AUTONOMY AND SELF-DETERMINATION

'Issues concerning autonomy and self-determination continue to take centre stage in international law and politics. This outstanding collection of chapters brings together leading voices on the subject, to offer expert insights and perspectives on this controversial issue at a time of uncertainty. The work would be of immediate interest to scholars and practitioners of international law, international relations and politics. Students are likely to find the text accessible and well researched, drawing on a multitude of sources.'

Joshua Castellino, Middlesex University, UK

Europe has reached a crisis point, with the call for self-determination and more autonomy stronger than it ever has been. In this book, renowned international lawyers give a detailed account of the present state of international law regarding self-determination and autonomy.

Autonomy and Self-determination offers readers both an overview of the status quo of legal discussions on the topic and an identification of the most important elements of discussion that could direct future legal developments in this field. This is done through the examination of key issues in abstract and in relation to specific cases such as Catalonia, Italy and Scotland. The book extends past a simple assessment of issues of autonomy and self-determination according to a traditional legal viewpoint, and rather argues that utopian international law ideas are the breeding ground for norms and legal institutions of the future.

This insightful book will be an invaluable read for international lawyers and political science scholars. It provides a clear, yet detailed, analysis of the issues Europe is facing regarding autonomy and self-determination in the face of a historical context, also making it a useful tool for European history scholars.

Peter Hilpold is in the Faculty of Law at the University of Innsbruck, Austria.

Edward Elgar
PUBLISHING

The Lypiatts, 15 Lansdown Road, Cheltenham, Glos GL50 2JA, UK
Tel: + 44 (0) 1242 226934 Fax: + 44 (0) 1242 262111 Email: info@e-elgar.co.uk

William Pratt House, 9 Dewey Court, Northampton, MA 01060, USA
Tel: +1 413 584 5551 Fax: +1 413 584 9933 Email: elgarinfo@e-elgar.com

www.e-elgar.com www.elgaronline.com

ISBN 978-1-78811-170-6

9 781788 111706

PETER HILPOLD

AUTONOMY AND SELF-DETERMINATION

EDITED BY
PETER HILPOLD

EE Elgar

AUTONOMY AND SELF-DETERMINATION

Between Legal Assertions and Utopian Aspirations

EE Elgar

2. Self-determination and autonomy: between secession and internal self-determination[1]

Peter Hilpold

1. ON THE PAST AND PRESENT RELEVANCE OF THE DISCUSSION ON SELF-DETERMINATION

The 20th century can be categorized as the century of self-determination.[2] Both politically and legally, the concept of self-determination formed the most important justification for quests for territorial changes.[3]

In hindsight, the following element attracts particular attention: Usually when a claim for self-determination was voiced, the justifications for these claims referred far back to the past while the goal the proponents of this quest pursued related to the very near future: a change of borders that should happen swiftly and be irreversible. The changes the act of self-determination would bring about should 'consume' this right. The extreme dynamics inherent in the self-determination movement should be replaced by definite stability. Often, however, this last goal was not achieved. Territorial changes following acts of self-determination formed

[1] This contribution is based on earlier publications published in German, in particular on 'Von der Utopie zur Realität: das Selbstbestimmungsrecht der Völker im Europa der Gegenwart' [2013] 68 Juristen-Zeitung 1061 as well as 'Das Selbstbestimmungsrecht der Völker' [2013] 53 Juristische Schulung 1081 which have been further developed in this chapter.

[2] According to the International Court of Justice (ICJ), the right of self-determination is 'one of the essential principles of contemporary international law'. For this statement see *Case Concerning East Timor (Portugal v. Australia)*, Merits, Judgment, ICJ Rep 1995, 4 at 302, para. 29. See extensively on this case Peter Hilpold, *Der Osttimor-Fall* (Peter Lang 1995).

[3] Ulrich Scheuner has pointedly qualified this right as 'a principle justifying change' ('Prinzip der Legitimierung von Veränderungen'), cited according to Stefan Oeter, 'Selbstbestimmungsrecht im Wandel' [1992] 52 ZaöRV 741 at 748.

only the starting point for fresh attempts that unleashed new forces directed at further changes. Thereby, the discussion about self-determination never came to a halt but has, rather, continuously taken new shape. The aspiration for self-determination became the driving force for permanent changes. While in the time before WWI primarily the Slav people of the Habsburg Empire and the non-Turk people of the Ottoman Empire pursued this quest for self-determination, after WWII this endeavour reached a totally different dimension when peoples in colonial dependence rallied behind this slogan. But even when the colonial self-determination process was all but completed the flame of self-determination did not die out. In fact, the changes brought about by the world wars meant in many cases new injustice, new forms of domination and suppression and new borders not corresponding to the wishes of the people. In part, these changes made even more evident the injustice that happened in the more distant past.

As will be shown below, for a long time it was much disputed whether this claim was only of a political nature or whether it constituted a right proper. It can be anticipated that this question cannot be answered with definite security, although there are many indications that all developments go in the direction of transforming this political postulate into a right in the stricter sense. Independently from the question of which stage we are now at in this process, this concept must surely bear out a generally applicable rule if it pretends to be more than the expression of power logics.

It goes without saying that behind any attempt to reformulate the content and meaning of the right to self-determination, specific interests loomed that were clothed in a political and a legal formula. In part, epochal transformations such as those associated with the political goals of the Entente during WWI were labelled with the positively interpreted term of 'self-determination' so as to provide additional legitimacy to these processes. Without doubt there existed a large array of political and legal norms that could potentially be used to cater for the compelling need to end colonialism after WWII. Self-determination was the most powerful and most colourful of these norms. Continuously, new challenges required new approaches. Thus, former colonies also had to face self-determination claims (for example, Morocco and Mauritania in the *Western Sahara* case, Indonesia in the context of the quest by Eastern Timor for self-determination, Sudan against Southern Sudan, etc.). Differently as it is often portrayed, the right to self-determination has therefore not been an asymmetrical privilege of colonial territories.

A further change of paradigm has taken place with the unravelling of Yugoslavia and the USSR, when self-determination totally distanced

itself from the colonial context. In the *Kosovo* case, which will be dealt with further below, the discussion on self-determination was brought to that on secession, even though this tendency was strongly resisted by many countries. A similar case is that of Southern Sudan. Here again the push for self-determination was finally successful and brought into life a new state that found even more rapid recognition than Kosovo.[4]

In view of the many facets these developments have taken it was regularly the role of academia to bring order and system to this picture. Categories were conceived that often had to neglect part of the factual developments and so very soon lost their relevance. As will be set out in more detail below, the meaning attributed to the term 'self-determination' in academia and practice is therefore characterized by an inherent contradiction: On the one hand, the intent to categorize necessarily implied the need to create more stability and to structure if not altogether stop this development; on the other hand, self-determination necessarily implies further evolution and the desire to create a 'better' and 'fairer' international system. To portray this discussion in a broadly used terminology, the call for self-determination, therefore, permanently oscillates between apology (for past factual development) and utopia (the hope to create a fairer, friendlier future).

For the international system, change is a continuous reality. There may be interests and attempts to halt these changes but the hopes to succeed in these attempts are bound to be disappointed as the social reality is subject to ongoing modification, and changes in the international legal system are only mirroring this fact. In this sense it can be stated that self-determination is reflecting factual processes. The term 'self-determination' has only been coined to attribute a name to this process. The legal discussion may steer this process to a certain extent but will never influence its basic direction.

The last step in this process up to this moment concerns the call for self-determination in the ambit of existing traditional national states (for example in Great Britain, Spain, but also in Italy). Also in respect of these developments it holds true that they are factual phenomena. It might be true that in such cases reference to self-determination will be

[4] As is well known, Southern Sudan declared its independence on 9 July 2011 and by 14 July 2011 this newborn state was accepted as the 193rd member of the United Nations. This did not, however, end civil war. Fighting soon started again, even though it took place between different opponents. Thereby the case of Southern Sudan was also disappointing for those who hoped that secession and the creation of new states would be the high road for the solution of any ethnic and national conflict.

useful to describe the ongoing power struggle between the central state and single sub-national territories but the forces here at work have come into being independently from the academic legal discussion. What is more, it has to be remarked that the existing international legal order does not provide any legal basis for such claims. Nonetheless, already at this point it may be remarked that in a more differentiated perspective this statement does not yet mark the end of the discussion even on (external) self-determination.

In fact, there can be no doubt on the following:

- Even according to the traditional international law perspective which is primarily based on state practice and *opinio iuris* (and therefore necessarily more akin to a static international system) self-determination in the form of a declaration of independence is not prohibited.[5] Notably, this also holds true outside the colonial context.[6]
- Even after the successful conclusion of self-determination processes there have been cases of further secessions (such as in Southern Sudan or in Kosovo).
- Also as a legal term 'self-determination' is open to the most variegated interpretations. Secession is not the only and arguably not even the most important expression of this term. Reference is here to be made to the concept of international self-determination as an important means to solve struggles between different ethnic and national groups. In this context, further below it will be examined whether the concession of autonomy might constitute an alternative to 'external self-determination' and whether international law contains specific norms that could be related to in this regard.

2. THE CONCEPTS OF SELF-DETERMINATION

While attempting to provide more clarity for the concept of self-determination several expressions of this concept have been distinguished: an 'external' right to self-determination and an 'internal' one, a 'democratic', a 'national', a 'socialist' and a 'colonial' right, only to mention a few.

---

[5] This was clearly stated by the ICJ in the *Kosovo* Opinion. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July, ICJ Rep 2010, para. 84.

[6] See, however, the dissenting opinion by Judge Koroma referred to below.

The external right to self-determination results from the delimitation of powers between two entities, two peoples. If these entities are state peoples, the right to self-determination corresponds to the right to territorial sovereignty. Closely associated with this right is the right to territorial integrity and the prohibition of intervention in internal affairs. To define self-determination this way does not, however, add content to the concepts mentioned. At the utmost, the use of the concept of self-determination can here further strengthen the concepts mentioned and give them additional authority.

There is, however, another meaning to the term 'external self-determination' and this refers to the 'right' to secession. In this case the opposed parties are the majority nation on the one side and the group trying to secede on the other. The adjective 'external' is used here to describe the final consequence the seceding entity aspires to. As will be shown in the following, it is hardly possible to demonstrate that the international legal order really provides for such a right. Of a totally different nature is the so-called 'colonial' right to self-determination which has found broad (and in the meantime universal) recognition since the United Nations (UN) anticolonialism movement of 1960 at the latest.[7] At the centre of this right stood the granting of independence to colonial countries and peoples. Here, care has to be taken not to intermingle different meanings of 'colonialism' and in particular to refer to situations of 'neocolonialism'. In fact, the UN practice refers to a far stricter meaning. Thus, according to Article 73 para. 3 of the UN Charter, colonial countries have 'to transmit regularly to the Secretary-General […] statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply'. In order to identify the respective territories a list has been drafted that includes those territories that traditionally were seen as colonies according to the so-called 'salt water theory'.[8]

---

[7] See UN Res. 1514 of 14 December 1960 ('Declaration on Granting Independence to Colonial Countries and Peoples') as well as UN Res. 1541 of the following day ('Principle which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for in Article 73[e] of the Charter of the United Nations') (UN Yearbook, at 49ff. as well as 509ff.).

[8] As is well known, according to this theory (which is sometimes also designated 'blue water theory'), only those territories the subject of colonial conquest that are geographically removed from the colonial state (preferably by the sea) can rely on the right to self-determination. On the basis of the so-called

The decolonization process has now come almost to an end. Only to a very limited extent was the legal practice developed in this context of use in the modern self-determination discussion:

– First of all, the colonial self-determination movement has kept alive and further developed the discussion on self-determination and given an important contribution to enhance acceptability and appeal of this subject.
– For some, this movement paved the way for the discussion on democratic self-determination as it opened the door to colonial peoples and territories to gain independence by a unilateral act. In reality, however, strict limits were set to this unilateral act.[9]

Furthermore, this voluntary act ending the colonial self-determination process should be of a one-time, final and irrevocable nature, elements that hardly coincide with a modern understanding of democratic self-determination as an ongoing, permanent process. Finally, politics, practice and academic writings attributed such a limited understanding to colonial self-determination that the distance towards modern notions of democracy was further enhanced. Self-determination claims voiced within third world countries that had previously gained independence through self-determination were often qualified as the outcome of a colonial plot directed against third world countries as a whole.[10]

'Belgian thesis', most obviously conceived to overburden the concept of self-determination, native populations such as those in Northern America or in Russia also should be enabled to require the right to self-determination. As to the list according to Article 73 para. 3) it has to be mentioned that in the meantime it has been shortened to a few territories whose economic and political importance is, if we except Western Sahara, Gibraltar and the Falkland Islands, rather small. See also Ulrich Fastenrath, 'Article 73', in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (vol. 2, Oxford 2002), 1089.

