

The Challenge of Self-determination and Emerging Nationalism

*The Evolution of the International Community's
Normative Responses to State Fragmentation*

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Abstract

How does the international community understand and apply the right of self-determination? Who holds this right: individuals, peoples, nations, states, ethnicities, minorities, majorities? What limits are there to the exercise of this right and which claims are 'valid' and which are not? This thesis addresses these issues as it seeks, above all, to answer the question of when, why and in what ways the international community's understanding of and normative responses to self-determination have evolved.

To do so, Part I explores critically the theories and history of nationalism, human rights, sovereignty and self-determination to explain the challenges of 'emerging nationalism' (defined herein as *nationalism* within established multi-national *states* aimed at altering the constitutional and/or social standing of the nation *vis-à-vis* the larger political entity). This part identifies the genesis of the interconnected ideas of identity, human rights, and sovereignty and begins to trace the evolution of the norm of self-determination over time as it has been conceived and employed by international society. It suggests new approaches to these concepts based within the liberal democratic tradition, which are, arguably, more philosophically coherent than other explanations for self-determination.

Part II assesses international normative responses to state fragmentation and national liberation prior to the end of the Cold War to determine how much they have resembled the interpretation of national self-determination suggested in Part I, contending that the conceptual evolution of self-determination can only be interpreted accurately by understanding the parallel evolution and development of international society.

Part III examines the evolution of self-determination and emerging nationalism in the post-Cold War era, asking whether the norms generated by the present-day society of states are consistent with the theoretical and historical observations made earlier. The recent case of Kosovo is examined in detail as it best suggests the present trajectory of international norms and responses to emerging nationalism.

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Introduction

At the Palace of Versailles in early 1919 as the great powers that were left standing at the end of the war began to reconstruct the shattered and bankrupt dynamics of international relations and domestic authority, Woodrow Wilson interjected the concept of self-determination into the debate. He confidently believed that self-determination would be one of the guiding precepts of the new era of democracy that he hoped would emerge from the otherwise pointless devastation wrought by the war. For Wilson, the war had been ‘to make the world safe for democracy’¹ and he considered, correctly, that self-determination was central to the workings of democracy and that it would have to play a part in any just and lasting peace.

The story of how such hopes were systematically thwarted through design, ignorance, apathy and carelessness at Versailles is well known. The unequal and uneven use of the principle caused disappointment and frustration to Wilson and others who subsequently felt that Versailles failed to make self-determination a coherent and accepted norm in international activity.² The practical complexities associated with the application of the concept proved extremely challenging, as Wilson himself later admitted. ‘When I gave utterance to those words, I said them without the knowledge that nationalities existed, which are coming to us day after day...You do not know and cannot appreciate the anxieties that I have experienced as the result of many millions of people having their hopes raised by what I have said.’³ Robert Lansing, Wilson’s Secretary of State, was even more critical of the notion of self-determination fearing the uncertain consequences of its use. He stated that while the idea was highly relevant, it was ‘loaded with dynamite’.⁴

Many of the challenges Wilson and the others faced at Versailles are intrinsic to the concept, as self-determination necessarily involves the emotions, values and the collective will of people and tests the limits and legitimacy of political authority. When self-determination is combined with the potent force of nationalism, especially when seeking to redefine power relations within or eliminate existing states (as was the case in 1919) the challenges of how to

¹ Woodrow Wilson, ‘Speech to Congress for a Declaration of War Against Germany’, 2 April 1917 [<http://www.archives.gov/historical-docs/todays-doc/index.html?dod-date=402>].

² However, Buchheit contends that the application of self-determination along ‘national’ lines in the period immediately following the First World War, with all its failures, solved about 50% of Europe’s ‘minority problems’ in one move. See Lee C. Buchheit, *Secession: The Legitimacy of Self-determination* (New Haven, CT: Yale University Press, 1978), 120.

³ Wilson in Buchheit, *Secession*, 115.

⁴ Robert Lansing in Alfred Cobban, *The Nation-state and National Self-determination* (London: Collins, 1969), 62.

respond coherently and consistently from a normative standpoint become extremely great.

As with all ideas and forces that affect international activity, self-determination is broadly dependent on and shaped by two factors: the context of international affairs in which the concept operates and its relative importance vis-à-vis other ideas and forces. These two factors determine how self-determination is defined and understood, how it is applied and whether it is part of the norms that govern the interactions of the various actors that control world politics at a given time. However, as self-determination interacts on so many levels with other vital concepts like identity, authority and legitimacy, its significance to international affairs is especially contentious, not only as to what it means and who has a legitimate right to exercise it but also about what limits may be justly applied on its exercise. Additionally, because it often involves a direct challenge to the existing international as well as the internal order, it raises further questions about who judges the validity of claims, how it ranks in relation to other competing norms and considerations that policy makers and other actors weigh up as they try to shape and direct events. As such, self-determination is a singularly slippery concept, open to multiple understandings and different applications.

Lansing appreciated the difficulties contained within the concept and openly postulated about them, yet despite the accuracy of his verdict, self-determination proved irrepressible, as did the concomitant challenges it presented. During the Second World War, self-determination emerged as a key principle in the stated war aims of both the Allied Powers and, surprisingly, the Axis countries as well, and at the end of the war, self-determination became an established, explicitly expressed norm of international society in the Charter of the United Nations. Self-determination was at the very heart of decolonisation in the post-World War II period, an operative principle of numerous international treaties and covenants in the late-twentieth century and remains a peremptory norm of international relations in the post-Cold War era, where it has proved extremely pertinent. In fact, even before Wilson expressed his desire to construct politics and the new international system around self-determination, the concept had been part of the intellectual and political milieu of (at least) Europe and the Atlantic community. The use of the concept by states acting alone or in concert with others stretches back to the seventeenth century, when the present-day structure of relations between states first coalesced, and self-determination's intellectual roots run deeper still.

Yet, if anything, the perennial challenges that self-determination presents to the international community have intensified since 1919 rather than

receded. The persistent, fundamental questions abound: is self-determination a right or a principle in international relations? Who holds the right: individuals, nations, peoples, states, ethnicities, minorities, majorities, etc.? What limits can be placed on its exercise, what claims are valid and, importantly, which are not? What is the relationship of self-determination to democracy and to state sovereignty? Moreover, these normative queries collide together when policy responses are formed, raising further concerns such as whether force should be used to support or deny a movement that bases its actions on a right of self-determination and whether the concept can be employed legitimately to fragment a sovereign state or to change its internal dynamics.

This study explores these questions and the theory and the history of self-determination from the standpoint of the international society of states to answer the overarching question of when, why and in what ways the international community's understanding of and responses to self-determination have evolved. To do so, it examines self-determination's status as a norm of international activity by tracing the concept's theoretical roots and the history of international responses to claims based on it and by analysing self-determination's evolution as a norm over time through an examination of a few critical events and cases that defined and continue to shape its trajectory.

In taking this approach, this study consciously looks for linkages between the practice of states and the international community and the ideas and norms on which they base their responses to situations involving self-determination. It also seeks to show not only how these ideas have been debated and understood at various historical moments with differing strategic and political circumstances, but to discern the intellectual roots of the idea of self-determination and then to see in what ways these ideas are employed by the society of states, gauging to what extent practice meets theory. In so doing, it attempts to get at the aforementioned slipperiness that surrounds self-determination, asserting that at least part of this slipperiness stems from a divergence between the international community's norms and responses and the intellectual foundations of the concept.

The fracture between the theory and the application of self-determination has proved very significant over time, especially since the mid-twentieth century when self-determination became an accepted norm of international politics. Like most other ideas and values on which international society rests, self-determination has specific intellectual origins that imbued the concept with very particular attributes, logical parameters and implications, and while the concept has been and remains open for debate and interpretation, international norms that ignore or run contrary to these 'roots' are more likely to

result in inconsistent or incoherent responses to actual or threatened state fragmentation.

Much of the current scholarship on self-determination does not approach the subject with these sensitivities in mind and is either too divorced from these philosophical matters or gives only cursory attention to them. Few accounts since Alfred Cobban's and Rupert Emerson's treatments of self-determination have attempted to link directly the responses of the international community to both the history and the theoretical underpinnings of the concept.⁵ These works offer insights into not only what happened during various movements for national liberation and state fragmentation, but they also pay careful attention to the motives and rationale of those who sought to challenge the existing order as well as those who opposed them, and also of the international community as it responded to these challenges. Their sensitivity to the dialogical exchanges of the parties involved in these episodes and the ideas on which such movements were defended and opposed throws much light on the meaning of self-determination and its evolution as a norm of action in international politics. Through such a lens, Cobban and Emerson offer a fuller and more satisfactory survey of self-determination, nationalism and state fragmentation than most other contemporary examinations.

Nonetheless, while these studies are excellent, they are dated, focusing on the challenges of nationalism and self-determination that were germane at their time of writing, and neither scholar could take account of the massive expansion of scholarship on nationalism, identity and the ethics of human groups over the past thirty years. Additionally, these works also predate the intense debate about the role and importance of ideas in the formation of norms ushered in by social constructivist theories, and as indicated below, this is a very relevant development, since the interpretation and understanding of ideas has a great impact on the application of self-determination and its evolution as a norm. Of course, these shortcomings are also evident in more recent examinations of self-determination, the bulk of which have focused on specific cases or on the legal or strategic aspects related to the concept. While many of these studies are extremely valuable (and are scrutinised when relevant in this investigation), a more penetrating and satisfying inquiry of the normative status of self-determination must take this broader view advocated above.

It is a major contention of this study that ideas are fundamentally significant to the formation and evolution of norms, self-determination included, and that when the practice of the international community and

⁵ Cobban, *The Nation-State* and Rupert Emerson, *From Empire to Nation* (Boston: Beacon Press, 1960).

individual states adheres more closely to the ideas and understandings that constitute such norms, the stronger and more potent such norms become. While it is possible to question the reach and influence of international norms, their existence and utility are beyond serious reproach. In a world where international interactions are increasingly governed by agreed norms and accepted patterns of behaviour, shared understanding, appreciation and enforcement of such norms will occur far more frequently when the theories on which such rules are founded are likewise understood and appreciated. On the other hand, when the practice of the international community and of individual states is inconsistent with these norms or, at the extreme, runs contrary to them, the meaning, integrity and utility of these norms are all lessened and the force these norms have in guiding and shaping international relations could degrade further, perhaps to the point of irrelevancy.

Yet, norms do not exist timelessly. Far from it, they evolve over time, and this evolution is subject to the interactions, debates, policies and responses to events taken by states, international organisations and other non-state actors. Moreover, there is no predetermined direction in which these norms will evolve, regardless of the ideas on which they are based or the subjects they seek to define and circumscribe. In other words, this evolution is not a teleological process. While norms may shift and change for innumerable reasons, and while there *might* be a direction in which norms *ought* to evolve (which this study suggests is the case with self-determination), there is no certainty as to the direction or momentum of such changes. There is often a potent clash and mixing of ideas at work in the creation and shaping of the norms that lie at the heart of international society and, at the same time, individual norms frequently collide and compete with other norms. Thus norms not only evolve but have to be understood contextually, and it is this context that in turn helps to shape and define the international system, the legitimate actors within it and the rules and procedures these actors employ.

As one of these norms, self-determination is subject to this kind of evolution, and this examination does not attempt to gauge just what the concept means or how it has been applied in a static fashion but instead tries to explore self-determination's dynamic evolution over time through an analysis of selected normative responses of the international community. Doing so outlines more clearly the concept's trajectory and its shifting role in international activity. However, examining self-determination's evolution through the lens of the international community's normative responses raises questions about the assumptions and methodology involved in this process.

Drawing in part on social constructivist theories of international relations, this inquiry considers ideas as not only meaningful but constitutive, especially on the normative plane. Social constructivist interpretations of international relations usefully and accurately direct attention to the links between institutions, their structures and procedures and to the ideas and norms that compose and guide them.⁶ As mentioned previously, norms are, by definition, ideas and understandings that constitute, guide and limit the practice of states and other actors within the international community, something akin to what Christian Reus-Smit calls ‘constitutional structures’.⁷ As J. Samuel Barkin and Bruce Cronin have noted, these normative structures, whether formalized or ad hoc, have an impact that is equal to if not greater than strategic and legal considerations.⁸ These structures provide the foundation for, give substance to and continually inform the workings of the international community.

Moreover, as Alexander Wendt indicates, the sovereign states and other constituents who comprise the international system are not bystanders in this process: their interactions over time create and modify the very structure and nature of this system of which they are a part. When Wendt suggests that ‘anarchy is what states make of it’, in reference to the assertion of an ‘anarchical society’ of states, he highlights the contingent nature of the structures and norms created by states and others and the fact that these are not givens and that they are not set in stone. For Wendt, even the sovereign state, the basic building block of the current international system, is ‘an ongoing accomplishment of practice, not a once-and-for-all creation of norms that somehow exist apart from practice.’⁹

Reus-Smit and Cronin build on this in their respective treatments of the nature of the state and of international society by emphasizing the role that identity and culture play in the practice of groups in international affairs.¹⁰ Both authors rightly posit that rather than a perpetual clashing of ‘interests’, the international society of states creates meaningful institutions through ontological and intersubjective understandings of ideas and their social and

⁶ Relevant examples include Alexander Wendt, ‘Anarchy is What States Make of It: The Social Construction of Power Politics’, *International Organization*, 46: 2 (1992) and Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); Friedrich Kratochwil, *Rules, Norms and Decisions* (Cambridge: Cambridge University Press, 1999); J. Samuel Barkin, *International Organizations: Theories and Institutions* (New York: Palgrave Macmillan, 2006); J. Samuel Barkin and Bruce Cronin, ‘The State and Nation: Changing Norms and the Rules of Sovereignty in International Relations’, *International Organization* 48:1 (1994).

⁷ Christian Reus-Smit, *The Moral Purpose of the State* (Princeton, NJ: Princeton University Press, 1999), 30-33.

⁸ Barkin and Cronin, ‘The State and Nation’.

⁹ Wendt, ‘Anarchy is What States Make of It’, 413.

¹⁰ Reus-Smit, *The Moral Purpose* and Bruce Cronin, *Community Under Anarchy: Transnational Identity and the Evolution of Cooperation* (New York: Columbia University Press, 1999).

political interactions. As Reus-Smit puts it, '[s]ocieties of states are communities of mutual recognition; they are bound together by intersubjective meanings that define what constitutes a legitimate state and what counts as appropriate state conduct.'¹¹ Bruce Cronin goes further, stating that:

the sovereign state develops its identity as a state through its associations within the nation-state system, and its unique consciousness is formed by differentiation from other states... In contemporary international society the creation and re-creation of conceptual boundaries continues to play a vital role in the development and transformation of identities and interests.¹²

Thus, at the core of the international community lies an interlinked dynamic exchange of ideas and identities that are mutually understood and cooperatively shaped, and these in turn shape, define and constrain the interests and actions of states and create structures that provide meaning and direction to international activity.

Because these contextually dependent shared understandings are of such great import to the foundation of international society, language and dialogue, the mechanisms by which these understandings are communicated, are essential components in the iteration of the structure of this community. How states express themselves, both in terms of what they say and the medium selected for communication, how they justify their actions and how and when they debate the rightness of others' actions and ideas creates a dialogical space and a shared idiom for interactions. Over time this dialogue shapes and changes norms and institutions. As Barkin asserts, international institutions 'encourage dialogue and communication among states as a first response to disagreements, and they foster rules-based, rather than power-based, dispute settlement in a variety of functional realms'. He adds that, as international institutionalization increases over time, there is a more general change to 'the basic expectations of states and foreign policy makers about how international relations work'.¹³ Accordingly, a primary methodology of this study is interpreting the dialogue that surrounds and pervades the debate about self-determination with these sensitivities in mind while also incorporating an analysis the historical, theoretical and strategic context in which that debate occurs.

However, despite proceeding from these understandings, this examination departs from a few of the premises behind some social constructivist and communicative theories of international society, as the ideas

¹¹ Reus-Smit, *The Moral Purpose*, 156.

¹² Cronin, *Community Under Anarchy*, 26 and 28.

¹³ Barkin, *International Organizations*, 133.

and identities on which norms form are rarely either open-ended or capable of entirely subjective interpretation. Ideas often have a discreet and contextually specific heritage that shapes and defines them, rendering them far less open to interpretation than some constructivist arguments imply. At a minimum, many concepts (like identities) have well-defined intellectual, historical and cultural foundations from which deployment and interpretation should be based, and this is especially the case with self-determination. As Friedrich Kratochwil asserts, ideas that form the basis of collective action need to resonate on some level with those discussing them and that through the process of this discourse, these ideas become collectively shared and often morph into norms that govern collective behaviour.¹⁴ While discourse is a quintessential element of constructing norms, finding shared purpose and understanding requires the creation of norms that are based on coherently and mutually understood rationales, and this is more likely to occur when the philosophical roots of these ideas are apparent and the logic underlying them is appreciated and accepted by those debating them. Just because institutions and norms are understood intersubjectively and constructed in a social dynamic, this does not imply that the ideas and values on which they are constructed can be construed in any way that is desired.

Ideas and values often have an intellectual foundation that serves to delimit the extremities of debate and the construction of norms and institutions built around them. While there may be considerable philosophical elasticity to these concepts, particularly over time as the context in which these ideas are *debated* shifts, the context in which they *developed* is usually more fixed and of great importance. Moreover, when attention turns to the ideas and concepts on which the fabric of the international system is constructed, such as is the case with self-determination, actions that fly in the face of these ideas or ignore their historical context *may* lead to incoherent norms or unsound institutions. Conversely, closer adherence to and better understanding of the intellectual foundations of the ideas and values on which norms are based *might* lead to more stable and more effective institutional arrangements that will better serve those who created and continue to shape such norms and structures.

For example, much of the current controversy over the World Trade Organization (WTO) centres on the application (or misapplication) of liberal economic theory and the norms and practices related to free trade. Many contend that the WTO's actions, far from assisting the growth of less

¹⁴ Kratochwil, *Rules, Norms and Decisions*. See also Jurgen Habermas, *The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society* (Boston: Beacon Press, 1985), particularly Chapter I.

economically developed countries or even advancing free trade more generally, are aimed instead at strengthening the economic advantages of the dominant countries within the organisation.¹⁵ Whether or not this is true is not the concern of this study, but what is relevant in this analogy is that the normative principles on which the WTO's actions are meant to rest, free trade, extend from a philosophical position that trade advances all economies most effectively when it has few (or at least fewer) constraints imposed by states and governing structures, which is a product of the European rationalist tradition, refined and articulated first in the eighteenth century. Like self-determination, the idea of free trade arose within a particular historical context and contains logical implications that can guide state actions and that also suggest conditions when states or institutions can impose limits on the exercise of the concept, often for perfectly sound domestic reasons. Yet, when institutions like the WTO adopt or permit safeguards, exceptions, subsidies and exclusions that seem to run contrary to the core concepts of free trade, the charges of institutional hypocrisy seem well founded, increase the likelihood of controversy and threaten the very stability the institution was created to ensure.¹⁶ While not taking a view on any of these charges, it is important to note that the provenance of the idea, the current debate over the concept's meaning and its application by the WTO amidst the specific conditions of the present moment are *all* relevant to the workings and evolution of the norm of free trade. To ignore any part of this puzzle is to miss the whole significance of what is at work.

It is for this reason that this study examines not only the intellectual roots of the concept of self-determination and its application by the international community, but also the context of the international system in which self-determination's meaning, use and limits are contested. Over its nearly 400-year evolution from principle to right to norm, self-determination has been used and discussed within very different international structures and contextual forces. Nationalism, liberalism, democracy, fascism and communism are some of the ideological forces that at times have been at work in this dynamic, while states, ethnicities, multi-lateral concerts and more formal intergovernmental organisations have formed the stage on which this interplay has and continues to occur. The trajectory of self-determination's evolution has been shaped consistently by both institutional and theoretical alterations and this continues to be the case, and, as later parts of this study suggest, shifts in the context and structure of international relations have often ushered in the

¹⁵ See for example the points raised by Dani Rodrik, 'Trading in Illusions', *Foreign Policy* March/April (2001).

¹⁶ A battery of these criticisms is pithily and potently summarized in 'The WTO under Fire', *The Economist* (18 September 2003).

greatest developments in self-determination's evolution as a norm. Thus, the challenges of self-determination, nationalism and state fragmentation exist on the theoretical and the practical level and sometimes simultaneously on both levels, as they did in 1919.

To assess the full depths of the challenges the lie beneath the evolution of the international community's normative responses to self-determination and the potential and actual fragmentation of states, Part I traces the philosophical origins of self-determination and seeks to discern the role that identity, particularly national identity, plays in the concept; Part II surveys selected international responses over time, noting the interrelations between the structure and context of international society and the reactions to self-determination and nationalism prior to the end of the Cold War; and Part III surveys the changes to international society ushered in with the end of the Cold War, reviews some of the initial alterations to the concept and then examines the case of Kosovo in detail, as that example highlights the current normative position of self-determination and reflects whether the international reactions are consistent with the ideological basis on which self-determination rests.

Like those who witnessed the events and participated in the negotiations at Versailles, and like countless others prior and subsequent to 1919, the post-Cold War generation faces the challenges presented by a concept that is desirable, perhaps, even inescapable, and yet is also seemingly impossible to contain. As democracy has flourished since the end of the Cold War, the salience and the relative significance of self-determination, as well as the potency and frequency of nationalist movements, have increased markedly, pushing the accompanying challenges to the fore, both on the normative and the practical level. As Michael Walzer has written, 'the tribes have returned'¹⁷, and they are demanding the right to determine their own political future, often outside of the confines of their current state. The massive strategic, political and socio-economic changes since the end of the Cold War have increased the likelihood of nationalism and identity-based political action, which draw strength from self-determination, and, as a result, the need for coherent norms and consistent responses at the international level is greater than ever. As one scholar posits, '[t]here is a danger that the continued absence of a collective and consistent response to self-determination will destroy the flimsy consensus on state sovereignty and self-determination without replacing it with an alternative.'¹⁸

¹⁷ Michael Walzer, 'The New Tribalism', *Dissent* (1992), 164.

¹⁸ Kemal Shehadi, *Ethnic Self-determination and the Break-up of States* Adelphi Paper 283 (London: Brassey's, 1993), 51.

This study contends that by tracing the foundations of self-determination to the liberal democratic philosophical tradition and by highlighting the concept's interconnections with the theory and international norms of human rights, more coherent and more theoretically sound norms are discernable. This approach also suggests practicable limits to the actions of 'emerging nationalism', which seeks to alter or abolish established political and social arrangements within states. While the evolution of the international community's normative responses to such movements over time have not entirely reflected this interpretation of self-determination, there are indications, particularly in the post-Cold War era, that a normative framework such as this is beginning to take shape.

Part I – Theory

Chapter I

Identity, emerging nationalism and self-determination

Self-determination has a long theoretical lineage and a lengthy history as an operative political principle and, more recently, as a peremptory norm of international society. In order to come to grips with the perennial challenges self-determination presents, its meaning, its limits and its moral standing must be assessed at the theoretical level first before surveying how the idea has been interpreted and applied by the international community.

The theory of self-determination begins properly with questions about the subject of the concept, the ‘self’ that is to be determined, and yet very few studies of self-determination, particularly those concerned with self-determination in international politics and its relation to state fragmentation, pause to consider this. Too many scholars opt for a cursory definition of the term or associate it automatically with nationalism by referring to it as *national* self-determination while others (particularly legal scholars) examine the current formulation, ‘the right of self-determination of peoples’, offering a brief treatment of the term peoples, and then focus on the practical limitations that ought to be placed on the application of the concept.¹ While some of these examinations are extremely effective within their own parameters, they fail to explain sufficiently either how self-determination is connected to identity of the people who exercise it or how self-determination relates to other norms of the international system, such as state sovereignty, political obligation and non-interference, and they do not consider the moral weight of the concept.

As a result, self-determination has rarely received the holistic analysis and debate it needs, either from the community of states, which shapes and acts based on these norms, or from the academic community. As noted, some studies avoid such questions and focus on the tangible consequences and results when the concept is applied. While practical considerations about the application of the concept are highly relevant, they cannot take the place of justified and articulated explanations of why self-determination should be

¹ For example, see Joshua Castellino, *International Law and Self-determination* (The Hague: Martinus Nijhoff, 2000); Antonio Casessie, *Self-determination of Peoples* (Cambridge: Cambridge University Press, 1995); Alexis Heraclides, *Self-determination of Minorities in International Politics* (London: I.B. Taurus, 1990); Thomas D. Musgrave, *Self-determination of National Minorities* (Oxford: Oxford University Press, 2000); Kemal Shehadi, *Ethnic Self-determination and the Break-up of States* Adelphi Paper 283 (London: Brassey’s, 1993); Max Kapelman, ‘Secession and the Right of Self-determination: An Urgent Need to Harmonize Principle with Pragmatism’, *The Washington Quarterly* 16:3 (1993).

considered as a basic *right* in international relations nor do they provide coherent and sensible standards by which the international community should judge the legitimacy of the holders and the claims based on this right.

However, even when the theoretical foundations of self-determination are considered, its relation to nationality, ethnicity and other identity based groups is frequently passed over, especially the question of why nations, as opposed to any other group(s), merit such a privileged position. To understand the nature of *national* self-determination and the ‘self-determination of peoples’, to consider the status of self-determination as a preemptory norm of international behaviour and law and to confirm it as a fundamental, democratic right, it must be shown first that such a right exists, what its proper subjects and objects are and what its position is vis-à-vis other international rights and norms. This chapter takes up the issue of the ‘self’ in self-determination as well as the concept of emerging nationalism, and considers what ‘determination’ entails for such groups and the individuals who compose them. To accomplish this, the historical roots of self-determination are traced to the origin of liberal democratic theory. The chapter then considers how the ideas of self-determination, nationalism and human rights appear to work against one another, before concluding with a suggested means of reconciliation.

(i) Self-determination and the liberal democratic political tradition

Coming to grips with the idea of self-determination is a challenge in and of itself, quite apart from those it presents when the concept is applied and leads to tangible actions (and its application and interpretation by states, it should be remembered, is part of how it is defined on the international level). In essence, self-determination is a principal component of freedom, based on the proposition that being free involves the ability to determine certain relationships and actions without reference to others, who themselves may be acting similarly to determine their relations and actions. Leaving aside just for the moment the *object* of ‘determination’ and the constraints that exist on the employment of the concept, it should be clear that, at its core, self-determination is intimately connected with autonomy and is relevant for the freedom of individuals and collectives, as both individuals and groups will seek to determine their actions and relations. Thus, both individuals and groups are correct *subjects* of the concept on a theoretical level. However, unlike autonomy, which normally refers to freedom of action in the private sphere, self-determination is normally concerned only with public freedom, specifically

freedom in political and social acts that relate to authority in some manner. It is from here that the true power of the concept stems, as it defines and shapes not only the actions of people to their political systems but also serves as a basis of legitimizing the authority of groups, including states. Such a formulation also begins to reveal how self-determination has its genesis within the liberal democratic tradition, given the central concern with freedom of human groupings and the individuals within them in their political and social relations.

However, it is also at this point that conceptual difficulties arise, for it is not yet clear what groups are able to act on the principle or whether or how self-determination *for groups* fits together with self-determination *for individuals*. Additionally, it is not clear which human groupings can make legitimate use of to the concept. For example, could *any* combination of individuals, however random, seek to determine their future by drastically rearranging their status before the state, or justly resort to violence to oppose the actions of a government or, at the extreme, separate from the state in an act of secession or conduct a revolution? If not *any* group, then which groups? From the opposite side of the coin, further questions arise: could a state claim to be the embodiment of 'the people' and use the concept to protect those within its borders from aggression or the actions by other states, or could a state claim with any justice to be acting on the principle as it restricts the actions of those whom the state feels are a threat to its 'national destiny'? However, these serious questions are more solvable when the object or aim of self-determination is considered *in conjunction* with its subjects, which is best accomplished by tracing the philosophical origins of the concept, which lie at the heart of the liberal democratic tradition of thought.

Although the exact origins of the modern concept of self-determination are not fixed, the most clearly discernible genesis of the idea (at least in Europe) is the intellectual and political milieu of sixteenth and seventeenth century Protestantism. The Protestant movements (for it would be wrong to employ the singular) emphasised many different theological positions developed from widely varying biblical hermeneutics; however, all Protestant thought emphasised the primacy of the Bible and the direct interaction of the faithful with the word of God. The importance of this over and above the centralised dogma of the Church of Rome was a hallmark of the various strains of Protestant thought, and the importance given to developing an individual connection and relationship with the Almighty marked an important and deeply significant alteration which

itself had far reaching implications, both theological and political.² In particular, the arguments advanced by the Protestants to defend their resistance to religious and also to secular authorities helped develop the idea that such resistance could be based on the will of a community of like-minded individuals. Although the concept of a unique community with its own political and social will had existed for many centuries,³ during the Reformation, such claims evolved into a near-sacred agreement that bonded all members together and to which all members of the community were an equal part. Although the particular religious nature of such agreements was highly significant at the time, the religious imperatives later diminished and a secularised version of political legitimacy emerged. This proved significant for the theory of self-determination because, over time, it strengthened the belief that a particular community, *defined by the individuals who constituted it, each having equal membership in that community*, determined their own *secular* political authority. Furthermore, it was during this period and soon after that these ideas were infused with the language of rights.

From the outset, the protest against Rome took on a political edge. Luther was adamant that the true church of Christ was a *congregatio fidelium*, a congregation of the faithful, all of whom were in equal standing with each other in relation to the majesty of God. In saying this, Luther argued both explicitly and implicitly that the connection between God and the faithful was beyond the direction of the Church, and was, instead, in the hands of the individual, who was, after all, the subject of the relationship.⁴ Thus, for Luther, salvation was a matter that directly concerned each equal individual. Moreover, the state of one's soul was not governed by the actions of the overarching authority of the Church or by unthinkingly observing the Church's dogma but by the actions and choices individuals themselves made to strengthen their direct and unimpeded faith in God.⁵ By promoting the importance of faith and devaluing the authority

² For the implications of Protestant thought on politics and specifically on concepts of individual liberty, see Quentin Skinner, *The Foundations of Modern Political Thought: Vol. 2 - The Reformation* (Cambridge: Cambridge University Press, 1978); Michael Walzer, *The Revolution of the Saints* (Princeton, NJ: Princeton University Press, 1965); G.P. Gooch, *English Democratic Ideas in the Seventeenth Century* (New York: Harper Torchbooks, 1959); A.S.P. Woodhouse, ed., *Puritanism and Liberty* (London: J.M. Dent and Sons, 1938).

³ See for example, Anthony D. Smith, *Chosen Peoples: Sacred Sources of National Identity* (Oxford: Oxford University Press, 2003).

⁴ These themes are mentioned throughout Luther's work, but for more specific reference, see 'Freedom of a Christian' (1520), 'Commentary on *Galatians*' (1531), and, in particular, 'The Pagan Servitude of the Church' (1520) and his open letter, 'An Appeal to the Ruling Class of the German Nation' (1520), all of which are contained in John Dillenberger, ed. *Martin Luther: Selections from His Writings* (Garden City, NY: Anchor Books, 1961).

⁵ Freedom for Luther was liberating the soul from the prison of trying (and failing) to achieve salvation through anything other than faith. The free choice in this process was the *spiritual* decision to hope for salvation by direct intercession with God through prayer and study of the Bible.

of the Church, Luther's attack robbed the Roman Church of much of its power, both spiritual and secular, and instead diffused it amongst the community of the faithful. Luther's emphasis on individual interaction of the faithful with the Holy Spirit, his belief in the 'priesthood of all believers', that nothing should separate an individual and the community of the faithful from the word of God can all be seen as a force to weaken authority and emphasise the importance of autonomy.

The political implications of this were many sided. The clear rejection of the authority of the Roman Church paved the way for the establishment of state-sponsored, self-determining Reformed churches, as was the pattern in Denmark, Sweden, England and many German principalities. It is necessary to point out that in putting forward these ideas, Luther intended to weaken the spiritual authority of the Church and not authority in general.⁶ Nonetheless, it was only a short step from arguing for an egalitarian and spiritually autonomous community of believers to the emergence of claims for a politically egalitarian and self-directing community, a step taken by thousands of German peasants in their actions and writings in 1525.

Although the peasants' dispute with their landlords had deep-running roots, 'The Twelve Articles' promulgated by the peasants drew directly on Lutheran theology and readily applied his teachings in support of their campaign.⁷ In addition to calling for the right to choose their own priests and the removal of the Church's obligatory system of tithing which they viewed as a tax (both of which were targeted in Luther's writings and sermons), the peasant leaders employed Luther's ideas of Christian equality and liberty in novel ways. In the passages related to serfdom, the authors of the 'Twelve Articles' attack their overlords, stating that the 'right' to hold people as chattel 'is pitiable, seeing that Christ has redeemed and bought us all with the precious shedding of His blood, the lowly as well as the great, excepting no one. Therefore it agrees with Scripture that we be free, and will to be so.'

This example shows how Luther's message was expanded and subtly transformed from a campaign for theological liberty into, first, a justification of individual autonomy and, then, a defence for the self-determining acts of a community. Although very ideologically distant from the modern concept of self-determination, Luther's writings are a very early, powerful example of the essential characteristics of the idea and mark an important first step in its

⁶ Skinner, *Foundations*, Part I, Chapter 3 generally supports this interpretation, despite making important reservations while doing so. cf. Roland Bainton, *The Reformation of the Sixteenth Century* (Boston: Beacon Press, 1952).

⁷ 'The Twelve Articles of the Upper Swabian Peasants' (1525), in Michael G. Baylor, ed. *The Radical Reformation* (Cambridge: Cambridge University Press, 1991), 231-238.

evolution. Above all, Luther's writings provide an implicit link between autonomy for the individual and self-direction for collectivities. Luther saw not only a direct link between God and each person as the foundation for a salvation but he envisaged the community of faithful as the joining together of people who were equal in their standing to each other before God and united by their faith in the Him.

However, Luther himself was not explicit about this connection and was reluctant to apply his ideas in such a way. He rejected, with vehemence and considerable detail, the Peasants' Revolt of 1525 and, like most of the Protestant reformers, was hotly opposed to the actions of the Anabaptists. For Luther, at least in the 1520s and 1530s, it seemed that liberty was entirely spiritual, both for the community and the individual Christian. Yet, Luther himself made something of a *volte-face* when the defence of his own church became an unavoidable necessity. The initial Lutheran response to physical confrontation was to adhere to the absolute Pauline and Augustinian tradition of passive resistance and prayer for deliverance. Any active resistance was seen as contrary to the will of God. However, when faced with the prospect of armed opposition, and, soon after, the real possibility of forceful elimination of the faith, Luther and his followers sought to justify the assertive defence of their community against the threatening religious and secular authorities, something which would have a vast impact on the ideas of self-determination and autonomy.

However, it is within the tradition of Calvinism that Protestant religious and political arguments for autonomy developed most towards the modern concept of self-determination. As Walzer, Bainton and a number of others indicate, the political radicalism that emerged from Calvinist theology is correctly seen as the basis for the modern concept of the secular state.⁸ Calvin and his growing number of followers at first approached the matter of defending their church as the embattled Lutherans did – by relying on the works of Catholic conciliarists and private-law theories to defend their communities.⁹

Calvinist theories of resistance were developed significantly in the years following the growing hostility and violence towards the Huguenots in the 1570s and 1580s. In a bid to woo disenchanted Catholics to the cause of resistance as resentment of the power of the House of Valois increased throughout France, the Huguenots first advanced a more overtly political theory of resistance in the

⁸ Walzer, *Revolution*, particularly Chapters 1, 2 and 5; Bainton, *The Reformation*; Skinner, *Foundations*; R.H. Murray, *The Political Consequences of the Reformation* (New York: Russell and Russell, 1960) and John Neville Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625* (Cambridge: Cambridge University Press, 1956).

