Constructing Identity", in A. Anghie/G. Sturgess (eds.), *Legal Visions of the 21th Century: Essays in Honour of Judge Christopher Weeramantry* 241 (1998). The existence of an international right to democracy is denied also by J. Rawls *The Law of Peoples* (1999).

67 *See*, for example, T. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", *supra* note 66, at 377.

open to debate. The many facts cited by *Thomas Franck* that might warrant such a conclusion (the positive attitude towards multiple citizenship, the growing number of transnational and international organisations towards which people can feel specific loyalty, the coming into being of an 'internet society', the deployment of multinational peace-keeping troops, to name only a few examples) contribute probably more to enrich individual identity than to replace nationality as the main factor of identify. Nonetheless it is also true that they make an exaltation of nationality less likely to happen.

On this basis, a significant change of perspective is occurring in the struggle for self-determination. It is less and less group-oriented and increasingly focuses on the individual. As a consequence, some of the most serious deficiencies of this concept as traditionally understood disappear. If the individual is the ultimate bearer of the right to self-determination, *Sir Ivor Jennings'* famous criticism on self-determination cited above is losing its relevance. There is no more need for a 'benevolent dictator' who first has to determine who is the people before the right to self-determination can be exercised. The concept of self-determination would no longer be suscetible to facile abuse by 'ethnic entrepreneurs'[68] who lead nations to war in the pursuit of their egoistic goals. The long-lasting conflict between the German romantic and the American or French liberal-rationalist idea of the nation[69] would be bound to disappear as both concepts would become perfectly reciprocally compatible. In a society where the presence of multiple identities is no more considered an expression of disloyalty or outright treason but as an enrichment, it is possible both to be a proud citizen of a rationally conceived nation and to develop strong ties to diverse groups to whom one feels a particular affinity on account of political, ethnical, historical or linguistical ties. These groups to which one feels to pertain to might even transcend national

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[68] The danger that this concept might be abused by 'ethnic entrepreneurs' has been pointedly remarked by H. Hannum, "The Right of Self-Determination in the Twenty-First Century", 55 *Wash. & Lee L. Rev.* 773, at 780 (1998).

[69] A thorough analysis of these two concepts can be found in T. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", *supra* note 66. However, with regard to Franck's assertion, 'that it is the German romantic, not the American or French liberal-rationalist, idea that has carried the day, both lexically and politically', some doubts may be raised. One gains rather the impression that both concepts are well and alive. They are both interacting and conflicting. They may generate partly overlapping entities but they may also become reciprocally congruent. In fact, a nation created primarily on a liberal-rationalist design can, over the years, well develop a profound cohesion based on a romantic concept, however ahistoric its elements may be. This development can head, of course, also in the other direction. To find examples of these developments it is not necessary to look out in remote regions; the nations taken to characterize the two diverse ideas are themselves the best representatives for this assertion. Thus it can be said that both in the United States and in France the liberal-rationalist idea, while still being very strong, is now firmly supported by a romanticizing view of the nation. On the other hand, for Germany the reunification goal had surely a strong romantic background. Apart from that, however, post-war Germany and even more so, unified Germany is a very good example of a nation trying hard to advance the liberal-rationalist concept of the nation, primarily because of historic reasons.

boundaries and bring together people from diverse countries without thereby putting into question the territorial sovereignty and integrity of the countries involved. On the contrary, respect for traditional nationhood may even be enhanced if there is the conviction that the State which has been condemned for being a stumbling block on the way of finding and expressing one's own true identity in the past becomes the main garantor for exactly that process.

These considerations should, however, not be misunderstood as an attempt to award international legal subjectivity to the individual, thereby granting 'all things to all men'[70]. The term 'personal self-determination' may be misleading in this sense and some interpretations given to this concept may have further enhanced this false credence. Rather the State will remain the major reference point for determining the identity of people also in the future and a garantor for the realization of their right to self-determination.

VI. Conclusions

The right to self-determination is rapidly evolving. By adopting a historic perspective it can be shown that this concept has been used and abused for a variety of different goals some of which are totally outdated today while others display a surprising modernity. It has been seen that the concept of self-determination has often been nothing more than the external layer of the driving forces of change in totally different natures which have come to surface with irresistible force. The potential threat to the existing community of State has been recognized in time, and through the strong opposition to the potentially disrupting elements of this concept it has been moulded into a new form. All too often the structural evolution this concept has undergone is overlooked when it is addressed in political and legal discussions. In the meantime this former foe for the stability of the state order has turned into a potential friend. In its perception as a right to individual self-determination it provides flexibility to government systems and allows for a better identification of the single with the whole. In this sense, the so-called right to self-determination is perhaps nothing more than a battlecry and the mirror image of the great ideas that have changed the political landscape of the world over the last hundred years. But if ideas are considered as driving forces of change[71] then this could also hold true for their reflections with which they are often seen as interchangeable.

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[70] This was the main concern of R. Higgins, "Self-Determination", in *id.* (ed.), *Problem and Process, International Law and how We Use It*, 128 (1994).

[71] *See*, in this context, the basic writings by G.W.F. Hegel, *Phänomenologie des Geistes* (1807, reprinted by Suhrkamp, Frankfurt 1980).