[9] See Principle VI of the Annex to UN Res. 1541 (XV) of 15 December 1960 ('Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter'):

> A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
>
> (a) Emergence as a sovereign independent State;
> (b) Free association with an independent State; or
> (c) Integration with an independent State.

[10] For a very pronounced statement in this regard see Judge Ammoun in the *Western Sahara* case (ICJ Rep 1975) who sided with Morocco in her attempt to

For the present discussion far more important is the so-called 'democratic' right to self-determination, which interestingly is considerably older than the colonial one. The origins of this concept can be traced back to US President Woodrow Wilson (1856–1924). Contrary to what is often stated, the principle of self-determination does not appear in his famous '14 points' presented on 8 January 1918 (and therefore at a moment when WWI was still ongoing) at the US Congress. In these 14 points Wilson had addressed territorial changes that should follow as a consequence of the war.[11] It was only one month later that Wilson tried to justify these requests by a general principle, the principle of self-determination. Now the concept of the 'consent of the governed' was emphasized and elevated to the paramount criterion for the affirmation and the maintenance of sovereign power. President Wilson, responding to German and Austrian peace offers, asked the following:

> First, that each part of the final settlement must be based upon the essential justice of that particular case and upon such adjustments as are most likely to bring a peace that will be permanent;
>
> Second, that peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited, of the balance of power; but that
>
> Third, every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states; and

---

retain sovereignty over Western Sahara. For Judge Ammoun the self-determination claim by the Saharaui people was legally without substance: '[The] colonizers sought to win over the colonized peoples to their own civilization, in order to bind them more closely to themselves. […] If this is indeed the explanation for the origin of a certain autonomous way of life on the part of the tribal populations in Western Sahara, one can similarly suppose that the present separatist tendencies […] are also the result of a foreign presence.' ICJ Rep 1975, 84. Cited according to Nathaniel Berman, 'Sovereignty in Abeyance: Self-determination in Law' [1988] 7 Wisconsin International Law Journal 1 at 101.

[11] For example, in point 9 the readjustment of the Italian borders is mentioned: 'The readjustment of the frontiers of Italy should be effected along clearly recognized lines of nationality.' If this principle had been followed South Tyrol could never have been attributed to Italy.

> Fourth, that all 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.[12]

Already this specification evidences the potential reach of as well as the risks and the contradiction inherent in this instrument. The basic intent to make the drawing of borders and the constitution of sovereign power dependent upon the consent by the governed may encounter broad recognition as thereby not only future wars of conquest are excluded but it may even be possible to seek redress for past injustice. It is, however, unclear how far back this right to redress may reach. By reference to the concept of intertemporal law[13] we can assume that the principle *tempus regit actum* finds application. A specific right to self-determination must already have existed at the time when the act of injustice happened or the act of perpetration must have been continued at the time when the right to self-determination had come into being. As a consequence, the injustice happening as a result of WWI can be reprehended only politically or morally but there is no legal instrument available for direct redress. The main problem with this approach lies in the identification of the entities entitled to exercise this right. Wilson had recognized – if only intuitively – that the principle of self-determination is replete with explosive power and therefore he has added in the last paragraph an additional condition: Self-determination shall only be accorded if it leads to no discord and antagonism. The concession of self-determination, a right interpreted by Wilson purely in its external fashion, is therefore subject to clear restrictions. Even if it should be possible to clearly determine the people enjoying such a right, if the will of the people should find clear expression and if the corresponding right was uncontested according to objective criteria (for example by reference to previous injustice or to a clearly determinable linguistic and ethnic divide) no automatism could apply as it would always be necessary to judge the overall consequences of the changes aspired to.

Therefore, while exercising the democratic right to self-determination a series of pre-conditions and caveats have to be respected. First of all, it

---

[12] See President Wilson's Address to Congress, 11 February 1918, http://www.gwpda.org/1918/wilpeace.html, accessed 14 May 2017.

[13] As is well known, in international law for any inquiry into the concept of intertemporal law of fundamental importance in this regard are the statements by Judge Max Huber in *Island of Palmas, Netherlands v. USA*, Judgment of 4 April 1928, RIAA II, 829ff.

becomes clear that the result of a democratic deliberation will largely depend upon the delimitation of the people entitled to vote and this holds true in particular if the majority principle applies. Furthermore, the Wilsonian request to ponder costs and benefits of any territorial change as to its effects on the overall peace situation introduces a highly speculative element: The question whether a right to self-determination is to be attributed or not is made dependent upon a complex prognosis as to the peace prospects of any decision in this regard. It goes without saying that the final decision will imply a taking of positions that may be difficult to justify in a system governed by the rule of law. This is in particular the case if the factual implementation of the right to self-determination goes hand in hand with acts of violence and the abuse of human rights. If elements can be discerned that are hinting at such a development a strong presumption will apply that the conditions mentioned cannot be fulfilled.

Although, as a consequence, the discussion about self-determination has had many ramifications (and here, in particular, the colonial and the socialist right to self-determination can be mentioned), the right to self-determination finds in its 'democratic', Wilsonian strand its most important expression. At the same time, this does not mean, however, that all the other specific meanings of the right to self-determination developed during the 20th century would have remained without lasting relevance, even though the particular goal pursued by the respective concept is now more or less achieved (this being the case for the colonial concept of self-determination) or is now politically or ideologically widely rejected (as is the case with the socialist right to self-determination).[14] It is rather the case that both these strands of the discussion on the right to self-determination have contributed enormously to elucidate the overall meaning of the (general) concept of the right to self-determination. The strong interest the third world and the socialist bloc showed in this idea provided an enormous impetus and a strong legitimatory power for its further development and clarification. By this way it was also possible, for example, to include the right to self-determination in Article 1 of the two UN Covenants on Human Rights of 1966. Finally, it has to be remembered that both the third world and the socialist bloc also furnished important elements for the clarification of the material content of the (general) right to self-determination. For example, a specific sensibility with regard to racial discrimination and

[14] This is also the reason why further elaboration of this strand of the right to self-determination is not held to be necessary in this chapter.

also as to the need to provide group protection was set out. Thereby, a right with a strong group orientation could affirm itself in a human rights system that was primarily inspired by Western individualistic thought.

3. PEOPLE AND NATION AS THE DECISIVE FACTORS OF SELF-DETERMINATION

Any attempt directed at the exploration of the legal nature and the meaning of the right to self-determination has, first of all, to discern the subjects entitled to exercise such a right. These subjects are 'peoples' or, as the term of 'national self-determination' seems to imply, 'nations'. But what is the specific relationship between these concepts, how are they to be defined and do they (partially or totally) overlap? As of yet, the pertinent academic discussion does not deliver an unequivocal answer to these questions. As far as the discussion about the terms of 'people' and 'nation' is concerned a great deal of complexity is added by the fact that, on the one hand, international law strives for a consistent and possibly unitary definition of these terms and, on the other, at the national level, these terms are issued in a widely different way also evidencing a change in meaning over the years. A broader analysis evidences 'disrupted continuities' as well as the continuous search for new orientations.[15] Particularly due to different political orientations the meaning attributed to these terms differed widely between the German speaking area (where the formation of a nation state occurred only late in time in European history) and France where, in particular after the French revolution, the whole French people was considered to make up part of the nation. This latter understanding of the concept of nation should afterwards also heavily influence the way it was used in the English speaking world and finally in international law.

It is interesting to note that etymologically the term 'nation' refers to 'birth', deriving from the Latin verb *nasci*. At first sight, this might imply common ancestry, a relationship of blood.[16] Interpreted in a more abstract

---

[15] See Reinhard Koselleck, 'Volk, Nation, Nationalismus, Masse', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe, Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Klett-Cotta 1992) 141 at 144.

[16] See Mohammad Shahabuddin, 'The Ethnic Dichotomy of "Self" and "Other" within Europe: Inter-war Minority Protection in Perspective', in Duncan French (ed.), *Statehood and Self-determination* (Cambridge University Press 2013) 407, referring to Walker Connor, 'A Nation is a Nation, Is a State, Is an

sense, this act of birth can also refer, however, to a common root of a community and this can also be, beyond the common blood line, a historical fact or a legal act by which all people living on a certain territory come to make part of the same entity, the same nation.

In default of a common German state, in the German speaking area the concept of 'nation' has been used for a long time not in the meaning of 'state nation' but in that of 'cultural nation' whereby a natural community of people was intended that was united by descent, history, language, culture and religion.[17] The concept of 'people' (*Volk*) has instead been associated with elements of 'meanness'. Thus, from the Latin term *populous* in German the depracative term *Pöbel*, meaning 'mob' or 'rabble' was derived.[18] Only around 1800 in the German speaking world did the term *Volk* also become understood as comprising the whole people living on a lasting basis in a certain territory.[19] Afterwards, Herder and Fichte, see below, embarked on a romantic glorification of the culturally defined nation which was equated with the people.

In France, Ernest Renan (1823–1892) discovered the cohesive power of a people constituted nation, an insight to which he forcefully gave expression in an often cited speech before the Sorbonne University on 11 March 1892:

> A nation is […] a large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future. It presupposes a past; it is summarized, however, in the present by a tangible fact, namely, consent, the clearly expressed desire to continue a common life. A nation's existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual's existence is a perpetual affirmation of life.[20]

It is evident that this definition mirrors the French conception of the nation or, equally, the way the French nation was lived. The situation in 'Germany', a territory at that time and up to 1871 a territory to be defined only culturally and not legally, was in many ways different.[21] In

---

Ethnic Group, Is a …', in John Hutchinson and Anthony D. Smith (eds), *Nationalism* (OUP 1994) 38.

[17] See Leander Palleit, *Völkerrecht und Selbstbestimmung* (Nomos 2008) 13.

[18] See Koselleck, *supra* note 15, at 143.

[19] Ibid., at 143.

[20] English translation, http://web.archive.org/web/20110827065548/http://www.cooper.edu/humanities/core/hss3/e_renan.html, accessed 14 May 2017.

[21] Nonetheless, the situation of Germany cannot be compared with that of Italy qualified by Duke Metternich at the beginning of the 19th century, in a

Germany the term 'nation' has an enormous power of appeal. The German nation, defined as a cultural entity, should be identified with the German people and this meant that far-reaching political change was needed. Neither Gottfried Herder (1706–1763) nor Gottlieb Fichte (1762–1814) intended to degrade other peoples when they romantically glorified the German people.[22] The primary ambition was rather to create a state for the German people, a goal achieved long before by other nations, in particular by France and Great Britain. In the 19th century, nationalism, that previously was primarily intended to give any nation a state, became rampant, necessarily also provoking contrast and conflict, primarily between France and Germany.

In the aftermath, the destiny of the great European nations also heavily influenced the way the concepts of people and nation were understood and finally also the meaning of self-determination. In particular, those national movements, such as *Italia irredenta* or the German nation after WWI, that had not yet been able to achieve the creation of a state or the correspondence between an existing nation state and the territory on which a certain nation, defined as a cultural or sociological entity, was settling, continued to profess the existence of a pre-state or trans-state nation.

As far as Italy is concerned, ideas of this kind can be retraced very well in the writings by Pasquale Stanislao Mancini (1817–1888) who, in his speech before the University of Turin, emphasized the importance of the nation as an entity of paramount relevance beyond time and state. For him, the nation defined in this sense was even the most basic element of the international legal order.[23] It is interesting to note that Italy, after the conclusion of the unification process, adopted a strictly positivist attitude towards international law, an attitude often associated with the name of Dionisio Anzilotti (1867–1950) while Mancini is all but forgotten. Only the recent separatist tendencies, in particular in Northern Italy, have recalled into memory, at least in some quarters, his name and his thoughts.

---

partisan and self-interested approach, as a 'mere geographical concept'. The nation-building process in Germany was surely far more advanced and also had a different geographical background. The Holy Empire was not a state in the legal sense.

[22] See Koselleck, *supra* note 15, at 321 as well as Eric D. Weitz, 'Self-determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right' [2015] 120 American Historical Review 462.