⁹ Skinner, *Foundations*, 206-221.

period just before the St. Bartholomew's Day Massacre in 1572.¹⁰ One of the most important of these writings was François Hotman's *Francogallia* (1573) which openly maintained that the people, as embodied in the Three Estates, were the source of authority and that their representatives had the authority to confirm the king and, as such, also had the authority to resist the actions of a monarch when his actions betray the reason for which the king was placed in power.¹¹ This introduced an argument for popular sovereignty into the Huguenot campaign but within an historicist methodology so as to present a more universal and more broadly based attack against unbridled monarchical power.¹² This theme was reiterated by Theodore Beza, Philippe du Plessis-Mornay and the anonymous authors of *The Awakener*, *Political Discourses* and *The Politician*, who broadened the idea to suggest that the sole basis for political authority was the people who can be seen even as the electors of the king.¹³

According to these later Huguenot accounts, the formation of political society was the result of a contract between the whole of the collective body and the leader, formed by the will of the community that was to be governed by the agreement.¹⁴ In addition to strengthening the resurgence of popular sovereignty, these writings clarified the idea that a people could be identified by their distinct beliefs and that political arrangements should enforce and protect the particular characteristics of the people. The mechanism through which this took place was the covenant, and this connection is made explicitly in Mornay's *Vindiciae Contra Tyrannos* (1579). This work, above all others written during the period, points to the explicitly liberal democratic nature of political self-determination. It is liberal in that it is concerned primarily with the situation of the individual person and their rights, and democratic in that it relates to individuals who are equal constituents of the group, each endowing the body with legitimacy. As Gooch observes, it 'is the first work in modern history that constructs a political philosophy on the basis of certain inalienable rights of man.'¹⁵ Combined with the Protestant teachings on Christian liberty, the significance of the community of saints, and the development of a vibrant, *rights*-based protection of these interests, the continental Calvinists' writings greatly advanced the development of the idea of self-determination. Whether they intended to or not, these authors went far towards linking the liberty of a

¹⁰ Julian H. Franklin, ed. *Constitutionalism and Resistance in the Sixteenth Century* (New York: Pegasus, 1969), 11-46.

¹¹ François Hotman, *Francogallia*, particularly Chapter VI, and Chapter XXV, which was an appendix to the 1586 edition, in Franklin, *Constitutionalism*, 53-96.

¹² Skinner, *Foundations*, 314.

¹³ Theodore Beza, *The Rights of Magistrates*, and Philippe du Plessis-Mornay, *Vindiciae Contra Tyrannos*, both in Franklin, *Constitutionalism*. See also Skinner, *Foundations*, 315-318.

¹⁴ Beza, *Rights*, 103-105 and 108-129; and, in particular, Mornay, *Vindiciae*.

¹⁵ Gooch, *English Democratic Ideas*, 14.

community of belonging to the ideology of natural law, rights and the *democratic* legitimacy of political and social order.

However, the real radicalism of the Calvinist tradition came from the ardent English Protestants who, after dutiful obedience to a very powerful, moderately Protestant sovereign in the figure of Queen Elizabeth and a less august but still palatable King James, found themselves confronting a suspected Catholic and authoritarian monarch in Charles I. As a result, English religious and political theory turned increasingly radical, following many of the lines developed by the Huguenots and other continental theorists yet with several departures from this that are highly significant for the concept of self-determination and human rights.

English radicals such as the Quakers and the Levellers, although very much on the margins of political thought at the time, proved to have an exceptionally long-lasting influence. Across the broad spectrum a religious thought in England in the mid and late-seventeenth century, there was a widespread and ever-increasing acceptance that the central Protestant idea of the 'priesthood of all believers' implied that each and every member of the godly community, *as an individual*, had a right to influence the actions of their government and that the actions of the government should be directed towards their well-being. Furthermore, to ensure that this would stay the case, such a government would remain firmly under the control of the people through their chosen representatives. Specifically, the writings of the Levellers provide evidence of this birth of democracy and popular sovereignty, fused with a philosophical commitment to the idea of individual rights.¹⁶

In the three successive versions of the 'Agreement of the People', all published between 1647 and 1649, the Levellers advanced a reasoned, essentially secular version of limited representative government, based on popular sovereignty with, crucially, a list of protected rights of individuals.¹⁷ The idea of a community bound together and acting for their own advancement comes though in passages such as, 'We do now hold ourselves bound in mutual duty to each other, to take the best care we can for the future, to avoid both the danger of returning into a slavish condition, and the chargeable remedy of another war.' They stress the 'Common Rights and liberties' of individual that must be preserved and, going so far as to list them in a bill of rights at the end of each

¹⁶ Theodore Calvin Pease, *The Leveller Movement* (Washington, D.C.: American Historical Association, 1916); H.N. Brailsford, *The Levellers and the English Revolution*, Christopher Hill, ed. (Palo Alto, CA: Stanford University Press, 1961) and Christopher Hill, *The World Turned Upside Down: Radical Thought during the English Revolution* (New York: Viking Press, 1972).

¹⁷ All three versions of the 'Agreement' are available in Don M. Wolfe, ed. *Leveller Manifestoes of the Puritan Revolution* (New York: Humanities Press, 1967).

Agreement and by noting that ‘the power of this, and all future Representatives of this Nation [i.e. Parliament], is inferiour only to theirs who chuse them.’

Although such ideas were radical in the seventeenth century, elements of them persisted and were refined through the filter of ‘rationalist’ methodology, in particular with the employment of the rationalist’s tool, the ‘state of nature’. In the *Prolegomena* to *De Jure Belli Ac Pacis*, Hugo Grotius traces the development of rights to individuals by considering the state of nature and the laws of nature as understood through rationalist inquiry.¹⁸ Grotius makes clear that the creation of political authority has its basis in the natural instincts of humans, and that the end to which mutual cooperation is directed is the greater good of all individuals who, in turn, chiefly seek to protect their *right* of survival. The formal creation of authority in shape of the laws is to be guided by human reason for the interests of all. Grotius expressly denies that sovereignty is always and absolutely popularly held; however, Grotius does admit that the prosperity of the people is the ‘primary consideration’ of most states.¹⁹ Thus, Grotius presents us with an occluded message, walking a fine line between positing a *theoretical* view in favour of popular sovereignty and individual rights and a pragmatic acceptance that government need not followed this pattern in all cases.

In a similar vein, Thomas Hobbes’s *Leviathan* uses rationalist principles to explain the origin of society, sovereignty and the existence of natural rights belonging to all individuals. Although Hobbes eschews the lengthy historical citations that thicken Grotius’ work, he, like Grotius, concludes that individuals are innately autonomous in a state of nature, that they possess certain rights, namely the right to self-preservation, that these rights are discernible through reason and that groups of individuals are the basis of society.²⁰ Hobbes perceives sovereignty as popularly created, but he, like Grotius, does not endorse a right of resistance or espouse a concept of limited government. However, despite this, the writings of both Hobbes and Grotius did much to shape and develop natural law arguments for autonomy and self-determination for individuals.

Also by applying the rationalist mechanism of the state of nature, John Locke traced the origin of government to the consent of the governed, developed a justification of individual rights and, crucially, explored the rights of resistance and limited government that a community could retain even after

¹⁸ Hugo Grotius, *De Jure Belli Ac Pacis, Liber Tres* (1625), Francis Kelsey, trans. (Oxford: Clarendon Press, 1925), ‘Prolegomena’, Sections 11, 12 and 40 in particular.

¹⁹ Grotius, *De Jure*, Book I, Chapter III, Section VIII.

²⁰ Thomas Hobbes, *The Leviathan* (New York: Collier Books, 1962), especially Chapters 13-17, 18 and 21.

creating a sovereign authority.²¹ Although his justifications for resistance and for limited government went beyond and were more novel than those developed by his intellectual predecessors, it has been contended with some justice that 'John Locke merely said in 1690 what the Levellers had said in 1646'.²² Nonetheless, Locke's ideas of consent, whether tacit or expressed, highlighted the democratic edifice of communal action and greatly shaped the liberal democratic theory of government.

It is in James Harrington's *Oceana* that a highly developed political theory incorporating popular sovereignty and a direct link between the people's will and the government's institutions first emerges. For Harrington, the involvement of all individuals within the community filled the same function as blood circulating through a healthy body, and although the guidance of the body politic would be limited to a few, the many got to participate in the expression of the political will at the ballot box.²³ Harrington's work is worth highlighting for the analogy with the human body points toward the type of emotional essence of nationality (discussed in detail below), as well as for his promotion of individual rights, popular sovereignty and self-determination of the group.

However, it is not until the eighteenth century that the modern concept of self-determination and *national* self-determination emerge clearly, most notably with the works of Jean-Jacques Rousseau. Rousseau's works are profoundly important to the evolution of self-determination, not only because of his absorbing and impassioned discussion of autonomy, but also because he develops a theory of order based around volition. Put simply, for Rousseau, one cannot will without making a choice and imposing order, but the order that is best is an order of one's own choosing and, thus, does not restrict one's liberty, provided the willed action was in fact free in the first instance.²⁴ As a result, autonomy is not at all anarchy; it is *self-government* or, as F.M. Barnard prefers, 'self-direction', in its truest sense.²⁵ Yet here, it seems, is a problem and one that is not addressed forcefully enough by Barnard. If this liberty is to be valued, even in the state of nature, why is it to be rejected by joining together in a society, the very thing that Rousseau so loathes?²⁶ The answer is that society is for Rousseau either a force of suppression and destruction *or* emancipation

²¹ John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1960), in particular Book II (The Second Treatise), Chapters 2, 7-9 and 19.

²² Theodore Calvin Pease, *The Leveller Movement* (Washington, D.C.: American Historical Association, 1916), 364.

²³ James Harrington, *The Commonwealth of Oceana* J.G.A. Pocock, ed. (Cambridge: Cambridge University Press 1992); Gooch, *English Democratic Ideas*, 245-247.

²⁴ Jean Jacques Rousseau, 'Discourse on the Origin of Inequality' and 'The Social Contract', in *The Social Contract and the Discourses* (London: Everyman Library, 1973), 90ff and 190-192.

²⁵ F.M. Barnard, *Self-direction and Political Legitimacy: Rousseau and Herder* (Oxford: Clarendon Press, 1988), 32.

²⁶ Jean Jacques Rousseau, 'The Social Contract'.

depending entirely on how it is composed and, vitally, how the wills of all those who make a particular community are joined *and for what purpose they are bound together*. For Rousseau, human fulfilment, indeed, human *perfectibility*, requires a specific type of willed action. This is not the willed action of the free, savage man, to do whatever crosses his mind; it is autonomy that is mindful of one's self-interest²⁷ yet *equally and simultaneously* aware of the community of which the individual is a part. As Rousseau explains, this requires the formation of a social contract whereby the individual's will both *creates and conforms to* the 'general' will. To do so, each individual:

gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others. ...Finally, each man, in giving himself to all, gives himself to nobody; and as there is no associate over which he does not acquire the same right as he yields over himself.²⁸

In this manner, the individual retains true freedom, yet also gains an increased and higher sense of self through the intimate association with those with whom the individual contracts, a process that Barnard aptly call 'the extension of selfhood'.²⁹ This new 'selfhood' is both formed by and rises above the commonality of the members to the social contract. As Rousseau puts it, 'At once, in place of the individual personality of each contracting party, this act of association creates a corporate and collective body. ...and receiving from this act its unity, its common identity, its life, and its will.'³⁰

Rousseau's account of autonomy and the self-determining community is novel because of the centrality of autonomy in fulfilling human existence. Without this fundamental liberty, life is pitiable to the point of being meaningless. By arguing that the self can only be fully, morally realised within and conforming to a society of which that self is but one part, Rousseau forged together the well-being of the individual and the society by making self-determination for the individual *dependent* on that of the community, *and vice-versa*. Thus, self-determination is delineated and given philosophical underpinning, with the result being a robust defence of its worth as a normative principle.

When taken as a whole, the development of these concepts from the late-sixteenth to the eighteenth centuries produced a solid philosophical base for the legitimacy of self-determination, redefining it as the securing of basic

²⁷ This should be understood as the quality of *l'amour de soi-même*, self-love, that Rousseau describes in detail. 'Love of self is a natural feeling which leads every animal to look to its own preservation, and which, in man is guided by reason and modified by compassion, creates humanity and virtue.' Rousseau, 'Inequality', 76.

²⁸ Rousseau, 'The Social Contract', 191.

²⁹ Barnard, *Self-direction*, 34.

³⁰ Rousseau, 'The Social Contract', 192.

individual rights as well as those of a community. As such, self-determination becomes a *right* (as opposed to merely a ‘principle’), exercised collectively by groups for the fulfilment of its individual members.

These writings are also crucial because they emerged at genesis of the modern (European) state system. The confluence of liberal democratic political philosophy and the rise of the modern states meant that the ideas of popular sovereignty, of a *right* of autonomy for unique communities based on the collective will of the populace, became a recognized and discernible element of the legitimacy of a political and social community. However, despite adding clarity, these philosophical roots leave three significant questions unanswered: what groups could be recognized as legitimately self-directing; whose rights trump whose – those of the group or those of individuals; and what limits can be placed on the exercise of the right of self-determination?

(ii) *Primary Identity Forming Groups and ‘emerging nationalism’*

Taking on the first of these interrelated questions is a challenge as there is any number of groups that could plausibly claim to be the legitimate subjects of the right of self-determination: peoples, ethnic groups, minorities (numerical or otherwise), nations, states, etc. The openness of the concept is, no doubt, one of its attractive features to groups that seek to base their claims upon it as they attempt to determine their future. However, provided the liberal democratic basis of the right is kept in mind, the list is narrower than at first glance, for within a liberal democratic approach, only groups that serve to fulfil and enhance substantially their members’ lives can hold the right and exercise it legitimately.

In theory, *any* group of likeminded individuals, bound together for *any* reason, including choice, could claim the right of self-determination, arguing that a transformation of social and political arrangements, either domestic or international, was necessary to fulfil its aspirations and improve meaningfully its members’ lives. However, within the Protestant accounts of autonomy, the self-determining community is one brought together by God for spiritual ends that were of the highest and most *defining* importance to the life of each individual in the group. In a similar but secular vein, the ‘rationalist’ liberal theorists, such as the Levellers, Locke and Rousseau, see the self-determining group as one that shapes and reflects the *identity* of the members at a fundamental level and engages the individual members in a constant and direct manner in countless ways. For all liberal democratic theorists, both secular and religious in tradition, the communities they conceive as legitimately holding a right of self-

determination are both profound and constitutive for the members, who in turn shape and define the collectives.

The profundity of these connections mean that communities legitimately holding a right of self-determination are fundamental to the identity of the individuals and to the shared identity of the whole in what is an essentially symbiotic relationship. Such identity relations are of such moment that, while in ideal circumstances these communities are not exclusive of other identity forming relations, in non-ideal, practical situations, it is rare that an individual will belong to two or more such groups. This study refers to such groups as Primary Identity Forming Groups (PIFGs), signifying both the role that membership plays in the formation of the individual constituent's identity and to highlight the primacy of such relations on both the theoretical and tangible level.

While in theory PIFGs could be composed through choice, in reality most are linked to more entrenched and inescapable human identity groupings such as ethnicity, religion, language and, perhaps most importantly, nationality. While the academic debate about the meaning and substance of such human groupings, particularly ethnicity and nationalism, is as intense as it is vast, much of this is actually not as relevant to self-determination as it might at first seem, provided, again, that a liberal democratic understanding of the term is employed. What is essential in this proper understanding of self-determination is not any particular quality of the group, but *the meaning and significance* of the association, the degree to which it resonates for members of a collective and to which it motivates them towards public action domestically, internationally or both.

Since the eighteenth century (if not before), nations and nationality have, arguably, been the most salient and relevant PIFG, particularly as agents of political and social change, despite the indeterminacy of the definition of the concept. As noted before, there is a vigorous debate about the origin, meaning and ethical significance of the term 'nation', but there is a broad consensus that a minimal definition of a nation is a community of people who share an identity, a history, a geographic space with which they identify and, perhaps most importantly, shared political and/or social aspirations or affinities that are valued. However, the intensity of each of these characteristics and the depth of commitment can and does vary tremendously, thereby stimulating the debate about the concept's relevance.

The two poles of debate are the modernist/social constructivist position, which holds that nations are nothing more than élite constructed, even fictitious, entities; and the primordialist/perennialist position, which contends that nations are givens, emerge in many human societies and that they have a

timeless quality that links a current nation with a real population going back into the mists of time.³¹ One of the most convincing approaches in this debate is the ‘ethno-symbolist’ approach, which highlights the significance of ethnicity, perhaps the most powerful PIFG, as the basis of the nation and nationalist activity.³² More recently, ‘liberal theorists of the nation’ or ‘liberal nationalists’ have revived the interpretation of the nation that focuses on its democratic elements of choice in creating communities and equality of membership within the collective.³³

Taken together, these potent accounts highlight the ethical worth attached to nationality through the basis of choice and/or identity and their combined meaning to individual members. While a strictly ‘liberal’ account of the nation may fail to account for the mass resonance required to motivate, sustain and propel a sense of nationality and nationalist activity, the link to PIFGs amply provides this. When self-determination is traced to some source other than the liberal democratic perspective, it does not suggest or limit what groups are legitimately self-determining; however, when its origin is correctly understood, self-determination is legitimately held by groups that are meaningful and fulfilling for the individual members, resonating with and stimulating them to actions aimed at advancing the group as a whole towards a larger, shared vision. While nationality in its liberal configuration is perhaps the most salient iteration of this in modern times, it is precisely the fundamental, defining and all-encompassing characteristics of PIFGs that make the mass resonance and appeal for group action on this basis so powerful.

J.S. Mill, probably the greatest theorist of liberal democracy, contends in *Considerations on Representative Government* that it is difficult if not impossible to conceive of a self-determining group that does not share a nationality, which Mill understood as a group having both a common identity and common beliefs

³¹ For accounts closer to the first pole, see Ernest Gellner, *Nations and Nationalism* (Ithaca, NY: Cornell University Press, 1983); Eric Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* 2nd edn. (Cambridge: Cambridge University Press, 1992); Benedict Anderson, *Imagined Communities* 2nd edn. (London: Verso, 1991); John Breuilly, *Nationalism and the State* (Manchester University Press, 1985); and for those closer to the latter view, see John Armstrong, *Nations before Nationalism* (Chapel Hill, NC: University of North Carolina Press, 1982); Anthony D. Smith, *Ethnic Origins of Nations* (Oxford: Blackwell, 1986); Anthony D. Smith, ‘State making and nation-building’ in John Hall, ed., *States in History* (Oxford: Blackwell, 1986); Clifford Geertz, *Old Societies and New States* (New York: Free Press, 1963); Pierre van den Berge, *The Ethnic Phenomenon* (New York: Elsevier, 1979). While these works do not exemplify perfectly either pole, they do explore the debate and take positions on the opposite side of the fence from the other.

³² The work of Anthony D. Smith is the best example of this. See Smith, *Ethnic Origins and Nationalism and Modernism* (London: Routledge, 1998).

³³ The two most effective works in this category are Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993) and David Miller, *On Nationality* (Oxford: Oxford University Press, 1995).

and values.³⁴ Mill did not limit his definition of nationality to only PIFGs or to those groups bound together by choice; rather, he fused the two categories together to show that nationality's democratic quality and mass resonance are tied together with identity, custom and political fulfilment.³⁵ As a result, Mill seems to suggest that nationalities not only provide fulfilment for the individuals who compose them but also reflect a high degree of political maturity stemming from the identity-based nature of nationality, and that, accordingly, they should form the basis of representative and independent governments.

Building on Mill's conclusions and other elements of the liberal democratic tradition outlined above, it is possible to create a bridge between the right of self-determination, PIFGs and nationalism. Nationalism may be defined in this context as the directed and willed, emotional promotion, even exaltation, of nationality in the hope increasing the social and political standing of the nation and its members. As noted before, Mill suggests that the fullest, but not necessarily the 'natural' or inevitable, expression of nationalism is the attainment of political independence for the group, thereby presenting the biggest challenge of identity politics and self-determination: do PIFGs and, in particular, nationalities have a right of self-determination that legitimately permits them to alter fundamentally the political arrangements within a state or, at the extreme, to secede?

'Emerging nationalism' refers herein to the phenomenon that provokes such questions, namely, movements by nationalities or other PIFGs that seek to alter or abolish the underlying political bonds of the state(s) of which they are a part. Thus, emerging nationalism presents a substantial potential for disruption to both domestic and international order on both a philosophical and a practical level. The ubiquity and multiplicity of PIFGs and the intensity generated by nationalism are ideal ingredients for instability even when not fused together as they can be in the concept of self-determination. While connecting identity, nationality and self-determination properly defines the list of legitimate holders of the right of self-determination, it not only leaves unanswered the question of how PIFG rights relate to individual member's rights, but it seems to increase dramatically the need to control the exercise of the right. In fact, tackling the first of these points actually paves the way to a workable normative framework for the exercise of the right of self-determination that addresses the serious concerns raised by emerging nationalism.

³⁴ J.S. Mill, *Considerations on Representative Government* (New York: Henry Holt and Co., 1882), Chapter XVI, 310-311.

³⁵ In fact, Mill does not preclude and often seems to encourage the 'blending' or 'absorption' of one nationality by another, confirming the element of choice in nationality.

(iii) *Human rights, group rights and self-determination*

The relation of the rights of groups to those held by individuals is a matter of tremendous import for the exercise of self-determination but also because it gives shape and meaning to the idea of human rights, which in the past thirty years have increasingly been a key issue of international politics. In fact, the power of 'human rights regimes' and the 'rights discourse' today is such that, at least insofar as international norms are concerned, it is taken for granted that individuals have rights and that the basis of their rights is the simple fact of their existence. However, while the links between individual rights and group rights are perhaps apparent, they have tended either to develop along different trajectories or to have been somewhat divorced in theory and application. For example, in most international instruments concerning rights, either individual human rights or the rights of groups are promoted, but rarely is a connection explicitly drawn between them.³⁶ Even within the academic discussions of rights, a division between the two is often maintained or the linkage is insufficiently explored.³⁷

This division is problematic for self-determination, but it is artificial on a theoretical level. On the one hand, self-determination clearly involves collectives, but, as demonstrated above, it is linked to fulfilling the individuals who compose the group. Moreover, it must be recalled that human rights and self-determination flow from the same liberal democratic tradition and acknowledging and emphasising this common intellectual foundation clarifies and resolves the issue.

To expose and explore these connections fully, the first analytical task is to address the creation of groups and the relation of groups to the individuals within them.³⁸ In common with many of the authors discussed above, it can be taken for granted that human beings are, through a mixture of choice and necessity, social animals and form groups for survival and to increase their mutual happiness. The creation of groups is, thus, a fundamental human occupation, and, in the realm of liberal political theory at least, it is done so on the basis of free choice. Thus, liberal theory in the ideal begins with the individual prior to any contractual agreements or casual associations, free to make decisions and chose whether to enter into or withdraw from collectivities.

³⁶ Chapter 4, below, examines these instruments in some detail.

³⁷ See for example the articles in Will Kymlicka, ed. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) and Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

³⁸ What follows is a theoretical discussion that, at several points, assumes ideal conditions within a liberal democratic framework, and distortions from real circumstances are a given but will be assessed later.

Liberal theory also holds that whatever rights are attributed to the individual they are based solely on the primordial, ineffable and singular nature of human existence. In other words, individuals do not owe their rights to any pre-existing social, economic or political arrangements; *all* individuals share some basic rights equally *simply because they are human beings*. Whatever further rights may flow from particular social and political agreements are qualitatively different from these basic human rights if they cannot trace their existence to this defining postulate.

In these idealised conditions, groups also have rights, *but* all groups, even PIFGs and families are the result of the will and actions of individuals. Furthermore, they are capable of withering over time and owe their continued existence to determined actions and desires of their members. Thus, in theory, group rights are based on the voluntary membership of the individuals who make up the collective and are thus, by definition, derivative. For example, the right to form and run a social or sporting club is not evidently intrinsic. Rather, the legitimacy of such an association stems from the choices and directed actions of the individual members. Such associations would not exist without the voluntary membership and active participation of their constituents, and they would come to an end should the members actively desire their termination or, through apathy, permit a group's demise. The difficulty with this is that, in theory, all human associations would have the same rights and ethical importance.

However, there are some groups for which the choices and actions of members have much less impact on the existence and character of the group, most notably PIFGs. Normally, PIFG membership is not voluntary but is, instead, thrust upon individuals and is virtually if not totally inescapable. As discussed earlier, PIFGs shape and mould individuals' development and personal identity greatly (often whether the shaping is desired or not), and because of the somewhat organic quality of most PIFGs, the rights associated with them are different to those of other corporate bodies. To return to the example of the social or sporting club, although membership can be incredibly important to a given individual's identity, these collectives do not have the permanence or the deeply pervasive qualities that typify PIFGs such as language or ethnicity.

Because of the virtually inescapable nature of PIFGs, their prominent role in the life of all individuals and because of their persistence in history, such groups are now widely considered to have rights intrinsically and not explicitly

by virtue of the democratic participation of their individual members.³⁹ Despite the theoretical right for individuals to quit PIFGs, others may not permit them to be characterised in any other way. For example, it would carry little weight for a person to argue that they want to be seen as an individual and not be associated with their ethnicity when they are denied entrance to a cinema because the person selling the ticket discriminates on this basis. Yet, granting *intrinsic* rights to even the narrow list of PIFGs has important consequences as Nathan Glazer has pointed out.⁴⁰ Such policies tend to strengthen the view that these identities are permanent and are incapable of change at any point in the future, and this view begs the serious question of whether a self-determining community might act against the interests or even the rights of its members in pursuit of a 'higher', group objective.

However, arguments in favour of intrinsic group rights fail on two counts. Firstly, they do not consider that *all* collectives are, at least in theory if not in practice, susceptible to alteration or elimination, even though doing so may take many years, cause much hardship and ultimately prove undesirable to the group's members. Secondly, no group, not even PIFGs, can legitimately violate the fundamental human rights of its members. Groups may legitimately pressure and limit the freedom of their populations, but only insofar as the constituents accept it. It is a rational contradiction of popular sovereignty and individual self-determination that any group can legitimately act habitually and intentionally in a manner that is contrary to the ultimate best interests of the people from whom the groups derives its sanction. To permit violations of human rights on such grounds would run contrary to the liberal democratic foundations of self-determination, even if a PIFG were to justify its actions on 'democratic grounds' as expressed by the numerical majority its members, despite any positive benefits the group acquires.

To clarify the relative importance of PIFG rights vis-à-vis the rights of individuals, it should be added that there is nothing inherently permanent about PIFGs. *Any* given nationality, ethnic group, culture or religion, can dissolve over *la longue durée* as a result of the choices and decision of the constituent individuals. And yet, jettisoning ethnicity, religion, home and nation may be particularly hard, even impossible, within the lifetime of one individual. When examined at this level, it is easy to conclude that the single member of a group may be losing much by not participating in groups actions or by leaving the collective altogether (if possible) and that they may come to regret such

³⁹ See for example the language of the UN Declaration of Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, A/Res./47/135 (18 December 1992) and the UN Declaration on the Rights of Indigenous Peoples, A/Res./61/295 (17 September 2007).

⁴⁰ Nathan Glazer, 'Individual Rights against Group Rights' in Kymlicka, ed. *Minority Cultures*.

decisions, but liberal individualism *ultimately* demands that doing so is the right of every individual, even if only possible on a theoretical level.

Individuals retain this right because each individual is, by definition, the same as all others in terms of the nature of their existence. While it is true that an individual can evolve and develop over time, their *nature* as an individual remains unchanged, and it is this unchanging quality of life from which human rights derive their legitimacy. Unlike the individuals who compose it, a group, whether a PIFG or not, is open to a degree of change. A group's nature, unlike an individual's, is capable of evolution, expansion or contraction, and groups are subject to disappearance. Although particular individuals do not possess a group's lengthy temporal span, individual will and action are the life-blood of all collective organisations. Put another way, individuals create and sustain groups and groups may sustain individuals, but groups do not *create* individuals. While it is difficult to imagine a 'group-less' human existence, it is possible. A 'member-less' human group is, however, an absurdity.

Therefore, there exists a *hierarchy of rights* that places fundamental human rights on the highest plane and groups rights below. Such a hierarchy is necessary, for without it groups could violate the rights of individual members to suit the interests of the collective, a proposition that cannot be accepted as valid since the core feature of all groups is that they are made up of individuals. Groups are not and cannot be the lowest denominator in society; they are divisible and, more importantly, they are made up of single, unitary individuals, who can, in theory at least if not also in practice, dissolve the group.

This is not to suggest that each and every individual must like or agree explicitly to all the decisions that the group reaches. For example, imprisoning or taxing individuals might be resisted by the people concerned, but such actions are legitimate if they are the correct action for the group to take to ensure that the rights of all its members are to be enjoyed and the duties of each are balanced in some manner consistent with the principles of justice to which all members would generally adhere.⁴¹

In this context, self-determination is a right possessed ultimately by individuals but exercised most commonly by a PIFG in order to protect its individual members from the actions of a person or a group acting to deprive its constituents of their fundamental human rights. It is correctly located within a liberal democratic, human rights-oriented framework, functioning as a protective mechanism aiming *above all other goals* to enhance the fundamental

⁴¹ This is a 'textbook' claim within liberal democratic theory. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), Locke, 'Two Treatises', and Rousseau, 'The Social Contract' all contain classic accounts of such tenets.

rights of all individuals who compose the group, and, as such, it cannot be employed legitimately to diminish human rights.

While such an understanding of self-determination addresses the question of who legitimately holds the right of self-determination and while tracing out the hierarchy of rights implicit within this framework resolves the clash of human and group rights, the final question of what limits can be placed on the employment of self-determination remains. As noted previously, the resolution of this last normative dilemma is contingent on the previous answers. With these answers in hand, sovereignty and political obligation will be considered along side self-determination and emerging nationalism to mark out the normative constraints that can be deployed to tackle the challenges of state fragmentation.

Chapter 2

Sovereignty, state fragmentation and the limits of political obligation

The relation between the concepts of sovereignty and self-determination is as complex as it is central to any normative understanding of self-determination and to the limits that can be placed on its exercise. Perhaps the greatest challenge extending from the right of self-determination is that it can be used both as an affirmation of the state and its sovereignty over a territory and a people as well as a justification for the fragmentation of an existing state. Chapter 1 explored the nature of self-determination and its connection to human rights and the rights of groups, concluding that its validity and significance as a norm was based on its ability to give meaning and fulfilment to the lives of those who make up the groups by affirming and strengthening their shared identity and aspirations. If self-determination operates in this fashion within the confines of a sovereign state, which, in turn reflects or enhances the lives of its citizens, then self-determination serves as a norm both to shape and define the character and identity of the state and to legitimize the state's actions towards its citizens, thereby reinforcing popular sovereignty and human rights. This is sometimes referred to as the 'internal' or 'domestic' aspect of self-determination, which at first glance may seem relatively incontestable, but there are large and controversial issues when a state contains more than one Primary Identity Forming Group (PIFG), which is the case in all but a handful of states today, and it becomes even more challenging when the 'external' aspect of self-determination is taken into account. This aspect refers to the interactions and relations of a self-determining community, the state in which it is located and the international society of states pertaining to questions of international legitimacy and recognition and, ultimately, of state fragmentation and secession.

Accordingly, the external aspect largely revolves around emerging nationalism and the international dimension of identity politics. This precipitates further questions such as whether the self-determination of nationalities or other PIFGs dictates that the only legitimate state is one that reflects the will of the people over whom it exercises authority, to what extent nationalist demands from within a *multi-national* state must be internationally recognized and accommodated and, *in extremis*, whether it validates the dictum 'to every nation, its own state', carrying with it a right of secession. Even on the 'less controversial' issues related to the internal aspect of self-determination there are potent questions, such as whether contemporary multi-national or

multi-ethnic states persist only through the repression of national consciousness by the state's institutions? Secession is the point at which the concepts of self-determination, political obligation and the role of the international community intersect and, as a result, it indicates more clearly the normative confines of self-determination and state sovereignty. Examining each of these challenges in turn provides greater clarity about the limits that can be placed legitimately on the exercise of self-determination.

(i) *Sovereign statehood and self-determination*

There is an intimate connection between the concepts of sovereignty, the state and self-determination. Although there is nothing groundbreaking in this assertion, it is worth restating because any attempt to separate the ideas and downplay or deny the connection would result in a misrepresentation of the concepts and their impact on international norms. Any defence of self-determination that fails to consider the concept of sovereign statehood and the society of states invites theoretical and pragmatic inconsistency and potential incoherence. As later chapters suggest, this explains in part the troubled course of events involving self-determination after the First World War and in the post-Cold War era.

The state is a political entity that is relatively easy to discern, especially considering its prominence today. Yet, despite being the central focus of politics in the modern era, the sovereign state and its characteristics are the subject of controversy. Part of the difficulty is that the modern state, like virtually all social and political constructs, developed in a particular set of historical circumstances, changed and developed over time and continues to alter with the constant process of evolution. Most authors identify a number of common characteristics that are constitutive of statehood and although there is a great deal of consensus about what the state is and even about what sovereignty involves, there is a wide divergence on the relative importance of various aspects, which makes subsequent discussions about self-determination and 'the state', 'sovereign authority' and the 'international system of states' problematic.

The 1933 Montevideo Convention defines a state as having a permanent population, a defined territory, a government and a recognized ability to enter into relations with other states.¹ In addition, it should be added that states are today the main political actors on the world stage (and have been in Europe

¹ 'Convention on the Rights and Duties of States' (Montevideo Convention), *League of Nations Treaty Series*, 165: 19 (1933).

since roughly the sixteenth century), that states recognize each other as having authority over their territory and populations, that states are legally equal and that they are only restrained legitimately through international law, over which states have some degree of control. Although these assertions arouse little controversy, they prove too vague when analysing sovereignty and the impact of self-determination. To get at the relation between statehood and sovereignty, the quality of independence needs to be explained.

Many accounts of the statehood indicate the interrelated nature of sovereignty and independence. Reynolds holds that sovereignty is the ‘formal authority to make binding laws and political decisions within recognized territorial limits without interference or control from other bodies and to act externally with a freedom that is limited only by voluntarily accepted restraints’.² Similarly, and in common with many other international lawyers, Jennings and Watts, in their *Oppenheim's International Law*, include sovereignty as one of the four constituent elements of the state, holding that ‘[s]overeignty in the strict and narrowest sense of the term implies...independence all around, within and without the borders of the country.’³ Having the ability to exercise this authority over a given territorial unit and being free from the interference or control of another state or states when exercising authority is an important, if not the defining, characteristic of the state.

However these views all leave the matter in a nebulous condition because they fail to describe exactly how sovereignty and independence fit together. None describe how the ability to govern within a state’s borders is gauged or understood, or how this relates to a state’s international standing and legitimacy. It is clear that the international community frequently applies a varying standard when judging the capacity of states to be sovereign within their own borders for the purpose of recognition.⁴ Furthermore, many authors understand the term sovereignty differently. As Hurst Hannum notes, ‘[a]t least part of the difficulty in defining sovereignty lies in the fact that sovereignty traces its historical roots to sovereigns, in whose hands “absolute” spiritual and temporal power rested’, and as Hannum continues, this is hardly the case today.⁵

However, both James Crawford’s insightful legal study of statehood and Alan James’s astute observations from the perspective of international relations

² Quoted in Alan James, *Sovereign Statehood* (London: Allen and Unwin, 1986), 20.

³ Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law* 9th edn. (London: Longman, 1992), 32.

⁴ See James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 1979), Chapter 2, Section 3.

⁵ Hurst Hannum, *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* 2nd edn. (Philadelphia, PA: University of Pennsylvania Press, 1996), 14-16 and, more generally, Chapter 2.

provide some much-needed clarity.⁶ James contends that sovereignty is best understood as that capacity which entitles a state to enter international society and play an active role on this stage. Sovereignty therefore becomes a function of power, one that creates states and ensures their position and standing in relation to other states. By taking the case of the Solomon Islands and tracing why they were once not a state and then were, James identifies the capacity to act without constraint from the British government that transformed the Solomon Islands into a sovereign and independent state. This freedom is fundamentally legal in character rather than the product of brute force, and, accordingly, independence is first and foremost constitutional in nature. Thus a sovereign state is one that has a constitutional capacity to enter the society of other states on the terms of equality, that is, an equality of standing, not of power.

In a similar vein, Crawford states that independence is ‘the central criterion of statehood’.⁷ Using the *Island of Palmas Arbitration* (1928) and the *Austro-German Customs Case* (1931) as precedents, Crawford concludes that independence is the ability of a state’s institutions of government to exercise exclusive control over its internal affairs. The recognition of this quality by other states is not a statement of approval or disapproval of the government or people, merely an acknowledgement of legal standing. By this explanation, the society of states is the collection of political entities that mutually recognize the right to independence over matters deemed to be internal and base their equal legal standing on this premise.