[23] *Della nazionalità come fondamento del diritto delle genti* (Botta 1851).

In Germany and in Austria, on the contrary, the traumatic experience of the peace treaties of Versailles and Saint Germain has given enormous impetus to the discussion about self-determination. For this, President Wilson's programme formed an important starter but subsequently the discussion developed a far broader scope and was enriched by 'typically German' elements of the nation concept.

When the war events were precipitated in 1918 these also reverberated at the political level, and in Germany as well as in the Austro-Hungarian Empire a discussion about the concept of self-determination set in motion that which would have seemed impossible only a few months earlier. In the pre-war period German and Austrian international law doctrine and politics, as far as they took notice of this concept at all, interpreted this principle, in particular in view of the multinational character of the Austro-Hungarian Empire, pre-eminently as a basis for realizing internal self-determination and autonomy and not as a possible source for claims for secession or independent statehood.[24] Initially, this subject was of relevance only in Austria-Hungary while in Germany the self-determination discussion was more or less ignored. In the last year of war, however, a radical reorientation took place. As both external and internal circumstances had completely changed, what was previously without or with very limited appeal now appeared to be a last resort to avoid the worst. In Austria-Hungary for instance, even the Czech people, previously staunchly pro-Empire, voiced claims for independence while the German group, which was dominant before, now foresaw a loss of its privileges and even discrimination.[25] With military defeat becoming ever more certain and the loss of position as a world power (Germany) or as a regional power (Austria-Hungary) only being a question of time both countries began to look for help and assistance in the international legal order. In doing so, both countries 'discovered' the international (i.e. 'external') dimension of self-determination. This way the Middle Powers tried to make the Wilsonian requests for self-determination, which were originally clearly directed against them, less threatening, as self-determination should now become generalized. Self-determination should thereby not only become an instrument to justify the territorial secession from these countries or even their splitting up but it should also be suited to defend the territorial integrity of these states insofar as the respective territories were inhabited by the state nations. Paradoxically enough, within a very short period of time Germany, Austria and Hungary

[24] See Palleit, *supra* note 17, at 16ff.
[25] Ibid., at 27ff.

transmuted from sceptics and opponents of an external right to self-determination to its most fervent advocates. In particular, after WWI the German speaking area became renowned for its intense political and academic interest for minority rights and self-determination. The fact that these principles were proclaimed only shortly before by the victorious powers and the prevailing impression that the peace conditions dictated to the vanquished states furnished a strong moral basis for academics and politicians that dealt with this subject, while in the Anglo-American area no political reason was seen to take heed of these pleas and requests, and in fact they were mostly totally ignored because of linguistic reasons. In fact, the war has brought about a dramatic loss of importance for German as an academic language[26] and especially in the French speaking area German publications were purposedly ostracized. Still the German concept of the 'nation' remained totally alien to the Anglo-American and the French world.

Nonetheless, the extensive territorial changes brought about as a result of the war made clear that the national element had to be recognized on the international level. If elements of a nation in an ethnic, cultural or linguistic sense remained without protection by a state adequate alternative protective measures had to be adopted and they could be found in various forms of national self-determination or in the protection of minorities. As is well known, demands going in this direction were satisfied only to a very limited extent. Only in a few cases were referendums organized.[27] As a subsidiary solution some newly created, numerically often very large minorities were offered specific minority protection. To many other minorities, however, such a protection was denied.[28] In those cases where minority protection was granted, these

[26] See Ulrich Ammon, *Die Stellung der deutschen Sprache in der Welt* (de Gruyter 2015), at 102.

[27] These cases were, in the immediate aftermath of WWI, North Schleswig (a territory disputed between Germany and Denmark), Danzig, Upper Silesia, the Klagenfurt Basin (contested between Austria and Yugoslavia), Sopron (lying at the border between Austria and Hungary) and, in 1935, the Saar region (claimed both by France and Germany). For a fundamental examination of this subject see Sarah Wambaugh, *A Monograph on Plebiscites* (OUP 1920) and *idem*, *Plebiscites since the World War: With a Collection of Official Documents* (Carnegie Endowment for International Peace 1933). Plebiscites were held in Upper Silesia, Karinthia, in the Saar and in Sopron. See also Yves Beigbeder, *International Monitoring on Plebiscites, Referenda and National Elections: Self-determination and Transition to Democracy* (Martinus Nijhoff 1994).

[28] For example, this was the case with the German speaking population of South Tyrol.

measures often proved to be of limited effect and of no lasting nature. There were no models in the recent history that states could refer to and those states which had to accept such protection obligations developed an ever-growing aversion against these obligations.[29] In general it was not intended to afford permanent protection to these minorities but at the utmost to soften the assimilation process which was seen as unavoidable. In other words: The preservation of an autonomous minority culture was not seen as a value per se and not even feasible in the long term. The hopes, ignited by the far-reaching proclamations by President Wilson, were therefore widely disappointed. They foundered because of the structure of the peace negotiations that were conducted according to the traditional pattern juxtaposing victors and vanquished, and because of the internal constraints President Wilson saw his assertions exposed.[30] German and Austrian international lawyers tried to oppose these developments by their writings. Prompted by widespread discrimination against German minorities abroad and referring to the Wilsonian principles as well as the German nation concept, a flurry of academic writings on international minority rights and on the concept of self-determination came into being.[31]

---

[29] See Pablo de Azcarate, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace 1945) and Peter Hilpold, 'The League of Nations and the Protection of Minorities: Rediscovering a Great Experiment' [2013] 17 Max Planck Yearbook of United Nations Law 87.

[30] The law of the victor came fully to bear upon the South Tyrolean population as Italy insisted on territorial gains as compensation for its participation in the war at the side of the Entente notwithstanding the assurances by President Wilson that no change of borders would be made against the will of the people inhabiting the respective territories. For the Armenians, the US isolationism started soon after WWI had fatal consequences. According to the Treaty of Sévres of 1920 an independent state of Armenia should have been created. However, this plan would only have succeeded if the United States had accepted a trusteeship over this territory. The Republicans in the US Senate opposed, however, such a plan and so the Turkish troops could continue their massacres against the Armenians. Only in the territories controlled by the Red Army were the Armenians protected against annihilation. See Gary J. Bass, *Freedom's Battle: The Origins of Humanitarian Intervention* (Vintage Books 2008) as well as Peter Hilpold, 'R2P and Humanitarian Intervention in a Historical Perspective' in Peter Hilpold (ed.), *The Responsibility to Protect* (Brill/Martinus Nijhoff 2015) 60.

[31] See, for example, Alfred Verdross, 'Die rechtliche Deutsch-Südtirols', in Hans Voltellini, Alfred Verdross and Wilhelm Winkler (eds), *Deutschsüdtirol* (Deuticke 1926); Hugo Wintgens, *Der völkerrechtliche Schutz der nationalen,*

Only the minority protection provisions in favour of the Swedish speaking population of the Åland Islands constituted an exception in this dismal picture. These provisions proved to be very effective and they outlived the League of Nations system.[32] Up to this day they are considered to be of an exemplary character. The discussion leading to the adoption of these provisions offered interesting insights into the subject of self-determination that radiated well beyond the immediate events of those days. As will be shown below, this discussion can also be gainfully referred to for present-day self-determination issues.

4. THE *ÅLAND* CASE

Although dating back nearly a century the way the *Åland* case was approached in international law is still of outstanding importance for the examination of the relationship between minority protection and self-determination. Affirmations and assessments made in this context also seem to be surprisingly topical for present-day discussions about self-determination.[33]

After Sweden's demise in the Swedish–Russian war of 1809, in the Treaty of Frederikshamn Finland was ceded together with the Åland Islands to Russia. In 1917 Finland seceded from the imploding Czarist Empire, an event at that time totally in line with Lenin's philosophy on self-determination already developed towards the end of the 19th century and based upon the recognition of a comprehensive title to such a right to any nation.[34]

---

sprachlichen und religiösen Minderheiten (Kohlhammer 1930) and Georg H.J. Erler, *Das Recht der nationalen Minderheiten* (Aschendorf 1930).

[32] As to the basis of this extraordinary resilience see Markku Suksi, 'Explaining the Robustness and Longevity of the Aland Example in Comparison with Other Autonomy Solutions' [2013] 20 IJMGR 51.

[33] As to the *Åland* case see Antonio Cassese, *Self-determination of Peoples: A Legal Appraisal* (CUP 1995) at 27ff.; Sten Harck, 'Aland Islands' [2008] in MPEPIL, online edition, http://opil.ouplaw.com/home/EPIL, accessed 28 November 2017; Lauri Hannikainen, 'Autonomy in Finland: The Territorial Autonomy of the Aland Islands and the Cultural Autonomy of the Indigenous Saami People' [2002] 2 Baltic Yearbook of International Law 175 and Sören Silverström, 'The Competence of Autonomous Entities in the International Arena: With Special Reference to the Aland Islands in the European Union' [2008] 15 IJMGR 259.

[34] As to Lenin's position in the self-determination question see also Jörg Fisch, *Das Selbstbestimmungsrecht der Völker: Die Domestizierung einer Illusion* (C.H. Beck 2010) at 133ff.

In the Peace Treaty of Brest-Litovsk of 3 March 1918 Soviet Russia agreed with the Middle Powers to grant independence to Finland. Even when the military situation changed radically to the detriment of the Middle Powers a few months later there was no retraction as to Finland's independence. However, immediately after the war, Finland had not yet fully consolidated its state power over its territory and now Aland's population which was ethnically almost entirely Swedish saw its time come to look for aggregation to Sweden. After Finland had become a member of the League of Nations Great Britain referred the *Åland* case to the Council of the League which mandated a Committee of Jurists and a Commission of Rapporteurs to examine the related questions. First of all, this Committee had to deal with the question whether the League of Nations was competent at all to deal with this issue. The Committee, although denying the existence of a right to self-determination of peoples in international law confirmed the competence by the League for this controversy which was characterized, on the one hand, by an offer for self-determination by Finland and, on the other, by a request for self-determination by the people of Åland. The Committee found the main reason for the existence of such a competence in the fact that the Finnish state had not yet fully consolidated:

> From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law […].
>
> Under such circumstances, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.[35]

According to that time's dominant thinking in categories of sovereignty and exclusive internal competence this was a revolutionary finding as now these issues for the first time were transposed to the international level.[36] The Commission of Rapporteurs subsequently emphasized very clearly that in situations like the present one there were two possible

---

[35] 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 upon the Legal Aspects of the Aaland Islands Question', League of Nations O.J. Spec. Suppl. No. 3, October 1920, 6.

[36] The Committee of Jurists left no doubt that there was no right to secession from a settled state:

solutions: the concession of self-determination or, 'if geographic, economic or other considerations' stood against such a measure, the introduction of minority protection provisions:

> The fact must […] not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace.[37]

Minority protection should therefore be only a second-best solution, although it might be better suited for peace preservation than (external) self-determination.[38]

As to the consequences of serious discrimination against minorities, the Commission of Rapporteurs went further than the Commission of Jurists when it seemed to concede, for this case, the possibility of secession:

> The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.[39]

> Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscites or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitely constituted.

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 upon the Legal Aspects of the Aaland Islands Question', League of Nations O.J. Spec. Suppl. No. 3, October 1920, 5, cited according to Cassese, *supra* note 33, at 28.

[37] League of Nations, Report presented to the Council of the League by the Commission of Rapporteurs, Council Doc. B7/21/68/106, 16 April 1921, at 6.

[38] See ibid., at 6.

[39] Ibid., at 28.

One has, however, to be careful not to read too much in this statement. The Commission did not state that such a right did exist in international law but it rather referred generally to the possibility of secession, immediately ruling it out for the Åland Islands as the inhabitants of these islands were not discriminated against to such an extent as to make secession a (political) option.

The League Council asked the Commission of Rapporteurs to draft a programme of action. In the end, this Commission opted for a solution according to which the Åland Islands should remain with Finland. The reasons given for this decision are, however, remarkable:

- First of all, the Commission argued that the Åland Islands have been governed by Abo (the ancient Finnish capital) since 1634. On an administrative basis, the Aland Islands have therefore been part of Finland. This line of argumentation is reminiscent of the essence of the *uti possidetis* concept.
- The Commission also examined the main thrust of the Alanders' request and identified thereby the following essence: The Alander were not really interested in political changes that should lead to an integration of the Åland Islands into the Swedish kingdom but rather in the preservation of their cultural identity and to achieve this aim provisions on the protection of cultural minorities should be the better instrument.[40]
- The Commission also took, however, the overall political context, surrounding the *Åland* case, into regard. In consideration of the fact that Finland was part of the victorious powers of WWI while Sweden had remained neutral the Commission stated the following: 'It would be an extraordinary form of gratitude […] to wish to despoil her [Finland] of territory to which she attaches the greatest value.'[41] Thus, even in this case the principle of self-determination was overshadowed by the primitive logic according to which the needs and the requests by the victorious powers should be given primary consideration.