Sovereign statehood reflects both an external and an internal dimension of sovereignty that is very similar to the internal and external aspects of self-determination. As Robert Jackson explains it, sovereignty includes both ‘an internal aspect which a government of a populated territory is supreme within its jurisdiction, and an external aspect in which that same government is legally separated from all other governments of the same sort and is recognized as such. Thus in international relations, sovereignty is a mark of political independence of the state.’⁸

It is more than coincidental that the conceptual explication of sovereign statehood and self-determination sound similar, as the two concepts originated at roughly the same historical moment and, more importantly, they are analogous and are interconnected. Sovereign statehood and the corresponding

⁶ James, *Statehood*, Chapters 1 and 2 in particular; Alan James, ‘The practice of sovereign statehood in contemporary society,’ *Political Studies* 47 (1999), 457-473; and Crawford, *Creation*, Chapter 2.

⁷ Crawford, *Creation*, 48.

⁸ Robert Jackson, ‘Introduction: Sovereignty at the Millennium’, *Political Studies* 47 (1999), 425.

concept of non-intervention have much in common with the self-determination and its democratic imperative. Briefly tracing the roots of the sovereign state usefully illustrates this point.

The international system of states coalesced in Western Europe during the early modern era (at the same time as self-determination first emerged) and the system was based on the ideas contained in the peace of Westphalia. The Westphalian formula of *cuius regio eius religio* (first stated in the Treaty of Augsburg of 1555) established independent and sovereign states as the model for international interaction and gave to that system many of its defining principles, including non-interference and territorial integrity. Westphalia was a settlement that, as Daniel Philpott has suggested, altered the ‘constitution of sovereignty’ for the key political actors concerned.⁹ As Jackson explains, this transformed Europe from a society in which authority was, at least nominally, in the hands several princes acting on behalf of the greater and unified *respublica Christiana*, to an international society based on separate, independent and equally sovereign entities, into whose domestic affairs other states would not interfere.¹⁰ This alteration was hardly democratic or liberal, but it did have everything to do with self-determination, for the peace of Westphalia imbued the sovereign state with certain rights that were predicated on the idea that each state could determine its own religious, social and political direction legally and constitutionally independent from the others. Over time, this idea became central to the relation of states. In effect, each state was free to determine its own path in the absence of any over-arching, sovereign authority. As Osiander points out, by the beginning of the eighteenth century, European monarchs were ‘essentially...self determining actors, none of which was entitled to dictate to others’¹¹, a process that could not have taken place without the conceptual shift brought about during this time.

One central assumption created at Westphalia was that the distinctiveness of states’ internal arrangements is the foundation of their independence and is the basis for non-interference. It is clear that, at the time of Westphalia (and for many years afterwards), the distinctiveness on which sovereign independence and non-interference was based was the preferences of a handful of monarchs or state élites. The determining ‘self’ in this case was the monarch. However, by adding the democratic underpinning of self-determination and nationality to this changes the locus of this distinctiveness.

⁹ Daniel Philpott, ‘Ideas and the Evolution of Sovereignty’, in Sohail H. Hashami, ed., *State Sovereignty* (University Park, PA: Pennsylvania State University Press, 1997), 28-34.

¹⁰ Robert Jackson, ‘Sovereignty in World Politics: A Glance at the Historical and Conceptual Landscape’, *Political Studies* 47 (1999), 435-439.

¹¹ Quoted in Jackson, ‘Sovereignty’, 439.

With self-determination, the *popular will and sentiment* of the state's citizenry, its nationality, defines the state and supports the claim to sovereign statehood, and it does so in a manner entirely compatible with the Westphalian settlement. While historical evidence of this is discussed at some length in Part II of this study, it is relatively uncontroversial to assert that, as the position of individual sovereigns diminished as democracy grew, their role as the definers of the state's uniqueness was usurped by the populace at large who were also wresting political power from them. By the beginning of the twentieth century in Europe and increasingly elsewhere, the phrase 'sovereign state' implied that the citizenry were a vital and defining part of the whole, rather than the hapless body of people living within the territorial confines of the state who were insignificant in relation to the person who was sovereign.

In this sense, self-determination can be seen as something quite different from what it is often presented as being.¹² Here it is not a claim for political separation; rather it is an expression of popular consent, or at least popular acquiescence, of the sovereignty of the state. This popular endorsement of the state's internal sovereignty confirms the state's position as a member of the society of states externally, thereby creating a link between the internal and external aspects of sovereignty and self-determination. This *passive* expression of self-determination is not as obvious as emerging nations are, which should be seen as *active* expressions of national self-determination, but it is no less significant. As the basis of a state's sovereignty over internal affairs and the state's external personality, self-determination takes on a new and more significant position than perhaps it is accorded when viewed as nothing more than a remedy to injustice.

Although this clarification is valuable, further issues related to it are not yet explained. If the link between self-determination and sovereignty is meant to be a precondition for international legitimacy, are states that cannot show evidence of popular sovereignty by definition illegitimate? If the answer to this is yes, then, by extension, is not *any* state containing emerging nationalism also illegitimate? If the answer to this is also yes, then *national* self-determination would seem to contain a robust and legitimate right to secession. The following section considers how popular sovereignty, political obligation and self-determination affect the question of state legitimacy and the constitutional arrangements within states, while section (iii) considers the question of secession.

¹² A similar point is made by Rodolfo Stavenhagen, 'Self-determination: Right or Demon?', in Donald Clark and Robert Williamson, eds., *Self-determination: International Perspectives* (London: Routledge, 1996).

(ii) *The internal aspect of sovereignty and humane governance*

Since self-determination can be both passive and active and is, in its passive manifestation, akin to popular sovereignty, it is vital to delve deeper into the specifics of sovereignty's internal dimension. To do this, it is useful to look at the formation of political society in the liberal democratic tradition again. As discussed in the previous chapter, political societies are created through a mixture of choice and necessity to fulfil both the basic needs and the desired ends of various human communities. The fundamental reason for the existence of political and social groups, especially PIFGs, is to serve the most significant interests of the group's members. Although necessity often plays a greater part than choice in these groups, liberal democratic theory stresses the importance of individual volition in this process and traces the genesis of the group and individual rights to this.

Stressing the role of individual choice in group formation helped elucidate the hierarchy of rights outlined in Chapter 1, but when considering the other side of the coin, that is to say the limits of such rights, the emphasis on volition proves somewhat difficult to systematise. The basic problem is that if individual or group choice creates a larger polity and/or endows it with legitimacy, there seems to be no restriction to another choice bringing it to an end at *any* point in the future. This is further complicated by the fact that, with the hierarchy of rights, the wishes and desires of each and every individual in a particular group must be perceived as meaningful, making it difficult to clarify when an association should change or end. For example, is a nationality acting in a 'popularly sovereign' fashion when serious dissent exists within its ranks? How small or how large must the percentage of dissent be before an act of self-determination (passive or active) ceases to be legitimate?

These challenging questions point to the indeterminacy created by the so-called 'consent theories' of sovereignty.¹³ The theories that fall under this broad heading take many shapes but share the common trait of being based ultimately on the democratic desires of the group (usually a nationality) taken as a whole. Self-determination in this context demands that the constitutional arrangements, whatever their exact configuration, reflect the desires of the 'the people'. However, Ivor Jennings's oft quoted point makes clear that this seems really easy on the surface, 'let the people decide', but, in fact, leaves out the

¹³ For developed examples of choice theories of obligation, see Henry Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987); Beran, 'A Liberal Theory of Secession', *Political Studies* 32 (1984), 23-35; Beran, 'A Democratic Theory of Self-determination for a New World Order', in Percy Lehning, ed., *Theories of Secession* (London: Routledge, 1998); and Daniel Philpott, 'In Defence of Self-determination', *Ethics* 105 (January 1995), 352-385.

answer to the question ‘who are the people?’¹⁴ One answer to this is that ‘the people’ should be taken as all persons in the state, but even if this were plausible for an overwhelmingly ethnically homogeneous ‘nation-state’ like Japan or Denmark, the vast majority of states are multi-national and/or have multiple PIFGs. As a result, something better is needed to address the situation caused by emerging nationalism.

A more productive approach is to blend the ideas of humane governance with the conclusions reached in Chapter 1 about the restriction of authority in groups. Humane governance is increasingly used in academic and policy circles and is differentiated from other concepts of governance by the emphasis it places on human rights, peaceful human empowerment, and democratic, rights-enhancing decision-making.¹⁵ The effect of this theory on self-determination, nationalism and sovereignty is to place human empowerment and human rights ahead of the arbitrary authority of a group or a state. In a general sense, it is entirely in line with liberal democratic ideas and, more specifically, it fits in well with the hierarchy of rights. As for the limits of self-determination, it was noted in Chapter 1 that a nation was meant to be the embodiment of the political will of its members but that unanimity was not required or expected for the actions to be legitimate, only that the actions and decisions could not be contrary to the well-being of the people in an overall or long-lasting sense. Provided this is the case, a nationality or other PIFG could legitimately demand a rather high degree of conformity from its members.

As Chapter 1 showed, the formation of social groups, especially PIFGs, involves consent and creates obligations and authority, and this process is even more apparent with states. As individuals and groups form or legitimate a state through their consent, they do so for ends that are ultimately in their own interests. Although states exist for many reasons, humane governance contends that their legitimacy rests on the state’s ability to provide an environment that serves its population’s needs and self-determined ‘goods’. In so doing, the individuals and groups making up the state are obligated to the state and agree to respect the state’s authority.

It should be noted that by accepting the state’s authority and the consequential obligations, the population accepts limitations on the absolute liberty they would, in theory, possess prior to the creation of such political

¹⁴ Ivor Jennings, *The Approach to Self-government* (Cambridge: Cambridge University Press, 1956), 56.

¹⁵ For a lucid, useful introduction of the concept, see Richard Falk, *On Humane Governance: Towards a New Global Politics* (Cambridge: Polity Press, 1995); Daniele Archibugi and David Held, *Cosmopolitan Democracy* (Cambridge: Polity Press, 1994); David Held, *Democracy and the Global Order* (Cambridge: Polity Press, 1995), Part IV in particular.

collectives.¹⁶ The duties imposed by states and the state's authority over peoples' lives are the natural consequences of any well functioning association. In its proper sense, authority is the right of a state (or another socio-political body) to control the functioning of the state and, *within limits*, its citizens' lives.¹⁷ In this context, obligation can be defined as the limitations placed on individual freedom resulting from the authority the state exercises. Both authority and obligation, indeed all the legitimate power of the state, arise from the transfer of freedom individuals make through their tacit or expressed consent for the state, a transfer made for the greater benefits achieved by the association.¹⁸ This is an important point, for without this, authority would be no more than the power to coerce. However, to view authority in this manner would be a misrepresentation of the concept, which in terms of humane governance is never distanced from its instrumentalist role. In this context, authority is coercive, but only insofar as the coercion is in the overall interests of the coerced. Authority, here, is much like Rousseau's 'General Will' which separated the individual from their particular motivations to force them to act in their general interest (i.e. their true interest) at all times.¹⁹ The result of this is a balance between the obligations a state may legitimately place on its members and their retained liberty while subject to its legitimate authority.

This balance is difficult to describe qualitatively with any exactitude, but it is surrounded by important guiding principles that give it a modicum of clarity. Like relations within groups, at an absolute minimum, the authority of the state cannot legitimately override basic human rights. Although an exact list of basic human rights is very hard to enumerate, it is relatively easy to argue that every *legitimate* state will respect at least the most basics rights such as, for example, life, conscience and freedom from torture, and, while these rights might be violated frequently in practice, it would be very difficult to argue that the states doing so exhibit a high degree of *internal* self-determination. Accordingly, states have a moral imperative to govern in a humane manner, so as to make their authority legitimate. However, the theories of self-determination, humane governance and consent demand more than this from states; they also set down the idea of democratic responsiveness as a yardstick by which to judge the application of authority and the imposition of obligations.

¹⁶ This builds on the premises taken in most contractual theories of the state. (e.g. John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1960); Thomas Hobbes, *The Leviathan* (New York: Collier Books, 1962), *et al.*)

¹⁷ *cf.* Beran, *Consent*, 5-15.

¹⁸ For a classic elaboration of tacit consent, see Locke, *Two Treatises*.

¹⁹ Jean Jacques Rousseau, *The Social Contract and the Discourses* (London: Everyman Library, 1973), 190-192.

This is not to suggest that only liberal democratic states can be self-determining. Self-determination does have its philosophical roots in liberal democratic theory and assumes a democratic or at least democratic backing for the state's authority, but neither it nor consent theory nor humane governance suggest that legitimate expressions of self-determination inevitably lead to liberal democratic institutions. Numerous peoples have given their tacit, if not their expressed, consent to forms of government and to associations that are not particularly democratic or even terribly rights respecting.²⁰ The point here is that for authority to be legitimate the state must reflect the interests of its population and it must maintain their approval or at least their willing compliance. In short, the state's population must exhibit a degree of self-determination, though this need not necessarily be *national* self-determination, for the creation or maintenance of a viable, singular national identity is not a necessary condition for a state's authority to be legitimately exercised (though most states seek to foster the development of a national consciousness in order to help legitimize their actions and existence).

This balance allows a state to exercise its authority while preserving the interests of individuals and groups within its borders, and it permits the creation of laws that are ultimately deemed to be in the interest of the public good even if they are not specifically attractive to a particular individual or groups. Examples of this could include limitation on travel or conscription. Many individuals may themselves be in the position of seeing no tangible benefit of such an obligation, but this is simply the trade off for the greater good of the whole society. In many cases, individuals may never actually receive any reciprocal benefit from such obligations in any overt or material sense of the term. For example, taxation of the wealthy may never yield any tangible benefit to them, nor may they ever have recourse to the public services their taxes support. Thus on the grounds of reciprocity as tangible reward, some people may not consider their contribution to be sufficiently worthy to warrant their continued allegiance to the state. Such an opinion, though plausible on the surface, does not bear up under scrutiny, as the basis of duties such as taxes to groups is not reciprocity in the sense of receiving immediately tangible benefit, but the intangible and, perhaps indefinable benefits of corporate society. Moreover, these duties are valid even when they are not codified, when they are the result of custom and even when the state was created by a previous illiberal action, such as conquest. As with PIFGs, what determines the legitimacy of a state is the degree to which

²⁰ For example, some Native American PIFGs have a great deal of power and authority that is based on the overwhelming, popular backing of their members yet observe a limited range of basic human rights and do not adhere to liberal democratic standards.

it is internally self-determining and acting in accordance with the principles of humane governance - in other words, the degree to which the state serves the interests of its population and provides opportunities for them to find meaning and fulfilment.

Of course, it must be remembered that states provide not only identity but also security for the enjoyment of individual rights at both the domestic and international level. They are (normally) the bodies that ensure social order, dispense justice and have the greatest responsibility to individual development by controlling or influencing education, housing, economic regulation, welfare and cultural policy. A degree of faith that they are in fact acting in the best interests of the members must, therefore, be extended to such collective bodies. The wholesale rejection of state authority and obligations would be folly in the extreme and an ultimately self-defeating proposition, as this would not be either possible in a practical sense or in the population's true, best interests as political association is intended to provide the individual with certain 'goods'. This does not deny the right of opposition or even the ultimate right to reform or abolish a state's institutions. Indeed, to deny the right of such ultimate remedies would undermine the liberal democratic basis of society.

The internal aspect of self-determination, then, is an ongoing and somewhat inscrutable balancing act between respecting the authority of the state and, at the same time, legitimising that authority through consent, which itself could be either expressed or tacit. Furthermore, the exercise of self-determination at this level could be either active or passive since it applies to associations of which the present-day population most likely did not themselves create but only inherited. In these circumstances, it would be illogical to expect every individual or group to exercise their right of self-determination through some form of expressed allegiance. Members of such collectives accept the authority of groups and states until such time as they see fit to use their right of self-determination *in an active manner* to oppose the sovereignty of the state.

The maintenance of state authority through a passive expression of self-determination by the individuals and groups in a state is most obviously accomplished by constructing and preserving institutions that not only fulfil the necessary conditions of basic human rights and minimally responsive government but also those that aim to develop genuine and meaningful relations between the state and the governed. Self-determination is meant to enhance popular sovereignty, and any scheme that would be inconsistent with such a principle would seem to run foul of this basic intent. Consequently, states have an obligation to developing inclusive politics, and it is for this reason that states seeking legitimacy (or at least its appearance) frequently embark on 'nation-

building'. In both theory and practice, the creation or the nurturing of an inclusive nationality by a state is a useful and important activity not only for states that aim towards the standards of humane governance but also for those hoping to minimize resistance from the population. As Chapter 1 showed, identity, particularly nationality, is deeply meaningful for most individuals, and the benefit of this for the individual citizen of a *national-* or *nation-*state is a direct identification with personality of the state and its internal institutions. Of course, it is not necessary and indeed may not even be possible for states to foster or promote a shared identity or nationality, but without the presence of the constitutional mechanisms to ensure that *all* their citizens' interests and identities are meaningfully and significantly reflected in and supported by the state, its authority could be called into question. The duty of providing democratic representation and meaningful respect for human rights for all nationalities and PIFGs within a multi-national state is very great, and begs the question of the length to which a state must go to ensure this and at what point an underrepresented or repressed group can legitimately assert its right of self-determination in an *active* manner to address this imbalance.

(iii) *Secession*

Secession brings the theoretical and practical difficulties surrounding self-determination and emerging nationalism to a head. Although, the active assertion of the right of self-determination does not necessarily imply the fragmentation of a state with multiple PIFGs into new, separate entities, the insecurity and the fear of instability ensure that any active application of the principle is a cause for concern internally if not internationally as well. There seems an impenetrable array of both practical and theoretical hindrances in the way of making a robust defence of self-determination that includes secession, and yet the liberal democratic imperatives that buttress self-determination make it difficult to argue against the possibility of legitimate political divorce if such actions were manifestly in the peoples' best interest and enjoyed overwhelming popular support.

The debate about whether a credible theory of secession exists has intensified in the post-the Cold War era as more and more states find themselves confronting emerging nationalism,²¹ but there are a few theoretical groupings or categories into which most positions can be placed: anti-secessionist, remedial right only, choice, national, and well-being arguments.

²¹ The reasons for the proliferation of such theories and the historical and strategic conditions that have led to it are taken up in Chapter 5 below.

Each of these will be considered in turn, but it is interesting to note that in all of the groupings, regardless of whether a specific theory defends a right of secession or not, there is little question that a right of self-determination exists in its passive form. The central issue across all the groups is not whether peoples' interests matter, for that is taken for granted, but whether and how their interests can be served by independence.

The essential point of the theories falling into the anti-secessionist category is that self-determination, regardless of the actions of a state towards its citizens, does not include a right of secession. Because it places a blanket ban on the fragmentation of states, this category could lead to the simplest of international norms: states are to be supported against all emerging nations (or any groups) that aim at independence. Some recent anti-secessionist commentaries have suggested that the right self-determination and a right of secession are two entirely different concepts and must be kept distinct.²² By this account, self-determination is a democratic right to participate in the political life of the state and a mechanism to protect basic human rights, yet the termination of the overall political association is both separate and illegitimate. This thinking is often traced to the overriding benefits and the legally binding nature of political membership in the state. As Buchheit indicates, the legal dictum that applies is *pacta sunt servanda*, that, all things being equal, agreements are binding.²³ By this line of thinking, the consent of the governed, whether tacit or expressed, is entirely binding even for succeeding generations. It was to this line of thinking that Abraham Lincoln subscribed. As he said in his first inaugural address in 1861, 'I hold that the Union of these States is perpetual. No State upon its own mere motion can lawfully get out of the Union.'²⁴ Lincoln, in fact, was willing to concede a very great degree of autonomy to the southern states (e.g. enforcing the Fugitive Slave Act and refusing to act against slavery in existing slaveholding states prior to 1862), while declining even to contemplate secession.

Of course, the difficulty with the anti-secessionist logic is that such blanket bans are blunt instruments and are open to many criticisms. The most obvious difficulty is that many states have been created as a result of secession, often without having the legitimacy of the fragmentation called into question, usually because the secession was overwhelmingly popular within the newly

²² Max Kampelman, 'Secession and the Right of Self-determination: An Urgent Need to Harmonize Principle with Pragmatism', *The Washington Quarterly* 16:3 (1993), 5-12.

²³ Lee C. Buchheit, *Secession: The Legitimacy of Self-determination* (New Haven, CT: Yale University Press, 1978), 20.

²⁴ Abraham Lincoln, 'First Inaugural Address' (4 March 1861) [<http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln1.htm>].

created state and internationally. For example, the international community endorsed most of the state creation following the First World War and during the era of decolonisation precisely because it enhanced popular sovereignty.²⁵ On the purely normative level, separating self-determination from secession is questionable in light of the principles of liberal democracy and consent theory. If popular sovereignty is to be valued as a safeguard of the rights and status of the people within a state, the right to alter or abolish that state cannot be denied, for without this reserved power, a state could inflict the most severe abuses on all or a portion of its population without the fear of a legitimate fragmenting taking place.

It might seem possible to make an exception to the anti-secessionist category and to limit secession only to the case of decolonisation or to political 'divorce' where all parties agree to the secession.²⁶ However, both cases fail to satisfy the demands of self-determination as it is understood in the liberal democratic tradition. If the enhancement and protection of rights and fulfilment for all citizens is the ultimate goal of self-determination and the sovereign state, it is hard to see how these exceptions necessarily achieve or work towards these ends. As for decolonisation, the 'exception' fails to identify accurately the real problem behind decolonisation, namely, unpopular and unresponsive rule. Colonialism can be condemned for many reasons, but arguing that it violates the right of self-determination for being 'alien' or 'foreign' rule misses the mark, as the real illegitimacy of colonial rule was its lack of popular support by those it ruled. Such a situation could easily exist or be worse within a state that has no experience of colonialism, and, yet, in these non-colonial cases would fall under the ban. Similarly, to grant an exception when the parties merely agree to separate might lead to a situation in which either or both of the new entities fail to enhance rights or actually to repress them. Both of these scenarios clearly are at odds with a rights based theory of self-determination and sovereignty.

It is for this reason that some scholars have focused on defending secession as a right used for remedial purposes only.²⁷ In remedial right only theories, no right of secession exists *except* when the group in question acts 'in

²⁵ These cases are examined more depth in Part II. Of course, it should be noted that whether the creation of states actually contributed to popular sovereignty is another matter.

²⁶ Michla Pomerance, *Self-determination in Law and Practice* (The Hague: Martinus Nijhoff, 1982); Malcolm Shaw, 'The Western Sahara Case' *British Yearbook of International Law* 49 (1978), 153.

²⁷ Although remedial theories have a long intellectual history, Allen Buchanan's recent treatment of the subject is arguably the clearest and most potent statement of the position at present. See Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991); Buchanan, 'The International Institutional Dimension of Secession' in Lehning, *Theories of Secession*; and Buchanan, 'Democracy and Secession' in Moore, *National Self-determination*.

response to serious and persisting grievances' and as a 'remedy of last resort to escape serious injustices'.²⁸ Although these conditions are far from specific, they establish parameters by which a state's legitimacy and its subsequent fragmentation can be judged internationally. Since self-determination is grounded in human rights and liberal democratic theory, persistent violations of individual rights and the standards of humane governance would certainly call into question a government's legitimacy and justify the fragmentation of the state provided that the aim of the secession was solely to redress serious injustices. Accordingly, the legitimacy of state fragmentation would be determined by the persistence and severity of the evils suffered by those attempting to secede and the degree to which the new state they aim to create reflects a correction of those wrongs.

The advantage of this theory is the equal emphasis it places on human rights and the necessity of those suffering the abuses to show sufficient cause for redress. As for the first of these, the emphasis on human rights and democratic governance fits well with self-determination's intellectual heritage. If a state's legitimacy is supposed to be based on its popular support, then the abuse of fundamental human rights ought to trigger an active assertion of a people's right to self-determination as a corrective to this, up to and including a right of secession. The emphasis placed on showing sufficient cause can be seen as a corrective to what one scholar has called 'vanity secessions', which are secessions based on motives that are ethically inferior to the serious and persistent abuse of fundamental human rights.²⁹ In this way, remedial rights theories permit secession but do so only in a highly conservative manner, thereby providing a defence against the (well-founded) accusation that secession is disruptive to international stability and security. By placing the burden of proof on the seceding party, remedial rights arguments ensure that the only legitimate cases of state fragmentation will be those where the protection and promotion of human rights and humane governance are the motivation. In any normative framework of self-determination, the challenge is to develop theoretical parameters that permit self-determination yet maintain a credible and workable degree of political obligation. Self-determination should never be responded to in a way that supports only one side of this important equation. The remedial rights only argument has the double-edged benefit of protecting a specific body of people on a specific occasion and promoting the general principles behind a liberal democratic conception of self-determination while also ensuring a stable

²⁸ Buchanan, 'Democracy', 25.

²⁹ Wayne Norman, 'The Ethics Of Secession and the Regulation of Secessionist Politics' in Moore, *National Self-determination*, 52-56.

framework for the application of these ideas through the setting of limits on the concept's application.

Although remedial right only theories provide some much-needed boundaries for the active application of self-determination, the emphasis on suffering as *the* criterion for the legitimisation of separation avoids the question of who can secede and what they can take with them in terms of land and resources. This seems to reopen some the issues that seemed settled about the legitimate holders of the right of self-determination and then to try and develop a remedial right of secession. For example, would religious congregations or even smaller groups, such as families, be legitimate holders of this right in this version and, if so, should other criteria such as the economic viability, the size or the degree of ethnic or national cohesion of a group be added to the list of requirements? If the persistent, widespread and serious violation of basic human rights is what matters, why should the size of the territory in question or the ethnic composition matter? What alternative do remedial rights theories hold for states, like former Yugoslavia, where the violation of rights was evident but the geographic mixing of PIFGs was such that viable secession seemed impossible in practical terms?

If it were only a matter of adding further criteria, remedial rights theories might serve as a basis for a normative framework for addressing secession, but there are more issues that are not addressed at all. One is that, regardless of how theoretically correct it is to justify secession as a remedy for serious and ongoing wrongs, it is far from easy in practice to judge accurately what constitutes 'grave violations', how much suffering is 'enough' to trigger a legitimate, active exercise of self-determination and who is competent to judge these criteria. While it might be acceptable to say that the 'court of world opinion' is a good place to look for verdicts, this court can be manipulated by those who might be more able than others to parade their suffering effectively on the international stage. It must also be noted, the international community has to balance other, potentially conflicting norms and a host of practical and strategic factors at the same time. Nonetheless, the indeterminacy surrounding this, while great, can be reduced, in theory at least though often not in practice, through diligent collection and reporting of human rights violations and humane governance initiatives that seek to judge and address the actual degree of democratic deficit.³⁰

However, a more fundamental problem with remedial theories is precisely the concentration on abuse. While the gross abuse of human rights

³⁰ The role of the media, intergovernmental and non-governmental organizations in collecting and reporting such information would be critical for success in this process.

and the persistent and systematic denial of humane governance would legitimize the active application of self-determination, there seems no good reason why a more expansive list of rights, or even democratic participation should be denied to a group that has not had the 'privilege' of persecution. To limit secession to remedial use only would encourage 'rouge states' to abuse all or part of their population to all lengths short of that which might break the (undefined and perhaps indefinable) minimum threshold at which the right to self-determination could be actively applied legitimately. As a result, limiting the cases of legitimate secession to remedial circumstances only might restrict the passive, democratic aspect of self-determination within states and might eliminate the possibility of legitimate political divorce based solely on the expressed, self-determined wishes of emerging nations.³¹ Thus, the remedial right only position is too limited to be the sole basis for an encompassing international norm of self-determination.

On the other extreme of the debate from the anti-secessionist position are the choice theories of secession.³² The arguments that fall under the heading of choice theories revolve around the central belief that there is an intrinsic value in democratically organised societies and in the exercise of political autonomy and that the expressed choice of a group to secede may be a democratically legitimate action, regardless of the group's motivation. Choice theories do not require evidence of prolonged or severe abuse by the state. According to choice theorists, the value of autonomy and the democratically expressed will of the people in favour of secession outweighs whatever value might be attached to the maintenance of the existing state. As Philpott clarifies, '[w]hat justifies self-determination is not the mere fact of the members' choice, but their realization of democratic autonomy, their increased ability to steer their fate. Autonomy here is a realized good.'³³ The circumstances giving rise to the secessionist movement are also of little significance, for, regardless of what specific participants themselves claim at the time, the real aim behind all secessions is the increase of autonomy.³⁴ In this conception of self-determination, the liberal democratic heritage is most openly visible and promoted. The expression of political will, whether in the shape of plebiscites or mass action takes on a liberating and enriching function for all those involved

³¹ Cases like the 'velvet divorce' of Czech and Slovak Republics in 1992 come to mind as cases that would not be valid under a remedial right only theory.

³² See for example Philpott, 'In Defence'; Daniel Philpott, 'Self-determination in Practice', in Moore, *National Self-determination*, 79-102; Beran, 'A Liberal Theory'; and Beran, 'A Democratic Theory'. Also see Ronald S. Beiner, 'National Self-determination: Some Cautionary Remarks Concerning the Rhetoric of Rights' in Moore, *National Self-determination*, 158-180, for a more limited endorsement of this concept.

³³ Philpott, 'Self-determination', 82.

³⁴ Philpott, 'In Defence', 375-376.

since the act of secession seeks a 'good' towards which they themselves desire and work. This approach to self-determination and secession also obviates the need to produce evidence of suffering that remedial right only theories necessitate. If the clearly expressed will of the people to separate from a state is *the* legitimizing factor, then it seems superfluous to require any group to endure human rights abuse. This has the tremendous added bonus of setting a higher standard of democratic accountability for states, which, again, reinforces popular sovereignty and respect for humane governance.

However, the emphasis on the expressed will of the people as *the* legitimating principle creates almost as many problems as it solves. One major difficulty is the failure to identify and limit the number and types of groups that can legitimately exercise the secessionist element of the right self-determination. Most choice theorists speak of a people with a common allegiance, a shared culture or an affective tie that binds them, which legitimizes their efforts to separate from their current state, but such formulations fail to show why these groups should have priority over any others if choice is the most important factor in their secession. Many choice theorists suggest that only groups with a specific territory and with economic viability can legitimately opt for secession or they go silent on the issue,³⁵ but such qualifications seem insubstantial. By placing such weight on the importance of choice, it seems implausible to then limit the choice-making groups to only those in neat, territorially confined parts of the state from which they wish to split, taking enough (but not too much) of the former state's resources to be economically viable once independent.

Another problem with choice theories is the potential for abuse. In addition to the threats of unlimited fragmentation and 'vanity secessions', Buchanan points out that plebiscitary theories of secession can actually prove to be anti-democratic, in that a minority group can hold a majority to ransom by endlessly threatening secession, and in so doing, monopolize the state's attention and an unjust share of the state's resources.³⁶ In effect, this abuse of the right self-determination runs counter to the democratic logic behind popular sovereignty. Although technically correct in calling this undemocratic, Buchanan fails to highlight the larger confusion surrounding the issue, for without knowing the boundaries of the *demos* in question it is impossible to determine whether an action is actually democratic. Additionally, choice theories emphasize democratic, as opposed to *liberal* democratic, values. Putting aside Buchanan's concern that choice theories can be used by minorities to wrest

³⁵ Philpott, 'In Defence', 369-371 and Beran, 'A Democratic Theory'.

³⁶ Buchanan, 'Democracy', 21-24.

concessions from a majority, there is too much silence about the rights of individuals within newly created states in choice theories and no mention about the protection of dissenting minority groups that might be trapped within the new states. All that can be inferred is that such individuals and groups would have the same right to leave or secede from the new state as the original group did from the previous state.³⁷

If choice theories are lacking because they do not clarify sufficiently what groups may secede, then nationalist theories of secession by contrast are far more restrictive. As Part II outlines, nationalist theories were employed frequently in the twentieth century and contend that nations are culturally, historically and socially distinct collective entities and, as such, hold the right to secede. Many authors, not just those who perceive a specifically national right of secession, argue or assume that seceding groups must have a high degree of unity and permanence to be legitimate.³⁸ Chapter 1 contended that, of all PIFGs, nationalities are the most developed in political terms, and, because many can draw on shared culture, history, ethnicity, homeland, etc. to maintain their unity, nations are the most likely groups to challenge the *status quo* within state, and, as such, they make the best (and perhaps only) case for being a 'special category' that can exercise a right to secede from a state.

Looking at the matter in ideal theory helps to confirm this conclusion, for in idealised conditions, it could be maintained that *any* group or *any* individual could exercise the right of self-determination actively and 'secede' on virtually any grounds. However, by adding the 'national' qualification, the employment of a right of secession is limited in a way that preserves the democratic basis of the right while adding more manageable conditions. Firstly, beyond permanence and unity, nations are democratic (or at least demotic) embodiments of their members' identity and desires, and, as such, they merit greater ethical significance than non-PIFG social and political groups and, because of their relative size and degree of political, social and economic unity and activity, they are more capable than any other PIFG group of meeting the requirements of sovereign statehood. Nationalities also bring their own territorial dimension to the secession process. Although the introduction of territory can be deeply problematic, virtually all nationalities have a 'homeland'

³⁷ Beran, 'A Liberal Theory' and 'A Democratic Theory' hints that this might be the case.

³⁸ See, for example, Beran, 'A Liberal Theory'; Beran, 'A Democratic Theory'; Simon Caney, 'National Self-determination and National Secession: Individualist and Communitarian Approaches' in Lehning, *Theories of Secession*; Kai Nielson, 'Liberal Nationalism and Secession', in Moore, *National Self-determination*; David Miller, *On Nationality* (Oxford: Oxford University Press, 1995), Chapter 4; Ralph Predmas, 'Secessionist Movements in Comparative Perspective', in Ralph Predmas, S.W.R. de A. Samarasinghe and A. Anderson, eds. *Secessionist Movements in Comparative Perspective* (London: Pinter Publishers, 1990).

and for most, this is not only a geographical space but carries with it a spiritual significance that binds people to it and normally evokes a high degree of loyalty and willingness to sacrifice to secure or obtain it.³⁹ While having a distinct geographic space is essential for acquiring statehood, the emotional attachment to land can become so visceral that any practical application of self-determination can be too focused on this one dimension, thereby thwarting a settlement and distracting the parties away from other crucial component of self-determination such as human rights.

Unfortunately, nationalist theories of secession fail on several other counts. Perhaps the most important is the way national theories treat any nation as having the same entitlement to secession. Although it has been contended that part of a nation's ethical worth is its democratic basis, it must be remembered that the term democratic is employed broadly and refers to the equality of membership and the crude articulation of public will that nations embody. While some nations are fully democratic in terms of participation, institutions and the reflection of popular sovereignty, nations are frequently subject to elite manipulation and have only marginally liberal or, indeed, illiberal institutions and policies.⁴⁰ In its simple form, the national theory of secession extends the right of secession somewhat blindly, equally to liberal and illiberal nations alike, but attempting to limit its application to 'liberal' nations is a tricky enterprise at best. For one thing, exactly what makes a nation 'liberal' is not immediately certain and even if criteria can be teased out, it is still far from obvious why this should confer an automatic right to secede.⁴¹

Of all the theoretical approaches to secession, perhaps the most vague at first glance is the 'well-being' defence of secession.⁴² It is somewhat helpful to begin by describing the affinities that well-being arguments have with remedial right theories. At the simplest level, well-being arguments, like remedial right theories, seek to protect the physical security and basic rights of individuals and groups by legitimizing secession that is carried out for these reasons. But, a concept of well-being also incorporates values that are beyond security and basic human rights, such as the welfare, interests and aspirations of the people within a society. The source of the ambiguity is the stress placed on well-being, which appears on the surface to be a deeply subjective matter.

³⁹ For more on the territorial dimension of nations and nationality, see Smith, *Ethnic Origins*.

⁴⁰ This point is well made, in a wider context, by Erica Benner, 'Is There a "Core" National Doctrine?' *Nations and Nationalism* 7:2 (2001).

⁴¹ For the difficulties in defining the idea of a 'liberal' nation, see Tamir, *Liberal Nationalism*.

⁴² For example, see Avishai Margalit and Joseph Raz, 'National Self-determination', *Journal of Philosophy*, 87 (1990).

However, the uncertainty about this list of values, which itself is not exhaustive, is entirely compatible with the democratic nature of self-determination, for it permits flexibility and greater applicability. To clarify, by not specifying what well-being means in absolute sense, each group or society is left to determine what is essential for their well-being, what they consider to be the 'goods' for which their society exists. In this sense, well-being is a concept that fits nicely with the democratic dictum of allowing people 'to find their own good in their own way'. Raz and Margalit speak of an 'intrinsic argument' in favour of self-government as a means to promoting the well-being of the body politic. Building on this point, Simon Caney maintains that the right of self-determination, including secession, can be justified by the benefits that autonomy and self-government deliver to the well-being of the people in question.⁴³ At the core of well-being arguments is the assumption that states ought to be popularly sovereign and that states have a fundamental duty to serve their citizens interests, thereby extending the internal aspect of self-determination to the external level.

However, few authors delve into any detail about what well-being means and how it might translate into international norms to deal with secession crises. One thing that helps with this is the relatively seamless fusing of well-being arguments to national theories of secession.⁴⁴ Doing so gets around a huge number of the difficulties previously mentioned. Firstly, it removes questions about which groups' well-being should be considered. This is not to suggest that PIGFs' or other groups' well-being is insignificant nor does it necessarily mean that only nationalities have a right to secede; it just indicates that nations, for the reasons outlined above, will be the only groups that *normally* have a right to secession, whereas other groups that lack the political, social and economic status and viability to achieve sovereign statehood will have a higher burden of proof to meet in order to secede legitimately.

This also addresses the 'other side of the coin', that is, the duties of the sovereign state that has multiple nationalities or PIFGs within its borders. In such cases, it is the responsibility of the majority or the dominant state-sponsored nationality (if indeed there is one) to ensure that the well-being of minority nationalities and other PIFGs are sufficiently respected, lest they spawn and give legitimacy to emerging nationalism. Although it may be that emerging nationalism within an existing state can best ensure the well-being of the members of that nationality, this alone may not be sufficient to legitimize

⁴³ Caney, 'National self-determination' 163-175.

⁴⁴ Many authors do so without noticing or articulating the benefits. See Margalit and Raz, 'National self-determination'; Caney, 'National Self-determination' 163-175; Miller, *On Nationality*, ch. 4.

secessionist campaigns. Since well-being can (and should) be interpreted loosely, it is easy to maintain that when multi-national states protect physical security and basic human rights and make genuine attempts to secure the interests and aspirations of *all* the individuals and groups within their confines, the legitimacy of secession by emerging nationalities is highly questionable. Because the results of secession are uncertain, emerging nations would have to show not only that their well-being would be discernibly and markedly improved by secession but that the state from which they are seceding has manifestly failed to ensure their well-being.

From this it is clear that well-being arguments are not as open to abuse as choice theories nor as restrictive as remedial right only theories. This introduces another dimension to the popular sovereignty/secession equation that is incredibly important (and notoriously overlooked) when the theoretical basis for international norms of secession is considered. Consistent, theoretically coherent and rigorous international norms should not only lay down conditions that legitimize secessions but they should also provide incentives for existing states to accommodate national and other PIFG minorities within their borders. International responses to movements for self-determination should never support only one side of this important equation. As Viva Ona Bartkus notes in her detailed examination of groups' decisions for secession, the reaction of states to the challenges and demands of potential secessionists is a key component in the course of action ultimately taken by groups threatening the state.⁴⁵ Accordingly, states hoping to avoid fragmentation have an interest in seeking to support the well-being of such groups and the international community, in turn, should hold up norms that facilitate and encourage states to make such efforts. As the well-being approach to secession places demands on both sides of the dispute, it goes some way toward providing a sound basis for international responses to emerging nationalism and to demands based on self-determination.

However, this modified well-being argument needs further refinement. Its greatest deficiency, which it shares with the national theories, is the insufficient protection of individual rights within the larger scheme of self-determination. To correct this, the hierarchy of rights mentioned in Chapter 1 should be applied. Doing so insures that self-determination and secession are kept firmly within the *liberal* democratic tradition.

The theory of self-determination and secession put forward here, then, places the well-being of the individuals within a nationality or other PIFGs in

⁴⁵ Viva Ona Bartkus, *The Dynamics of Secession* (Cambridge: Cambridge University Press, 1999).

the uppermost position. It assumes that nationalities are the type of group most likely to seek secession and normally make the best case for seceding; that, ultimately, individuals form and/or maintain national identities (even if inherited) because they are deeply valuable in some way to them; and that, since nations are made up of and exist for the benefit of the individuals who compose them, national rights are secondary to individual rights. Additionally, because self-determination and secession must work *only* towards ends that increase the well-being of *all* individuals, emerging nations have the burden of showing that the any scheme that dramatically increases autonomy within or fragmentation of the existing state is aimed at these goals. Some important limitations on the right of self-determination and secession follow on from this.

One of these limitations strikes at two particularly troublesome aspects of post-secession states, namely the problem of post-secession minority enclaves and the protection of citizens' rights in the new state. The logic of secession holds that, following independence, the nationality that was formerly an oppressed or poorly served minority will be governed better now that they form the majority in the newly created sovereign state, but many theories of secession ignore or only weakly address the plight of the *new* minorities invariably created by the separation. However, the incorporation of the hierarchy of rights and the emphasis on well-being and humane governance ensures that no campaign for self-determination should be legitimate that would result in a new state or a devolved federal region that permitted violations of human rights or restricted to only a portion of the citizenry the opportunities for meaningful participation in the public life of the new entity.

Moreover, if a newly independent state were to contravene the hierarchy of rights on which this framework for self-determination is based and failed to look after the well-being of its minorities, it would be furnishing the minority in question with grounds for redress or even secession that would be identical to those the new state employed against the multi-national state from which it seceded previously. Although this (theoretically) risks 'infinite divisibility' it is highly unlikely, because of the stringency of the conditions that have to be met before secession could be valid.

It should be stressed that this approach to self-determination and emerging nationalism sees secession very much as a last resort. Although the remedial right only argument was rejected as too limited, the theory of secession proposed here is still rather conservative. Provided a multi-national state's actions are not contrary to the principles of humane governance, the well-being of the individuals living there is probably best served by finding a solution within the state (e.g. autonomy, federalism, consociational government, etc.) rather

than through secession. No PIFG could *legitimately* secede without paying due regard to the just obligations required by the association they are attempting to alter or abolish. Such just obligations are the natural consequences of any well-functioning state and form the other side of the sovereignty coin. Accordingly, a state can expect a relatively high degree of compliance from the PIFGs living in its borders. In effect, this formula gives both sovereign states and emerging nations targets *and* limits. The target is to create and maintain institutions that respect the rights of all of the state's citizens and govern in their interests, and the limit is to respect the authority of the state, a respect generated by the benefits provided by being part of the state.

This formula for self-determination and secession does not concentrate on what limits or conditions can be placed in front of a seceding group before the secession is acceptable. Rather, it approaches the issue with the premise that secession is a legitimate, if extreme, action *provided* the protection of human rights for *all citizens* of the new state is *equal to or greater than* the protections given to all citizens of the state from which the group seeks separation. The use of the term 'citizens' rather than 'nationals' or 'peoples within the state' is deliberate and is crucial to the success of the formula. By using the term 'citizens', self-determination hopefully becomes a more inclusive norm, treating the majority and minorities in the state equally. The principle is directed to *all individuals* who are subject to the power of the state and those who would be under the sovereign authority of the new entity, thus emphasising the superiority of individual and human rights when confronting emerging nationalism.

This argument also does not privilege national or ethnic claims based on historical evidence or even directly on the sufferings (real or imagined) of the seceding groups. Instead it places the spotlight on the actions and policies of current and 'potential' states, thereby directing the scrutiny where it ought to be in a normative framework that seeks above all to ensure and promote humane and liberal democratic government. Following this argument, the state attempting to thwart a secession cannot rely on vague appeals to sovereignty and non-interference or put forward convoluted legal opinion and precedent, yet, at the same time, the nationality or other group seeking independence cannot rely on 'ancient claims' or 'evidence' of past wrongs to justify the rightness of their cause to the court of world opinion whose hearing is selective and whose verdicts are fickle at best. Instead a challenge is created.

In the first instance, it is a challenge for the existing state to accommodate to the greatest possible extent its minorities through existing mechanisms of political reconciliation and inclusion, such as consociational government, constitutional reform or autonomy. However, it also challenges the

seceding group to examine its programme in light of the requirement to accommodate not only its own members but also all minorities in the new state and to ensure that these groups will be well governed, secure and respected and fully part of the workings of the new state. Failure to do so might legitimize secessionist actions against this new state and garner the support of the international community. This requirement alone might have a most profound and sobering effect on emerging nationalist movements.⁴⁶

(iv) Implications for international norms

The accuracy and utility of these theoretical observations related to self-determination, sovereignty and secession must ultimately be judged by their ability to provide a sound and practicable normative framework for international responses to the challenges presented by emerging nationalism and identity politics. On the normative level, the challenge is, as Buchheit notes, ‘to suggest acceptable guidelines for the operation of the principle of self-determination which, for obvious reasons, may not accede to the demands of every parochial sentiment but which must also avoid an uncritical affirmation of the supremacy of the “sovereign” state.’⁴⁷ What Buchheit calls for is nothing less than a way of working through at least some of the challenges of self-determination and emerging nationalism that this study seeks to address, and while the interpretation and analysis of self-determination and its related concepts presented in Part I may not entirely meet such a rigorous test, it goes some way to providing the philosophical foundation for a normative framework from which coherent and effective international responses might be developed.

Self-determination’s origin in the liberal democratic tradition of political thought and its connections with individual autonomy offer a powerful basis on which norms could be constructed by which PIFGs could assert their identity in the internal workings of the state of which they are a part, all the while enhancing the legitimacy of the state externally to the international community on the basis of popular sovereignty. The challenges of self-determination increase markedly when PIFGs, most notably nationalities, seek to alter their relationship to the state of which they are a part, and these difficulties increase further still when emerging nationalism threatens the existence of the state, which by necessity involves the international society of states.

⁴⁶ As Bartkus notes in *The Dynamics of Secession*, secessionist groups can be dissuaded by a significant increase in the ‘costs’ of secession, and such demands could be seen as a significant increase in such costs.

⁴⁷ Buchheit, *Secession*, 7.

While no one theory of secessionist self-determination is entirely successful in revealing coherent norms, self-determination's grounding in liberal democratic theory, specifically its orientation towards the achievement and insurance of human rights points to a logical and coherent approach by which the international community could develop consistent and practicable norms to guide their responses to such situations. What can be called the well-being argument for secession strikes at the core of this tradition, given its emphasis on achieving and maintaining human rights as well as providing not only a principled, last-resort mechanism for the fulfilment of national aspirations but also a means to limit the active application of self-determination in such a way that might ultimately permit independence as a form of redress of serious wrongs by a state. At the same time, this method places the well-being of the individual and humane government at the centre of the debate and works to incentivise all parties to find solutions that ensure at least the maintenance if not the significant enhancement of the rights and the meaningful inclusion of all citizens within any given state.

However, as was stressed at the outset of this study, an examination of the theory and philosophical lineage of self-determination, while critical, is insufficient to explain fully why or even how the international community responds to emerging nationalism and cannot on its own come to grips with the full extent the challenges that self-determination entails. To get closer to this goal, as Buchheit articulated it above, it has be acknowledged first that theory can be very separate from practice and that even when they are conjoined, the *context* in which ideas are understood is of fundamental import to norms, both in terms of what actors are part of this creative and evolutionary process and what other strategic and normative factors are at work. In other words, there is a dynamic connection between the ideas and the context in which they are active that constructs a normative framework and shapes its evolution.

With the theoretical observations of Part I in mind, Part II of this study attempts to analyse selected interpretations and applications of self-determination in an effort to trace the evolution of the concept up to the late-twentieth century, just prior to the end of the Cold War. The aim of Part II is to highlight the international community's normative responses to self-determination, emerging nationalism and state fragmentation by drawing careful attention to the intricate connections between ideas, structures and forces that were at work at key junctures during this lengthy time-span and to evaluate whether there has been any congruence between the theoretical framework outlined in Part I and the understanding of self-determination that states have collectively held and acted on over time.

As the following, selective narrative will reveal, the evolution of these normative responses has not been a teleological progression. Since the first appearance of self-determination as an international political concept in seventeenth century Europe, the idea has been debated, interpreted and employed in various ways leading to different outcomes that have had a range of implications for the future. Part I suggested the basis on which a coherent and practicable normative framework might develop, yet the nature, scale and scope of these responses have evolved over time for many reasons, but in each case, there is a link to the structure of the international system that is far more than coincidental. Accordingly, a principal concern of the following chapters is to examine in what ways and how extensively changes in the structure of the international community and the forces affecting it have played in the understanding and use of self-determination.

Part II – History

Chapter 3

From ‘concept’ to ‘principle’ – The birth of nationalism, the construction of international society and the Paris Peace Conference

As Part I illustrated, self-determination has a long and complex intellectual history, the theoretical roots of which (i.e. liberalism, democracy, nationality) stretch back at least to the fifteenth and sixteenth centuries if not much earlier. Most of the conceptual building blocks were extant in Europe by the end of the seventeenth century, and while an international normative framework for understanding and interpreting these ideas was not yet formed, the context in which such a system could be constructed was at hand.

As this study contends, the challenge of creating consistent and coherent norms is not only a function of an exchange of ideas but also of the practice of states and the ways in which practice and theory are interlinked. As states respond to events and to each other, they begin to construct shared understandings about their relations and, importantly, the mechanisms through which they conduct their interactions. These structures of communication and interaction in turn facilitate the development of shared norms and consensus about their responses.

By the end of the eighteenth and the beginning of the nineteenth centuries, the concept of self-determination was increasingly operating within the existing states of Europe at the time that nationalism rose to prominence as a driving force of politics and international activity. It was also during this critical time period that the modern system of international relations coalesced and formalized, offering the first opportunities to construct norms in an organised and coherent fashion. This process, the simultaneous advancement of the ideas of self-determination and nationalism on one hand and the construction and formalization of an international society of states, continued throughout the nineteenth century in an uneven but highly interconnected manner. The increasingly formalized relations of mutually recognized and intersubjectively understood political entities propagated more structured interactions that enlarged and strengthened the dialogical space in which ideas, norms and actions could be debated and understood collectively.

Part II attempts to outline the trajectory self-determination over time by looking at selected examples that reveal how the international community interpreted and applied the concept as it constructed normative responses to

emerging nationalism. As the context and meaning of ‘international society’ changed so much during this time period, the interconnections between the formation of the society of states and the construction of norms related to self-determination will merit particular attention. This chapter concentrates on the earliest phase of this process, when the nascent international community, itself undergoing unprecedented institutionalization, first acknowledged the significance of the ‘political principle’ of self-determination as a normative issue. Throughout this time, which spans roughly from the end of the eighteenth to the middle of the twentieth centuries, there was a surge in the potency and attraction of nationalism, leading to number of political movements that threatened the nascent state system, presenting the fledgling community of states with a challenge that could not be ignored. These early responses to emerging nationalism mark the starting point of the development of the norms of self-determination and highlight the correlation between the ideas and the actors who employ them, illustrating much about both.

(i) Early reactions to self-determination and emerging nationalism

The peace of Westphalia in 1648 internationalised the idea that states were independent and sovereign over their own internal affairs owing in large part to their internal distinctiveness. Over the next century and a half, states of Europe accepted as a general principle that each of them was unique and had a separate, equivalent legal status to one another. However, while conducted in an increasingly common dialogue that reflected and reinforced this legal equality, the interactions between these states were not institutionalized or particularly structured. Also, many states in Europe underwent tremendous internal transformations during this period, leading to the creation and institutionalization of national or proto-national identities. This process suggests an unspoken acceptance and increased popularity of the internal aspect of self-determination, though this expansion had more to do with pragmatism and efficiency than ideological commitment. Most states (then as now) saw a utility in harnessing the power of limited popular consent and shared identity, as it could serve the ends of the state effectively.

In some cases, such as in England and Switzerland, there is much evidence to suggest that states exhibited an expression of passive self-determination, as representative institutions permitted a relatively high degree of correspondence between the state and those governed. These nation-building exercises spread rapidly in the late seventeenth and the eighteenth centuries. It

would also be accurate to say that some of the struggles of this time could be characterised as emerging nationalism. The Dutch revolt against the Spanish in the late fifteenth century, leading to the eventual recognition of the United Provinces of the Netherlands at Westphalia; the successful Swedish revolt led by Gustavus Vasa against the Danes in 1520; the rejection of Spanish rule in Catalonia and Portugal in 1640, leading to temporary autonomy for the Catalans and to independence for the Portuguese, all fit the model of emerging nations.¹

However, it would be inaccurate to say that these developments constitute entirely satisfactory examples of self-determination and emerging nationalism. The main reason is that the degree to which these acts were accurate reflections of *national* will is rather uncertain. There is little to separate these cases from the run-of-the-mill internal power struggles that took place within states and empires from time to time throughout 'pre-national' history. These pre-national conflicts often had more to do with the actions of dissatisfied local élites or anger over the distribution of patronage than with the manifest desire of a nationality to steer its own political fate. And yet, the institutions set up in each of the cases mentioned above did (arguably) result in more popularly responsive forms of government, and, more importantly, in each case, there was a groundswell of popular support for the actions, illustrated most frequently by the willingness of large sections of the populace to take up arms and to die in the cause.²

Aside from this point, it is also significant that the international reactions to these crises (the central concern of this study) were virtually non-existent or, when they did occur, were directed almost exclusively by commercial and/or strategic interests. While such motives surround the international responses to self-determination today, the nature of the reactions and the context in which they take place are remarkably different in the present context of international affairs. Firstly, the concept of international society or a community of independent but co-operating states was, *at best*, nascent during this time. If such a community did exist it was almost exclusively limited to Western Europe, and even here the nature of diplomatic interaction was not integrated, significantly institutionalized or even consultative, and the aim was not to achieve or foster consensus. Accordingly and secondly, there is little evidence of attempts to develop norms related to state fragmentation (or to any other type

¹ These examples do not take into account earlier and more diverse struggles that could be interpreted as examples of emerging nationalism. A credible case could be made that the (briefly) successful, rebellion of the Vietnamese against Chinese rule in the first century CE, led by the still venerated queen Trung Trac, was a case of an emerging nationalism, as was the Jewish resistance to Roman rule at about the same time.

² For example, the case of England is illustrative. See G.P. Gooch, *English Democratic Ideas in the Seventeenth Century* (New York: Harper Torchbooks, 1959).

of international disruption for that matter). There were of course established 'rules of the game' for international relations well before the nineteenth and twentieth centuries, but it seems clear that these were vague and haphazardly structured and there were few if any *deliberate* attempts to create international normative practices, at least any related to self-determination.

Nonetheless, in the late-eighteenth century, with the American and French Revolutions, the political theory associated with national self-determination was employed directly and boldly in such a way that the states of Europe were forced for the first time to respond to the particular challenges posed by movements for self-determination. However, it has to be noted that, while this connection with self-determination can and should be made, the vocabulary and the mentality of those who debated these ideas and reacted to these events were not explicitly tied to the concept, which at that time was not yet fully formulated or articulated as such. Similarly, as noted before, the international context in which these events and ideas were at work was also lacking in any tight structure that might have allowed the formation of truly international normative responses. At this time, the dialogical space needed for this was limited, and yet, these events prompted reactions and stimulated activity that can be seen as an early and significant guidepost in the development of norms related to self-determination and emerging nationalism.

The separation of thirteen of Britain's North American colonies in 1776 has since proved to be a major turning point in the norms related to self-determination, not only because of the way in which the Americans tried to justify their secession and the British and foreign reaction to this, but also because of the precedent it set for the future. The understanding and interpretation of their own revolution has, over time, greatly shaped the approach Americans have taken with regard to emerging nationalism and has influenced, whether consciously or subconsciously, the American efforts to shape the international normative framework of national self-determination.

As with most cases of emerging nationalism, there were numerous motives that led to the American colonists' rebellion. However, despite the specifics, the leaders of the American uprising saw the root cause as being a denial of democratic rights, and, for their part, successive British administrations resisted the American actions on the grounds that their right to govern for the whole of their territory and populations was beyond dispute. The conflict was, thus, explicitly centred on the issue of self-government and political obligation and the eventual separation of the American colonies from the Crown had everything to do with competing national identities and self-determination.

When in 1764, following the defeat of the French and their allied Native Americans in North America, the British government increased its intervention in the affairs and finances of their American colonies. In a series of parliamentary acts aimed, at least in part, to pay for colonial defences and for the recent war with France, the British government increased the taxation on its American colonies and ended what many Americans considered to be the long-standing practice of allowing the colonies to govern themselves concerning most issues including taxation. The termination of this period of 'statutory neglect' brought up many questions related to the limits and nature of government. Coming nearly within the living memory of the English Civil War, the happenings in America seemed to the colonists to threaten the very liberties that they felt had been so hard won and affirmed in the Glorious Revolution. As James Otis of Massachusetts, a leading member of the 'Sons of Liberty', noted, the imposition of taxation on American without adequate (i.e. direct) representation was a violation of the freedom affirmed by parliament's assertion of authority over the Crown in the previous century.³

Parliament's imposition of the Stamp Act in 1765, and the subsequent refusal even to consider the American petitions for its repeal or amendment seemed to many on both sides of the Atlantic to be a complete breach of the nature of the political arrangements between the Crown and the colonies. Many American commentators saw this and the ensuing British actions as a direct contravention of the understood relation between the people and the governed. Interestingly, this understood relationship was, for the American leaders, not a matter of specified tenets but a mixture of (often erroneous) beliefs about the British constitution and the increasingly popular and well-circulated political theories of Hobbes, Harrington and Locke. In particular, the idea of the social contract was ever more popular, and many American statesmen argued against the imposition of taxes not on the basis of historical or constitutional precedent but on the grounds that such actions were in violation of the reasons for which political society was founded in the first instance. Many also saw the abrogation of democratic rights as going against God's natural order or natural law.⁴

In the proceedings of the First Continental Congress, even James Galloway, a Pennsylvania conservative who sought tirelessly to retain the link

³ James Otis's speech, 'Rights of the British Colonies Asserted and Proved' delivered at a town meeting in Boston in 1764, is quoted extensively in Page Smith, *A New Age Now Begins* (New York: Penguin, 1976), Vol. 1, Chapter 2.

⁴ The opinions and sentiments of the American revolutionaries are captured in numerous works on the causes of the rebellion. One of the best treatments is Smith's *A New Age*. Likewise, see Edmund S. and Helen M. Morgan, *The Stamp Act Crisis* (New York: Collier Books, 1963) and Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1967).

with Britain, acknowledged that the bond between the mother country and the colonies could be maintained only through a democratic uniting of political will in a British sanctioned, American legislature. In the resolutions of that assembly, the delegates argued, *first*, that they were a singular people who ‘by the immutable laws of nature’ as well as by English legal precedent were holders of certain basic human rights, including life and liberty, and who, in order to protect these rights, could only be bound through their own consent.⁵ In the American ‘Declaration of Independence’ of 1776, Thomas Jefferson, the principal author, echoed themes that were also closely aligned to the theories of self-determination and popular sovereignty. The ideas that government was consent-based and meant to serve the interests and rights of the governed form the cornerstone of the American appeal for independence. In short, the end of government is the interests and rights of the nation and that ‘whenever any form of Government becomes destructive to these ends, it is the Right of the People to alter or abolish it and to institute new Government, laying its foundations on such principles, and organising its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.’

By phrasing their secession in such terms, the Americans were, in the terminology of the previous chapter, actively asserting the principle of self-determination and popular sovereignty. Regardless of the specific language used to explain it, in so doing, the Founding Fathers of the American republic enhanced and promoted the concept as a viable and unavoidable political principle. In Britain, Edmund Burke and Lord Chatham were tireless campaigners for the rights of the American colonies, who, although stopping short of advocating independence in 1776, saw a democratic legitimacy to the Americans’ appeals. Burke, whose approach to America and governance in general was greatly shaped by his experience in Ireland, viewed the entire situation as a civil war and, in so doing, acknowledged the responsibility incumbent upon a state to govern in a manner that reflected the wishes and interest of its various peoples. As Burke noted his speech regarding American taxation of 1774,

if, intemperately, unwisely, fatally, you sophisticate and poison the very source of government, by urging subtle deductions, and consequences odious to those you govern, from the unlimited and illimitable nature of supreme sovereignty, you will teach them by

⁵ The resolutions can be found in full in Henry Steele Commager, ed. *Documents of American History* (New York: Appleton, Century, Crofts, 1963).

these means to call that sovereignty itself into question...They will cast your sovereignty in your face.⁶

Opinions similar to this were not uncommon in England. Most pro-American commentators agreed with Burke that, while outright independence was not justified, some accommodation had historical precedent and was necessary to ensure 'good government'.⁷ In 1777, the Earl of Abingdon went even further and made an implicit link to the theoretical foundations of self-determination and nationalism, arguing that, by their declaration and acts of independence, the Americans had 'followed the teachings of John Locke and had accordingly established a new civil society over which Parliament had no jurisdiction'.⁸

Although the reactions to the Americans' struggle outside of the British Empire were governed far more by *Realpolitik* than by ideological persuasion, there were many who saw more in the American cause than an opportunity to exploit the distracted British. Among these were the Physiocrats of France, who saw in the Americans something of the idealised, self-governing agrarian society they promoted. Additionally and hardly surprisingly, various liberal political theorists such as Rousseau, Condorcet and Jean Paul Marat, were very supportive of the American cause and promoted ideas and policies that were philosophically compatible with the concept of self-determination.⁹ Also, the very large number of Europeans who voluntarily sailed for America to fight with Washington's armies cannot be dismissed. To be sure, many were seeking only military experience and/or fame, but the future political activities of the Marquis du Lafayette and Tadeusz Kosciuszko, both of whom fought for American independence, indicates that the commitment to popular sovereignty was very great amongst some foreign volunteers.¹⁰

There is little question that nationalism played an essential and overt role in the events of the French Revolution. Indeed, it is no exaggeration to suggest that the French Revolution ushered in nationalism in its truest sense, that is, the

⁶ Edmund Burke, 'Speech on American Taxation' (1774) in David Fidler and Jennifer Welsh, eds., *Empire and Community: Edmund Burke's Writings and Speeches on International Relations* (Boulder, CO: Westview Press, 1999), 115.

⁷ Chatham (William Pitt) and his followers were major proponents of what would be called today devolution. In fact, David Hartley, a prominent MP who advocated conciliation, proposed a federal solution to the American problem, which was not unlike the 'home rule' stance eventually taken by successive British governments with regards to Canada, Australia, New Zealand and Ireland in the nineteenth century. On this point, see Richard Van Alstyne, *Empire and Independence: The International History of the American Revolution* (New York: John Wiley and Sons, 1965). Lord Durham's *Report on the Affairs of British North America* (1839) [<http://faculty.marianopolis.edu/c.belanger/quebechistory/docs/durham/>] is also confirmation of sorts that such a position became official British policy after the American Revolution.

⁸ Van Alstyne, *Empire*, 130.

⁹ Van Alstyne, *Empire*, 47-48 and 47n.

¹⁰ The role Kosciuszko played in the Polish uprisings of 1794 is discussed later in this section.

mass mobilisation of a nationality's popular political will for the advancement of the nation. However, since *emerging* nationalism refers herein to movements by nationalities that are attempting to redefine the parameters of their group's relationship with the authority inside of a multi-national state, the French Revolution does not appear to fit this type.

A more accurate way of describing the French Revolution in the terms used in this thesis would be as an *internal* expression of nationalism and self-determination that radically transformed the constitution of the state without causing its actual fragmentation. Many of the key figures of the revolution saw the events around them in such terms. The 'Declaration of the Rights of Man and the Citizen' (1789) stated that *all* individuals were equal before the law and were constituents of the nation, and, proceeding from that stance, all legitimate authority flowed directly from the nation.¹¹ This application of liberal democratic principles marked a radical watershed in the history of nationalism and self-determination, and, although not strictly an example of emerging nationalism or of self-determination by name, its impact on the theory and practice of self-determination and the responses to it is of such moment that to ignore it entirely would be a mistake, particularly with regards to the reactions outside of France.

The international reaction to the French Revolution is informative. Although the states of Europe were not responding to the fragmentation of a state, *per se*, they faced some of the same questions raised by emerging nationalism in the future. Such questions included the thorny, perennial issues associated with self-determination: what government to support, whether intervention was warranted and what ideas should guide the responses and, as a consequence of that, what ideas were to be supported and which were to be opposed. Following so closely on the heels of the American Revolution, the French case presented a problem for many in England who had supported the American cause, as well as in the United States, where the former rebels now had to determine whether to support revolutions elsewhere.

Amongst the Americans, still technically in an alliance with the French government, support for the revolution was initially unrestrained and impassioned, with most Americans perceiving the struggles as an expansion of the ideas they had espoused in their war of independence. Thomas Jefferson, who in 1789 was serving as the Washington administration's minister to France, not only enthusiastically supported the resistance to the sitting government but also assisted and encouraged the revolutionaries in what he saw as 'the most

¹¹ Declaration of the Rights of Man (1789) [<http://www.yale.edu/lawweb/Avalon/rightsof.htm>].

sacred cause man was ever engaged in'.¹² Jefferson, like so many other Americans, saw the revolution in exactly the same terms as the American secession: it was an affirmation of the rights of co-nationals to assert their authority to ensure the blessings of representative and responsive government. Jefferson's philosophical commitment to the revolutionary cause is borne out by his assistance in drafting the 'Declaration of the Rights of Man and Citizens' and his on-going consultation with the leaders of the early stages of the revolt.

Given Britain's later response to the French Revolution, it is worth recalling that the initial reaction in Britain to the events in France was not dissimilar to that in the United States. For the growing number of British 'liberals' and for many others as well, the feeling was that the revolution would bring about an end to unresponsive and unjust rule. Even Pitt, who would prosecute vigorously the British armed opposition to the revolution in 1793, said with optimism in 1789 that 'the present convulsions in France must sooner or later culminate in general harmony and regular order... And thus circumstanced, France will stand forth as one of the most brilliant powers of Europe. She will enjoy just that kind of liberty which I venerate.'¹³ Echoing Jefferson's exuberance, Charles James Fox considered the fall of the Bastille as 'the greatest event that ever happened in the history of the world', and pronounced the new French constitution as 'the most stupendous and glorious edifice of liberty which has been created on the foundations of human integrity in any time our country'.¹⁴ In the early days of the revolution, one of the very few voices of opposition was Edmund Burke. Given his stance on the rebellion in America, Burke's reaction surprised many, including Jefferson who noted in 1791 that 'The Revolution in France does not astonish me so much as the Revolution in Mr. Burke'.¹⁵ Few others voiced outright opposition, preferring instead to welcome cautiously the changes, while inwardly speculating that it would all end in tears.¹⁶

The significant turning point in international opinion regarding the French Revolution was the increasingly violent nature of events in France. The execution of the king was almost universally seen as an act of mob hysteria and evidence that the few early prophets of doom such as Burke and, in the US,

¹² Quoted in Samuel Eliot Morison, Henry Steele Commager and William Leuchtenburg, *The Growth of the American Republic* 6th edn. (New York: Oxford University Press, 1969), Vol. 1, 300. For an informed and detailed analysis of Jefferson's views on the French Revolution, see Merrill D. Peterson, *Thomas Jefferson and the New Nation* (New York: Oxford University Press, 1970).

¹³ Quoted in Asa Briggs, *The Age of Improvement, 1783-1867* (London: Longman, 1979), 130. For a concise yet powerful discussion of the reaction to the Revolution amongst British liberals, see Briggs, *Improvement*, 129-137.

¹⁴ Both quoted in Briggs, *Improvement*, 130.

¹⁵ Quoted in David Fidler and Jennifer Welsh, eds. *Empire and Community: Edmund Burke's Writings and Speeches an International Relations* (Boulder, CO: Westview Press, 1999), 33.

¹⁶ Typical of those in this camp were Alexander Hamilton and John Adams whose subsequent views are discussed below.

Alexander Hamilton had been correct in their assessments. While many liberals, such as Jefferson and Thomas Paine remained wholly supportive of the aims (if slightly more guarded as to the means) of the revolution, the core of influential foreign opinion became openly hostile. Yet, within the numerous rejections of the revolution, there were more intricate arguments that highlight a growing attention to the normative issues raised by self-determination and how to interpret, shape and legitimate its application.

Burke's opinion, that the revolution was 'the greatest evil', was, literally, almost directly opposed to Jefferson's, and, on the surface, it presents a difficult obstacle to interpreting his reaction (and others') to popular sovereignty. Upon closer examination, there seem to be two ways of explaining Burke's negative reaction to the French Revolution that might also be valid for the others who initially welcomed it and then opposed it. Firstly, it is possible to conclude that Burke, like the American opponents to the French Revolution, most notably Alexander Hamilton and John Adams, was deliberately inconsistent in his response to these events; that Burke and the others might have been in favour of *particular* movements while opposing others. Because inconsistent reactions to self-determination and emerging nationalism remain such a dominant feature of international politics today, it is worth investigating this interpretation of Burke's views afresh as applying Burke's thoughts in this manner might prove illuminating for analysing contemporary challenges related to self-determination.¹⁷

Following this first possible interpretation, Burke's reactions are explicable because of the practical considerations specific to the French case, the most important of which was the violence and chaos of the revolution. For Burke, then, the potential for internal savagery and international conflagration were worries that overrode any potential benefits such an exercise of popular sovereignty and nationalism might bring. That Burke was not joined in this opinion by many until after the violence escalated is of little consequence since Burke was utterly convinced that the revolution would be very bloody and chaotic. In this interpretation, both Burke and those who subsequently opposed the revolution did so on *pragmatic* grounds as opposed to ideological ones, which endorses the view that judgements about the legitimacy of self-determination, *then and now*, must always come second to practical considerations¹⁸ or, more

¹⁷ It should be noted that Burke did not refer specifically to self-determination and that the following interpretations of Burke's writings intentionally rework his thinking to fit hold them up to circumstances well outside of the context of his time of writing.

¹⁸ For a recent statement that is perfectly in line with this approach, see Max Kampelman, 'Secession and the Right of Self-determination: An Urgent Need to Harmonize Principle with Pragmatism' *The Washington Quarterly*, 16:3 (1993), 5-12.

likely, that Burke realised that theoretical considerations must be weighed simultaneously along with a host of practical concerns.

Such a conclusion would not only influence the understanding of this period of nationalism but later historical and contemporary instances of emerging nations. Accordingly, it is very important to ascertain the degree to which this explanation is accurate and satisfactory. It should be noted first that there is ample evidence to support this interpretation of Burke's thought. Even a cursory examination of his writings shows that what Burke found most distressing about the French Revolution was its potential for internal chaos and international violence, specifically the violence that would be (and proved to be) injurious to the European balance of power, which Burke saw as a positive, stabilizing force. The amount of time and the detail Burke devoted to these concerns, as opposed to the ideological considerations related to self-determination, indicates that, for Burke, practical concerns of security and national interest took absolute precedence over the force of democratic ideas in the determination of policy.

This interpretation seems even more applicable to those who initially supported the revolution and then rejected it following execution of the king and the growing violence. Especially for them, the violence that flowed from these acts of self-determination trumped whatever good they delivered or promised to the people of France. For most international observers, then, the response to self-determination in France was limited by the practical circumstances, rather than by kind of liberal democratically oriented normative framework suggested in Part I. If correct, this interpretation would be significant not only for the analysis of subsequent cases of self-determination but could support the view that pragmatic considerations have been historically uppermost when the international community responds to emerging nations.

However, there is another plausible interpretation of Burke's response. By this rendering, Burke was not inconsistent in his interpretation of and commitment to the ideas related to self-determination but understood these principles in a consonant manner, resulting in his approval of the American Revolution and his condemnation of the French. Far from denouncing the French Revolution simply for its violent potential, Burke can be interpreted as denouncing it because he saw no legitimate purpose to the violence of the revolution, arguing that any suffering would be liberty-denying rather than a necessary means to a genuinely democratic and liberty-enhancing outcome. As he argued frequently, the revolution was likely to create a military dictatorship

rather than yield any practical benefit to the people of France.¹⁹ For Burke, the revolution sought to destroy the traditions and customs on which the French nationality (as *he* perceived it) had been built. The revolution sought to destroy monarchy, nobility and the priesthood, on which the entire social and political fabric of the country rested.²⁰ Moreover, since Burke felt that each country's constitution was organic and specific to their particular national traditions, he feared that the misguided interpretation of popular sovereignty the revolution advocated would spread throughout Europe and cause a further corruption of the concept. Thus, in this reading of Burke, the French Revolution is seen as a denial of internal self-determination rather than assertion of it, whereas, in America, the revolution could be cast as a legitimate attempt to reassert the liberties that the Americans held as British subjects.²¹

This rendering of Burke's thought is slightly harder to apply to those who at first supported and then opposed the revolution, but it is possible. For example, Pitt's decision for war against France in 1793 was not based on a rejection of the legitimacy of self-determination or even popular sovereignty *per se* but on the grounds that Britain's vital interests and security were put seriously at risk by the *external* actions of the Committee for Public Safety and the Directory.²² Indeed, most British opposition to France was against the French government's threatening foreign policies rather than its legitimacy before its own people or even the ideas of liberty it (nominally) espoused. Likewise, in the United States a quarter of a century after the outbreak of the French Revolution, Thomas Jefferson conceded in letters to Lafayette and John Adams that the course the revolutionaries took in France led them to abuse and even destroy the principles of self-government and liberty, but he firmly asserted that the original intentions of the revolution were legitimate.²³

It is easy to see both of these elucidations as at least partially accurate, and the result seems to be a somewhat confusing picture. However, this confusion should be accepted as it leads to the probably accurate conclusion that, as the ideas related to self-determination and nationalism first entered European politics on a large scale with the French Revolution, the reactions to it are difficult to analyse with accuracy. Since the idea of self-determination was still *in statu nascendi*, its should not be surprising that these initial responses are

¹⁹ This is a frequent theme of Burke's *Reflections on the Revolution in France* L.G.Mitchell, ed. (New York: Oxford University Press, 1993).