---

[40] See as to this line of argument Harck, *supra* note 33, para. 6.

[41] See 'The Aaland Islands Question' (Report Presented to the Council of the League of Nations by the Commission of Rapporteurs, 16 April 1921), League of Nations Council Doc. B.7 21768/106, 30, cited according to Daniel Thürer and Thomas Burri, 'Secession' [2008] in MPEPIL, online edition, http://opil.ouplaw.com/home/EPIL, accessed 28 November 2017, para. 25.

As a consequence, Finland was asked to further strengthen the minority protection provisions in favour of the Åland Islands, a request to which Finland followed suit by the Åland agreement of 27 June 1921. This agreement was transposed into national law and thus one of the world's most exemplary and stable minority protection regimes was established.

In hindsight, the considerations by the Committee and the Commission on a possible right to secession by an oppressed minority should receive the greatest attention. The Committee left open whether such an alternative should be available for the minority while the Commission confirmed in principle the existence of such an option (on the political level) while ruling it out in the present case as no such outrageous situation of discrimination could be discerned. Neither the Committee nor the Commission provided specific reference as to the legal reasoning behind their argumentation.

5. SELF-DETERMINATION AFTER WWII[42]

5.1 The Early Practice on Self-determination as Part of the Anticolonialism Movement

Already during WWII hopes were nourished that the principle of self-determination should be of decisive importance for conceiving the post-war order. At least this was suggested by the Atlantic Charter of 12 August 1941.

According to Clause 3 of this document the signatories, US President Roosevelt and British Prime Minister Winston Churchill agreed that 'they respect[ed] the right of all peoples to choose the form of government under which they will live; and they wish[ed] to see sovereign rights and self government restored to those who have been forcibly deprived of them', while according to Clause 2 'they desire[d] to see no territorial changes that [did] not accord with the freely expressed wishes of the peoples concerned'. As is well known this proposition would be radically violated in particular in Central Europe where millions of Germans were driven from their homes.[43]

---

[42] See extensively on this issue Peter Hilpold, 'Self-determination in the 21st Century: Modern Perspectives for an Old Concept' [2006] 36 Israel Yearbook on Human Rights 247.

[43] As to these events see Mark Levene, *The Crisis of Genocide* (vol. 2, OUP 2013) at 367ff., who describes them in great detail and qualifies them as 'genocidal violence'.

The entry into force of the UN Charter in 1945 had created a completely new situation in comparison to that of the Åland crisis. Now, for the first time the principle of self-determination had found entrance in a set of rules of highest ranking reputation and of potentially universal application. The norms on self-determination within the UN Charter, to be found in Article 1 (2) and Article 55, are, however, rather vaguely formulated and in particular in the first years self-determination was seen as nothing else than as a consequence of national sovereignty and as a pre-condition for the equality of states enshrined in Article 2 para. 1 of the Charter.[44] Afterwards other writers highlighted critically that the Charter referred only to a 'principle' which could only be seen as a political directive with no legal value.[45] It was therefore up to the anticolonialism movement to provide this principle with (legal) life. By the two 1960 anticolonialism resolutions of the UN General Assembly[46] milestones were set in the juridification process of the principle of self-determination. After the principle of self-determination had also been enshrined in the two UN Human Rights Covenants of 1966 the legal character of this concept could no longer be put in question. This fact could not, however, put an end to the discussion about the content of this right and about the subjects entitled to exercise this right. In fact, the respective discussion was now only starting.[47] In the German speaking area theories were developed that stood in stark contrast to the American 'mainstream'. The reason behind this German (and Austrian) *Sonderweg* (special approach) can be found in the fact that the 'national question' was still unsolved. This was true in two senses: On one hand, Germany was still divided in two states (against the manifest will of the majority of the German people) and, on the other hand, large German minorities lived abroad in states where they were subject to harsh discrimination or

---

[44] See in this sense the first extensive and very renowned commentary to the Charter by Hans Kelsen. See H. Kelsen, *The Law of Nations* (Stevens 1950) at 52ff.

[45] See Karl J. Partsch, 'Self-determination', in Rüdiger Wolfrum and Christiane Philipp (eds), *United Nations: Law, Policies and Practice* (Martinus Nijhoff 1995), at 1171, para. 11.

[46] 'Declaration on the Granting of Independence to Colonial Countries and Peoples', GA Res. 1514 (XV) v. 14 December 1960 and 'Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter', GA Res. 1541 (XV) v. 15 December 1960.

[47] For a detailed – and very critical – analysis of the United Nations' contribution to the formation of the right to self-determination see Michla Pomerance, *Self-determination in Law and Practice* (Martinus Nijhoff 1982).

they had been driven from their homes and were now living in Germany with the hope that one day their rights would be restored and their assets returned. For a long time many of these displaced persons continued to hope to be enabled to return and to obtain restitution or just compensation for their looted property. The Anglo-American and the German (and Austrian) academics dealing with questions of self-determination did get together in a real dialogue: In the Anglo-American area the German (and the Austrian) contributions to this discussion already remained widely unknown for linguistic reasons (German contributions to international law are practically no longer read in the Anglo-American world) while in Germany and in Austria the new direction the discussion (and also the legal development) in the field of self-determination had taken, was also stubbornly ignored.[48] The borders between law and politics blurred and thereby hopes were nourished in the German speaking area that international law could not fulfil. International lawyers described a world as it should be according to their perceptions and ignored thereby that reality on the ground had taken a different direction.

There can be no doubt that ethnic groups in Europe cannot refer to the 'colonial right to self-determination' in their fight for autonomous statehood, while this fact was ignored by many German writers of this time. Nonetheless, this branch of self-determination discussion has also advanced and further strengthened the importance and the reach of the general concept of self-determination.

In this context, the *Western Sahara* and *East Timor* cases should rise to special prominence. Both cases introduced a particular note of complexity into international law practice as they concerned former colonies

---

[48] See, i.a., Theodor Veiter, *Nationalitätenkonflikte und Volksgruppenrecht* (Braumüller 1977) at 175: 'The term peoples in the two Covenants refers both as to its origin as with regard to its formulation to peoples in the ethnic sense' (translation by this author). See also Otto Kimminich, *Rechtsprobleme der polyethnischen Staatsorganisation* (Grünewal 1985) at 123 as well as Felix Ermacora, *Der Minderheitenschutz im Rahmen der Vereinten Nationen* (Braumüller 1988) at 72ff. Dieter Blumenwitz, *Minderheiten- und Volksgruppenrecht* (Kulturstiftung der deutschen Vertriebenen 1992) at 32 writes the following (translation by this author):

> The interpretation of the term "people" which can be found in the UN Charter as well as in some Resolutions by the UN General Assembly has been subject to an extensive interpretation over time. In the meantime it can be taken as granted that the right to self-determination pertains also to ethnic groups.

(Morocco and Indonesia, now independent) that tried to impede the exercise of the right to self-determination to other colonies.

Western Sahara was a Spanish colony until 1884. Since the 1960s the UN has addressed the Western Sahara problem as an issue of colonialism.[49] Several times and with ever more insistence the UN has called upon Spain not to further oppose the right to self-determination for the people of this territory. Finally, in 1974, the ICJ was seized of this question by the UN General Assembly.[50] In its Opinion of 16 October 1975 the ICJ confirmed the applicability of Res. 1514 (XV) of 14 December 1960 on this territory and the ensuing obligation to grant the right to self-determination. The Spanish government chose, however, a different way and concluded an agreement with Morocco and Mauritania regulating the partitioning of this territory by these two countries. In 1976 Spain left Western Sahara to its destiny, thereby violating the obligation incumbent on colonial powers to permit the exercise of the right to self-determination.[51] The same day the ICJ Opinion was published Morocco announced its plan for the 'Green March', a massive transfer of people to this territory, by which 350,000 persons were brought to the Western Sahara.

Although Morocco pretended to pay heed to the appeals by the UN to stop this settlement policy, de facto it was continued unrelentingly so that the ethnic composition of Western Sahara's population was subject to a profound change in the following four decades. The military victory

---

[49] In 1958 Spain declared that Western Sahara was a Spanish province and would therefore not qualify as a Non-Self Governing Territory (NSGT) entitled to become self-determined. The United Nations General Assembly (UNGA) remained, however, undeterred by this statement and in 1965 declared that Spain, as an 'administrating Power', was obliged to grant self-determination to this territory. See GA Res. 2072 (XX) of 16 December 1965. A year after the UNGA even requested Spain to hold a referendum in Western Sahara so that the people of this territory could freely exercise their right to self-determination. See GA Res. 2229 (XXI) of 20 December 1966.

[50] Reference was made here, i.a., to Res. 1514 (XV) of 14 December 1960, so as to leave no doubt that a right to self-determination was given.

[51] The ending of Spanish colonial rule over Western Sahara was based on the so-called Madrid Declaration of 14 November 1975 signed by Spain, Morocco and Mauritania (988 UNTS 259). This Declaration was reportedly accompanied by a secret pact providing for the partition of this territory between Morocco and Mauritania, thereby clearly violating the right to self-determination of the Saharaui. See Martin Dawidowics, 'Trading Fish or Human Rights in Western Sahara? Self-determination, Non-recognition and the EC-Morocco Fisheries Agreement', in Duncan French (ed.), *Statehood and Self-determination* (CUP 2013) 250 at 257ff.

achieved by the Western Sahara liberation movement Polisario over Mauritania turned out to be of no avail as the territory from which the Mauritanian army had retreated was immediately occupied by Moroccan forces. Up to this day, the Western Sahara problem is unresolved. While the UN cannot be denied an earnest endeavour to find a fair solution all these efforts had to fail in view of Morocco's stubborn determination to hold a tight grip on this territory so rich in natural resources and in particular of phosphate. Morocco does not feel bound by the UN decolonization obligations. In this, out of political reasons, the Moroccan government finds strong support from powerful states in the international community (Morocco has strong ties with the West, while the Polisario movement was supported by Algeria, a country that was long opposed to the West) and by the developing countries in particular as Morocco has for a long time assumed the role of a key leader within this group.

If one were to adopt a cynical-agnostic perspective, one could say that this case gives full confirmation to the following, often cited saying by Sir Ivor Jennings:

> [O]n the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people.[52]

A closer examination of the *Western Sahara* case demonstrates, however, that other instruments would have been available to determine in a somewhat objective manner whom the power to decide should be attributed to.[53] In particular the Separate Opinion by Judge Dillard contains very acute considerations as to the legal nature of the claim for self-determination. Thereby, Judge Dillard posits people before territory: 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people.'[54]

On this basis it can be stated that the impossibility to implement the principle of self-determination, owing to specific political circumstances, does not detract anything from the legal nature of this claim as it pertains also to the people of Western Sahara.

---

[52] See Ivor Jennings, *The Approach to Self-government* (CUP 1956) at 56. On the difficulties in defining the 'self' see also Hurst Hannum, 'Rethinking Self-determination' [1993] 34 Va. J. Int'l L. 1 at 35ff.

[53] For instance, it would have been possible to refer to the latest census by the Spanish colonial administration held in 1974.

[54] *Western Sahara*, ICJ Rep 1975, p. 122.