²⁰ Burke, *Reflections* and Burke, 'Thoughts on French Affairs' (1791) and, in particular, his 'Remarks on the Policy of the Allies' (1793) in Fidler and Welsh, *Empire*, 236-253 and 264-286.

²¹ It must be pointed out that Burke never advocated independence for the Americans, arguing instead for conciliation as the best application of the principles of popular sovereignty, though he accepted American independence *ex post facto*.

²² For a discussion Pitt's views and those of others, see Briggs, *Improvement*, 129-183.

²³ These letters (1816) are quoted at some length in Peterson, *Jefferson*, 935-936.

difficult to interpret, yet as the later sections of this study assert, subsequent international responses to self-determination often prove similarly difficult to understand. As noted before, part of the reason for this is that self-determination presents both theoretical and practical challenges, and international reactions to emerging nationalism and the fragmentation of states frequently involve the clashing of a range of ideas and strategic conditions that affect any normative response. What is certain is that the American and French Revolutions introduced the principle of self-determination (if not by name) into the milieu of European politics. As Alfred Cobban poignantly observed:

By proclaiming the principle of popular sovereignty, the French revolutionaries fundamentally altered the prevailing conception of the state and opened a fresh chapter in the history of the nation state...The great achievement of revolutionary political thought, for good or evil, was the conception of government as a manifestation of the democratic will, and the identification of the state as the sovereign with the people.²⁴

The reaction of the Washington administration when it faced the thorny issue of whether or not to receive Edmund Charles Genet as the official Minister Plenipotentiary of France in 1793 reflected this. Since the National Convention and not the king had appointed Genet, his formal acceptance by the American government would have amounted to recognition of the new government and, consequently, of the Revolution itself. In a cabinet meeting in April, the issue was hotly debated, with Hamilton strongly opposed and Jefferson heavily in favour of Genet's acceptance. Jefferson pointed out that by refusing to receive Genet, the United States would officially:

deny to other nations that principle whereon our government is founded, that every nation has a right to change [its constitution] of its own will; and externally to transact business with other nations through whatever organ it chooses, whether that be a King, Convention, Assembly, Committee, President, or whatever it be. The only thing essential is the will of the nation.

Washington and a (narrow) majority of his cabinet could not fault Jefferson's logic and duly received Genet, thereby enhancing the force of self-determination as a principle of international diplomacy.

(ii) The nineteenth century: the creation of normative responses

As momentous as these developments were, the greatest alteration to self-determination over the course of the following century did not relate

²⁴ Alfred Cobban, *The Nation-State and National Self-determination* (London: Collins, 1969), 247-248.

directly to the theory of the principle, its growing acceptance or even the increased frequency of emerging nationalist movements. Instead, during the nineteenth century, the context of international relations began to shift significantly. These alterations included the formation of a semi-permanent institutional arrangement that facilitated diplomatic interactions in Europe, the (limited) democratization of political processes, the expansion of the European system of states to other parts of the globe through trade, increased communication, diplomacy and empire. This contextual change meant that as the minority nationalities and Primary Identity Forming Groups (PIFGs) across Europe sought to alter their political and social standing, the foreign actors involved were more numerous, more organised and more significant to the whole process, all of which were alterations that emerging nationalist movements increasingly made use of. Although there were many factors that account for this contextual shift, the two most significant were the increased cohesion of the international community of states and the expanding influence of 'public opinion' on the formulation of international policy.

As for the first of these, during the nineteenth century, a coherent international *society* of states emerged in Europe, between whom the meaning and importance of self-determination and its applications and limitations could be weighed. This process developed independently of self-determination's growing appeal but altered dramatically how responses to international events (including emerging nationalism) were formulated. Before the invention of the Congress system and the idea of a 'Concert' of Europe, there was simply no established international forum through which meaningful normative judgements could be made about movements for self-determination or about anything else for that matter. Although the international institutions of the nineteenth century were only a shadow of those that arose after the First World War, they were revolutionary in their own right. The opinions and reactions to the American and French Revolutions discussed in the previous section took place in a rather unstructured environment and the influence of a particular opinion was largely limited to the policy of the author's government. By the mid-nineteenth century, there was a clearly discernible diplomatic mechanism by which policy alternatives could be discussed and responses decided upon. This not only created the potential for concerted and agreed action that would be truly international, but it created a dialogical space in which the powers of the day could form *normative* approaches to the strategic and ideological hazards that (the increasingly frequent) emerging nationalist movements presented.

Secondly, 'public opinion' had an increased impact on the formulation of international policy in nineteenth century Europe. This change was itself two-

fold: the meaning of 'public opinion' was shifting and the responsiveness of politicians to it was increasing. At the beginning of the nineteenth century, the 'public' whose opinions 'mattered' was limited to a very narrow melange of titled aristocrats, influential politicians, some wealthy landed gentry and merchants (and, depending on the country, the clergy) representing, in total, only a tiny proportion of the actual populace. By the latter part of the century, as the electoral franchise increased dramatically in most European countries and as awareness of international events expanded with the growth of public education, literacy and, crucially, the mass media, politicians were more and more accountable to the opinions of an increasing number and a more socially diverse group of their constituents.

The European politicians of the nineteenth century found themselves more constrained by the opinions of a more coherent, larger and more demanding electorate who simply would not be ignored with impunity. While certainly not as democratically inclined or responsive as politicians in twentieth century states, those in authority faced new pressures to justify and explain their actions to a wider circle of people. The growth of the mass media, aided by the invention of the telegraph, brought the international disruptions, dangers and conflicts that emerging nations entail into a far greater light and also placed the task of forming responses under far more scrutiny than had ever been the case. While somewhat limited in their impact at the time, these two important changes to the context of international affairs continue to be hugely important for facilitating democratic action and ideas and, by extension, self-determination and emerging nationalism.

The illuminating case of the 'January Insurrection' in Poland in 1863-1864 illustrates the degree to which these contextual alterations began to affect the trajectory of self-determination. If ever there was a case that defines the concept of an emerging/submerged nationality, then Poland is it. As Norman Davies remarks, 'Poland, it is said, is a phoenix which repeatedly rises from the ashes of its own destruction'²⁵, and the January Insurrection was only one episode in that nation's long and tortured history of emergence following national suppression. As such, the events reveal much about emerging nationalism and the position of self-determination in the context of nineteenth century international relations.

It is useful to recall that Poland in the late-eighteenth century, while enjoying a brief period of independence, became the focus of a revolution in

²⁵ Norman Davies, 'The effects of the January Insurrection on East Central Europe' in Bela Kiraly, ed. *The Crucial Decade: East Central European Society and National Defense, 1859-1870* War and Society in East Central Europe Series (New York: Brooklyn College Press, 1984), 37.

government that attracted the attention and support of many leading liberal democratic thinkers and politicians. During the tumultuous reign of Stanislas Augustus Poniatowski (1764-1795), described as 'undoubtedly the most enlightened and most universally educated Pole of his generation',²⁶ Poland underwent a remarkable national awakening that was heavily influenced by the ideas of the enlightenment and the American and French Revolutions, and this national revival was inspired by liberal thinkers, leading to significant political reform along liberal democratic lines.²⁷ Stanislas sought out gifted scholars and writers for his court and initiated educational reforms with the aim of reviving Polish literature, history and traditions.

He encouraged political theorists, many of whom were liberals and influenced by the works of Locke, the French Jacobins and the American revolutionaries, thereby stimulating political debate about the transformation of the Polish state and its institutions. Many outside of Poland, most notably Jean Jacques Rousseau, took a great interest in the creation of the Polish constitution of 1791, which was designed to make the Polish diet, the *Seym*, more national and more representative of the whole Polish nation. Although this constitution was stillborn, owing to the second partition of Poland by Prussia and Russia in 1793, the national awakening proved to be much more long-lasting, fuelling a series of rebellions that sought to revive Polish statehood and national identity in 1794 and in 1830-1831.

Thus, when the Poles rose again in January 1863, they could draw on a powerful national identity that now had the added tradition of national resistance to foreign (primarily Russian) subjugation. In fact, the rising of 1863-1864 was even more popular with the whole of the Polish nationality than the earlier insurrections, with a much higher proportion of rural and urban poor supporting the actions of their leaders. Not only were the demonstrations in the cities that preceded the insurrection composed of ordinary Poles of virtually all walks of life, but those who fought in the Polish forces were entirely volunteers and were also more socially diverse than in 1830-1831.²⁸ Moreover, the goals of the insurrection were more overtly democratic than in previous risings, with the leaders promising a liberal enfranchisement act and a new constitution with even broader representation than had previously been the case.

²⁶ B. Dembinski, 'The Age of Stanislas Augustus and the National Revival', in W. Reddaway, *et al* eds., *Cambridge History of Poland* (Cambridge: Cambridge University Press, 1941), 116.

²⁷ For an overview, see Dembinski, 'Stanislas Augustus'; Aleksander Gieysztor, *et al.* eds., *History of Poland*, 2nd edn. (Warsaw: Polish Scientific Publishers, 1979) and Norman Davies, *God's Playground: A History of Poland* (New York: Columbia University Press, 1982).

²⁸ Eligiusz Kozłowski, 'The Social Structure of the Insurrection Army, 1863-64', in Kiraly, *Crucial Decade*, 108-118 and Ryszard Bender, 'The Urban Population in the January Insurrection' in Kiraly, *Crucial Decade*, 119-133.

As had been the case in the past in Poland, the insurgents of 1863-1864 placed a great importance on the external façade of their rebellion; however, the shifting context of international affairs meant that foreign relations could play a greater and perhaps decisive role than in the previous risings, *if*, as the insurgents calculated, they could make full use of these changing circumstances. The leaders of the insurrection in Poland, Polish émigrés abroad and supporters of Poland in foreign countries were fully cognisant of this, and how they represented their struggle to the international community of the day reveals as much if not more about international norms of self-determination at that time than they do about the character the Polish insurrection itself.

When the insurrection began on 22 January 1863, sparked by the botched conscription into the Russian army of thousands of Poles who were considered 'revolutionary', the Poles had a permanent and recognized base for diplomatic activity. The Bureau of Polish Affairs, occupying much of the Hôtel Lambert in Paris, functioned very effectively as the Polish foreign office abroad, complete with fully staffed departments occupying different rooms. From here, the Poles, under the direction of Prince Wladyslaw Czartoryski, who took orders from the various insurrection leaders, masterminded and controlled the external contact with the community of states in Europe. The activities of the Bureau²⁹ show that Czartoryski and his agents understood very well the prevailing attitudes of their audience and that their careful packaging and presentation of their cause to foreign governments and to the mass media was calculated to play on the sympathies and ideological commitments of the Great Powers.

For some time, the Bureau had been lobbying the various powers of Europe to intervene on their behalf and to press Russia for concessions that would eventually lead to independence, and this continued to be the main aim of their policy during 1863-1864. The central question facing Czartoryski and the Bureau was how best to pursue this goal, as there were a number of avenues open. The Poles had a strong historical argument in their favour, as there was ample evidence of their long existence as a distinct PIFG, as a nationality and, though briefly, as a sovereign state, and the Great Powers at the Congress of Vienna in 1815, which included Russia, had jointly agreed that Polish nationality would be recognized constitutionally and respected by Russia following its

²⁹ There are very few sources that are not in Polish that interpret the activities of the Bureau during the 1863-1864 revolt, and the most detailed analysis, by Jerzy Zdrada, 'Foreign Policy During the January Insurrection' in Kiraly, *Crucial Decade*, 148-168, must be treated cautiously as it is based on Polish sources and has no references or bibliography. Where this source is referred to, all comments have been checked against other available primary and secondary sources for corroboration.

absorption of the Duchy of Warsaw, a promise that had not been kept.³⁰ Czartoryski could also argue that an independent Poland would provide a check on Russian power, thereby providing a buffer zone between Eastern and Western Europe. In the end, the Bureau correctly gauged that foreign support could not be won by touting treaty commitments and strategic promises alone.

There were two main themes in this crisis with which the international community resonated and on which the Poles played heavily: the Russians' persistent and serious failure to respect Polish nationality by not promoting 'good government' for the Poles and the intense suffering that the Polish people were enduring at the hands of their Russian overlords.³¹ The diplomatic contact between the other Great Powers and Russia and the frequent public statements by the Powers were the chief mechanisms by which the increasingly distinct society of states within Europe communicated and exchanged ideas about this matter (and others). These indicate that both of these themes were repeatedly taken up as matters of concern and formed a significant part of the diplomatic intervention related to the Polish crisis. The frequent iteration of these points during the crisis *may* even suggest the early development of a normative response to emerging nations in the mid-nineteenth century. A closer examination of the language and the tone used in the diplomatic traffic and the popular press reveals much about this hypothesis.

As for the first of these themes, many Powers held an historical commitment for the flourishing of Polish nationality. The repression of Polish institutions, the Polish language and the restriction of the Roman Catholic Church angered many, particularly in France and Britain where the enjoyment of such beliefs and practices were considered basic human rights. As mentioned before, Polish exiles had worked effectively for many years to build sympathy for their cause by highlighting these restrictions, but it would be fair to say that this sympathy had never led to the direct intervention the Poles desired. However, Alexander II, the reforming Russian Emperor who had in 1861 freed the Russian serfs, was planning liberal reforms and genuine *national* development for Poland. The main changes for Poland included the establishment of a Commission of Public Worship, the reopening of 'national' institutions such as scientific academies, universities, art and literary societies, the return of the right of petition, a Council of State with Poles serving as members to discuss further

³⁰ Similar guarantees were sought and obtained from Prussia and Austria, who also divided up Polish lands. For more on this, see H. Montgomery Hyde, 'The Congress of Vienna', in Reddaway, *et al.*, *Cambridge History of Poland*, 257-274.

³¹ It should also be noted that there were significant strategic concerns that also resonated with the other European powers, some of which encouraged intervention and others making this less likely, so these more emotional appeals were of considerable import.

changes and the direct election of Polish town counsellors.³² In a nutshell, what Alexander offered the Poles was significant step towards full national autonomy within the Russian Empire. For the Great Powers (and many Poles) independence, even if it could be won, was not considered necessary for securing Polish interests. Of paramount importance was the *right* that Polish nationality should be respected and that the Poles were governed in a manner that the Poles accepted.

The proposed reforms seemed to promise this, and the liberal democratic nature of the Emperor's intentions was appreciated abroad. As an article in *The Times* in 1861 put it:

Alexander II has plainly learnt wisdom from the lessons which have been of late read to Royalty... His father, his father's ungrateful ally [the Austro-Hungarian Emperor], and some half-dozen of the minor sovereigns whom they protected have fallen under the most grievous calamities, and all for the same reason, - that they have ignored the *national and individual rights which now form part of the political creed of Europe...* Alexander has made concessions which, though not as large as the advanced Liberals desire, ...show that the world has made some progress since 1831, and even since 1849. The Emperor has at least recognized the *right* of his Polish subjects to ask for reforms, even when those reforms involve the concession of something like nationality.³³

Alexander himself accepted the premise behind this statement, writing in 1861 that he would spare no effort to ensure the welfare of his Polish subjects, while asserting the principle that, in return, he should expect their loyalty.³⁴ A leading Polish émigré, Count Zamoyski, accepted the ideas underlying this but summed up the feelings of many Poles, reportedly saying that '[t]he country will accept the reforms with gratitude, but at the present moment these are but nominal. The country now depends on their being carried into execution.'³⁵

However, the reforms did not lead to better government for the Poles, for, as the Poles feared, the promised reforms were never fully implemented, thereby strengthening their argument that the well-being of the Polish nationality *within* the Russian Empire was insecure at best. Nonetheless, when the various European states began their diplomatic intervention in early 1863, official contact was directed principally at encouraging the Russians to push through the promised reforms and to govern more humanely rather than at

³² The reforms in Poland are discussed in detail in A.P. Coleman, 'Poland under Alexander II: The Insurrection of 1863', in Reddaway, *et al.*, *Cambridge History of Poland*, 366-376.

³³ *The Times* (28 March 1861). Emphases added.

³⁴ Alexander's letter to Gorchakov (Russian Foreign Minister), n.d., printed in *The Times* (20 March 1861).

³⁵ *The Times* (4 April 1861).

supporting independence.³⁶ Lord Russell, the British Foreign Secretary, admitted in parliamentary debates on 8 May 1863 that Russian policy was creating ‘a lasting sense of resentment, and an enduring belief that the Poles never can rely on the policy of the Russian government.’ However, he concluded that:

I do not mean to be to say that the institutions which suit England are exactly those which would suit Poland, or any other country which could be named; but what I say is essential is that the persons who govern, whether they are named by the municipal councils or by the Emperor himself, or are chosen by the suffrages of the electors, *should be persons who have the confidence of the nation* - in the performance of whose promises the nation confides.³⁷

Thus, although there was considerable international pressure placed on the Russian Emperor to act, the international position was that autonomy, leading to better government, should be the aim of their intervention.

However, the Poles also saw that one of the surest ways of increasing the momentum for intervention abroad would be to highlight the suffering of the Polish people and to ensure that the mass media, particularly in Britain and France, were well supplied with information about the Russian ‘atrocities’.³⁸ In this task, the genuinely brutal treatment meted out by the Russians aided the émigrés’ efforts. Already gripped by the situation in the region, the popular press, particularly in Britain and France, were full of stories of the mass executions without trial of suspected rebels, the sacking of villages by Russian troops, and the excessive force used by Russian troops and the police against even the smallest and most peaceful demonstrations.³⁹ The ferocity and the nature of the attacks suffered by the Poles was (in part correctly) perceived as confirmation that Alexander II had no real intention of implementing his reforms, thereby increasing the view that independence was the only real chance the Poles had for securing their rights.

³⁶ Zdrade, ‘Foreign policy’, 155-162; Lord Russell’s (British Foreign Secretary) letter to Lord Napier (British Ambassador to Russia), dated 2 March 1863, printed in *The Times* (6 April 1863); Extracts of the notes of Spain, Sweden and Italy to Russia and extracts of the replies, printed in *The Times* (7 May 1863); Drouyn de Lhuys’s (French Foreign Secretary) letter to the Duke of Montebello (French ambassador to Russia), n.d., printed in *The Times* (29 April 1863).

³⁷ Lord Russell, speaking in the House of Lords, 8 May 1863, reported in *The Times* (9 May 1863). Emphasis added.

³⁸ Zdrada, ‘Foreign policy’, 149-150. There were also numerous meetings in Britain, France and in Sweden in support of the Poles before, during and after the rising at which Polish émigrés spoke of the abuse suffered. Whether or not the supply of this information flowed directly from Czartoryski and his agents (and there is much to suggest that the Bureau was the source), there is clear evidence that British and French politicians were moved by the contacts they had with Bureau members.

³⁹ The examples are far too numerous to mention here, but reports in *The Times* (17 April 1863) are a typical example of the Russian actions and the way such events were reported in Western Europe.

In contrast to the potency of statements by the various powers regarding Polish national rights, constitutional arrangements and the strategic calculations, the public reaction to Polish suffering was potent, and the demands for action on these abuses fell on the doorsteps of policy makers. There can be little doubt that what actions the states of Europe took against Russia were generated principally by the sense of public outrage over what would today be called human rights abuses inflicted on the Poles. Policy makers were pushed into action by and frequently spoke of the anger and disgust felt within their respective countries, and the diplomatic notes sent to the Emperor usually referred specifically to this type abuse as being outside of the bounds of the proper behaviour of a sovereign.⁴⁰ Although it is necessary to point out that the active 'public' that followed these events and pushed their politicians was far smaller than in the twentieth century, there is no mistaking the link between the popular press, the public anger and the actions of politicians on the diplomatic front, at least on the part of the British and French governments.

Although the evidence of a moral clamour and the effect it had on encouraging a tougher stance over Poland is apparent, the diplomatic intervention of the powers for a change in Russian policy came to nought as the Russians, not unexpectedly, managed to quell the insurrection in 1864. In the years following the uprising, the Russians did implement some limited reforms in Poland, but repression was the hallmark of the late-nineteenth century in Poland.

Despite the failure of the diplomatic efforts to encourage better treatment of the Poles and to engender a settlement, it would be wrong to suggest that the international intervention had no impact at all. During the early months of the insurrection, the pressure placed on the Emperor was sufficient to keep Polish national rights and Polish suffering at the top of the diplomatic agenda, making it difficult if not impossible for the Emperor to ignore completely such concerns. This pressure certainly played a part in Alexander's offer of amnesty and negotiation with the Poles (which was rejected).⁴¹ As a result, the Polish case highlights much about the status and the trajectory of self-determination at this time. By comparing the actions of the Great Powers in Europe to the normative model suggested in Part I and to the reactions to self-determination discussed earlier in this chapter, a number of observations can be made.

⁴⁰ For example, see *The Times* (29 April, 9 May and 11 July 1863); Coleman, 'Poland under Alexander', 378-384; Zdrada, 'Foreign policy', 159-164.

⁴¹ Coleman, 'Poland under Alexander', 380-381.

The reactions to the Polish case, at a minimum, confirm that by the mid-nineteenth century the principle of self-determination and the concern for human rights and humane governance had arrived on the international stage, albeit still not explicitly in those terms. The tone and substance of the international reaction shows that the concepts of 'nationality', 'national rights' and 'responsive government' were part of the understood vocabulary of politics between the states involved in the matter. Similarly, it is clear that concern for human rights and some of the ideas associated with humane governance were beginning to resonate across Europe. In a manner that foreshadows greatly the cases of emerging nationalism and self-determination in the post-Cold War era, the influence of public outrage over media coverage of human rights abuse played a significant role in the international responses to the conflict. Thus, self-determination was evolving away from its status as a thoroughly vague and 'dangerous' political idea and into an increasingly accepted notion and, for those who claimed it, a *right* that nationalities possessed.

Of course this conclusion needs *many* important qualifications. It has to be remembered that 'normative' implies a uniform and widespread acceptance of the principles or rights discussed, and this was *not* the case with Poland. Although there was a relatively high degree of consensus in the international reactions, the principal actors had different levels of commitment to the ideas they upheld and some, notably Austria and Prussia, each with their own 'Polish problem', were never really moved to the extent that the Western European states were and certainly did not replicate the more liberal and democratic tone of their arguments.⁴² Even between the powers that condemned the Russian actions and attitudes, there were differences in the reasons for supporting the Poles. Most states had a genuine concern for the condition of the Polish nationality, but most also had their attention focused on strategic concerns.

This is hardly surprising considering the level of international interaction and organisation at this time and the aims and objectives of the European system. The Concert of Europe's guiding principles were the balance of power and the preservation of order, *not* the development of humane or even good governance, though this might have been a hoped for side-benefit. There were no treaty commitments regarding the treatment of PIFGs and no mechanisms to monitor or insure the rights of either groups or individuals. In short, there were few international norms that had anything to do with 'domestic' concerns, and there were no institutions or processes to enforce or encourage such norms

⁴² For more on the Austrian and Prussian reactions, see Zdrada, 'Foreign policy' and Gieysztor, *et al. History of Poland*.

had they existed in any meaningful sense. Such normative developments simply did not appear until the twentieth century.

Of course, this represents an important point about the construction of international society as well as its norms and rules. While the international reactions to the Polish insurrection reflect a stage of increasing institutional development at the middle of the nineteenth century in Europe, it also highlights the reality that the creation and evolution of one norm cannot be understood in a vacuum, for while there is evidence that self-determination was gradually emerging as a concern of the international community, its meaning, importance and utility were extremely limited and very much affected by clashing with other norms, in this case, the norm of non-interference in domestic concerns and the primacy of preserving stability of relations between the Great Powers. Perhaps not coincidentally, the next point of great significance in the evolution of the international community's normative responses to emerging nationalism occurred as a result of the First World War, an event where the norms of non-interference and maintenance of the strategic status quo were thoroughly violated with devastating effects.

(iii) The Paris Peace Conference and the interwar period

Self-determination was transformed from a political concept operating implicitly and in the background of international affairs into one of the chief operating principles during and immediately after the First World War. As was the case in the early and mid-nineteenth century, one of the key factors bringing this about was a change in the context of international affairs. Once again, and not for the last time, the changing environment in which nationality, self-determination and sovereignty operated and were discussed proved to be more significant than any change to the ideas that might have occurred in the course of their evolution.

Putting aside all of its other, very considerable effects, the Great War, altered dramatically the amount, the breadth and the nature of international activity. The war was in part caused by and fought between the alliances formed through diplomatic contacts, and the conflict necessitated dramatic growth of international coordination. States went through four intense years of shared strife and struggle based on mutual cooperation on issues ranging from mundane matters like troop transport to vital concerns such as war aims. As the number of combatants increased and as the conflict intensified, so did the amount of international contact and coordination, to the point that international integration on a wide range of major and minor issues seemed commonplace.

Moreover, the effects of fighting a war whose theatres of operations stretched well beyond the geographical and political limits of Europe accelerated the long process of integrating more states into the international system that originally began in Europe. This process happened on the economic and cultural as well as on the strategic level, and brought the states and peoples of South America, Africa and Asia into the conflict either directly through their status as participants or indirectly through diplomatic and/or economic involvement.⁴³ The war also led to the emergence of many new international actors. Most of these were new states, ultimately created as a result of the war, but there were also many non-governmental bodies formed during and after the war, which themselves opened up a whole new arena of international contact and activity.

Above all, the Great War brought about a change in the nature of international affairs. This change had three primary facets: a broadening of the content of international activity; the institutionalization of international processes; and popularization of democratic practices and ideas.⁴⁴ Building on the already existing trend of wider and deeper social and economic co-operation, the First World War hastened and formed international links on a wide range of issues beyond the traditional scope of commerce and politics. To take just one example, the influenza pandemic of 1919 increased the momentum for coordinated medical and health programmes both on the inter- and non-governmental level, which culminated in the creation of the Health Bureau, which later became the World Health Organisation.⁴⁵ The creation of the League of Nations, incorporating 'non-political' organs such as the ILO and the Permanent Court of International Justice, and the growth of non-governmental organisations during this time expanded the focus of the international community significantly, increasing international concern for many issues never before seen in such a light.

Also, the establishment of (what were intended to be) permanent institutions to facilitate international activity was an extraordinary accomplishment. Although the League ultimately proved to be short-lived and failed to have as inclusive a membership as its successor organisation, the United Nations, it was a truly novel creation. Never before had so many states agreed to such enormous international undertakings, much less in such formal and

⁴³ Within this, the role of the principal combatants' colonial populations cannot be forgotten. In more than one case, the effects of the Great War on these peoples precipitated the events that would lead to their entry into the international system later in the twentieth century. For details on the effect of the First World War on Europe's colonies, see Rupert Emerson, *From Empire to Nation* (Boston: Beacon Press, 1960), especially Chapter 2.

⁴⁴ More correctly, this last point should read 'the popularization of *one interpretation* of democratic practices and ideas', namely the Wilsonian interpretation.

⁴⁵ On this point generally, see F.S. Northedge, *The League of Nations: Its Life and Times, 1920-1946* (Leicester: Leicester University Press, 1986), 163-191.

explicit terms, and never had so many hoped for such a project's success. Even the briefest comparison with the Congress system of the mid-nineteenth century highlights the gulf of commitment that separates the two projects. It is only from this point that one can speak confidently of an environment in which the norms of international behaviour could be easily discerned and evaluated, for there now existed the dialogical space in which values, customs, laws and ideas could be exchanged and agreed upon.

However, the change to the international system that had the greatest effect on the evolution of self-determination was the spread of democratic ideas and the forceful, *explicit* support for the concept during the Paris Peace Conference. The victory by Britain, France, the United States and their allies; the internal disorder of the defeated powers and the victors' complete domination of peacemaking arrangements meant that the conquering states had a unique opportunity to shape the terms of the peace and to construct the post-war international arrangements as they saw fit.⁴⁶ Thus, at the Paris Peace Conference of 1919, the victorious powers were able to stamp their mould on the norms and institutions that came out of the settlement. However, in so doing, the policy makers at Paris faced many difficult choices about the post-war system they were to construct, and, when facing these choices, the powers were influenced by a range of motives, inclinations and beliefs about how international relations operated and how they should in the future, and self-determination was just one of the many competing ideas.

The peacemakers had to choose between, what Arno Mayer has called, the 'old' and the 'new diplomacy'.⁴⁷ As Mayer explains, the old diplomacy was typified by undemocratic and unaccountable practices, such as secret negotiations, territorial aggrandisement, alliances, and the protection of spheres of influence; above all, it was the antithesis of the open, liberal and democratic practices on which the new diplomacy was to be based. While there is no question that the old diplomacy persisted at Paris and after and is still present today, the new diplomacy was not only evident but powerful during the conference and is, arguably, the dominant modality of international relations today. Yet, although its introduction brought democratic oriented practices to the fore at Paris, there were two rather differing interpretations of what 'democracy' meant and, consequently, two different versions of how the new

⁴⁶ The victorious powers were also aided by the absence of the Russians from this process owing to the turmoil resulting from the Bolshevik Revolution and the subsequent civil war. Of course, this high degree of freedom, while offering the victors a blank canvas on which to work, also ultimately weakened the legitimacy of their efforts and reduced the potency of their claim to be advancing democracy.

⁴⁷ Arno J. Mayer, *Political Origins of the New Diplomacy* (New Haven, CT: Yale University Press, 1959).

diplomacy would actually function in practice from this time until the end of the Cold War: a socialist version, championed by V.I. Lenin, and a liberal democratic one, championed by Woodrow Wilson.⁴⁸ In both versions, the principle or right of national self-determination was central to each champion's understanding of democracy and the new diplomacy.

However, neither man fully thought through the implications of his ideas or the logical consequences that self-determination implied. As a result, the evolution of self-determination into a norm of international relations was, on the one hand, greatly enhanced by the development of this new diplomacy, yet, on the other, the ill-considered and contested meaning of self-determination during this period led to applications of the concept that were quite different from the framework outlined in Part I of this study. While an incongruence from this framework could have been predicted solely as a result of the immensely complex and interrelated challenges created by the practical and normative upheaval of the war, the philosophical divergence between the socialist and the liberal democratic understandings of self-determination had important consequences when the international community responded to the large number of emerging nationalities following the First World War and even more so in the decades to follow.

Both Lenin and Wilson saw self-determination and nationalism as fundamentally democratic principles. However, as Part I of this thesis contended, self-determination has a two-sided nature. One side is the liberating, freedom-enhancing belief that a nation's will should form the basis of governmental legitimacy and justify actions seeking to ensure or achieve this. The other side limits the exercise of that right by emphasising the just obligations that a sovereign state may legitimately impose. Both Lenin and Wilson looked at only the first side of the principle and ignored or insufficiently attended to the other. However, Lenin had less of a problem than Wilson did in doing so.

As Lenin posited in the years before the Bolshevik Revolution, Tsarist Russia was 'a prison of nations', and a socialist revolution based on nationalist *and* socialist principles was more likely to succeed than one based on socialism alone. An awakening of class-consciousness was essential for his ultimate goal of a unified, communist society in which nationalism would play no part. However, in societies, such as Russia, where a sufficient degree of class-consciousness had not yet developed, an appeal couched in the more accessible language of

⁴⁸ This approach runs through Mayer's work, but it is adopted by many others, notably Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1996), 14-23.

nationalism and minority secession might be a necessary first step in the process of liberation. Lenin acknowledged that this might lead to the fragmentation of states, but the newly liberated national entities would be better suited to the evolution of class-consciousness, thereby ultimately stimulating the desire for unification into a single socialist society. Thus, for Lenin, self-determination, including a right of secession, was not only an entailment of the concept but a facet that was to be openly trumpeted.⁴⁹

However, Lenin saw self-determination, above all, as a tool (an essential tool to be sure, but a tool nonetheless) of the larger socialist revolution.⁵⁰ For Lenin, self-determination was like a wrench, used by a skilled mechanic to fix an engine. A wrench would be essential to the overall process of getting the engine running properly and it would certainly be picked up and used from time to time. However, the mechanic would place it back on the bench if another tool might be of more use or if the wrench proved counterproductive in bringing about the desired goal. Just as the mechanic would find no logical contradiction in their intermittent use of a wrench, Lenin saw few contradictions or inconsistencies in his uneven application of self-determination. Thus, for Lenin, when the idea of self-determination clashed with an action or event that was necessary for the world socialist revolution (such as the violent absorption of Georgia, Armenia and Azerbaijan between 1918 and 1922 against their will), he did not hesitate to put it aside and was able, with some success, to side-step any charge of logical inconsistency in the matter. However, it is fair to contend that the ease with which the principle, or *right* as Lenin called it, could be discarded weakened the overall impact of the concept.⁵¹

The matter was much more complex for Wilson: he perceived self-determination as both the means and the end of democracy.⁵² Wilson had an almost religious devotion to democracy and liberal values and his views on nationality and self-determination reflected much of the liberal democratic reasoning outlined in Part I. Wilson's views on politics, nationalism and self-determination (indeed *all* his beliefs) were based primarily on the Presbyterian tradition of freedom and equality amongst the elect of God and on the

⁴⁹ For Lenin's statements on self-determination, see A.A. Kristian, *The Right to Self-determination and the Soviet Union* (London: Boreas Publishing, 1952), 13-15.

⁵⁰ For a brief summary of Lenin's views on self-determination, see Cassese, *Self-determination*, 14-19 and Derek Heater, *National Self-determination: Woodrow Wilson and His Legacy* (Basingstoke: Macmillan, 1994), 32-36.

⁵¹ As Cassese, *Self-determination*, 18, highlights, Lenin essentially acknowledged this much when he conceded that the handing over of Poland, Byelorussia, etc. to Germany in the Brest-Litovsk Treaty without these peoples' acceptance was a violation of their rights.

⁵² Wilson's life and political beliefs have been the subject of much study, and the most focused work on Wilson and self-determination is Heater, *National Self-determination*, but see also Cobban, *Nation-State*; Cassese, *Self-determination*, 19-23; and Harley Notter, *The Origins of the Foreign Policy of Woodrow Wilson* (Baltimore, MD: The Johns Hopkins Press, 1937), 53-121 and 519-645 in particular.

American democratic experience.⁵³ Having been greatly influenced of these sources, Wilson, much like J.S. Mill understood the nation as a group of individuals bound together by their common values, ideas, history and culture, and believed, again like Mill, that the *mature*, democratic expression of national will should be political fulfilment as a free and independent state.⁵⁴ Although Wilson, was rather vague about what a *mature* nation was, he indicated that nationality in general and self-government in particular demanded much of a people and that there was no *automatic* right to independence.⁵⁵ As Heater relates, on the question of the Philippines, Wilson was in favour of granting independence but only after a suitable period of tutelage (by the Americans naturally), which he considered necessary for a people whose character and constitutional development was not ready for the task of self-government.⁵⁶

Nonetheless, Wilson believed that self-determination did permit the fragmentation of states. As a fervent believer in America's revolutionary heritage, he could hardly avoid this conviction. In fact he proudly declared that '[t]he glory of the of the United States is that when we were a little body of 3,000,000 people strung along the Atlantic coast we threw off the power of a great empire because it was not a power chosen by or consented to by ourselves. We hold to that principle.'⁵⁷ The American experience was for Wilson more than a case study to be admired; it was a shining example of democracy and national fulfilment for the world, and it was the mission of the United States to be a bastion, indeed, a champion of such rights for all peoples. That this commitment entailed the possibility of secession and the break-up of existing states did not trouble Wilson in principle and can be seen as the logical extension of Wilson's belief in a liberal and democratic theory of national self-determination.