Additionally, the people of East Timor's patience had to undergo severe testing until self-determination could be achieved. On the whole, this case shows interesting parallels to the *Western Sahara* case. East Timor had been a Portuguese colony for centuries. At the beginning of the 1970s the Portuguese colonial empire began to crumble. At the end, Portugal undertook serious efforts to bring colonial rule over this island to an orderly end but she was no longer in a position to do so as Indonesian troops invaded this territory and subjugated the population in a ruthless and cruel way that outmatched the behaviour of the former colonial rulers. Unlike Spain with regard to the Western Sahara, Portugal undertook every possible effort before the United Nations to defend the interests of its former colony and to keep the attention on this case alive. This was no easy task in view of the prominent role Indonesia played within the group of the non-aligned countries and in consideration of this country's strong ties with Western powers. Nonetheless, and notwithstanding the fact that Indonesia had not accepted the ICJ's jurisdiction, in 1991 Portugal brought this case before the ICJ.[55] In view of the lack of jurisdiction of the ICJ in the relation between Indonesia and Portugal this was possible in an indirect way, that is, by a claim against Australia who had concluded an agreement with Indonesia over the exploitation of East Timor's offshore resources. It goes without saying that this was technically a risky endeavour and in fact, in the end, in 1995, the ICJ dismissed the claim on jurisdictional grounds. Nonetheless, the ICJ seized the opportunity to say some words about the nature and meaning of the right to self-determination. This Court confirmed with unprecedented clarity that the people of East Timor had a right to self-determination[56] and that this right had an *erga omnes* character.[57]

While initially the rejection by the ICJ of its jurisdiction had met with widespread disappointment on a longer run this statement should be of considerable importance for undermining Indonesia's authority over this territory. On this basis the ground was laid that later on, in 1998, when Indonesia suffered a severe internal crisis due to political and economic turmoil, the people of East Timor could claim their right to self-determination. In 1999 a referendum was held that clearly turned out in favour of self-determination. Eventually, independence was achieved in 2002. The ICJ, referring to its earlier jurisprudence, confirmed the

---

[55] See Peter Hilpold, *Der Osttimor-Fall* (Peter Lang 1995).

[56] See *East Timor*, ICJ Rep 1995, para. 37.

[57] See *East Timor*, ICJ Rep 1995, para. 29: 'In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and the United Nations practice, has an erga omnes character, is irreproachable.'

importance of the right to self-determination in its 'Wall Opinion' of 2003 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* for the Responsibility of the UN for Palestine).[58]

Again this was the case in the *Kosovo* Opinion[59] of 2010.[60]

On the whole it can therefore be stated that the rudimentary rules on self-determination set by UN law over time, by way of international practice and a consolidated *opinio juris*, have evolved to a right proper. The colonial branch of this development has operated as an important catalyst which, for a long time, also monopolized the pertinent discussion. Fears, however, that thereby a particular right with a clearly limited field of application would be established, have turned out to be unjustified.[61] Neither has this colonial right to self-determination acted as a barrier to the formation of a general right to self-determination. In the

---

[58] In particular, the ICJ confirmed again the *erga omnes* character of the right to self-determination and the ensuing obligation not to recognize situations resulting from a violation of this right: 'As for the consequences for other States, the ICJ observed that certain obligations violated by Israel were obligations erga omnes, namely the right of the Palestinian people to self-determination and certain obligations under international humanitarian law. The ICJ was of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodies in that Convention.' See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, para. 200.

[59] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Rep 2010.

[60] Ibid., para. 79.

[61] Thus, Michla Pomerance, a renowned expert in this field has stated the following in her detailed analysis of the relevant UN practice: '[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.' See Michla Pomerance, *Self-determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff 1982) at 75. As to the period examined by Michla Pomerance, until the end of the 1970s, this analysis can be seen as fully correct.

meantime, such a general right has surely come into being even though its exact contours are still in many ways unclear.

5.2 Self-determination in the Postcolonial Practice

The self-determination processes in the Balkans and in Central and Eastern Europe in the 1990s have unfolded outside the UN anticolonial practice. In these processes, elements of state dismemberment and self-determination were closely interwoven. These were two sides of the same coin and it should remain open which element should be the decisive one.

This had become very clear in the course of the Yugoslav dismemberment process where claims for self-determination of single territories and more fundamental unravelling processes concerning the state as a whole were mutually reinforcing. It was interesting to see how the broad majority of the state community first tried to oppose both tendencies,[62] while in the aftermath, when it became apparent that this dissolution process was irreversible, it was attempted to at least administrate and somewhat steer these events, so to avoid an uncoordinated drifting apart of the single regions and an ensuing further deterioration of the humanitarian situation in these territories and of the security situation in this region as a whole. As is well known, an important instrument to this end was the institution of an expert commission, the so-called Badinter Commission.[63] In its first opinion of 29 November 1991 this Commission left no doubt as to the fact that the state of Yugoslavia was now to be considered as defunct[64] and that, as a consequence, the results of this irrevocable dissolution process have to be examined from an international law perspective.[65]

---

[62] As is well known, when the then Foreign Minister Hans-Jürgen Genscher pressed ahead with the recognition of Croatia in 1991 (formally the recognition took place on 23 December 1991) this met with harsh criticism, with some critics accusing Germany (albeit unjustly) for being responsible for the definite unravelling of Yugoslavia. See 36 'Der Spiegel' (1995) 38.

[63] The Badinter Commission was a commission of arbitration established by the EC Council of 27 August 1991 with the purpose of giving legal advice to the Commission on Yugoslavia.

[64] '[T]he Socialist Federal Republic of Yugoslavia is in the process of dissolution.'

[65] Ibid. '[I]it is incumbent upon the Republic of Yugoslavia to settle such problems of state succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities.'

The most delicate challenge was now to be found in the need to find criteria for the territorial delimitation of the new states that were established as a consequence of the dissolution process. In fact, in a multinational state formed of nations which see themselves as cultural nations in the meaning used by Herder and which show very strong ties to historical myths this may be a task which is extremely hard to fulfil, in particular if the widespread intermingling of the various ethnic groups is taken into account. To overcome this problem the Badinter Commission referred to the *uti possidetis* principle that was developed for the drawing of borders in the 19th century in Latin America and that would finally become of paramount importance during the decolonization process in Africa in the 20th century.[66]

This approach was radically new in the sense that even outside the colonial context internal administrative boundaries of a federal state became relevant for international law. The *uti possidetis* principle as such does not grant any right to self-determination. It can, however, be helpful for the implementation of this right in practice as it may be of decisive importance for determining who constitutes the 'people', the 'self'. In Latin America, where the *uti possidetis* principle was developed, this question was of no greater relevance as the drawing of the borders was the starting point for the development of a different national identity of the various newly born states. Somewhat more surprising was the success story of this principle in Africa as the different African tribes evidenced a clearly discernible cultural and historical identity. However, the newly created political and historic realities should evidence a totally unexpected and rapidly unfolding identity-forming power that would swiftly overlap historic tribal identities to a considerable extent.[67]

The situation in former Yugoslavia was different. While in the first moment the application of the *uti possidetis* principle should lead to the creation of independent republics whose territory more or less coincided with that of the former sub-state republics within Yugoslavia the original

---

[66] With regard to the *uti possidetis* principle see Giuseppe Nesi, 'L'uti possidetis hors du contexte de la décolonisation: Le cas de l'Europe' [1998] XLIV AFDI 1; Georges Abi-Saab, 'Le principe de l'uti possidetis: Son role et ses limites dans le contentieux territorial International', in Marcel G. Kohen (ed.), *Liber Amicorum Lucius Caflish* (Brill 2007) 657 and Suzanne Lalonde, 'Uti possidetis: Its Colonial Past Revisited' [2001] Revue Belge de Droit International 23.

[67] Of course, this was no definite impediment to further tribal conflicts but at the outset and in view of the nearly total lack of a historic tradition of these newly created states a conflictuality of a far greater dimension was to be feared.

national identities remained alive. Now the prevailing attempt was to create ethnically homogeneous nations by brutal repression, ethnic cleansing and genocide.[68] In two cases the state community tried to oppose these primordial forces. This was, first of all, the case in Bosnia where it was possible, by the use of enormous military and financial means, to ensure the survival of the republic as a multinational and multireligious entity.[69] Furthermore, this happened with regard to Kosovo where the state community even demonstrated a preparedness, in special circumstances, to abandon the *uti possidetis* principle.

The essential elements of the Kosovo conflict can be briefly summarized as follows:[70] Kosovo, predominantly inhabited by Albanians, was declared an 'autonomous province' by Tito in 1974. Although the autonomous competences of this province resembled very much those of an 'autonomous republic' the formal legal status was clearly of a lower rank. This was surely no coincidence as Tito tried hard to forestall any secessionist tendencies. As subsequent events showed the consequences of this choice were extremely far-reaching: When the Badinter Commission had to implement the *uti possidetis* principle it referred only to republics and not to provinces. Only former (sub-national) republics should be recognized to have a right to independence. Milosevic first restricted the Kosovar autonomy and afterwards abolished it completely. In the second half of the 1990s repression by the Serb dominated government in Belgrade was on the rise and led eventually to ethnic cleansing and crimes against humanity.[71] After intense mediation attempts

---

[68] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep 2007.

[69] Whether this would also be possible in the longer run is, however, open to debate. Up to this date, no common 'Bosnian identity', no common 'Bosnia self' can be discerned. In the short run, the approach chosen by the state community did surely make sense: Inter-ethnical hostilities have come to an end and a stand was taken that dissolution processes based on ethnic conflict could not unfold indefinitely. See Stefan Oeter, '"International territorial administration" als neue Form der internationalisierten Zwangsverwaltung', in Fabian Frommelt (ed.), *Zwangsadministration* (Duncker & Humblot 2014) 309 and John Malik, 'The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing Through Democracy' [2000] 36 Stan.J.Intl. 303.

[70] For more detail, see Peter Hilpold, 'Das Kosovo-Problem: ein Testfall für das Völkerrecht' [2008] ZaöRV 779 as well as, *idem*, 'The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Re-requisites', in Peter Hilpold (ed.), *Kosovo and International Law* (Martinus Nijhoff 2012) 1.

[71] See in this sense *Prosecutor v. Milan Milutinovic*, Judgment of 26 February, ICTY, 2009.

by the state community had brought no result and human rights violations had become rampant, NATO intervened on 24 March 1999. On 10 June 1999 the defeated Serb troops left Kosovo. At the same time the UN Security Council passed Res. 1244/1999 which provided for the establishment of an international civil and security presence in Kosovo. The final status of Kosovo was left open and made dependent upon a political agreement. It was thereby made clear that no unilateral solution should be possible.

In November 2005 the UN General Secretary appointed Martti Athisaari as the Special Envoy for Kosovo and commissioned a detailed analysis of the situation in this region. The Special Envoy presented his report in February 2007.[72] Athisaari saw no viable options either in the return of Kosovo to Serbia[73] or in the continuation of the UN administration.[74] The only possible option was surveilled independence.[75] A political consensus to this end was, however, not attainable at the international law level. Thus Kosovars took their destiny in their own hand and on 17 February 2008 they declared the independence of Kosovo.

This act met with harsh resistance from Serbia and her allies (in particular Russia). Some countries rushed forward to recognize Kosovo, others followed more hesitatingly, still others temporized. At Serbia's instigation a majority was found in the UNGA to seize the ICJ with the question whether Kosovo's declaration was in conformity with international law. In its Opinion of 22 July 2010 the ICJ stated that international law does not prohibit declarations of independence and this Court could neither find a conflict between the independence declaration of 2008 and Res. 1244/1999, as the Kosovar politicians issuing this declaration, according to the ICJ, had acted as private persons and not as deputies to the Provisional Kosovar Assembly.

The ICJ took notice of the fact that there was an ongoing discussion in international law theory and practice about a 'remedial right of secession' but the ICJ did not find it necessary to take a position in this regard. Nonetheless, there can be no doubt that the overall attitude of the ICJ to this concept was highly critical.[76] By the expression 'radically different views were expressed', this Court made clear that no uniform *opino iuris*

---

[72] 'Report of the Special Envoy of the Secretary-General on Kosovo's future status' S/2007/168 v. 26 March 2007.

[73] Ibid., at 2, para. 6.

[74] Ibid., para. 8.

[75] Ibid., para. 1ff. '[T]he only viable option for Kosovo is independence, to be supervised for an initial period by the international community.'

[76] See *Kosovo* Opinion, ICJ Rep 2010, para. 82ff.

was given in this regard and therefore it was not possible to identify a corresponding customary law provision.

At this point, the relation between NATO military operations of 1999 and Kosovo's act of self-determination of 2008 has to be addressed.