In short, Wilson saw self-determination as a democratic expression of popular sovereignty, that governments must enjoy the approval (tacit or expressed) of those governed to be legitimate and that the creation of new

⁵³ On the influence of Presbyterian theology on Wilson's ideas see Robert M. Cruden, *Ministers of Reform: The Progressives' Achievement in American Civilization, 1889-1920* (Urbana, IL: University of Illinois Press, 1984), 3-38 and 225-273 and Notter, *Origins*, 3-52. For the influence of American history on Wilson, see Notter, *Origins*, 53-121; Harold Nicholson, *Peacemaking 1919* (London: Constable and Co., 1945), 28-31 and Heater, *National Self-determination*, 15-27.

⁵⁴ See Notter, *Origins*, 74-82.

⁵⁵ It is possible that he subscribed to Mill's theory of 'civilised nations' that were capable of mature politics and 'barbarian peoples' that were not suited to it. However, Wilson's strong support of the League's Mandates system, while paternalistic, indicates a belief in 'progress' towards national fulfilment.

⁵⁶ Heater, *National Self-determination*, 24-25. It should be noted that, as President, Wilson supported legislation granting a substantial degree of autonomy to the Philippines with full independence to take place soon after the implementation of autonomy, the later of which actually became law in 1916 (the Jones Act).

⁵⁷ Quoted in Lee Buchheit, *Secession: The Legitimacy of Self-determination* (New Haven, CT: Yale University Press, 1978), 116.

states, the redrawing of borders and alterations to the status of those governed should always reflect the will of the governed. For Wilson, nationality was the embodiment of the democratic will of its members and this gave life and legitimacy to the state. Accordingly, Wilson's interpretation of self-determination had to function *within* the ideas of liberal democracy and could not be a right that was important but ancillary to the higher purpose of another ideology, as was the case for Lenin. It was not a tool for Wilson but an integral part of democracy as he understood the term. As a result, Wilson could not easily champion the right of self-determination, apply it for one nationality and later say that it should not apply elsewhere to others without opening himself up to the charge of inconsistency, which is exactly what happened.

Despite these underlying challenges, self-determination was centre stage during the construction of the new context of international relations after the First World War. It is worth pointing out that, in addition to and in large measure separate from Wilson's efforts to promote his interpretation the principle, self-determination was increasingly evident in the thinking of the victorious powers. Even before the United States entered the war and had its greatest degree of influence over war aims and objectives, the British officially endorsed their own interpretation of the *principle* (not the *right*) of self-determination for nationalities. As the Memorandum on Territorial Settlement of 1916 states:

His Majesty's Government have announced that one of their chief objectives in the present war is to ensure that all the states of Europe, great and small, shall in the future be in a position to achieve their national development in freedom and security. It is clear, moreover, that no peace can be satisfactory to this country unless it promises to be durable and an essential condition of such a peace is that it should give full scope to national aspirations as far as practicable. The principle of nationality should therefore be one of the governing factors in the consideration of territorial arrangements after the war.⁵⁸

In 1918, David Lloyd George, the British Prime Minister publicly stated his view that 'government with the consent of the governed must be the basis of any territorial settlement in this war'.⁵⁹ In this address, Lloyd George used the specific term 'national self-determination', unlike Wilson in his 'Fourteen Points' speech given later that year, and he committed the United Kingdom to the principle's application in the Middle East and for German colonies in Africa and Asia (though, crucially, he did not make clear exactly *how* it would apply).⁶⁰

⁵⁸ Quoted in Cobban, *Nation-State*, 52.

⁵⁹ David Lloyd George, *War Memoirs* (London: Odhams, 1938), 1513.

⁶⁰ Lloyd George, *War Memoirs*, 1512-1515.

The French too seemed committed to applying the principle to correct the suffering experienced by those under 'foreign domination', such as the Czechs and Slovaks and the Arabs.⁶¹ Even the left-wing parties within Germany accepted that self-determination would have to play a part in whatever settlement would come after the war.⁶² However, many politicians were less enthusiastic in their support of the principle than these official positions suggest, and few were prepared to make the seemingly obvious logical connection about the principle and its implications for their colonial possessions. Moreover, many in Britain and France had promoted national self-determination and encouraged certain emerging nations for strategic rather than ideological reasons. As Cobban points out, '[t]he Western powers had not called the force of nationality into being; they had rather reluctantly recognized it when it appeared and used it, not to win the war but to hasten its last stages. In so doing, and in the propaganda they had poured forth, they had committed themselves to the principle of self-determination.'⁶³ These varying commitments to and interpretations of self-determination and nationalism, while understandable, were to plague the peacemakers in 1919.

The problems for Wilson and the other leaders only really began when their ideological commitments to self-determination clashed with the tangible challenges emerging nationalism presented and the other myriad strategic, economic and political problems associated with the peace. Because the negotiations at Paris and the subsequent responses to emerging nationalism have been so well examined by other scholars, the analysis given here will aim, instead, to gauge the degree to which these international responses followed Wilson's intentions and the theoretical suggestions made in Part I, and to assess the impact of this on the principle's evolution as a norm of international activity.

One of the most obvious consequences of the post-war treaties was the creation on several new states in the heart of Europe. The Czech, Polish, Slovak, Finnish and Albanian nationalities, to name just a few, had long been submerged within larger states or empires for different lengths of time and under varying standards of treatment. With the changing context of international relations ushered in by the First World War and the tremendous opportunity created by the war's disruption of the existing strategic circumstances, the chances for 'success' had never looked so positive to these nationalists. There seemed to be a real opportunity to achieve some, if not all,

⁶¹ Heater, *National Self-determination*, 29.

⁶² Heater, *National Self-determination*, 44. Mayer, *Political Origins*.

⁶³ Cobban, *Nation-State*, 52.

of their long hoped for goals, and these emerging nationalities now found an international community by whom their appeals might be warmly received.

The representatives of the various emerging nationalities made frequent visits to the Allied powers with the hope of obtaining official support and to increase public sympathy for their causes.⁶⁴ However, because the Allies openly endorsed certain nationalities as a war tactic to weaken Germany and the Ottoman Empire in particular, and because of the growing support for democratic institutions and self-determination, the emerging nationalities did not face the arduous struggle to win the hearts and minds of the Allied powers that the Poles had in the nineteenth century. Even before the end of the war, these emerging nationalities created an impressive mechanism by which their claims could be promoted, one that reflected the ongoing changes to the structure and procedures of international relations.

On 11 April 1918, the 'Congress of Oppressed Nationalities' met in Rome to discuss their common plight. Representatives of the Czechs and the Slovaks (who were represented jointly), the Italians, the Poles, Romanians, the Serbs, Croats and Slovenes (also represented collectively by the Yugoslav National Committee) were present. The main achievement of the Congress was the drafting of a joint statement to the Allied War Council, pledging the nationalities present to struggle for the break-up the Austro-Hungarian Empire and for the creation of independent states. Once the Paris Peace Conference opened, these groups had official representatives in place who routinely met with the leaders, ministers and civil servants of the 'Supreme Council' of the victorious powers.⁶⁵ Through personal negotiations, careful publicity of their cause and a fair amount of pleading and badgering, many of these emerging nations were granted statehood in the resulting treaties.⁶⁶

Although these representatives used a specifically nationalist discourse in their diplomacy, many of the groups and the states that were subsequently created contained multiple PIFGs and were often *multi*-national. There were many pockets of 'stranded' minority nationalities and other PIFGs within these new entities, and some groups were already conglomerations of multiple identities, yet presented themselves as a *single* nationality.⁶⁷ The best examples

⁶⁴ C.A. Macartney, *National States and National Minorities* (Oxford: Oxford University Press, 1938), 179-211; Heater, *National Self-determination*, 47-77.

⁶⁵ For the activities of these representatives, see Raymond Pearson, *National Minorities in Eastern Europe, 1848-1945* (London: Macmillan, 1983), 117-189; Macartney, *National States*, 212-272; and Nicholson, *Peacemaking*.

⁶⁶ The new states created by the several peace treaties of 1919 were: Austria, Hungary, Poland, Czechoslovakia, the Serb-Croat-Slovene Kingdom (Yugoslavia), Romania, Estonia, Lithuania, Finland, and Turkey. This excludes entities that were made mandates or protected areas under the League, such as Danzig and the Saar region.

⁶⁷ Macartney, *National States*, 208-211.

of this were Czechoslovakia and the Serb-Croat-Slovene Kingdom (later called Yugoslavia).⁶⁸ The Czech and Slovak nationalities were consciously and deliberately made (principally under Czech pressure) into a single 'Czechoslovakian' nationalist campaign, one that claimed a territory in which the estimated majority of people were neither Czech nor Slovak (in fact the ethnic Germans outnumbered the Slovaks). In the Serb-Croat-Slovene Kingdom (S-C-S), the new nationality was formed around the Serbian and the Croat ethnicities, of which over seventy-five per cent of the population of the new state were a part, but the number and scale of the S-C-S's ethnic cleavages meant that the new state was potentially divisible on grounds similar to those on which they had appealed. Regardless of these facts, these representatives presented themselves as national both at the Peace Conference and in their subsequent constitutions.⁶⁹

By doing so, these new multi-national states not only papered over numerous, deep divisions in their populations based on identity, their creation and sanction at the Conference helped to increase the validity of the *national-state* as opposed to the nation-state. Wilson never suggested that self-determination could apply only to fully formed, 'nationally pure' groups, thus giving support to other, similar claims by multi-national groups. However, not all of the emerging nationalist movements succeeded in obtaining sovereign statehood in 1919. Many nationalities found that they were not only still submerged but were now within new and often potentially hostile states. The Ruthenes, the Byelorussians, and the Montenegrins were now within states whose leaders had even less interest in accommodating their identity and their aspirations than did their former masters. Also, the borders of the new states occasionally stranded peoples whose identities had been dominant in their former state but who now were national minorities, which was frequently the plight of the Germans and Hungarians in the new entities. In most cases, this led to heightened tension, anxiety, and, in many cases, low intensity armed conflict.⁷⁰ In such cases, however permeable or inclusive the national identity of these new states might have been in theory, there existed the real threat of human rights abuse and a violation of these peoples' right to self-determination, the very principle that was invoked to create the new states.

The peacemakers of 1919 were not unaware of such pitfalls within the principle of self-determination and developed an answer to the challenge that not only held out real promise for the threatened minority nations but

⁶⁸ Pearson, *Minorities*, 147-189.

⁶⁹ See constitutional extracts and analysis in Macartney, *National States*, 209-210.

⁷⁰ Heater, *National Self-determination*, 60, indicates that there were fourteen such conflicts in mid-1919.

corresponded roughly to some of the limits to national self-determination outlined in Part I, namely, the minority protection treaties.⁷¹ These treaties, all of which were similar in wording and intention, were concluded between the victorious powers and the new states and were meant to serve as both a moral inducement to the new state to observe and protect the ethnic, religious and national minorities within their borders and to set up the League of Nations as a protector of these rights.

These treaties granted equality of rights to all persons within the new states; the protection of national, ethnic ('racial' was the word used then), religious and linguistic customs; and they spell out the process by which the Council of the League could take action to redress grievances and violations of the protections. The guiding idea behind all the treaties was, as Clémenceau, the French Prime Minister, put it, to ensure the 'elementary rights which are, in fact, secured in every civilised state'.⁷² The League's Council was empowered to 'take such action and give such direction as it may deem just and effective' to ensure these rights.⁷³ In addition to these specific guarantees, the peacemakers also encouraged and endorsed plans for autonomy, devolution and federal structures to accommodate emerging nationalism and to secure the rights of PIFGs.⁷⁴ These far reaching ideas not only challenged the view that state frontiers were inviolable but they also point to a growing consensus that securing the rights of PIFGs and promoting the well-being of nationalities within existing states was integral to self-determination and was an essential part of 'proper government' by sovereign states. This approach, implied throughout the treaties, suggested that the principle went beyond a stark choice between independent statehood on one hand or repression and assimilation on the other and moved the discussion towards the protection of rights and inclusive political and social arrangements within both existing and newly created states.

Another similar attempt to address the challenges of self-determination and emerging nationalism was the use of plebiscites.⁷⁵ As the foregoing has implied, a persistent difficulty with the application of self-determination in 1919 was the broad dispersal of PIFGs across Europe and the rather constructed

⁷¹ The best account of these treaties, along with detailed excerpts from the various documents is L.P. Mair, *The Protection of Minorities* (London: Christophers, 1928). See also Macartney, *National States*, 212-294, and Thomas D. Musgrave, *Self-determination and National Minorities* (Oxford: Oxford University Press, 2000), 32-61.

⁷² Clémenceau to the Polish leader, Paderewski, upon the signing of the agreement, quoted in Mair, *Protection*, 39.

⁷³ Quoted in Mair, *Protection*, 41.

⁷⁴ For example, in the 1918 Pittsburgh Agreement, the Czechs promised the Slovaks autonomy and a separate legislature within a federal Czechoslovakian state and similar promises were made in the minority treaty regarding the Ruthenes. See Mair, *Protection*, 44-45 and Pearson, *Minorities*, 150-155.

⁷⁵ The classic work on plebiscites is Sarah Wamburgh, *A Monograph on Plebiscites* (Oxford: Oxford University Press, 1920). See also Heater, *National Self-determination*, 78-82.

nature of many of the nationalities that were emerging. The hope was that an active expression of self-determination through monitored and controlled voting mechanisms would mirror the practice that democratic countries had used countless times to determine successive administrations in an orderly, timely and efficient fashion. The difficulty with plebiscites and emerging nationalism, then and now, is that although the question put to the voters might be simple enough, unlike ordinary domestic elections, the electoral area and its population are often uncertain. No fixed boundaries or eligible electorates existed for the post-war plebiscites and drawing boundaries assumed a far less confusing demographic situation than was the case. With each alteration of a potential state's boundaries, a new electorate was created, usually resulting in a new permutation of majority-minority relations. Nonetheless, the plebiscites in certain areas (e.g. Schleswig, the Klagenfurt Basin) provided democratic legitimacy and some much-needed clarity to the fixing of borders that led to better and more responsive government.

Thus, there were many ways in which the application of self-determination at the Paris Peace Conference and in the interwar period were consistent with a liberal democratic, human rights orientated normative framework, and many of these led to a legitimate and peaceful (if not always permanent) settlement to many of the challenges arising from emerging nationalism. However, some of the international responses and the application of self-determination during this period proved to be inconsistent with the framework and some of these inconsistencies led to disastrous consequences.

One of the biggest criticisms of the promotion and application of the norm of self-determination in the post-war treaties and in the interwar period is that it created and increased as much tension as it reduced. Yet, this criticism is misguided. It is true that the context of the new diplomacy and the growing international commitment to self-determination, coupled with the widespread popular support for many emerging nations, emboldened nationalist movements in Europe and elsewhere. It is also true that the Wilson and the other politicians soon felt frustrated and overwhelmed by the range and number of groups that sought international assistance for their movements for reform or secession, but, the failure to find practical limits for the application of the principle is not an inherent flaw of the concept; it owes more to Wilson's one-sided consideration of the concept's theory and to the conflict that developed between the embryonic norm of self-determination and the other pressing concerns, both practical and theoretical, arising out of the settlements.

As posited earlier, Wilson's interpretation and championing of the principle, which was incredibly influential in the interwar period, only examined

seriously the side of self-determination associated with national and personal liberation and neglected the consideration of what logically defensible, normative limits might be placed on the idea. Wilson and the other leaders of the interwar era gave scant attention to establishing norms that might apply generally to the type of challenges created by emerging nationalism, failing to realise that the ideological and emotional force of identity politics requires not only practical but also philosophical constraints. While security, economic and political concerns, to name a few, were understandably and perhaps rightly uppermost in the minds of those who negotiated these settlements, the promises, statements and support shown for a norm of self-determination raised hopes to a level that, when reality did not reach expectations or even seem to align with the ideas advanced, the potential impact of the concept was reduced. In addition, the faith many held in the idea and in those who espoused it was likewise degraded, and opened up the leaders, Wilson especially, to charges of inconsistency and insincerity.

For example, it is difficult to reconcile how Wilson was persuaded by the arguments based on self-determination in favour of statehood for Poland, yet offered no detailed explanation why the Ruthenes should not be supported towards the same end that squared with his democratic interpretation of the principle. It could be contended that the nationalities that formed independent states were those that negotiated most effectively and persuasively rather than those who were being badly governed and perhaps 'deserved' to be independent. The lack of consistency led to more acute problems in the future when the budding norm of self-determination was not applied uniformly across the peace settlements, particularly with regard to Germany. Unlike the Austro-Hungarian or Ottoman Empires that crumbled, the Germans within the atrophied German state found their co-nationals dispersed across territories where they were now the (often hated) minority.

The Saarland represented the most confusing application of self-determination, as it was overwhelmingly German but held coalfields greatly desired by France as compensation for war losses. Any just application of the right of self-determination would have left the Saar region in the hands of the German state, settling the question about the coal and reparations through some other means. As it was, the principle was bastardised, and the Saarland was placed under League of Nations control and its material wealth sent to France and Belgium until a plebiscite was held in 1935 when it was returned to Germany. The highly selective application of the emerging norm of self-determination in

this situation weakened the idea's credibility as tool for enhancing democracy and well-being internally and increasing stability internationally.⁷⁶

Still more damage was suffered when it became clear that the Allied powers had no intention of meeting the demands from emerging nations whose claims lapped on to their very shores. As Harold Nicholson relates, the Greek delegation made demands for Cyprus based on the principle and noted that 'it [Cyprus] is wholly Greek and under any interpretation of self-determination would opt for union with Greece'. Nicholson, a member of the British delegation in Paris felt that Britain would be 'left in a false moral position if we ask everyone else to surrender possessions in terms of self-determination and surrender nothing ourselves. How can we keep Cyprus and express moral indignation at the Italians retaining Rhodes?'⁷⁷ The reply Nicholson received from Sir Eyre Crowe, his superior at the Conference, reflects the opinion of many at the time:

Nonsense, my dear Nicholson. You are not being clearheaded. You think that you are being logical and sincere. You are not. Would you apply self-determination to India, Egypt, Malta and Gibraltar? If you are *not* prepared to go as far as this, then you have not right to claim that you are logical. If you *are* prepared to go as far as this, then you had better return at once to London.⁷⁸

The reluctance of the Allied powers to follow the democratic imperatives of self-determination extended to the division of German and the Ottoman colonial holdings, where the Allied countries enjoyed something of a 'land grab' following the war. This was somewhat mollified by the creation of the League of Nations' Mandates system, which fitted well with Wilson's paternalistic view that nationalities had to 'mature' in order to merit independence. Under this system, self-determination was not so much denied as delayed, as territories were to be 'taught' liberal democratic practices and prepared for decolonisation.⁷⁹ However, the Mandates system varied widely and many 'mandatory powers', which were meant to facilitate the transfer of authority, used the opportunity simply to exploit the territories as colonies under the guise of self-determination.

In all of these cases, the lack of coherent and logically consistent normative limits to self-determination made the practical application of the

⁷⁶ For an overview of how self-determination was applied in this limited and problematic fashion with respect to Germany, see Heater, *National Self-determination*, 121-148.

⁷⁷ Nicholson, *Peacemaking*, 200-201.

⁷⁸ Nicholson, *Peacemaking*, 201. It is worth noting that Nicholson immediately conceded this point to Crowe.

⁷⁹ On the mandates and the League, see Northedge, *The League*, 192-220 and Heater, *National Self-determination*, 177-205.

principle haphazard. Unfortunately, this problem was further magnified in the late 1930s. One of the major difficulties related to self-determination in the 1930s was that, by this time for numerous unconnected reasons, the League was showing acute signs of rigor mortis. The Covenant of the League included explicit references to self-determination only in the drafting stages, its final wording avoiding the term, but the protection of minorities was a firm commitment of the Council. However, the paucity of decisive and rapid action by the League made enforcing the treaties a virtual impossibility. It would be fair to say that the failure to enforce minority rights was not a denial of their worth as a mechanism to ensure self-determination and the observation of human rights, but it did make the exercise and protection of minority nations' right to popular sovereignty limited.⁸⁰

By far, one of the most dramatic situations related to self-determination during the interwar period, which impacted its evolution greatly, was the Nazi's use of the principle. As mentioned before, a glaring double standard applied at the Paris Peace Conference was the denial of self-determination in Germany and for German peoples across Europe. This, and the Allies' endorsement of the principle of self-determination without any coherent normative limits, played into the Nazi's tactics perfectly as Hitler repeatedly held up these inconsistencies as well as the arguments in favour of self-determination put forward by his opponents to further his own ends. While the decision to uphold security and other more concrete concerns over self-determination is explicable and perhaps understandable in the context of the events, the impact of doing so was profound.

Hitler was able to produce an argument that drew on force and the vocabulary of self-determination. Although he did not always use the exact language set out in this study, he explicitly used the term national self-determination and he constructed an argument that aped the theory of self-determination outlined in this study. With regards to the proposed *Anschluss* or union with Austria, which had been barred by the Treaty of Versailles, Hitler argued that it was a denial of a cherished democratic right, and his denouncement of alleged maltreatment of the Sudetan Germans in Czechoslovakia and the Germans of Poland sounded remarkably similar to the language used in this study, namely, a violation of their well-being and an impingement on their human rights, thereby justifying their emerging nationalism. As the existing minority protection mechanisms had limited results at best, the Nazis promoted the cause of their emerging and stranded co-

⁸⁰ Macartney, *National States*, 295-369

nationals. Given the absence of a ready, normative response answer to the 'limits' side of the self-determination conundrum, Hitler was able to (mis)interpret and selectively apply the ideological foundations of self-determination to his advantage in a manner that greatly jeopardised the security of Europe and endangered rather than helped to protect human rights and democratic freedoms. In doing so he also tarnished the idea of self-determination in the eyes of many.

Wilson's aim of elevating the concept of self-determination and the practices of liberal democracy to the status of international norms met with varied success. The principle, though increasingly accepted as one of the norms of international affairs was not seen by all as a *right*, nor was it global in the sense of being universal and applying equally to all, as a right must do. Moreover, self-determination was applied in the post-First World War treaties and settlements and in the interwar years in a haphazard manner. Wilson's interpretation of the concept and the norm that began to develop during this time were based on a democratic logic and heritage that resonated relatively well with the international context that arose from the devastation of the Great War, but there was no theoretically consistent or practically uniform means to limit its employment as its popularity spread. When compared to the framework outlined in Part I, the evolving norm of self-determination and the international responses to emerging nationalism in the interwar years lacked clarity and failed to provide sufficient incentives for inclusive politics and humane governance. In short, the norm that began to take shape in the post-Versailles world did not have sufficient clarity as to the limits that could be placed on its exercise.

However, it must also be remembered that the conditions following the First World War were exceptionally demanding and the challenges that emerging nationalism presented added greatly to an already truly complex context. That Wilson and the other politicians of this generation were able to balance self-determination *to any degree* against the array of other political, economic and strategic motives and concerns that were operating during the peacemaking and after is an accomplishment of note. Given the need many felt to subdue Germany and the real need to concentrate on rebuilding economies and societies after the war, and considering the institutional limitations that hindered the League in carrying out its lofty goals, it should not be surprising that self-determination was interpreted incoherently at times and that responses to emerging nationalism were often inconsistent with the liberal democratic framework outlined in Part I.

It is also significant to note that although there was tremendous movement in the evolution of the norms related to self-determination during

the Paris Peace Conference, the inconsistencies and limitations in its application discussed above did not prevent the concept from spreading. To the contrary, self-determination was widely viewed at the time and even during the disruptions of the later 1930s as the 'imperative principle of action' that Wilson thought it needed to be to foster the more liberal democratic system of international relations he desired.⁸¹ When the post-Versailles international system, which aimed at its most ambitious points to outlaw war as an instrument of policy, began to fall apart and a new wave of violence culminated in a second, truly, *world* war, the powers opposing the fascist and militarist states, committed themselves anew to the idea self-determination. The nature and the effects of this commitment on the system they forged while fighting this war and solidified while making the new peace proved to have a deep impact on the trajectory of self-determination's evolution.

⁸¹ Some of these attitudes are reviewed in Heater, *National Self-determination*, 95-120.

Chapter 4

From 'principle' to 'right' - The UN system, the Cold War and the 'special case' of decolonisation

In the interwar years, self-determination was clearly discernable as a central if contested principle of international activity and was, in the opinion of many, a *right*. Yet, it took the shock of another world war (this time an indisputably global conflagration) and a corresponding alteration to the international community and the context of international affairs to usher in an era in which the concept would be universally and explicitly recognized as a fundamental norm of international activity. As self-determination was increasingly accepted and its prestige enhanced during this period, these changes took place at an uneven pace and only partially resulted in the much-needed clarity regarding self-determination's meaning, application and, particularly, its limitations.

The first section of this chapter seeks to explain how and why, despite considerable problems regarding its application during the interwar years, the concept of self-determination persisted and became one of the chief pillars of the international system that was constructed after the Second World War. The development of the United Nations Organisation (UN) was the most significant institutionalization of international relations to date and was a far greater change to the context of international affairs than the Concert of Europe, the Congress system or even the creation of the League of Nations. For the first time, there would be a truly international body in which norms could be debated and take shape, transforming lofty ideas into practical policies. In the events and discussions leading up to the creation of the UN, the concept of self-determination figured prominently, but although its meaning and limits were discussed and elucidated far more than they had been in the past, they were still some way distant from the normative framework laid out in Part I.

However, the founding of the UN system played only one part in the evolution of self-determination and its transformation into a normative right. During the first forty-five years of the UN's existence, there were two historical developments that had a vast impact on the application and, thus, the evolution of self-determination: the Cold War and decolonisation. The two remaining parts of this chapter assess the impact of these two protean phenomena on emerging nationalism and state fragmentation.

The Cold War, which arose almost simultaneously with the formation of the UN and the decolonisation process, presented the most threatening

strategic circumstances in human history and had a pronounced impact on the workings of the international community, the interpretation of self-determination and, consequently, the international responses to emerging nationalism. The Cold War imposed dramatic limitations on the scope and application of the concept, yet, paradoxically, it was during the Cold War and in part because of it, that self-determination was invoked as a justification and served as the propelling force for the granting of independence to nearly two-thirds of the world's population.

The decolonisation process, which formally involved the international community at almost every stage, intensely shaped and defined the norm of self-determination in this period and set precedents that still affect the responses to emerging nationalism in the post-Cold War era. The endorsement of self-determination for the purposes of decolonisation was remarkably true to the intentions of the idea's earlier proponents such as Wilson, but by invoking the right of self-determination, the decolonisers faced all the perennial problems associated with trying to create logically coherent and practical limits to its application. The international community's overt desire to present decolonisation as a 'special case' and thereby to create limits to the application of self-determination will be examined in the last section of this chapter.

(i) *The United Nations system and self-determination*
 a) *The Atlantic Charter and the war-time alliance*

The attempt to establish a new international system with a 'new diplomacy', based on liberal and democratic practices and principles at the end of the First World War appeared doomed when Nazi Germany, fascist Italy and the militaristic Japanese Empire together discarded even the pretence of acting according to such ideas and embarked on a spree of territorial aggrandisement. What little interest these powers showed in liberal democratic ideas was when they pilfered them for their own benefit.¹ However, when the countries opposing the violent actions of Germany, Italy and Japan began to consider aims that went beyond their immediate strategic survival and contemplated a post-war world, they immediately embraced many of the ideas that gained international recognition in the 1920s, including self-determination.

¹ For an account of the Nazi controlled 'plebiscite' in Austria, and for Hitler's use of self-determination regarding the *Sudeten* Germans at the Berchtesgarden meeting in 1938, see William L. Shirer, *The Rise and Fall of the Third Reich* (New York: Simon and Schuster, 1960), 322-356 and 357-454. In the Nazi Party's first significant statement of policy in 1920, the *Twenty-five Point Programme* [http://www.yale.edu/lawweb/avalon/imt/document/nca_vol4/1708-ps.htm], 'the right of national self-determination' is claimed in Point 1, and the rest of the document is suffused with the connected ideas of popular sovereignty and national rights.

The earliest, explicit consideration of such aims arose from the secret meeting between the British Prime Minister, Winston Churchill and President Franklin D. Roosevelt of the US at Placentia Bay, Newfoundland in August 1941. This meeting resulted in a joint declaration later known as the Atlantic Charter. It had not only the immediate effect of formally expressing the aims of the United States and the British Empire in the current conflict but also placed into the public domain an expression of the ideals on which these two powers felt that a just and lasting post-war order ought to be based. As such, it not only served to strengthen the cooperation and shared determination of the two countries, it set a normative moral framework for the post-war world to which the parties publicly committed themselves.²

The Atlantic Charter is a brief document, outlining the two countries 'shared principles'³, but paragraphs two and three, relate directly to self-determination, albeit without using the term specifically. Point two, states simply that: 'they [the US and the UK] desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned'. In the third paragraph, the Charter states that the two governments 'respect the *right* of all peoples to choose the form of government under which they live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.'⁴

These paragraphs together form a clear endorsement of the 'self-determination as democratic self-government' theory and suggests a 'plebiscitary' interpretation of the theory of self-determination or, as described in Part I, an *active* application of the principle to confer legitimacy on sovereignty. By this, territorial adjustments (or non-adjustments) become legitimate only by the will of the people, articulated through some type of vote or other similar expression of opinion. Also clearly behind the declaration is the idea that sovereignty lies ultimately with the people of a given political space and

² It was enhancing the first of these intended effects that most concerned Churchill in August 1941. While the ideological vision for the future was indeed significant, the UK government was primarily interested in cementing the existing relationship with America and extending American commitment to the war effort. The Atlantic Charter's emphasis on ideological commitment and the absence of a US/UK military alliance explains the dominant British perception of the Charter as a 'flop' when its terms were revealed upon Churchill's return to the UK. On this point and the British aims for the Charter see David Reynolds, *The Creation of the Anglo-American Alliance 1937-41* (London: Europa Publications Ltd., 1981), 251-294; and David Reynolds, 'The Atlantic "Flop": British foreign policy and the Churchill-Roosevelt meeting of August 1941', in David Brinkley and David Facey-Crowther, eds. *The Atlantic Charter* (Basingstoke: Macmillan, 1994) 129-150.

³ 'Joint Declaration of the President of the United States of America and Mr. Winston Churchill, representing His Majesty's Government in the United Kingdom' [The Atlantic Charter] (14 August 1941), in Appendix A.

⁴ Emphasis added.

that their will should be the basis on which government rests, again fitting in neatly with liberal democratic understanding of self-determination.

While this was not the first time that ideas associated directly with self-determination appeared in an international declaration or document, the significance of its presence within the Atlantic Charter should not be underestimated. The Charter, which was first drafted by Churchill and then modified by Roosevelt and then further amended by their respective foreign ministries, was specifically aimed at stating the principles on which a post-war order was to be created. When Churchill, at Roosevelt's suggestion, wrote the first draft, he had many objectives in mind.⁵ He clearly intended to make a bold policy statement and later took great pride that the statements and sentiments contained were of British derivation.⁶ However, he was consciously responding to the American President's recent speech in which Roosevelt outlined 'Four Freedoms' on which any post-war order should be based, and Churchill took pains to use language that would seem at one with the President's well-known commitment to liberal and democratic values.⁷

As for Roosevelt himself, he was firmly committed to 'Wilsonian' principles, having been a major proponent of the League and the democratic ideas of self-determination and popular sovereignty, but Roosevelt coupled his idealism with a strong dose of pragmatism, believing that ideas without practicable and realistic limits would be pointless.⁸ In a letter to Roosevelt's personal representative to Pope Pius XII, Roosevelt noted that self-determination was 'the most substantial contribution made by the Versailles Treaty', particularly the practical application of the concept through the use of plebiscites.⁹

Although not a treaty and thus not a binding international agreement, the Atlantic Charter had a great impact almost immediately. It soon became the basis for stated war aims of virtually all the allied combatants as it was co-opted in a series of international meetings and declarations during 1941 and 1942, the most important of which was the Declaration by the United Nations (the

⁵ See n2 above.

⁶ Winston Churchill, *The Grand Alliance*, Vol. III of *The Second World War* (Boston: Houghton Mifflin, 1950), 434.

⁷ Roosevelt's 'four essential human freedoms' were the 'freedoms of speech and expression, freedom of religion, freedom from want and freedom from fear'. On these, see Frank Donovan, *Mr. Roosevelt's Four Freedoms* (New York: Dodd, Mead and Company, 1966) and Thomas Hoopes and Douglas Brinkley, *FDR and the Creation of the UN* (New Haven, CT: Yale University Press, 1997).

⁸ See Hoopes and Brinkley, *FDR*.

⁹ Quoted in Ruth Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945* (Washington, D.C.: The Brookings Institution, 1958), 43.

first time this term was used) on 1 January 1942.¹⁰ Thus, even prior to the international conferences for the establishment of the United Nations Organization at Dumbarton Oaks and San Francisco, there was an endorsement of the right of national self-determination. It is for this reason alone that the Atlantic Charter stands out as a major development in the history of the concept.

The bold positioning of self-determination in the Atlantic Charter did not prove an isolated iteration. The adoption *in toto* of the Atlantic Charter within the United Nations Declaration in 1942 ensured that the ideas surrounding self-determination would remain in the vocabulary of the combatants, but as the post-First World War difficulties with the principle bore witness, the idea could have been set aside by appeals to *Realpolitik* or lost in the mix of more immediate and tangible concerns. As it was, self-determination, particularly the passive application and the internal aspect of the principle, remained a central idea in almost all of the discussions dealing with the proposed post-war order, featuring prominently in each of the summits between heads of state and foreign ministers throughout the war. To be sure, it jockeyed with other concerns and norms and on many occasions the principle was intentionally ignored out of deference to strategic imperatives. For example self-determination was deliberately placed under the table at Dumbarton Oaks (for reasons that will be made clear later), but it quickly resurfaced to play a hugely significant role at the conference for creating the UN in San Francisco in May and June of 1945, with explicit use in the Charter itself and in numerous subsequent UN declarations and resolutions. Throughout the war, even when not publically espoused, the concept was a persistent part of the discussion between states.

This raises two important questions. The first is why did it persist, indeed why did it figure so prominently, in the construction of the UN system when other considerations and imperatives could have so easily submerged it? The answer to this first question is relatively straightforward: the principle had become adopted as an expressed or implied norm of virtually every power in the United Nations and was wholeheartedly championed by two of the most powerful states, the US and the USSR. Although, as mentioned in Chapter 3, the Americans and the Soviets interpreted and sought to apply self-determination in markedly different terms, they both exerted just enough

¹⁰ The Atlantic Charter was endorsed in full by virtually all of the allied governments in their public statements in the months following the publication of the Charter. For individual countries' statements and the Declaration by the United Nations of 1 January 1942, see Louise Holborn, ed. *War and Peace Aims of the United Nations, September 1939 – December 31, 1942* (Boston: World Peace Foundation, 1943)

influence at critical moments to keep the concept central to the discussions about the post-war order. In addition to their efforts, a number of smaller and/or less powerful states made impassioned arguments in favour of self-determination, creating momentum in favour of solidifying the concept as a norm in international politics. Rarely did all these less powerful states champion self-determination at the same time or for the same reasons, but equally, rarely was it allowed to drift far from the minds of those who designed post-war international society and its norms.

The other question raised by the prominent position of self-determination in the post-World War II order is whether the framing and articulation of the concept was made in such a way that it might result in a more philosophically coherent and practically applicable norm than previous iterations. Answering this requires a longer and a less conclusive treatment than the first question did; however, in brief, self-determination's employment in the Charter and later declarations, and in the negotiations for crafting of these agreements was far more illuminating and more encompassing than that of the Versailles era. As a result, these deliberations were far more mindful of practical applicability of such norms than the vague if fulsome support that self-determination was given in early 1919. Yet, crucial theoretical difficulties remained and a lack of clarity persisted as the normative interpretation of self-determination evolved during this period. A close look at the relevant text from the documents and the *travaux préparatoire* of some of the deliberations helps to discern more detailed and satisfactory answers to these two important questions.

b) The UN Charter

At the conference held in San Francisco to create the United Nations Organization in the summer of 1945, there was a general feeling amongst the delegates that some explicit reference to self-determination should be made in the Charter. In the pre-Conference submissions, the Soviet Union had made a specific request to the other three sponsoring powers (i.e. Britain, China and the United States) and France to modify the Dumbarton Oaks proposals so as to place self-determination in the Charter as a guiding principle of the organisation. The Soviet Foreign Secretary, Molotov, had spoken frequently and publicly about this and made it clear to the other sponsoring powers that the inclusion of self-determination was a matter of great concern to his country.¹¹ A number of other lesser powers, including Mexico, had also mentioned the need

¹¹ Russell, *United Nations Charter*, 811.

to include the *right* of self-determination in the Charter.¹² Accordingly, the four sponsoring governments tabled an amendment to include self-determination in Chapter I of the UN Charter, the section in which the purposes and principles of the UN would be stated.

In the Dumbarton Oaks Proposals, Chapters I and II defined the purposes and principles of the organisation, respectively, with Chapter I, paragraph 2 stating that one of the purposes would be: 'To develop friendly relations among nations and to take other appropriate measures to strengthen universal peace.' The proposed amendment changed the text to read: 'To develop friendly relations among nations *based on respect for the principle of equal rights and self-determination of peoples* and to take other appropriate measures to strengthen universal peace'.¹³ A similarly worded amendment to the chapter dealing with the proposed Economic and Social Council referring to self-determination was also tabled by the sponsoring powers.¹⁴

Committee I of Commission I was tasked with the wording of Chapter I of the Charter and the delegates worked to provide substance and meaning to this newly introduced clause, which proved to be a very important step in the concept's evolution into a norm of the international community.¹⁵ For the first time, a focused, detailed discussion between representatives of the international society of states began on the meaning, limits and role of self-determination, aimed at forging a *mutual* understanding of these points. In the initial country specific position papers on the Dumbarton Oaks Proposals, the generally enthusiastic reception that the amendment got is noteworthy, but what is even more interesting is the connection immediately made by so many delegates between self-determination and human rights.¹⁶ The submission of the Panamanian government highlighted the intertwined nature of human rights and self-determination and called for the creation of a 'declaration of human rights' that would enshrine self-determination and self-government as 'essential human rights'.¹⁷

¹² United Nations (UN), *Documents on the United Nations Conference on International Organization* (New York: United Nations Information Organization, 1945), Vol. 3, 146-148; see also M. Glen Johnson, 'A *magna carta* for Mankind: Writing the Universal Declaration of Human Rights', in M. Glen Johnson and Janusz Symonides, *The Universal Declaration of Human Rights: A History of Its Creation and Implementation, 1948-1998* (Paris: UNESCO, 1998), 28-30.

¹³ Changes noted in italics.

¹⁴ The new text, later adopted (without any significant debate) as Article 55, reads: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations *based on the respect for the principle of equal rights and self-determination of peoples*, the United Nations...' (italics identify the addition).

¹⁵ UN, *Documents*, Vol. 6, 296.

¹⁶ UN, *Documents*, Vol. 6, Doc. I/I/215.

¹⁷ UN, *Documents*, Vol. 6. Many governments advocated the adoption of a declaration of human rights as part of the Charter, but for a host of reasons, the crafting of a declaration was effected until 1948. The inclusion of self-determination and other associated concepts within this document is discussed below.

In the sixth meeting of the Committee on 15 May 1945, for perhaps the first time, representatives of the international society of states discussed the applicability and limits implicit within the concept, something that was not broached during the Paris Peace Conference or at any previous time for that matter by a group of states. The abiding feeling that emerged from this meeting was that self-determination should be understood and promoted as self-government and that at the heart of the idea was the promotion of the will of the governed. As the minutes of this discussion noted:

Concerning the principle of self-determination, it was strongly emphasized on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter...¹⁸

The report also charged the new Assembly to be 'unstinting and painstaking' in creating a declaration of human rights. The only real dissention to this was the renewed appeals of some states to have such rights confirmed and strengthened by making the declaration an integral part of the purposes and principles chapter.¹⁹ As the rapportuer of the subcommittee handling this issue, Farid Zeineddine of Syria, later wrote in his official report to the Conference, there were few problems with the language or the ideas used:

The Committee understands that the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; that the respect of that principle is a basis for the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years.²⁰

This somewhat confusing text does at least clarify the answer to the question of why self-determination persisted. Despite its language, this report as well as the related deliberation and submissions all convey the widely felt view that the Nazis and their allies had held a valuable principle hostage during the war, and that the new international organisation needed to embrace and define it so that future abuses could be prevented. The hope was that the 'genuine expression of popular will' would be seen as the basis of legitimacy, which, in turn, merited a 'respect' for peoples, something that most delegates felt had been grossly violated during the war.

¹⁸ UN, *Documents*, Vol. 6, 296.

¹⁹ UN, *Documents*, Vol. 6, 296.

²⁰ UN, *Documents*, Vol. 6, 396.

In this light, the phrase ‘two complimentary parts of one standard of conduct’ holds up self-determination of peoples as a force to strengthen world order and world peace and not to threaten it. Moreover, seen within the context of other crucial passages of Chapter I of the Charter, it is the *universal right* of self-determination that creates and enforces the *sovereign equality* of states and peoples, a respect for which would be the basis not only for ‘friendly relations’ but also for the ‘political independence’ and ‘territorial integrity’ of states, as protected in Article 2, paragraphs 4 and 7. By supporting and defining self-determination in this manner, the delegates threw more light on this elusive and contested principle than had ever taken place and, at the same time, fixed it as part of the context of the new international order they were forging. The connection thus made between self-determination, governmental legitimacy and international respect for political independence went far towards shaping the clearer and more coherent understanding of self-determination that was outlined in Part I. The reference to self-determination as a right was also a huge step in its evolution as a normative concept of the international system.

However, despite the increased clarity of this connection, the language selected was too vague in and of itself to clear up all the controversy surrounding the concept, particularly the difficulty concerning the question of who are the legitimate holders of the right. More than one delegate warned of the dangers of an open-ended endorsement of the idea, and the representative of Belgium made a formal submission to the Committee aimed at narrowing the meaning of the term.²¹ The particular objection concerned the use of the word ‘peoples’ as opposed to ‘nation’ or ‘state’, all of which, the Belgian memorandum noted, had been used in the Charter might give rise to appeals by nationalities within states which, in turn, could spawn intervention from foreign states in support of these claims. After discussing the proposals of the Belgian government, the Committee, by a two-thirds majority, rejected the proposed modifications and affirmed that ‘what is intended by paragraph 2 is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights, therefore, extends in the Charter to states, nations and peoples.’²²

Meant to serve as a clarification, this ambiguous point seems to be a clarion call to *any* group hoping to use self-determination to bolster its cause. Moreover, the blanket nature of the phrasing introduced more obscurity about the legitimate holders of the right instead of the much-needed theoretical and practical precision. In fact, by enhancing the status of the concept to such a high plane while at the same time increasing the confusion surrounding its

²¹ UN, *Documents*, Vol. 6, 300.

²² UN, *Documents*, Vol. 6, 704.

meaning built difficulties into the normative framework under which the idea still operates.

The inclusion of such a potentially expansive interpretation is all the more puzzling given that the Committee had already attempted to set out stern limits on the application of self-determination. In the aforementioned discussions on 15 May when the Committee pushed strongly to have self-determination enunciated in the Charter, they added the caveat that ‘the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.’²³

Leaving aside for the moment the logical, historical and ethical problems associated with an outright ban on secession that were considered in Chapter 2, the Committee’s recommended text was taken up by the Coordination Committee, which was charged with confirming the final wording of the Charter. In this Committee’s somewhat confused exchanges, it was at least clear that inclusion of self-determination was desired, but its exact meaning, the legitimate holders of the right and its limits remained elusive. The Committee’s deliberations and the public statements of many powers including the United States and the Soviet Union reveal that the ban on secession was only half-heartedly endorsed. As will be discussed in the section on decolonisation below, at the same time that self-determination was written into Articles 1(2) and 55 of the Charter on the understanding that states should remain intact, the delegates were negotiating another amendment to the Dumbarton Oaks Proposals, a chapter on non-self-governing territories and, in so doing, many sought to extend self-determination to ‘peoples’ who sought secession from ‘alien rule’.²⁴

Thus, despite the fact that the Charter set self-determination as a normative principle and despite the limited success in contextualising the concept within a larger system of international priorities and concerns, self-determination remained both a contested and a popular notion, at once promoted and not fully understood. Nonetheless, as Aureliu Cristescu, the UN Special Rapporteur charged with examining the history of self-determination within the UN system, wrote in 1981, its incorporation into the UN Charter marked ‘not only the legal recognition of the principle...but also the point of departure of a new process – the increasing dynamic development of the principle and its legal content, its implementation and its application to the most varied situations of international life.’²⁵

²³ UN, *Documents*, Vol. 6, 296.

²⁴ UN, *Documents*, Vol. 10, 428ff.

²⁵ Aureliu Cristescu, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments* E/CN.4/Sub.2/404/Rev. 1 (New York: United Nations, 1981), 18.

During the creation of the Charter, many countries and non-governmental organisations (NGOs) pleaded for and laboured to promote human rights. These efforts culminated in demands for the drafting and inclusion of an ‘international bill of human rights’ within the Charter.²⁶ While widespread agreement in principle was achieved, the time needed to craft an effective and workable bill of rights within the Charter was not available. However, over the next twenty years, as the three documents that eventually made up the International Bill of Rights - the Universal Declaration of Human Rights (UDHR) in 1948, and the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) in 1966 - were hammered out, the international community made significant enhancements to the scope and meaning of self-determination as a norm, transforming it from a ‘vital principle’ to a ‘sacred right’ of the international system. Moreover, placing self-determination firmly within the context of human rights was also a significant and long-reaching decision, as it rooted self-determination within a system of beliefs that was becoming increasingly universal and unassailable. This process also helped in the long run to provide greater clarity over the limits and the holders of the right that had eluded the drafters of the Charter.

Despite this ambiguity over self-determination, the wording of the Charter had reflected well the growing centrality of human rights in the thinking of the victors of the Second World War. There were seven explicit references to human rights in the Charter and the pressure to incorporate a comprehensive bill of rights within the Charter was considerable and nearly sufficient to force the issue before the delegates at that time.²⁷ However, the matter was passed on to the Economic and Social Council (ECOSOC), which in its first meeting in 1946 created a smaller committee (the Nuclear Committee) and mandated that they consider the creation of ‘an international bill of rights, ...international declarations or conventions on civil liberties, ...the protection of minorities ...[and] any other matter concerning human rights not covered...’²⁸.

This charge was problematic in that it left open the door as to both content and to procedure. The central question revolved around whether a more general declaration would be created separately from a more detailed, binding covenant. In the nearly two years that the Nuclear Committee took to

²⁶ For more on the pressures placed on the UN to adopt a bill of fundamental human rights, see Johnson, ‘A magna carta’, 19-32.

²⁷ Johnson, ‘A magna carta’, 30-32.

²⁸ ECOSOC directions to the Nuclear Committee (1946) quoted in Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999), 13.

draft the Universal Declaration, a division appeared between the mass of smaller states who, on the whole, advocated the ‘binding covenant’ approach and the larger states, most notably the US and the USSR, who backed the ‘declaration’ method. A compromise of sorts played out over nearly three decades in which, in succession, the Universal Declaration and the two International Covenants, were drafted and ratified. Self-determination, nationality, identity and sovereignty were all discussed throughout the drafting and figure greatly in each of these documents. For the first time, states worked together in a structured international context to face the theoretical and practical questions of how to reconcile a group right (self-determination) *within* a theoretical framework of individual rights operating as a norm for a system of sovereign states. Taking this step was fraught with difficulties and challenges, especially given that most states involved were not aware they were taking this step and many who were aware were resistant! As with the creation of the Charter, the debates, drafts and final documents are all significant signposts in the evolution of the norm of self-determination.

c) The Universal Declaration of Human Rights

The first of these steps was the creation of the Universal Declaration of Human Rights (UDHR) between 1946 and 1948, and while the term ‘self-determination’ was never directly used in this document, a major and long-lasting step in the interpretation of the concept took place. It was the first occasion that nationality, popular sovereignty and democratic government were explicitly linked with human rights, and human rights and firmly fixed as the basis for the workings of the international community. Doing so, even while avoiding the explicit use of the phrase ‘self-determination’, went far to moving the international community’s normative framework closer to that advocated in Part I and, thereby reducing some of the theoretical inconsistencies that had existed in the past.

In the text of the UDHR, the clearest references to nationality and to other Primary Identity Forming Groups (PIFGs) come in Articles 2 and 15.²⁹ Article 15 declares that ‘Everyone has the right to a nationality’ and that no one may be deprived of their nationality arbitrarily. On the surface, this article is an endorsement of nationality as a protected category, suggesting that a multi-national state has a duty to protect individuals who collectively constitute a national group. To an extent, this is an accurate interpretation, but a closer

²⁹ The full text is in Appendix B.

examination of the drafting process reveals that a more complex analysis is needed.

When writing this article, the states participating were responding particularly to the policies of the Nazis that stripped German citizenship from Jews, Gypsies and Slavs within the Reich owing simply to their ethnic heritage, judging that such practices left individuals ‘naked in the world of international affairs’.³⁰ The clear intention the article was thus to ensure inclusiveness within a state’s legal definition of citizenship so as to avoid the creation of ‘statelessness’, which was recognized as a legitimate problem, but no acceptable wording could be hammered out beyond a somewhat vague protection of ‘nationality’. However, it is clear is that the delegates were really referring to ‘citizenship’ when they were crafting Article 15 and not nationality as *national identity*.³¹

Nonetheless, there was significant pressure to force states to be more inclusive or at least non-discriminatory. As Morsink notes, ‘it is mostly due to [the Soviet Union’s] persistence that [non-discrimination] is so prominent a feature in the document. More than any other voting bloc the communists pushed from the very start for the inclusion of clear antidiscrimination language in the Declaration.’³² A prime (and hugely important) example of this is the Soviet amendment to Article 2 to include the term ‘national origin’ into the list of categories meriting explicit reference along with ‘race’ and ‘colour’. The linkage of national origin with race and colour was intended to broaden the protections to the individual members of ethnic and other minority groups within states.³³ During the committee debates, there was a lengthy exchange about the meaning of the phrase, and the Australian delegate, McNamara, argued that it meant nationality (in the sense of citizenship), but that it might also have a wider meaning, including ethnicity (though, of course, that term was not yet in common parlance).

Critically, the Soviet delegate made an impassioned statement to clarify the suggested link between the terms. In response to the suggestion by Shafiq, the Iranian expert, that the term ‘ethnic’ replace ‘national’, Borisov, the Soviet representative, rejected the idea. While Morsink calls Borisov’s reasons for opposing the change ‘unclear’, a closer reading of the debates yields another, more plausible interpretation. Borisov states that ‘within that same nationality

³⁰ Morsink, *The Universal Declaration*, 80.

³¹ See the review of the debates, including the extensive quotations of the delegates in Morsink, *The Universal Declaration*.

³² Morsink, *The Universal Declaration*, 93.

³³ This is an opinion that Morsink endorses strongly on 103-104.

there could be different origins.³⁴ Far from being unclear or confusing, this response reflects a conceptualisation of nationality that is permeable and not defined exclusively by a specific ethnicity even if it is that of the majority of a state's population, which is a central idea within the Soviet understanding of nationality.³⁵

Most representatives agreed that nationality involved more than mere legal rights and that it was qualitatively different from citizenship. To clarify this, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in its deliberations approved the Soviet amendment to Article 2, which stated 'that "national origin" should be interpreted by taking this conception, not in the sense of citizen of a State, but in the sense of "national characteristics", in other words, in the sense of 'nationality'³⁶. While the Sub-Commission did not elaborate on the matter in the same manner as the Soviet delegation, it is clear that they intended Article 2 to protect nationality *per se*, as means of shielding *individual members* of that nationality from the actions of a state. In so doing, the Sub-Commission forced the debate onto the issue of group rights and their relation to human rights.

These issues were first addressed by the Nuclear Committee as it began its work on the text proposed by John D. Humphrey, the Canadian legal expert and Director of the Human Rights Division of the UN Secretariat, who influenced much of the wording of the Declaration.³⁷ His draft contained the following passage:

These rights are limited only by the equal rights of others. Man also owes duties to society, through which he is enabled to develop his spirit, mind and body in wider freedoms.³⁸

This emphasizes individuals as opposed to collectives (e.g. 'rights are *limited only*'), yet it clearly states that duties flow from these rights not only to other individuals but also to groups (e.g. 'man *also* owes duties...'). However, and this is critical, individuals owe duties to groups because such groups 'enable' individuals to enjoy 'wider freedoms' and achieve individual fulfillment. As this text was

³⁴ The debates are quoted in great detail by Morsink whose comments follow on 104, *supra*.

³⁵ See Chapter 3, (iii) and the discussion in the latter part of this Chapter for more on the Soviet interpretation of nationality and self-determination.

³⁶ Quoted in Morsink, *The Universal Declaration*, 103.

³⁷ A short but highly effective discussion of Humphrey and the other key figures of the Nuclear Committee is found in M. Glen Johnson and Janusz Symonides, eds. *The Universal Declaration of Human Rights: A History of its Creation and Implementation* (Paris: UNESCO, 1998).

³⁸ Quoted in Morsink, *The Universal Declaration*, 244.

discussed, there was a general belief that ‘society’ was essential to human growth and virtually none of the delegates dissented.³⁹

However, this left unanswered the question of what groups were ‘of worth’, what relation they had to individuals, and whether there was a clear hierarchy of these rights, like that outlined in Chapter 1. This was further complicated when later amendments changed the wording to what became its final form, including a switch from ‘a’ to ‘the community’ and the addition of word ‘alone’ to qualify the space in which an individual might develop.⁴⁰ This implies the existence of only one community, and suggested to some delegates that this meant only the community fostered by a state, thereby leaving no place to reconcile allegiance to a nationality, or any other PIFG other than the one that is dominant in a given state.⁴¹

Many delegates and groups expressed problems with the proposed wording, including the American Federation of Labor, which stated that ‘[t]he *State* has no good other than the good of its individual members, present and prospective – its supreme test is the way in which it provides for the full and free development of each individual.’⁴² Charles Malik, the delegate from Lebanon, spoke in a similar vein. He stated that the state represented the greatest threat to an individual in the modern age, and Malik placed the rights of the individual above the state as well as above other communities to which he believed a person might have duties. As he argued, ‘[r]eal freedom sprang from the loyalty of the individual not to the state but to these intermediate forms’. Malik himself mentioned national and ‘social’ groups as examples of this type of community, however, he went on to add that ‘the human person is more important than the racial, national or other groups to which he may belong’ and that ‘the social groups to which the individual belongs may like the human person himself may be wrong or right; the person alone is the judge’.⁴³

Taken together, these statements reflect the concept of duties owed to a PIFG and to a state as well as the hierarchy of rights outlined in Part 1. While these ideas and the theory behind them were not accepted by all in their entirety, the desire to support human rights, to acknowledge the worth and importance of groups *other* than a state to *individuals*, and the strong desire to protect the individual from the state resulted in some significant changes in the

³⁹ A few delegates pointed out that there were other sources that contributed to personal growth besides the ‘community’, but this view did not prevail, despite the backing of the United States. See Morsink, *The Universal Declaration*, 246-8.

⁴⁰ The various amendments that led to this change are quoted and discussed at length in Morsink, *The Universal Declaration*, 244-248.

⁴¹ Morsink, *The Universal Declaration*, 269-270.

⁴² Quoted on Morsink, *The Universal Declaration*, 242, emphasis in original.

⁴³ All quotations are reprinted in Morsink, *The Universal Declaration*, 242.

draft text. The passage was eventually moved to the end of the document so as to use a physical separation of the text to make a theoretical separation of the rights held by individuals from their corresponding duties.⁴⁴ Additionally, the text itself was altered, taking its final form as Article 29:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The new second paragraph in particular highlights the type of limitations on rights that are in keeping with the hierarchy of rights outlined in Chapter I, as individual rights are balanced with not only the rights of individuals but also by the need to ensure the ‘general welfare’, thereby indicating that individual rights are supreme but not un-checked, and that ‘democratic society’ must play a part in the determination of these legal limits. The meaning and implication of ‘democratic society’ is still contentious today and was hotly debated at the time, but to understand this phrase in context, whether it amounted to the establishment of hierarchy of rights, and how this affected the ideas behind self-determination, it is necessary to draw attention to the connected use of the term ‘democracy’ in Articles 2, 21 and 29.⁴⁵

Proposals to introduce the word ‘democracy’ into the Declaration were mentioned at a many points, and the original Soviet sponsored phrase was for ‘democratic State’ in Article 2 (later 29), but many different takes on this were floated. All parties made clear that the idea of democracy was a central and necessary element in the struggle for human rights. Unfortunately, the Cold War debates over the meaning of ‘democracy’ and ‘state’ and over who was the ‘true champion’ of democracy soon developed. The Soviet Union’s delegate, in an attempt to defend his country’s proposed wording, pointed out that:

notions of the State and democratic society were embodied in the documents signed during the war. ...In modern democracy, the State was not a power imposed on society by force. It was the product of the society which had unfortunately in some cases detached itself from the society from which it had sprung and had come to dominate and oppress that society [a dig at the West]...[Soviet

⁴⁴ For the debates on how and why the move occurred, see Morsink, 244-246.

⁴⁵ See Appendix B for the full text.

democracy] was true democracy: the right to participate in government.⁴⁶

Despite the rhetoric, the assertion that human rights, duties to the state and self-government were fundamentally connected was universally supported.

The French representative moved to change the wording to ‘democratic government’, and defined such a government as being that which secured human rights.⁴⁷ This wording almost exactly makes the theoretical connections discussed in Chapter 2 between state sovereignty, legitimacy, democracy, human rights and duties. The warm reception this interpretation received suggests that the international community, though its representatives, might have been moving even closer the theoretical framework outlined in Part I, although the suggested text was not, ultimately, approved. ‘Democratic society’ won out in the end over the objections of the Soviet delegate and others. The deciding factor seems to have been the desire by the majority of states to place the imperatives of individual human rights above the desires and needs of the state. As A.M. Newlands of New Zealand put it, to give into the Soviet wording would give the state ‘an escape clause’ by which a state could argue that it was *only* via the state that individuals could thrive, which was, in brief, the kernel of the communist argument. Many delegates joined her in this reasoning, agreeing that human rights were superior to the duty of the state to maintain order.⁴⁸

As a consequence of this, the debate moved on to the question of whether such commitments implied or even necessitated representative government and how popular sovereignty should be applied in the text. The debate centered on the proposed text for Article 21, which confirmed the right of participation in the government of the state.⁴⁹ What is striking is that there was essentially no opposition to the article’s inclusion. The debate turned to details such as the frequency of ‘free’ elections and whether secret ballots should be required. The Cuban and Iraqi delegates attempted to include as many people in the electorates of states as possible by moving to insert words such as ‘everyone’ and ‘plebiscite’ into the text. While the more constrained language endured, the intent of the drafters is clear: they sought to endorse and promote popular sovereignty as a basis for legitimacy and tried place a commitment to the protection and promotion of human rights at the core of any well-functioning democracy.

The widespread commitment to such moves even led some to ask whether Articles 2 and 21, when taken together, created and necessity for an

⁴⁶ Quoted on Morsink, *The Universal Declaration*, 64.

⁴⁷ Quoted on Morsink, *The Universal Declaration*, 64.

⁴⁸ Morsink, *The Universal Declaration*, 65.

⁴⁹ See Appendix B.

inclusive, multi-party democracy to ensure rights were protected for all citizens. Lord Dukeston, the UK representative posited that this may well be the case and that the Soviet insistence that only a one-party, communist government could ensure vigorous human rights protection should be rejected.⁵⁰ Others felt that even a multi-party democracy might not be sufficient to reflect the will of the governed if neither the rights of petition and rebellion nor the rights of minority groups were addressed in the document.

As for redress and rebellion, these two issues are central to self-determination and secession and many delegates connected them to human rights, seeking to limit state authority to account for this. The right to petition was introduced and heavily supported by many as originally worded: ‘Everyone has the right, either individually or in association with others, to petition the government of his State or the United Nations for redress of grievances.’⁵¹ The proposed text recognized that a state had an obligation not only to hear the demands of its individual citizens but also of groups of likeminded individuals within its borders. Many, like Carrera Andrade, the delegate from Ecuador, felt that since many liberal democracies had such provisions in their constitutions that ‘[i]t was essential to raise to the international plane a right which was an integral part of the democratic faith...’.⁵² Interestingly, while this reasoning was not denied by any delegates, they expressed worries that were two-fold: that a right of rebellion for colonial ‘peoples’ would fragment empires, and that the right to petition the United Nations carried with it immense practical difficulties. Before the depths of the first (and more juicy) issue were fully explored, the administrative challenges related to appeals to the UN resulted in the striking of the whole sentence, despite the widespread belief that such a right existed and should be included in the Declaration.

Perhaps less explicable is how the right of rebellion, which was far more controversial, appeared in the final text of the UDHR, albeit in the Preamble and only by implication. Morsink rightly notes that the ‘right to rebellion was special because on its surface it does not really seem to be a right an individual could have.’ To explain, Morsink usefully draws on Thomas Paine’s comment that in a revolt an individual ‘throws into the common stock as a member of society.’⁵³ In the debates over Article 21, suggestions were made to include a link to rebellion as a means of ensuring the democratic will of the people was the basis of government, an ultimate guarantee as it were. As Alberto Canas, the Costa Rican delegate stated ‘that if the right to oppose the government was not

⁵⁰ For this quotation and the surrounding debate, see Morsink, 112.

⁵¹ Quoted in Morsink, *The Universal Declaration*, 303.

⁵² Quoted in Morsink, *The Universal Declaration*, 305.

⁵³ Morsink, *The Universal Declaration*, 307-308.

added to the right of participation in government “all human rights would be lost. The Nazi and fascist governments – like all tyrannies – had been able to deprive the people of all fundamental human rights precisely because they had first deprived them of the basic right to oppose the government.”⁵⁴

However, the plan to include an explicit statement of a right to rebellion was not widely supported. Most delegations saw this as too potentially destabilizing, as it might give encouragement to *any* group, national or otherwise, that sought to overthrow a legitimate government. The compromise that emerged was for a statement in the Preamble, which takes the following shape:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...

While the wording may seem an endorsement of sorts of the right to rebel, the placement of the text in the Preamble and not in the text of Article 21 is a reflection of the grudging support it received as well as the unease with its possible effects that the drafters felt. Nonetheless, the inclusion of such wording is indicative of an acceptance of a key concept related to self-determination. The statement at least acknowledges that the likely practical outcome of tyrannical oppression is rebellion, and a more accurate assessment would be that states have a primary duty to protect human rights and that gross failure to do so might lead citizens to make use of the ultimate protection they have at their disposal.

The question of specific protections for minority PIFG rights, which many delegates felt was essential, was frequently and passionately taken up, and an article was in fact proposed and approved. Thus it is strange and complicated story to relate how the article fell by the wayside and did not appear in the final text. In the draft prepared by Humphrey, an article (mostly formulated by the legal scholar Hersh Lauterpacht and approved by the Sub-Commission on Minorities), created explicit limitations on a state’s power over its citizens by delineating specific duties owed to minorities. It stated that, in any state with a:

substantial number of persons of race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic, or religious minorities shall have the right, as far as compatible with public order and security to establish and maintain schools and cultural or religious institutions and to use their own languages in the Press, in public assembly and before the courts and other authorities of the State.⁵⁵

⁵⁴ Morsink, *The Universal Declaration*, 308.

⁵⁵ Quoted in Morsink, *The Universal Declaration*, 272.

The only country with strong opposition to its inclusion was the United States, though other countries saw that its inclusion might necessitate wider discussions about minorities as distinct from sub-state PIFGs. The Byelorussian delegate suggested that the article might need broadening to include matters of ‘territorial autonomy’ for minority groups.⁵⁶ In the drafting sessions, the chair, Eleanor Roosevelt representing the US, unsuccessfully attempted to delete the entire article twice. However, the ensuing debate became convoluted and the French expert, Prof. Cassin, withdrew the article so that it could be ‘held over’ for future discussions. The article disappeared, despite even more dramatic discussions before the full ECOSOC session, where again, despite general approval of the idea, no acceptable formulation could be brought to a vote for inclusion in the Declaration.⁵⁷ These events illustrate how in the drafting of the UDHR the perennial problems associated with self-determination surfaced and trumped the vigorous and determined efforts of many states to address fully and completely the implications of the concept, particularly with regard to the limits of its exercise. Despite the omission of a specific reference to minority rights, it should be noted that many delegates felt that Articles 2, 15, 18, 19, 21, 22 and 27⁵⁸ already contained fundamental protections that would apply to all members of a society, whether in the majority or minority, and that these articles ensured their ability to achieve meaningful participation in the life of the state in which they found themselves.

Looking at the UDHR through its drafting and in its final form, a less than clear picture emerges related to self-determination. Firstly, it has to be noted that although self-determination played a crucial role in the drafting process, the term never appears in the text. It could be argued that this is not surprising given that self-determination is a right exercised by groups and not individuals, who were more properly the subject of the UDHR. However, parts of the International Covenants and later documents crafted by the United Nations employ the phrase, and the term’s absence in a document that draws so heavily on so many of the conceptual touchstones related to self-determination begs the question as to why it was not simply used.

The best answer is that it was a combination of two factors. The first is that most of the states participating in the creation of the UDHR were deeply concerned about the likely practical implications of including self-determination as an explicitly stated right in a normative document such as this. Many of the

⁵⁶ Quoted in Morsink, *The Universal Declaration*, 272.

⁵⁷ These sessions are covered in *great* depth in Morsink, *The Universal Declaration*, 273-280.

⁵⁸ See Appendix B.

major powers involved had colonies or were only just beginning to decolonise and many states without colonies feared that explicitly conferring rights to PIFGs, let alone a right of *national* self-determination, would lead directly to secession and state fragmentation, something from which the implied right of rebellion in the Preamble steers very clear. Regardless of whether a right to rebellion implicitly exists in the UDHR, the Preamble was written so as to permit only reform or revolution *within* an existing state and *not* withdrawal. Given the membership of the UN at the time, and particularly given the absence of the soon to be independent Asian and African countries, the non-inclusion of self-determination in an explicit form that took on fully these issues is not that surprising.

The second factor that might explain self-determination's explicit absence has more to do with contextual understandings of the theory than with the more immediate practical outcomes of including it. As we have seen, the UDHR and the *travaux préparatoire* are littered with commitments and references to 'democracy', 'popular sovereignty', 'nationality' and a human rights foundation of state legitimacy, all of which are critical to the construction of a normative framework for a right of self-determination. Yet, actually making the connections necessary to affect this was not possible at this moment in time, as these terms still meant different things to the states involved, especially the most powerful ones. While there was frequently agreement about the importance and value of the terms, there was far less about their meaning and even less about how they might fit together. The sharp and often bitter exchanges noted above reflect only a taste of the differing understandings related to concepts that, the superpower blocs championed.⁵⁹ Given that the international community was still in the midst of a massive contextual shift, resulting in a much greater formalization and institutionalization of relations, it is not surprising that compromise and consensus, essential for establishing norms, eluded the diplomats. We are thus left with only a crude outline of a normative right to self-determination, which is found by piecing together conceptual fragments. Nonetheless, these fragments represent another enormous change in the evolution of the concept.

Following the approval of the UDHR in 1948, the ECOSOC began the task of developing a more detailed, legally binding elaboration of the Declaration. This soon evolved into two Covenants: The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR) which were

⁵⁹ These disagreements are taken up in detail in section (ii), below.

drafted in the early-1950s, ratified in 1966 and entered into force in 1976.⁶⁰ As with the drafting of the UDHR, the *travaux préparatoire* for the Covenants reveal much about the understanding of self-determination at that time as well as how this interpretation shaped the trajectory of the concept.

d) *The International Bill of Rights*

The first reference to self-determination in the Covenants appeared in a draft proposed in 1949 by the Soviet Union.⁶¹ This proposal was initially dropped but resurfaced later in 1950 at the insistence of a number of states. Once self-determination resurfaced, the lines of debate focused around four key questions: whether self-determination was a ‘principle’ or a ‘right’; if it was properly located within covenants protecting *individual* human rights; who could legitimately exercise self-determination, specifically, whether it was limited to non-self-governing ‘peoples’ or whether it also applied to ‘peoples’ within existing states; and, lastly, what, if any, legal limits or organisational mechanisms could or should be set up to manage and control the application of self-determination.

The first of these four questions reflected the sharp and growing division between, on the one hand, the communist bloc and the recently independent countries, such as India and Pakistan, and, on the other, those states who at the time still held colonies (e.g. Belgium, France and the UK) and their allies, most notably the United States. Eleanor Roosevelt, who represented the United States on the Third Committee as the Covenants were first drafted, noted that the US had no argument against the *principle* of self-determination or its appearance in the text as such. In fact, she took pains to stress that the US supported it greatly in theory and in practice, and the representative from the United Kingdom seconded this approach to the concept.⁶² Although the US and the UK pushed for this interpretation, their efforts were somewhat half-hearted, perhaps because they sensed the changing world-view of the concept.

Despite the fact that Article 1(2) of the Charter refers to self-determination of peoples as a ‘principle’ rather than as a ‘right’ and despite the fact that the UDHR had not mentioned self-determination explicitly in any fashion, the muted support for this interpretation of self-determination shows how world opinion had begun to shift. There was extremely strong support for a ‘right’ of self-determination, particularly from the Soviet Union and its satellite

⁶⁰ These form, respectively, Appendix C and D.

⁶¹ See Antonio Cassese, ‘The Self-determination of Peoples’ in Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), 92.

⁶² UN, A/C.3/SR.310 (1950) and A/C.3/SR.402 (1952).

states and, not surprisingly, from the newly independent countries such as India, the Philippines and Egypt. Instead of pursuing what increasingly looked like an anachronistic line, the states still holding colonies and the US tended to highlight the difficulties that a less measured approach to the concept might entail.⁶³ Nonetheless, this small change of wording, the outcome of an exceptionally brief debate on what was regarded by most participants as a minor point related to self-determination, reflects a singular milestone in the evolution of the concept. This was the first time that self-determination is expressed explicitly as a *right* within a binding treaty governing the action of states that were party to it. It is to this draft article of the ICCPR and to this moment in time that one could reasonably point to date the emergence of the right of self-determination as a peremptory norm of international relations.

The acceptance of the 'right' of self-determination was momentous; however, that its acceptance was so matter-of-fact and achieved with minimal dissent is also striking. Perhaps this indicates that world opinion about self-determination had already shifted, and that the greatest support for the concept was now located in states where it had not originated. Whatever the case, the speedily achieved consensus to include a 'right' of self-determination in the draft Covenant was not matched by a similarly speedy agreement about the meaning and implications of the right. However, the debates that unfolded over the next four years as the Covenants took shape provided a heightened degree of mutual understanding of the concept.

How self-determination, which most felt was a collective right, fit together with human rights was questioned frequently while drafting the Covenants. This first came up when the US and other countries asked whether the Third Committee, which focused on human rights issues, was the appropriate body to deal with matters related to self-determination.⁶⁴ While the US and others raised this issue principally to divert discussion away from affirming a 'right' of self-determination (for reasons discussed above) and while the competence of the Third Committee to discuss the matter was never seriously challenged, several other delegations sought to clarify the status of what they felt was clearly a 'group' right within the framework of individual rights.

The representative from Turkey pointed out that there were three types of rights: individual rights, 'rights recognized to groups of individuals and exercised by groups of individuals', and the rights of nations.⁶⁵ This tripartite

⁶³ See below.

⁶⁴ UN, A/C.3/SR.310, 311 and 312 (1950).

⁶⁵ UN, A/C.3/SR.310 (1950).

division of rights was at least tacitly accepted by most other states, and many saw an interconnectedness of these rights. For example, the Yugoslavian representative noted that the right of people to self-determination was an individual right but one that was ‘enjoyed collectively’ much like religion and the right to live under a democratic regime, and the Ukrainian representative asked how individual rights could be secure if individuals, acting collectively, could not determine their own fate in their own form of government.⁶⁶ The representative from Mexico felt ‘the right of peoples to self-determination was certainly the attribute of collectivity, but that collectivity was composed of individuals. To make an attempt on their collective rights was the same thing as to violate their individual freedoms.’⁶⁷ In the boldest and most blunt statement on this point, the Byelorussian delegate noted that if the *right* of self-determination was not recognized ‘all individual rights would cease to exist’.⁶⁸

These comments reflect the view that although self-determination is inherently a group right, it is connected fundamentally to *all* individual rights owing to its function as a guarantee of responsive government and democracy. This interpretation moves close to the hierarchy of rights as well as towards the understanding of the duties of states towards all citizens outlined in Part I, but it lacks the kind of definitive statement about the relative moral worth or legal standing of group rights and individual rights that would have secured this. However, in the preamble to the ICCPR, the second paragraph expresses that human rights have their origin in natural laws and not just in international law, the result of an insertion made by the Australian government.⁶⁹ By noting that human rights are inherent, and, moreover, by tracing them to the dignity of individuals, this insertion locates the origin of the idea of human rights within the liberal democratic tradition and it implies a primacy of individual rights over and above those exercised by a group, again moving closer to the framework suggested in Part I.