The NATO intervention of 1999 is – in a strictly legal consideration – an act of humanitarian intervention that finds no legal basis in international law or, to say it more clearly, that is, as a matter of rule, strictly forbidden by international law.[77] Nonetheless, the international community has de facto ignored this violation; no sanctions were applied. There can be no doubt that NATO intervention was a factual precondition for Kosovo's independence. Nonetheless, to draw a direct line between the events of 24 March 1999 and those of 17 February 2008 and to see here an expression of a right to remedial self-determination would hardly be legally plausible. Even among those states which expressed themselves eventually (de facto) in favour of the existence of such a right, the vast majority rejected such a qualification for the present case. Essentially, the ICJ followed this line when it qualified this situation as a sequence of factual events in a *sui generis* context and nowhere does it give the impression of recognizing a remedial right to secession.

But neither does the ICJ subscribe to the different extreme: While Judge Koroma has expressed the conviction that a secession was prohibited as international law protects the territorial integrity of states the *Kosovo* Opinion clearly bears out that the ICJ does not support this position.

6. THE REMEDIAL RIGHT TO SELF-DETERMINATION

The notion that in extreme cases of oppression and discrimination a minority or a people should exceptionally be awarded a right to secession seems to be finding growing support. The advocates of this proposition are able to bring forward elements that refer far back to history[78] and at least to the *Åland* case if only the more recent history is taken into

---

[77] See Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' [2001] 12 EJIL 437.

[78] As to the historic development of the remedial right to secession see Peter Hilpold, 'Die Sezession: zum Versuch der Verrechtlichung eines faktischen Phänomens' [2008] 63 ZÖR 117. For a critical stance towards this concept, see also Robert Kolb, 'Autodetermination et 'Sécession-remède' en droit international public' [2013] The Global Community 57 and Katherine del Mar, 'The

regard. As shown, however, this reference does not really convince, at least if trying to draw legal consequences in the stricter sense from this case. A more suitable legal basis for a remedial right to secession could perhaps be found in Principle V para. 7 of the Friendly Relations Declaration of 1970. Although this Declaration is not legally binding as such it is to be seen as an authoritative interpretation of UN law and as a basis for determining the further direction of the development of UN law.

The relevant provision goes as follows:

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

To deduce from this provision a general right to secession would, however, overstretch its meaning as the clause 'without distinction as to race, creed or colour' clearly refers to the colonial context.[79]

It had been pointed out[80] that the United States had tried to find an alternative formulation according to which the presence of a representative government should explicitly be seen as a manifestation of self-determination. This (broader) formulation did not, however, find a majority.

Interestingly enough, however, exactly this broader formulation was adopted by the Vienna Declaration on Human Rights of 1993. Therein, at first sight, a profound change of attitude could be seen:

Myth of Remedial Secession', in Duncan French (ed.), *Statehood and Self-determination* (CUP 2013) 79: 'It is submitted that remedial secession does not form part of the international law of self-determination' (ibid., at 85).

[79] See Christoph Gusy, 'Selbstbestimmung im Wandel' [1992] Archiv des Völkerrechts 385 at 410 as well as Cassese, *supra* note 33, at 61. According to Patrick Thornberry ('Self-Determination, Minorities, Human Rights: A Review of International Instruments' [1989] 38 ICLQ 867 at 877) this clause appears to address racial issues, thereby limiting its application 'only [to] Pariah states like South Africa, which oppresses its majority on racial grounds'. According to G.H. Fox, who refers to this remark by Professor Thornberry (in 'Self-determination in the Post-Cold War Era: A New Internal Focus?' [1995] 16 Michigan Journal of International Law 734 at 740) 'the United States offered an alternative text which directly equated representative government with fulfilment of self-determination', but this (broader) proposal was rejected (ibid.).

[80] Ibid.

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.
>
> 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 on 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.[81]

According to this provision a government is required that should be representative in relation to the entirety of the population and no reference is made to the colonial issue. Nonetheless, neither from this provision can a right to secession be deduced. It is true that here representativity is required as a general rule. In default of such representativity no automatic right to secession follows. We are rather confronted here with unclear formulations, imprecise promises and hidden threats. This is surely not a *lex perfecta* describing the conditions for its application and the respective legal consequences.

Also some judicial pronouncements have been referred to as a justification for a purported right to self-determination but the cases made do not convince. An often cited judgment is that of the Canadian Supreme Court in *Reference re Secession of Quebec*,[82] which, however, recognizes a right to self-determination only for the cases of colonial dependence or alien subjugation, domination or exploitation which are generally uncontested. The existence of a more extensive, general remedial right to secession is portrayed by this Court only as a possibility and no definite

---

[81] See Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 2.

[82] See Reference by the Governor in council, pursuant to Art. 53 of the Supreme Court Act, concerning the secession of Quebec from Canada, 1998, S.C.R. 217, ILM 37 (1998), at 1342ff.

answer is given in this regard.[83] This decision has also inspired the Russian Constitutional Court which in its decision of 31 July 1993 regarding a possible secession by Chechnya and in the Tatarstan case has come to a similar conclusion.[84]

Similar statements can be found in the Catanga case (Democratic Republic of Congo) decided by the African Commission of Human and Peoples' Rights:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the

---

[83] The Canadian Supreme Court came to the following conclusion: '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 these 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 external self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec 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 law, to secede unilaterally from Canada.' Two experts (James Crawford and Luzius Wildhaber) have presented specific studies on this subject to this Court. The Court has essentially sided with Professor Crawford. Luzius Wildhaber, on the other hand, accepted a remedial right to secession. See for more details Peter Hilpold, 'Self-determination in the 21th Century: Modern Perspectives for an Old Concept' [2006] 36 Israel Yearbook of Human Rights 2006, as well as *idem*, Die Sezession, *supra* note 78, at 134.

[84] See Antonello Tancredi, 'A Normative "Due Process" in the Creation of States Through Sucession', in Marcelo Kohen (ed.), *Secession: International Law Perspectives* (CUP 2006) 171 at 181 referring to Tigran Beknazar, 'Übergesetzliches Staatsnotrecht in Rußland: Staatsnotstand und Staatsnotstandsbefugnisse der Exekutive. Zum Tschetschenien-Urteil des russischen Verfassungsgerichts v. 31. Juli 1995' [1997] 57 ZaöRV 161 at 180. See also the Tatarstan case decided by the Russian Constitutional Court in its Judgment of 13 March 1992. An unofficial English translation of this judgment has been published by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1, to which Paola Gaeta (see below) refers. For a comparison of these judgments see Markku Suksi, 'Keeping the Lid on the Secession Kettle: A Review of Legal Interpretations concerning Claims of Self-determination by Minority Populations' [2005] 12 IJMRGR 189. See also Paola Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court' [1996] 7 EJIL 563.

> absence of evidence that the people of Katanga are denied the right to participation in government as guaranteed by Article 13 (1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[85]

Here, the Commission only states that in the present case for a remedial right to secession being attributed even the most basic factual elements are lacking. The question whether such a right exists at all, is not specifically addressed.[86]

It has also to be mentioned that the Finnish government in its statement in the *Kosovo* proceedings has tried hard to justify Kosovo's declaration of independence by reference to a remedial right to secession. This document portrays in detail the massive discrimination that happened in Kosovo, how Serb authority over this territory came to an end by NATO intervention as well as the exceptional situation that followed this crisis. According to the Finnish government in the *Kosovo* case the remedial right to secession applied on the basis of the findings of the League of Nations in the *Åland* case.

The Finnish government merits approval when it emphasizes the extraordinary character resulting from the Kosovo crisis. In an *ex post* perspective this situation can surely be described as a case of self-determination. On the other hand it should not be overlooked that the ICJ did not qualify the *Kosovo* case this way and that the state community, in its great majority, tried adamantly to rule out such a qualification. It simply took note of a situation that had come about on the factual level. It was the special nature of the *Kosovo* case that was key to exclude its qualification as a case of self-determination.

If a situation is *sui generis* it can hardly qualify as an expression of a legal concept which by its very nature should find general application. The attempt was to open the door for a very specific case of self-determination that could not and should not be impeded but to close the door immediately afterwards. It is, however, doubtful whether this *sui generis* approach still finds general recognition as soon as the situation is settled and the mist of the immediate conflict surrounding this situation

---

[85] Case 75/92, *Kantangese Peoples' Congress v. Zaire*, at 1.

[86] These findings were confirmed and sustained in the case of *Kevin Mgwanga Gunme et al. v. Cameroon*, Comm. No. 266/03, decision of 13–27 May 2009, http://www.achpr.org/files/sessions/45th/comunications/266.03/achpr45_266_03_eng.pdf, accessed 14 May 2017.

disappears. It then becomes all too evident that this qualification was dictated by political considerations.

A special aspect that still merits examination regards the question whether quests for self-determination can be supported by force, that is, whether the right to self-determination constitutes an (additional) exception to the prohibition of the use of force and whether it should therefore also offer a justification for an 'intervention by invitation'. Recently, this question has gained particular prominence in the context of the Russian intervention in Crimea, a discussion that has provided very clear results:[87] A right to self-determination – be it of an external or an internal nature – never provides a justification for a military intervention. It is therefore not possible to reintroduce by this way, through the back door, a right to humanitarian intervention[88] and neither does the existence of a secession conflict abolish the prohibition of intervention.

7. 'INTERNAL SELF-DETERMINATION'

On the whole – and pending a more detailed examination towards the end of this chapter – it can be stated that no remedial right to self-determination, understood as a right of a minority or an ethnic group to secede from a state in the case of serious human rights abuses that jeopardize the very existence of a people, can be found in international law.

Ever broader recognition finds, however, the right to 'internal self-determination'. For many, outside the colonial context the right to 'internal self-determination' is even to be seen as the most important

[87] See Peter Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History' [2015] 14 Chinese Journal of International Law 237 at 251; Jerzy Kranz, 'Imperialism, the Highest Stage of Sovereign Democracy: Some Remarks on the Annexation of Crimea by Russia' [2014] 52 AVR 205 and Antonello Tancredi, 'Crisis in Crimea, referendum ed autodeterminazione dei popoli' [2014] 8 Diritti umani e diritto internazionale 480.

[88] See also the Independent International Fact-Finding Mission on the Conflict in Georgia: 'Military force is never admissible as a means to carry out a claim to self-determination, including internal self-determination. There is no support in state practice for the right to use force to attain self-determination outside the context of decolonization or illegal occupation […] This also means that a secessionist party cannot validly invite a foreign state to use force against the army of the metropolitan state', www.rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf, accessed 14 May 2017.

form of self-determination. As a consequence, how to define this concept becomes of paramount importance. Generally, internal self-determination is understood as the systematic involvement of all groups in the national democratic process, thereby allowing for the preservation of their cultural identity and their development on an equal footing with the majority population. As a consequence, democracy must not be equated with the application of the majority principle. Care has rather to be taken that minorities are not systematically overruled by the majority. While the strict application of the majority principles would lead to a situation where minorities never have their say, in a genuine democracy respecting the principle of internal self-determination precautions have to be taken that the interests of minorities are taken into account the same way as is the case for the majority. The democratic process must not degenerate to an 'all or nothing' mechanism but it is rather the case that the interests of the single member of the minority must have the same weight as that of an individual pertaining to the majority. To achieve this end, in practice it will regularly be necessary to introduce preference rules for minorities, so-called 'positive measures' ('positive discrimination'). Such a balancing of interests should lead to a consociational democracy.

There are various provisions in international law, in particular in the field of human rights law,[89] from which a right to internal self-determination can be deduced. This is the case for freedom of expression (Article 21 Covenant on Civil and Political Rights (CCPR)), freedom of assembly (Article 22 CCPR), the right 'to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors' (Article 25 b) CCPR) and generally the right 'to take part in the conduct of public affairs, directly or through freely chosen representatives' (Article 25 a) CCPR).

Although many uncertainties are still given, ever more elements are forming, according to which a 'right to democratic governance' is coming into being.[90] In such democracies based on international law the

---

[89] In this way, the concept of self-determination is developing a stricter human rights bias. As Catriona Drew has noted, '[d]espite its textbook characterisation as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be "human rights"'. See Catriona Drew, 'The East Timor Story: International Law on Trial' [2001] 12 EJIL 651 at 663.

[90] As is well known the fundamental contribution in this regard was written by Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995). See also Gregory H. Fox and Brad Roth (eds), *Democratic Governance and*

protection of minorities – which finds additional guarantee in an ever-growing number of specific international provisions – will be of fundamental importance.

Will the internal right to self-determination, as it is often said, transmute to a right to secession in cases where minorities are denied their right to effective participation? There is no convincing evidence for the existence of such a mechanism as it has been demonstrated in the context of the discussion about the so-called right to remedial self-determination. Furthermore, it has to be noted that the individual is a bearer of a multitude of rights that would most probably be affected by the exercise of such a right to secession and there is no instrument available to assess the effects of secession on these rights and to find a criterion for balancing these effects.[91]

8. AUTONOMY

Autonomy is often seen as an alternative to self-determination. At a closer look, however, the situation is far more complex. Autonomy is both an alternative to self-determination as well as an expression of it. From an etymological perspective both concepts should be more or less identical as the term 'autonomy' is formed by the Greek terms *auto* and *nomos*, meaning, if put together, 'self-determination' as well. And in fact, in practice there is a close relationship between 'autonomy' and one

---

International Law (CUP 2000) and Charlotte Steinorth, 'Democracy out of Instrumental Reason? Global Institutions and the Promotion of Liberal Governance', in Duncan French (ed.), *Statehood and Self-determination* (CUP 2013) 471.

[91] See Jeremy Waldron stating very appropriately that 'self-determination is not the only principle in the constellation of political values recognized in international law; it must take its place alongside other principles such as human rights, democracy, and the rule of law'. See Jeremy Waldron, 'Two Conceptions of Self-determination', in Samantha Besson and Johan Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), cited according to Robert Howse and Ruti Teitel, stating in this context the following: 'A claim to external self-determination by one group within an existing state may seriously disrupt the entitlements and affect the interests of other groups on that territory, and these may well be protected by international human rights law, which encompasses civil and political but also social, economic and cultural rights.' See Robert Howse and Ruti Teitel, *Humanity Bounded and Unbounded: The Regulation of External Self-determination under International Law*, New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 13-78, November 2013, at 54.

specific form of self-determination, namely internal self-determination. Conceding to a minority the right to deliberate about issues that are of immediate relevance for the conservation of their identity is tantamount to creating a framework guaranteeing the systematic participation of these groups in pivotal societal decision processes. It is true that autonomy systems often have a larger reach but at the same time it is also true that the concession of specific minority and group rights regularly stands at the centre of such sets of rules. Autonomy has even been called the 'queen of minority protection instruments'.[92]

Of course, there is not the one and only conception of autonomy; autonomy systems may rather present themselves in many different fashions. In a certain sense, each autonomous order is unique. Typically for most autonomous orders it is their territorial entrenchment. If the autonomy issue is addressed, usually a territorial autonomy, finding application on a certain part of the national territory, is meant.[93] On first approaching this issue one could say that an autonomous order is located, as to its function, between a mere minority protection system and the implementation of self-determination with ensuing territorial changes. In fact, minority rights are focused on the protection of individual rights, even though, as a consequence, they may protect the minority as a whole and also evidence therefore a collective dimension (this is the case, for example, with topographic naming and the right to political representation). Here the territorial aspect has the role of a logical pre-condition for the application of the right and is not in itself a subject of the regulation. In an autonomy system, instead, the territory acquires the role of a constitutive element of the whole protective mechanism without putting into question the basic sovereign rights of the territorial state. Dynamic elements can be found in an autonomous system only insofar as certain protective measures are adapted to changing needs by the minority and its members. With regard to the sovereign prerogatives of the nation state autonomy rules are, instead, of a static nature. It can even be said that a

---

[92] See Michael Brems, *Die politische Integration ethnischer Minderheiten* (Peter Lang 1997) at 142, referring to Christoph Pan. See also Markku Suksi, 'Autonomy and Conflict Resolution', in Hans-Joachim Heintze and Pierre Thielbörger (eds), *From Cold War to Cyber War* (Springer 2016) 21.

[93] As is well known, alongside the concept of territorial autonomy there is also the concept of personal autonomy conceived for situations in which the members of a minority live scattered over the territory and intermingled with the majority population. This concept had considerable relevance in the Ottoman Empire (in the ambit of the so-called Millet system) while presently it is pre-eminently of academic relevance.

specific characteristic of these systems lies exactly in the fact that they do not challenge the sovereign power of the state. Therefore, autonomous systems regularly display characteristics of a compromise which necessarily is fraught with doubts and imperfections. The often cited saying according to which autonomy is granted reluctantly and accepted ungratefully appears to be very much to the point. Once an agreement on autonomy is achieved, this compromise may at any time be questioned again: The central government may be tempted to interpret the autonomy provisions restrictively and to withdraw concessions made once it feels it has the upper hand in the struggle with the autonomous region(s). However, the opposite may also happen: The minority may see the autonomy as a basis for further requests that should finally lead to secession, to independent statehood.

Lately it was suggested that a new concept of autonomy was taking shape that would countervail these secessionist tendencies.[94] Whether such a change of mind has really taken place is, however, open to debate as substantiated empirical evidence is still lacking. It seems to be more appropriate to see in autonomy an ongoing challenge for all stakeholders that have to be convinced time and again of the inherent value of such a set of norms. At the same time they have also to be persuaded that any extreme alternative to existing autonomy that attributes more power and competence to a group (or the central state) could come at a high price.[95]

If autonomies are sometimes viewed with scepticism this can be attributed to the fact that for a long time no immediate basis was given in international law for this concept[96] and it was difficult to find a

---

[94] See Stefan Wolff and Marc Weller, 'Self-determination and Autonomy: A Conceptual Introduction', in *idem* (eds), *Autonomy, Self-governance and Conflict Resolution* (Routledge 2008) 1 at 2: 'In response, autonomy was re-discovered as a potential remedy of self-determination claims. It was now no longer seen as the secessionists' stepping stone towards independence, but instead, in a 180-degree reversal of the previous position, autonomy was now considered as a possible tool in accommodating separatist movements without endangering the continued territorial integrity of an existing state.'

[95] A list of requirements that a successful autonomy model has to fulfil can be found in Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnics Conflicts* (USIP Press Books 1997) at 199ff. There, particular emphasis is given to the need to involve all stakeholders (and in particular also the kin state of the minority) in the process of forming and developing autonomy. This process has to take place step by step in a dynamic and democratic way.

[96] See H.J. Steiner, 'Ideals and Counter-ideals in the Struggle over Autonomy Regimes for Minorities', in [1991] Notre Dame Law Review 1539 at

commonly agreed definition for this tool.[97] In the meantime, much has changed in this regard. In this context, special attention has to be given to the Lund Recommendations on the Effective Participation of National Minorities in Public Life of 1999[98] which highlight the importance of territorial arrangements for the realization of effective participation of minorities.[99] A vast literature on autonomy issues underscores the pivotal importance of autonomy arrangements as a minority rights protection instrument.[100] A special field in which such arrangements have found most useful application is that of the protection of indigenous peoples and much more could still be done in this area after arrangements of this kind have found international recognition and support by the United Nations Declaration on the Rights of Indigenous Peoples of 2007.[101] At

---

1547. Contra: G. Gilbert, 'Autonomy and Minority Groups: A Right in International Law', in [2002] 35 (2) Cornell International Law Journal 302.

[97] As to the various attempts to define autonomy see Lapidoth, *supra* note 95, at 29ff.

[98] See OSCE High Commissioner on National Minorities, *The Lund Recommendations on the Effective Participation of National Minorities*, 1999.

[99] See in particular para. 20 of the 'Lund Recommendations' (*supra* note 98):

> Appropriate local, regional, or autonomous administrations that correspond to the specific historical and territorial circumstances of national minorities may undertake a number of functions in order to respond more effectively to the concerns of these minorities:
>
> – Functions over which such administrations have successfully assumed primary or significant authority include education, culture, use of minority language, environment, local planning, natural resources, economic development, local policy functions, and housing, health, and other social services.
> – Functions shared by central and regional authorities include taxation, administration of justice, tourism, and transport.

[100] See, i.a., Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (University of Pennsylvania 1996); Markku Suksi (ed.), *Autonomy: Applications and Implications* (Kluwer 1998); Special Issue on Forms of Autonomy, [2008] 15 International Journal on Minority and Group Rights 143 and Lauri Hannikainen, 'Cultural Autonomy: and Some Related Aspects of Territorial Autonomy', in Daniel Thürer and Zdislaw Kedzia (eds), *Managing Diversity* (Schulthess 2009) 193.

[101] See Art. 4 Annex, UNGA Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 61 UN GAOR (vol. 111), Supp. No. 49, at 15, UN Doc. A/61/49: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for

the same time, however, this Declaration leaves no doubt that a right to autonomy will never constitute a basis for secessionist claims by indigenous peoples.[102]

On the whole, it can therefore be stated that within the large array of minority protection instruments available autonomy has proven to be a very successful one.[103] Its usefulness has been – and continues to be – demonstrated in a myriad of cases. Exactly because this instrument has so successfully stood the test of practice the fears often voiced in the past according to which the concession of autonomy could set in motion secessionist processes constituting a first step towards independence have lost their urgency, and in conflict situations more and more preparedness is noted to directly refer to autonomy as a problem solution instrument,[104] exactly to counteract further secessionist tendencies.[105]

As the Scottish referendum of 18 September 2014 has revealed, a highly developed legal order should not fear a discussion about a possible

---

financing their autonomous functions.' While in the years before it was prevailingly disputed that a right to autonomy should be part of indigenous rights (see, in particular, the Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc. OEA/Ser.L/V/II.62, doc. 26 (1984), at 81–2) this can now no longer be disputed. See also Jane A. Hofbauer, *Sovereignty in the Exercise of the Right to Self-determination* (Brill/Martinus Nijhoff 2016) at 166s. and Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' [2006] 42 Texas International Law Journal 186.

[102] See Article 46 para. 46 of the Declaration: 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.' On the particularities of autonomy rules for indigenous peoples see also Gudmundur Alfredsson, 'Indigenous Peoples and Autonomy', in Christian Tomuschat (ed.), *Modern Law of Self-determination* (Martinus Nijhoff 1993) 41.

[103] See the example of the South Tyrol autonomy. See Peter Hilpold, *Modernes Minderheitenrecht* (Manz 2001).

[104] See the widely cited report by Asbjorn Eide on 'Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities', E/CN.4/Sub.2/1993/34. With regard to indigenous peoples the UN Declaration on the Rights of Indigenous Peoples of 2007 now explicitly refers to the right to self-determination (Article 3; this provision grants in substance, however, only a right to 'internal self-determination') as well as to the right to autonomy (Article 4).

[105] See Marc Weller, *Towards a General Comment on Self-determination and Autonomy*, 2/AC.5/2005/WP.5, 25 May 2005.

secession of parts of its territory even without international or constitutional obligations permitting it.

9. CONCLUSIONS

The considerations above have demonstrated that the modern concept of self-determination, as given life by Woodrow Wilson in 1918, is ambiguous and contradictory. Exactly in the situation for which it had been created, the post-war peace settlement after WWI, it has miserably failed. Nonetheless, a process had been set in motion that continues to be operative up to these days. Assisted by the creation of a broad system of human rights the concept self-determination has continuously strengthened the position of the person, both as an individual and as a member of a group.

The roots of this concept that are to be found in the Wilsonian (if not to say the US-American) conceptions of individualism, democracy and fairness continue to reappear in this process despite the many situations of backlash and disappointment. The various steps in this process might not always satisfy the high expectations usually associated with the idea of self-determination. This is in particular the case with regard to decolonization where the needs and interests of the oppressed peoples were often neglected (as happened with regard to the Ibos in Biafra/Nigeria or the Saharauis in Western Sahara).

This whole development was characterized by the intent to create a fairer world order.[106] Self-determination underwent a far-reaching evolution as the sensibility for human rights questions became more acute, as the relevant norms became more detailed and as new norms came into being that were directed at granting ever broader participatory rights to all parts of the population in order to grant effective democracy. There is, however, no indication that this process would have led to the result of providing single minorities or groups with a right to their own state even against the will of the majority in the existing state. Neither can the existence of a right to remedial self-determination in the case of massive discrimination be convincingly proved, even though a considerable part of international law doctrine is trying hard to provide such evidence. Nonetheless, over the last century many (judicial and academic) pronunciations have been made and developments can be retraced in international law practice that identified consistent legal elements in the

[106] For the principle of fairness see Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995).

self-determination concept that might be conducive to fostering secession also outside the colonial context. Thus, as a rule, state sovereignty is to be given preference over claims for self-determination by single regions or groups. Internal conflicts have to be solved in the ambit of the existing structures. If, however, state sovereignty is weakened, the internal struggle for secession may acquire international relevance. This was first attested in the *Åland* case and afterwards reconfirmed in the Yugoslavia crisis. The criteria developed by the Badinter Commission for an ordered solution of the Yugoslavian crisis, which were respected in detail by the state community, demonstrate very clearly that internal administrative boundaries that are as such irrelevant for international law may be referred to by international law if state sovereignty dwindles or disappears altogether. The mechanism applying here is of a complex nature: Although there is no direct causality between human rights violations and a right to independence (as sustained by advocates of the remedial secession theory), grave breaches of human rights can undermine state sovereignty. There can be hardly any doubt that the military intervention in Kosovo was not intended at creating a new state as a consequence of previous human rights violations and such a result was rejected outright by the intervenors, at least in the first moment.[107] On a practical level, however, such an intervention can create conditions that bring about independence as a matter of fact. A similar observation can be made with regard to a serious economic crisis. The case of East Timor has demonstrated that secession can become an option if a severe economic crisis renders the mother nation (in this case Indonesia) fragile, even if this state, only shortly before, has governed the dependent territory with an iron fist rejecting all pleas for independence. There is a basic presumption in favour of the conservation of existing state structures. Here applies the old saying that the community of states, still constituting the main legislator in international law, is not a suicide club. This does not mean, however, that the state communities would try to uphold territorial integrity at any price. The Athisaari Report on Kosovo[108] evidences this fact very clearly and this tendency has found further

[107] See also the following preambular provision of Resolution 1244/1999: 'Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2.'

[108] See UN Security Council, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, 26 March 2007, S/2007/168, para. 10: 'Independence is the only option for a politically stable and economically viable Kosovo.'

confirmation by the many declarations of recognition in favour of Kosovo.[109] Recognition policy has always been dictated – at least to a considerable extent – by partisan interests.[110] Nonetheless, as has been demonstrated also by the *Kosovo* case, a pivotal criterion for any decision in this regard has always been the question of whether an independent state is better suited to attain the core goals of an ever more integrated state community than the existing larger entity with all its internal conflicts. Part of these core goals are also the basic human rights principles. If a territory aspiring for independence is not able to provide satisfactory guarantees as to a balancing of the interests of all groups living in this area quests for independence will meet with particular suspicion by the state community.[111]

If an attempt is made to examine the present self-determination claims in Europe it has to be acknowledged that in international law no right to secession for single territories, groups or minorities is given. Nonetheless, in international law practice a plethora of elements can be discerned that operate in favour of secession movements. Thus, for example, it can be noticed that governments are now more prepared than in the past to negotiate with centrifugal forces. Behind this attitude the conviction can be discerned that legitimate sovereignty has to have a contractualistic nature and be based on a consensus oriented government. This is in particular true if the secessionist claims are of an 'irredentist' nature, that is, if changes of borders are at issue, if a people wants to leave one state

---

[109] As of 23 June 2015, 108 out of 193 states have recognized Kosovo. See https://en.wikipedia.org/wiki/International_recognition_of_Kosovo, accessed 27 November 2017.

[110] On the relationship between secession and recognition see Stefan Oeter, '(Non-)Recognition Policies in Secession Conflicts and the Shadow of the Right of Self-determination', in Christopher Daase, Caroline Fehl and Anna Geis (eds), *Recognition in International Relations: Rethinking a Political Concept in a Global Context* (Palgrave Macmillan 2015) and Brad Roth, 'Reconceptualizing Recognition of States and Governments', in Christopher Daase, Caroline Fehl and Anna Geis (eds), *Recognition in International Relations: Rethinking a Political Concept in a Global Context* (Palgrave Macmillan 2015) 141. For Mileno Sterio ('On the Right to External Self-determination: "Selfistans", Secession and the Great Powers' Rule' [2010] 19 Minnesota JIntL 137) of decisive importance for a self-determination claim to succeed is the support by the so-called Great Powers.

[111] In fact, in relation to Kosovo this was also one of the most delicate aspects. For this reason, the Athisaari plan foresees a series of balancing mechanisms. Up to this moment the Kosovar government has not yet fully met these requirements.

and join another, 'taking the territory with them'. It is true that in these cases no right proper for secession exists[112] but at the same time it has to be taken into consideration that in such cases more and more consensus oriented government becomes paramount. Furthermore, history is becoming ever more important. The following questions acquire particular relevance: are there historic titles and, if yes, what is their foundation, how intense are the demands for self-determination, is historic injustice still present and how strongly is it felt?[113] The answers to these questions also strongly influence the consensus on which democratic government in ever more countries is built. Often, economic elements are also decisive in this regard.[114] Recent studies demonstrate that even the previous concession of autonomy is often decisive for the subsequent successful assertion of self-determination claims.[115] These studies are mostly characterized by a highly critical undertone against secessionist attempts. It may be open to debate whether the causalities asserted in these studies are really an empirical fact. Thus, it may be correct that resource rich territories are particularly tempted to fight for independence. On the other hand, the wealth of resources may previously have been decisive why this territory has been occupied in the first place. It may also be true that territories endowed with autonomy may fare rather prominently among those territories which advance claims for secession. It should not be neglected, however, that the respective autonomy has been granted exactly because this territory evidences considerable differences from the rest of the territory as to the linguistic, ethnic and cultural composition of its population. This autonomy can also be seen as compensation for (external) self-determination being denied.

Irrespective of the fact of how these factors are politically gauged and how far back in history we want to go to measure the causalities

---

[112] See Arnold N. Pronto, 'Irredentist Secession in International Law' [2016] 40 The Fletcher Forum on World Affairs 103.

[113] As to this point see extensively Lea Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' [1991] 16 Yale Journal of International Law 177 at 199.

[114] See P. Collier and A. Hoeffler, 'The Political Economy of Secession', in Hurst Hannum and Eileen F. Babbit (eds), *Negotiating Self-determination* (Lexington 2006) 37 at 52ff.: '[S]ecessionist movements should not in general be seen as cries for social justice. Those few secessionist movements that are able to scale-up to being organizations with a serious political or military capability are likely to occur in rich regions and contain an element of resource grab.'

[115] See E. Jene, 'National Self-determination: A Deadly Mobilizing Divide', in Hurst Hannum and Eileen F. Babbit (eds), *Negotiating Self-determination* (Lexington 2006) 7.

mentioned it can be assumed that these elements are highly sensitive for the self-determination issue.

On the whole it can be said that autonomy can contribute to a considerable measure to countervail situations of widespread discrimination and to realize a consociational democracy that should permit the accommodation of persons and groups with different languages, religions, culture and ethnic affiliation. If such measures offer important help to preserve these different identities in a peaceful environment but at the same time pave the way for more extensive self-determination requests this may be a price to be paid for a successful consociational democracy.[116] A living, functioning democracy should not fear a discussion on self-determination that takes place within established political procedures and avails itself of recognized instruments. In a democracy in which the people are sovereign a discussion about territorial changes must also be allowed. Care has to be taken, however, that this discussion is not conducive to new forms of nationalism and that the political procedures, permitting exactly this discussion, are not destroyed or altered in their structure so to inhibit a similar discussion in the future. In other words: In a democratic order it should also be possible to discuss changes in the political and territorial framework but the choices taken as a consequence shall not be irreversible and no new situations of discrimination shall thereby be created. Such a strategy could be part of a long-term management of self-determination claims.[117]

It may be noted that in Europe the discussion about self-determination has gained enormous breadth and the distinction between 'external self-determination' and 'internal self-determination' has created a broad space for introducing a plethora of new modes through which this right can be exercised. The strengthening of the democratic principle has added further to the relevance of this discussion. The many self-determination movements all over Europe have therefore to be taken seriously if international law does not grant any right to secession outside the exceptional cases treated above. The strengthening of the 'internal self-determination' grants larger participatory rights to minorities and

---

[116] On the concept of 'consociational democracy' see Arend Lijphart, *Democracy in Plural Societies* (Yale University Press 1977) as well as *idem*, 'Self-determination versus Pre-determination of Ethnic Minorities in Power Sharing Systems', in Will Kymlicka (ed), *The Rights of Cultural Minorities* (OUP 1995) 275.

[117] On this subject see also Kathleen Gallagher Cunningham, *Inside the Politics of Self-determination* (OUP 2014).

groups and at the same time a discussion about vanishing borders between external and internal self-determination is no longer a taboo.

And if we consider all these factors it is fair to say that the quest for self-determination which shows up these days in many places all over Europe is of a rather strong nature and it is highly probable that these demands will sooner or later be crowned with success. Therefore it can be assumed that what presently appears as illusionary and utopian can become a hard fact in reality in the future.

Therefore, we are confronted here with a strange contradiction: Although the reference to a remedial right to secession does not convince, although peoples outside the colonial context do not have any right to their own state and although historical myths on which many self-determination claims are based usually do not withstand closer scrutiny, the belief to the contrary can create new realities. At the end, whether a historical myth is true is all but irrelevant.[118] What really matters is not whether a group can prove historically and objectively to constitute an independent nation but rather whether this group truly

[118] This has already been impressively demonstrated by Benedict Anderson in relation to the formation of nations. See Benedict Anderson, *Imagined Communities* (Verso 1996). Many examples have been given in literature for such nation-building processes. See, for example, the many cases referred to by Martti Koskenniemi, 'National Self-determination' [1994] 43 ICLQ 241 (i.a., the Finnish nation-building process). See also Han Liu, 'Two Faces of Self-determination in Political Divorce' [2016] 10 Vienna Journal on International Constitutional Law 355, who states that Chinese nationalism is also an artificial creation: 'The Chinese nation, invented by modern political leaders like Sun Yet-Sen, comprises Han, Mongol, Tibetan, Manchu, Hui ethnic groups. The concept of "Chinese" was unknown to many ordinary people even after the founding of the Republic of China in 1911' (ibid., note 181). Also for David Miller 'identities are partly mythical in nature'. Miller sees the resulting self-determination process positively as thereby a pressing need is answered, the need to maintain solidarity in large, anonymous societies. See D. Miller, 'In Defence of Nationality' [1993] 10 Journal of Applied Philosophy 1. Similarly, Ernest Gellner (*Nationals and Nationalism* (Cornell University Press 2006)) maintains that nations are the result of a self-determination process. In the same vein also Féderic Mégret ('The Right to Self-determination: Earned, Not Inherent', in Fernando Téson (ed.), *The Right to Self-determination*, Cambridge University Press 2016): 'The subjective belief is not that one *is* a people in some objective, incontrovertible sense, but that one aspires to be a people *through self-determination*. Self-determination, therefore, does not as much flow from the existence of a people, as it is its founding act. The practice of constituting oneself as a people conditions not only the operation of the right, but its very existence in a particular case' (ibid., at 56ff).

believes in these myths and whether it has built up sufficient identificatory elements that furnish somewhat convincing arguments to justify the claim for an autonomous identity. Should one day the specific conditions materialize that permit the realization of a secession claim, utopia can become reality. At the same time, there should be greater preparedness to discuss and eventually also to accept territorial modifications based on a freely expressed will by the concerned populations. They are surely no panacea for the solution of problems in the day-to-day interaction of different groups and it should also be clear that modifications of this kind will create new social, political and economic costs that have to be carefully pondered before starting such a project.[119] Nonetheless, it becomes clear that what was radically excluded in the past and not even suitable for discussion now can be faced far more openly. And the consequences of this development may be different than supposed: If the discussion about territorial changes loses its conspirative glare it may be the case that at the end of this process the decision is taken to leave the territorial situation as it is, perhaps with the exception of some minor changes and improvement. Such an outcome would again constitute a 'plebiscite de tous le jours' in the sense of Ernest Renan[120] for the preservation of the democratic system within the existing territorial borders combined with an ongoing struggle, also taking place on a day-to-day basis, for permanently optimizing the given arrangements.

---

[119] See the famous analysis by Arnold J. Toynbee: 'Self-determination is merely the statement of a problem and not the solution of it', in 'Self-Determination' [1925] 484 Quarterly Review 317 at 319. As the case of Southern Sudan has shown, state creation by secession (in 2011) may lead to a whole array of new problems, to new violence and bloodshed (starting in 2013). According to some analysts, peoples aspiring for secession should first demonstrate their ability to integrate the future state successfully into the international peace order. See Milena Sterio, *The Right to Self-determination under International Law* (Routledge 2013), referring to the fourth criterion of the Montevideo Convention 1933, 'the capacity to enter into international relations' (ibid., at 175).

[120] See Ernest Renan, *Qu'est-ce qu'une nation?* (Calmann Lévy 1882).