As the drafting process continued, the drive to include the right of self-determination grew and the efforts to clarify further the holders of and limits to the right continued. In late-1952, the decision was made to split what was originally intended to be one Covenant into two⁷⁰ and what was to become Article 1 of both the ICCPR and the ICESCR now included the following wording:

⁶⁶ UN, A/C.3/SR.399 (1952).

⁶⁷ UN, A/C.3/SR.311 (1950).

⁶⁸ UN, A/C.3/SR.311 (1950).

⁶⁹ Manfred Nowak, *The UN Covenant on Civil and Political Rights: CCPR Commentary* (Kiel, Germany: N.P. Engel Publishers, 1993), 2-3.

⁷⁰ UN, A/C.3/SR.360, 361(1951) and 371 (1952).

- I. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status.⁷¹

Other references to self-determination were included in other draft proposals for the ICCPR and the ICESCR, but despite the agreed changes and shared understandings that all this represented, there was deep uncertainty about the details entailed within the passages. Some states pointed out that including the right to self-determination prior to its key precepts being clearly defined might be detrimental to the overall process of enhancing individual rights, but this objection did not carry the day.⁷²

Once again, the perennial issues associated with self-determination raised their heads, and none was bigger than the question of what groups could legitimately exercise this right, and, more specifically, what were the implications if ‘nations’ (present in the 1952 draft article) as opposed to or in addition to other PIFGs within a state were legitimate possessors. In 1952 during the Third Committee’s discussions on this question, the Chilean representative attempted to provide greater precision, suggesting different cases in which the right of self-determination of *peoples* might apply: states that had lost their ability to exercise this right due to aggression, ‘highly developed peoples’ who had not yet exercised their right to self-determination (presumably colonies), and the like.⁷³ It was also put forward that the term ‘peoples’ referred to those groups that did not yet form independent states and were under colonial control. Others noted that ‘peoples’ should be interpreted to mean large national groups and that ‘the right of self-determination should be granted only to those who made a conscious demand for it; and that peoples who are politically undeveloped should be placed under the protection of the international trusteeship system, which would prepare them for the exercise of the right to self-determination’. Still others felt that the reference to ‘nations’ was important as this gave greater clarity as to which groups had a legitimate claim to the right of self-determination, as only nations had the requisite political development to hold the right.⁷⁴

Given this degree of uncertainty, many members of the Human Rights Commission concluded that a study should be made to determine exactly the content of the right, and they noted that ‘the Commission would be failing in its task if it merely kept on repeating, in one way or another, that peoples had the

⁷¹ UN, E/2256 (1952).

⁷² UN, E/2256 (1952).

⁷³ UN, A/C.3/SR.399 (1952).

⁷⁴ UN, E/2256 (1952).

right to self-determination, and did not study those problems which, once elucidated, should make it possible to transfer the whole problem from the theoretical stage to that of practical application.’ It was also suggested that the Sub-commission on the Prevention of Discrimination and the Protection of Minorities should study the relationship between minorities and self-determination and that UNESCO might study the sociological and psychological characteristics involved.⁷⁵ However, it would not be until 1970s that such systematic efforts were made, and it is questionable whether these (admittedly excellent) investigations on the subject provided the hoped-for and much needed clarity.⁷⁶ Without the benefit of such studies at the time of drafting, the Commission fell squarely into the trap it hoped to avoid.

In the draft of Article 1 that had been submitted for both Covenants, the holders of the right of self-determination were identified as ‘all peoples and all nations’, which indicated that the right might still be connected with the idea of nationality as well as to less well-defined ‘peoples’. The inclusion of ‘nations’ came about at the request of the communist states and was, at least at first, widely supported, as the intention was to provide protection for minority nationalities within existing states, a long-standing concern of the Soviet Union.⁷⁷ Raising the issue of national (as well as other PIFG) minorities sharpened the debate, especially since the Charter had referred only to ‘self-determination of peoples’ and used the term ‘nations’ as a synonym for ‘states’. On one level, there was concern that this might be expanding the right, in that this might require states to recognize in some legal fashion groups already extant within their boundaries and that this might ultimately permit other states to interfere with what they considered ‘domestic matters’ or even to violate the territorial integrity of states. However, on another level, there was concern that limiting the right to ‘nations’ and ‘peoples’ only might narrow the interpretation too severely.⁷⁸ The overwhelming majority felt that ‘nations’ could be deleted since ‘all peoples’ was considered to be the more comprehensive phrase, thus including ‘all nations’.⁷⁹

This more expansive interpretation of ‘peoples’ won out because it seemed to pose the fewest barriers to decolonisation, which was, given the historical moment in which the debate occurred, increasingly the focus of the

⁷⁵ UN, E/2256 (1952).

⁷⁶ These attempts are recounted in and advanced by two UN studies: Cristescu, *The Right to Self-determination* and Francesco Capotorti, *A Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* E/CN.4/Sub.2/384/Rev.1 (New York: United Nations, 1979)

⁷⁷ The Soviet interpretation of self-determination was outlined briefly in Chapter 3 and will be returned to again in section (ii) of this chapter.

⁷⁸ UN, A/C.3/SR. 361(1951), 398 and 399 (1952).

⁷⁹ Cristescu, *The Right to Self-determination*, para. 47 and see UN, E/2256 (1952) and E/2731 (1955).

right;⁸⁰ however, this interpretation brought up serious questions about groups within states. It was noted in the *travaux* that if self-determination was limited to non-self-governing territories this might have the effect of giving them ‘more effective protection than to peoples living in other territories [within states]’ and that this might ‘be giving approval to discrimination’ against such groups. For this reason a draft article, separate from Article 1, was proposed for inclusion within the ICCPR, which later became Article 27. This article states that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This insertion was highly controversial both then and now. At the time, it was feared that, owing to the increased obligation imposed on multi-national states, many would not ratify the Covenant. The representative of Belgium, in the 399th session of the Third Committee, commented that if it applied to *all* peoples, this might encourage interventions or ‘artificial separatist movements’.⁸¹

The fear of secession (in a non-colonial context) was widespread, and many countries raised the issue as they attempted to define (and limit) the legitimate holders of the right to self-determination. For example, when the representative of New Zealand noted that ‘if self-determination was intended to be recognized as a right, the right should be commensurate with the principle and should include the right of secession’⁸², a number of countries that had previously supported vigorously the inclusion of a right of self-determination now sought to limit its scope to non-self-governing territories.⁸³ The *travaux* show that there was a clear consensus that peoples under colonial administration or peoples who were in non-self-governing territories, regardless of the conditions of that rule, held the right of self-determination, however there was only limited agreement on what characteristics groups within states needed to possess to be legitimate holders of the right. The most common ones mentioned were the characteristics associated with PIFGs, namely, ethnic, religious, linguistic and cultural factors, and some consideration was given to the

⁸⁰ See section (iii) below.

⁸¹ UN, A/C.3/SR.399 (1952).

⁸² UN, A/C.3/SR.648 (1952).

⁸³ See, for example, the statements of Greece, Syria and Pakistan in UN, A/C.3/SR.572, 648 and 652 (1952), respectively. Given the sizable national minorities within each of these countries, it is hardly surprising they adopted this view.

idea that such groups needed to differ substantially from the rest of the state's population.⁸⁴

The lack of consensus on delineating the legitimate holders of the right did not consume all the discussion. For example, in the 366th meeting of the Third Committee, the idea that self-determination had an 'internal and external aspect', was brought up and widely supported.⁸⁵ There was broad consensus that the external dimension implied that a 'people' could achieve independence, international recognition and respect for their territorial integrity, and that the internal aspect, whereby the same people could govern themselves, had been present in the drafting of the Charter and the Covenants. The deliberations also indicate that states considered that the one of the chief internal aspects of self-determination was the achievement of effective human rights protection. This was certainly the intention behind Article 27.

However, also in the 366th meeting of the Third Committee, some argued that self-determination should not be confused with the rights of minorities and that the Charter was not intended to give rights to minorities.⁸⁶ Thus, it is hard to draw any firm conclusions from the proceedings of the committees that drafted the ICCPR about whether groups, national or otherwise, within existing, non-colonial territories are able to exercise the right of self-determination in any form beyond the extent guaranteed in Article 27, i.e. within their existing borders.

As noted legal scholar Antonio Cassese concluded in his recent analysis these exchanges, the 'peoples' entitled to a right to self-determination must meet two conditions: first, that they must be a 'national' group, i.e. that they 'must be a member of a state made up of different national groups of comparable dimensions'; and, second, that the national group 'must be recognized constitutionally'.⁸⁷ Based on the *travaux préparatoire*, there is some support for the idea that the delegates drafting the Covenants reached such a conclusion. If accurate, this interpretation limits the right of self-determination rather severely and in a manner that is inconsistent with the philosophical foundations from which much of the ICCPR emanates. However, Cassese makes clear he is referring to 'international self-determination', which indicates that he is considering those groups that would have international recognition and, presumably, legitimate access to secession, but this seems to read something into the deliberations that created the International Bill of Rights. While some of the states present might have concurred, 'it was also argued, however, that,

⁸⁴ Capotorti, *A Study on the Rights of Persons*, para. 166.

⁸⁵ UN, A/C.3/SR.366 (1951).

⁸⁶ UN, A/C.3/SR.366 (1951).

⁸⁷ Cassese, 'The Self-determination of Peoples', 95.

under the Charter, all peoples had the right to self-determination, that it mentioned no exception, and that hence a people could not be debarred from exercising that right on the pretext that it had formed a national minority.⁸⁸

So there appeared to be concern over national minorities but at the same time, a belief that their rights were already protected, though not explicitly. Thus, despite the lack of precision, a new awareness for nationalities and other PIFG within existing states did emerge and, importantly it did so within a framework of liberal democratic human rights, with some consideration also given to the relative importance of those rights. An expanding and deepening consensus regarding non-self-governing peoples, particularly colonies, had also materialized and solidified, to the extent that the few states that attempted to raise questions about self-determination's appearance in the Covenants or about the exact contents or meaning of the right were derided for attempting to delay an inevitable and just process of human liberation.⁸⁹

The final question around which these debates centred was about what, if any, mechanisms were needed to manage the application of self-determination. This was driven by a push-pull effect, in that, on one hand, there was a powerful, widespread desire to apply self-determination to the decolonisation process and explicitly to link this with the emerging human rights norms, and, on the other, to find a coherent formula by which to prohibit or at least to limit the legitimacy of secession for national groups within states. Controlling this effect would be difficult given the long-standing philosophical problems of simultaneously endorsing and restricting secession, which were explored in Chapter 2.

Although the relationship between self-determination and decolonisation is explored in greater detail in section (iii) of this chapter, it is impossible to avoid the topic now as it was such an important issue during the drafting of the Covenants. As mentioned above, the fear over secession and its obvious connection to the right of self-determination was omnipresent in the drafting committee, but such was the moral imperative to decolonise that few if any ventured to play down or deny the connection between self-determination and decolonisation.

One of the strongest critics of the decolonisation process was Belgium, and their opposition (if it can be called that) was more about the timing and management of the process than it was about decolonisation's correctness. In 1950, the Belgian representative argued before the Third Committee that if self-determination were applied quickly within colonial territories such as the Congo and led to independence 'the people would elect chiefs who would deprive [the

⁸⁸ UN, E/2256 (1952).

⁸⁹ UN, E/CN.4/SR.474 (1954) and UN, A/C.3/SR.668 (1954).

inhabitants] of many of the human rights accorded by the authorities responsible for their administration'.⁹⁰ This argument was roundly dismissed as were most subsequent attempts to spell out how independence would take place or what other options self-determination might imply besides independence. As noted earlier, many countries saw these attempts as obstruction, and, not surprisingly given the context, there was no further consideration of the points the Belgium raised.⁹¹ This is unfortunate, because, despite Belgium's real motives in raising these issues, the concern of human rights is perpetual and is meant to run beyond independence and, accordingly, no fully, logically coherent normative framework for the right of self-determination could ignore how human rights will or will not be enhanced by decolonisation. Because this portion of the equation was intentionally ignored, the framework for the application of self-determination created in the ICCPR contains potential weaknesses.

Moreover, the limited agreement reached about the application of self-determination and the somewhat constricted nature of the debate meant that serious questions about secession outside of the decolonisation process were explored insufficiently. For example, when self-determination was removed from the draft Covenant in 1950, Noriega, representing Mexico, interjected that he would like to see it return, and he expressed his country's regret at its deletion. Responding to this, Baroodi of Saudi Arabia commented that the deletion came about because of the fear that the right of self-determination might be employed by minorities within states. In response, Noriega noted that 'human rights should be protected by the rule of law, lest man should be compelled to have recourse to rebellion against tyranny and oppression... to prevent it, the collective right of self-determination should be guaranteed.'⁹² Noriega's comment linked self-determination and a right of rebellion in an interesting fashion, showing that he believed them to be inseparable, but he also suggested a means of moving forward that might reconcile the employment of both ideas. In this conception, the collective right of self-determination is best seen as an inducement to states to protect human rights and the rule of law so that the exercise of the ultimate right of redress, rebellion and/or secession, would not become necessary. However, owing in part to the haste to include a reference to self-determination for the purposes of decolonisation and in part to

⁹⁰ A/C.3/SR.310 (1950).

⁹¹ Pakistan was one country that used such language frequently in the drafting of the covenants and reflected the zeal of many countries for the decolonisation process when the Pakistani representative noted that regardless of the final definition of the right, self-determination would be achieved, as it was too significant to human progress to halt. UN, E/CN.4/SR.474 (1954).

⁹² UN, A/C.3/SR.310 (1950).

the reluctance to explore secession for fear of empowering emerging nationalism within existing states, Noriega's fascinating interjection received virtually no further consideration and an opportunity to provide clarity and, perhaps, a more coherent norm was lost. Having noted this, the lack of consensus did accurately reflect the shifting positions and priorities of the international community at this turbulent stage in the evolution of the concept.

Still, some aspects of this problem were addressed in a way that provided greater clarity. The United States consistently challenged the status of self-determination during this period, but because of its growing numerical inferiority during voting as new states joined the UN, the American objections were not normally decisive, yet one consistent interjection that the United States made, that independence was not the only legitimate end of self-determination, was taken up and debated constructively and became a commonly accepted point.⁹³ It was agreed repeatedly in the *travaux* 'that self-determination was but one of many operating principles of the international system and that its exercise was conditioned on the maintenance of international peace and security.'⁹⁴

This study has argued that this kind of debate leading to shared understanding and the prioritization of values and concerns is fundamental to the construction of norms of international behaviour and to understanding the nature of international society itself. Whether international peace and security should rank higher than the exercise of self-determination, or whether the exercise of self-determination is necessary for the maintenance of international order are crucial questions to resolve, as the answer to these questions guides the responses to the challenges of self-determination. It is clear from the evidence examined that, when drafting the International Bill of Rights, the international community felt that the maintenance of international peace and security was mostly a separate and competing norm and that it took precedence, despite the fact that self-determination was also seen as a priority both for decolonisation and for relations between existing states. Although more debate would certainly have thrown increased light on the thinking behind this, the debates during this time pointed toward increased consensus on at least some aspects of the challenges.

e) *The Declaration on Friendly Relations*

Outside of the context of decolonisation, only few resolutions of the General Assembly had any significant impact on the evolution of self-

⁹³ UN, E/2256 (1952), E/CN.4/SR.474 (1954) and E/2731 (1955).

⁹⁴ UN, A/C.3/SR.366 and A/C.3/SR.366 (1951) and 399 (1952).

determination at the normative level, but one of those few crucial exceptions was the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (commonly known as the Declaration on Friendly Relations), passed in 1970.⁹⁵ The inclusion of self-determination in the text of this resolution was virtually a given as it had appeared in numerous General Assembly resolutions related to decolonisation (discussed below) prior to this one, but drafting the Declaration offered a fresh opportunity to explore and clarify the meaning of the right of self-determination, especially given that the last systematic attempt to do so had been nearly a decade before and prior to the admission of many new member states as a result of decolonisation. In the *travaux préparatoire*, many of the positions expressed in the drafting of the ICCPR were restated, including the American and the British desire to recognize the ‘principle’ of self-determination. Others felt that the right of self-determination should be limited to the decolonisation process only, but neither of these opinions was widely supported.⁹⁶ As the records of the special committee tasked with drafting the Declaration indicate, ‘[i]t was also recalled that the right to self-determination could not be interpreted in such a way that it meant that the right could be exercised only once and solely with the view to independence’⁹⁷, suggesting an appreciation of the internal dimensions of the right and the view that it extended beyond the decolonisation context.

As had been the case in the drafting of the ICCPR the question of who could hold and exercise the right surfaced, and, as before, many different views were expressed. One delegate felt that it should apply not only to peoples who inhabited large or small areas but also those within federal states, autonomous regions and non-self-governing areas, and that those who were ‘geographically distinct and ethnically and culturally different from the remainder of the state should, with adequate safeguards, be able to exercise the right to self-determination’.⁹⁸ Other representatives noted that such a wide interpretation of ‘peoples’ would be ‘an invitation to secession’ and that this would carry the principle ‘to an absurd extreme’.⁹⁹ The consensus that emerged was that ‘peoples’ needed to be interpreted in a broad sense to increase its applicability, that self-determination had both an internal and external component and, very importantly, that there were a range of expressions that reflected fulfilment of

⁹⁵ UN, A/Res. 2625 (1970).

⁹⁶ UN, A/7619 (1969), paras.140-154.

⁹⁷ UN, A/7619 (1969), para. 153.

⁹⁸ UN, A/7619 (1969), para. 156.

⁹⁹ UN, A/7619 (1969), para. 157.

the right.¹⁰⁰ While the committee accepted that self-determination was the driving moral force behind the decolonisation process, there was widespread support for the United States' suggestion that fulfilment of self-determination could also include free association or integration with an existing state and many expressed a fundamental connection between human rights and self-determination.¹⁰¹

Importantly, the committee investigated what this interpretation of the right implied about the duties states had towards peoples within their jurisdictions.¹⁰² Specifically, some countries felt that greater, explicit clarification related to the internal aspect of self-determination was needed. The majority of the committee wanted to include a statement that would require states to respect human rights and promote representative, democratic institutions that were inclusive of all citizens. However, some felt that this would apply only to states with existing federal arrangements or with geographically, ethnically or culturally distinct minorities. This touched off a further debate related to secession, and opinion was sharply divided with some states promoting an explicit right of secession as a means to 'cement...unity' while others felt this would be a corruption of the right. Some representatives felt that 'it would be an interference in a State's domestic affairs if the Committee were to draw up rules for the secession of peoples within a State' and that 'if there were genuine discrimination against any ethnic group in an independent state that group would have the right to rebel but it would be a domestic matter'.¹⁰³

Drawing in part on the drafts proposed by the US and the UK and the debates mentioned above, the committee created several passages related to these points that became part of the Declaration.¹⁰⁴ The Declaration makes clear that '[e]very State has the duty to promote through joint and separate action universal respect for and observance of human rights' and that 'alien subjugation, domination and exploitation' as well as 'denial of fundamental human rights...constitutes a violation of the principle [of self-determination and] is contrary to the Charter'. The final text also has an inclusive tone, stating that 'all peoples have the right freely to determine without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter'. The Declaration also makes clear that states

¹⁰⁰ UN, A/7619 (1969), paras. 158-159 and 171-172.

¹⁰¹ UN, A/7619 (1969), paras. 140, 153, 156, 159, 164, 175 and 176.

¹⁰² UN, A/7619 (1969), paras. 175-177.

¹⁰³ UN, A/7619 (1969), para. 179.

¹⁰⁴ For the full text of the Declaration, see Appendix E.

must refrain from any action that might deny this right, and although in no case does it define 'peoples' exactly, the wording and the *travaux préparatoire* confirm that a broad definition was intended and that this certainly included the inhabitants of existing states.

From this, it seems clear that self-determination had evolved considerably in major UN instruments by 1970, most of which were not specifically connected with decolonisation. A link between the right of self-determination and human rights was made, though not fully articulated. States were obliged to promote self-determination and were in no cases to deny it, even within their own borders, and the limits of the right and its relationship to secession were explored, though, again, without sufficient clarity added owing to a lack of consensus. However, a few other resolutions in the General Assembly as well as several resolutions of the Security Council during this time period offer more precision, which, while limited in scope and general impact, further shaped the trajectory of self-determination within the UN system.

f) General Assembly and Security Council Resolutions

Although self-determination became an established part of the UN structure with the Charter, there were few resolutions of the General Assembly and even fewer of the Security Council mentioning self-determination in the early years of the organisation's history. The right of self-determination was first used in the text of a General Assembly resolution in the first session in 1946, and in this resolution, a pattern that continued for years was set: the right of self-determination was applied almost exclusively to the issue of non-self-governing territories.¹⁰⁵ Decolonisation and its relationship to self-determination is the subject of section (iii) below and, as will be suggested there, decolonisation was the one application of self-determination around which an overwhelming, favourable consensus developed. However, despite the paucity of resolutions from the General Assembly and the Security Council that refer either directly or indirectly to self-determination outside of decolonisation, there were some important documents and discussions that broadened the scope of the right beyond this narrower application.

The situations in South Africa and Southern Rhodesia were just such cases and were of great concern to the General Assembly and the Security Council from the UN's earliest days until the 1980s. In both cases the right of self-determination of peoples was at the heart of the resolutions passed. However, neither of these cases fitted neatly into the decolonisation model that

¹⁰⁵ UN, A/Res.9 (1946).

emerged during this period. In neither case could the ‘non-indigenous’ or ‘non-African’ populations simply withdraw as they were so large and so entrenched in each country, and in the case of South Africa, the matter was all the more complicated because the Republic of South Africa was a recognized, sovereign, non-colonial state whose internal affairs were meant to be protected by the principles of sovereignty and non-interference in ‘essentially domestic matters’. Moreover, because the majority of the population of these two countries were disenfranchised and had no meaningful part in either the government or the public life of those states, their plight could not be construed as a *minority* rights issue in the strict, numerical sense of the term. Accordingly, they presented unique challenges to the norm of self-determination that was taking shape in the international community at this time.

The primary concern of all the General Assembly resolutions related to both South Africa and Southern Rhodesia, beginning with resolutions in the General Assembly’s First Session, was the denial of fundamental rights on which these ‘illegal racist minority’ regimes were based.¹⁰⁶ In the case of Southern Rhodesia,¹⁰⁷ the situation did involve the transfer of sovereignty away from a metropolitan power to local control, but this transfer had been progressively hijacked and deliberately controlled so as to limit the participation of virtually all the inhabitants who were of ‘African origin’.¹⁰⁸ Despite this, the thrust of the General Assembly’s reaction was to ensure that an inclusive polity emerged, by forging a constitution through ‘the full participation of representatives of all political parties’ and by operating the political system based on ‘one-man one-vote’.¹⁰⁹ In resolution 1760, the General Assembly demanded ‘the immediate extension to the whole population, without discrimination, of the full and unconditional exercise of their basic political rights...and the establishment of equality among all inhabitants of the Territory’.¹¹⁰ The tone of this early resolution was remedial (rather than chastising) and steeped in the language of human rights and the internal exercise of self-determination, understood here as genuinely representative government and meaningful participation in the society.

In later resolutions, as the inflexibility of the regime led by Ian Smith became increasingly evident, the tone hardened. For example, in resolution 1889

¹⁰⁶ For example, see UN, A/Res.44 (1946),

¹⁰⁷ The complex history of the creation of Zimbabwe with all its intrigues, power bargaining and political machinations are retold well and succinctly in Peter Calvocoressi, *World Politics since 1945* 7th ed. (London; Longman, 1996).

¹⁰⁸ Part of the complexity of this situation was that not all ‘white’ inhabitants supported these moves and many ‘blacks’ did, usually for personal reasons of conviction and, often, for financial self-interest.

¹⁰⁹ UN, A/Res.1747 (1961).

¹¹⁰ UN, A/Res.1760 (1961).

passed in 1962¹¹¹, while there is an explicit reference to self-determination and while it clearly aims to achieve meaningful participation of the whole population, the text mentions the denial of the rights of ‘the majority of the African population’, which is the first differentiation of inhabitants in the territory by identity. While this may seem a minor semantic change, its relevance to the application of self-determination is significant, because the differentiation (however correct it may have been in fact) suggests that the only rights that concerned the General Assembly were those of the named group. Of course, in the understanding of self-determination outlined in Part I of this study, and indeed in the ICCPR, the right to self-determination applies to all peoples, PIFGs or otherwise, and the central goal was equality and equal representation, not the privileging of one, currently oppressed group over those of their oppressor, however ‘just’ doing so might seem at the time. This dangerous interpretation of self-determination became more pronounced in resolutions 2138 and 2262, both of which speak of the ‘inalienable rights’ of the ‘African people of Zimbabwe’.¹¹² In neither case is it clear who constitutes the ‘people of Zimbabwe’ or, more importantly, who is excluded from this group and its rights.

Similarly, the General Assembly was clear in its repeated condemnation of the ‘racist regime’ in South Africa during the apartheid era. In the Third Session of the General Assembly in 1948, the treatment of South Africans who were ethnically Indian was raised by the representatives of India, and it was deemed a violation of the principles of the Charter and of the UNDHR.¹¹³ In subsequent years, the condemnation of the South African government widened to encompass the whole apartheid system, by which the vast majority of South African citizens were denied a meaningful role in society and the political system. Resolutions 615 and 616, passed in 1952, were fulsome in their rejection of the apartheid system at all levels and called for its swift removal, but 616 went further and outlined what the future of a multi-racial South Africa (or any other similarly diverse state) should look like.¹¹⁴ It noted that harmony in such a society is dependent upon ‘respect for human rights and freedoms... equality before the law for all persons regardless of race, creed or colour, and when economic, social, cultural and political participation of all racial groups is on a basis of equality’. In addition to this, the resolution also makes a general statement about the duties of states, affirming ‘that governmental policies of

¹¹¹ UN, A/Res.1889 (1962).

¹¹² UN, A/Res.2138 (1966) and 2262 (1967).

¹¹³ UN, A/Res.265 (1948). This was reiterated in several subsequent resolutions: A/Res.395 (1950), 511 (1951) and 615 (1952).

¹¹⁴ UN, A/Res.615 and 616 (1952).

member states which are not directed towards these goals, but which are designed to perpetuate or increase discrimination, are inconsistent with the pledges of the members under Article 56 of the Charter.¹¹⁵ As a result, this resolution not only recites the specific failings of the South African regime but it traces out a norm about states' responsibilities to all of their inhabitants, thus providing further details about internal expressions of the right of self-determination. Moreover, unlike the resolutions related to Southern Rhodesia discussed above, this resolution, points to an inclusive, democratic future in which all South Africans would have equal rights.

Between 1946 and the end of the Cold War, the UN Security Council passed roughly 650 resolutions while in just the next ten years, another 650 were passed and the annual number of resolutions of the Security Council in the last few years has increased above even this high rate. The dynamics of the Cold War that restricted the activity of the Security Council did not apply in the same way to matters related to self-determination, particularly to the cases of Southern Rhodesia and South Africa.¹¹⁶ The Security Council spent much time debating these matters and passed numerous resolutions related to both situations.

When the Smith government in Southern Rhodesia attempted to declare independence in 1965, the Security Council responded with a resolution rejecting the actions of what it called a 'racist settler minority'.¹¹⁷ Subsequent resolutions brought in economic sanctions and condemned the 'political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia'.¹¹⁸ Resolutions 277 and 328 both recognized the resistance to the Rhodesian government as 'liberation', called upon all member states to isolate the regime in Southern Rhodesia and asserted a vigorously the right of self-determination of 'people of Zimbabwe'.¹¹⁹ However, by doing so the Security Council added to the level of confusion about whether the 'people of Zimbabwe' included anyone, black or white, who supported 'Southern Rhodesia' or the Smith government or, indeed, what 'Zimbabwe' meant. Resolution 328 called on the UK as administering power to guarantee the right to self-determination, and

¹¹⁵ UN, A/Res.616 (1952).

¹¹⁶ It is interesting to note that the other areas in which the Security Council was extremely active were decolonisation and the Israel-Palestine conflict, both of which had multiple resolutions and both of which dealt with the right of self-determination to some degree.

¹¹⁷ UN, S/Res.217 (1965). It is interesting to note that it passed unanimously with only one abstention, that of France, not United Kingdom as might have been expected given that the UK nominally exercised sovereign authority for Southern Rhodesia. The UK's unwillingness to use the veto to stop this process perhaps reflects the fact that by 1965 it had accepted decolonisation and distanced itself somewhat from South Africa and Southern Rhodesia.

¹¹⁸ UN, S/Res.232 (1966) and 253 (1968).

¹¹⁹ UN, S/Res. 277 (1970) and 328 (1973).

specifically called on them to ensure the unconditional release of political prisoners, the repeal of all racist, discriminatory legislation, the establishment of full political rights and equality for all citizens. While the aim was to create ‘majority rule’, the emphasis on establishing rights and equality for *all* suggests that a liberal democratic, inclusive solution was desired. However, in resolution 411, passed in 1977, there is no mention of political equality or the establishment of equal rights within the hoped-for new state of Zimbabwe, thereby weakening the idea that national liberation was to be an inclusive activity.

Even though the situation in South Africa was similar in many ways to Southern Rhodesia, the Security Council’s resolutions had a different feel to them and took a different positions related to self-determination, which further shaped the development of the concept and in a direction that reflected the framework outlined in Part I. From the earliest resolution about South Africa, the Security Council made a connection between human rights and the obligations of the state to ensure the well-being of all its citizens by suggesting that systemic abuse of rights, such as apartheid, was a threat to international peace and security.¹²⁰ Moreover, unlike most of the resolutions about Southern Rhodesia, the ones related to South Africa never envisaged any future for the country other than a stable, multi-ethnic, democratic and rights-respecting government, and this vision was explicitly at the core of almost every resolution. Resolution 134 reminded the government of South Africa of its obligations towards all of its citizens and that the goal of the state should be ‘racial harmony’.¹²¹ Resolution 182, passed in 1963, pointed out that the object of South African leaders was to ensure ‘basic human rights and fundamental freedoms for all individuals within the territory of the Republic of South Africa without distinction as to race, sex, language or religion’.¹²²

Although Resolution 392, passed in the wake of the Soweto riots in 1976, ‘[r]ecognizes the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination’, it fails to define the parameters of ‘the South African people’ potentially introducing a less inclusive interpretation.¹²³ However, Resolution 417, passed the following year, eliminates this confusion while at the same time illustrating how the interpretation of self-determination was evolving.¹²⁴ In the text, the Security Council affirmed ‘the right to the exercise of self-determination by all the people of South Africa as a whole, irrespective of race, colour or creed’. The Security Council went on to

¹²⁰ UN, S/Res. 134 (1960).

¹²¹ UN, S/Res. 134 (1960).

¹²² UN, S/Res. 182 (1963).

¹²³ UN, S/Res. 392 (1976).

¹²⁴ UN, S/Res. 417 (1977).

express 'its support for, and solidarity with, all those struggling for the elimination of apartheid and racial discrimination and all victims of violence and repression by the South African racist regime'.

By identifying *all* those struggling against apartheid as the group whose right to self-determination was being repressed, the Security Council, perhaps unwittingly, interpreted self-determination within the liberal democratic tradition and in accordance with the normative framework traced out in Part I. As the resolution clearly indicates, it is not specifically the repression of the ethnic, racial, national or religious identities of those denied self-determination that triggered the Security Council's ire; instead, it is the persistent and pervasive abuse of political rights and fundamental freedoms that condemned the South African government, not the fact that the government was 'alien' or 'colonial', and as a result, the government had rendered itself fit for removal by those who opposed it, who would be acting *with* international support. While the discrimination of certain PIFGs under the system of apartheid rightly received *particular* condemnation, the Security Council's upholding of human rights *generally* within the context of the right of self-determination not only made for a more philosophically coherent normative response to the *particular* abuse of apartheid but it also enhanced the vision of an inclusive South African future, thereby creating incentives for both sides of the conflict to be inclusive in the pursuit of a settlement.

In subsequent resolutions, Security Council pushed for the peaceful dismantling of the apartheid system so that all South Africans could be given 'a full and free voice in the determination of their destiny'.¹²⁵ When the South African government attempted to redraw the Constitution, ostensibly to create greater inclusion but in fact to perpetuate the apartheid system, the Security Council rejected it, particularly its enfranchisement of 'coloured' and 'Asian' South Africans, which the Council saw as an 'insidious' attempt to 'fragment' the population. The Security Council's call for a 'united and unfragmented South Africa' should be seen not only as a rejection of any secessionist activity but also as a restatement of the desire for genuine inclusion as an exercise of the internal aspect of right of self-determination.¹²⁶ It could also be argued that the Security Council hoped to create a new national identity in South Africa, constructed not on ethnic or racial lines, but within the liberal democratic tradition, based around inclusion and equality of rights for all the PIFGs within the country.

What emerges from the study of self-determination in the UN system is that by the 1980s, the understanding and, to a lesser extent, the normative

¹²⁵ UN, S/Res.473 (1980).

¹²⁶ UN, S/Res.554 and 556 (1984).

expression and application of the concept evolved dramatically if slowly and unevenly, and it was in some important respects similar to the normative framework outlined in Part I. The Charter based the protection of human rights and respect for political independence of states on the 'principle' of self-determination, thereby establishing it as one of the UN's founding ideas. The drafting of the International Bill of Rights and the Declaration on Friendly Relations reflected a growing global consensus in favour of linking the 'right' of self-determination with human rights and political, social and cultural inclusiveness. The General Assembly and Security Council resolutions dealing with the illustrative cases of Southern Rhodesia and South Africa reveal that the international community was prepared, at least in part, to apply these standards to the challenges presented by groups within states who sought to alter the *status quo*. While these changes played out over half a century and ultimately did not to provide quite enough clarity to address all the challenges thrown up by the concept, they constituted a more workable structure for addressing the perennial questions associated with self-determination and emerging nationalism than had ever existed.

(ii) The Cold War and self-determination

The superpower conflict more than any other factor came to shape and define the context of post-war international affairs had a distorting effect on the interpretation and the application of self-determination by the international community that persisted for nearly fifty years. Both the Soviets and the Americans championed self-determination throughout the second half of the twentieth century, offering enthusiastic yet often vague endorsements of the concept, but, as mentioned before, they interpreted the idea in very different ways. The intermittent presence of self-determination during the discussion about international norms from the Atlantic Charter up to the creation of the UN was principally the result of two the emerging superpowers differing attitudes about the meaning and limits of the concept. Because the Cold War was the defining paradigm in which self-determination was interpreted and applied until the 1990s, these early East/West debates over the concept are illuminating.

Shortly following the publication of the Atlantic Charter, the Soviet ambassador to the United Kingdom, I. M. Maisky, set out the Soviet Union's position on the document.¹²⁷ In this speech, Maisky stated that the Soviet

¹²⁷ The text of the Soviet statement to the Inter-Allied meeting at St. James's Palace is contained in Holborn, ed., *War and Peace Aims*, 356-357. All references are to this text.

Union was 'guided in its foreign policy by the principle of self-determination of nations' and he noted that this was one of the chief 'pillars' of the Soviet system. Maisky continued by stating that the Soviet Union defended 'the right of every nation to the independence and territorial integrity of its country' and that it 'denounced all violations of sovereign rights of peoples, all aggression and aggressors, all and any attempts of aggressive states to impose their will upon other peoples and to involve them in war.'

Given the Soviet Union's actions before the war towards Finland, Poland and the Baltic states, such declarations invited charges of hypocrisy, but, to be fair, Maisky's policy statement can be seen as an attempt to balance the application of such principles with practical considerations. As Maisky noted 'the practical application of these principles will necessarily adapt itself to the circumstances, needs and historic peculiarities of particular countries...'. This caveat could be interpreted in one of two ways: as an attempt by the Soviets to give themselves an 'out', thereby allowing them to violate the principle whenever it suited them; or as a genuine acknowledgement of the difficulties of applying such normative ideas (or *any* normative ideas for that matter) to actual circumstances on the ground. The evidence in this case is heavily on the side of the former explanation, but there are good reasons not to brush aside the later interpretation hastily.

As discussed in Chapter 3, Lenin's position on self-determination was crucial to the principle's popularity and persistence in the interwar period, and the Soviet Union's official endorsement of self-determination was not novel when Maisky spoke in 1941. Stalin, at Lenin's behest, wrote at length on the subject of nationality and the right of self-determination when he took on the Communist Party's newly created role of Commissar for Nationalities in 1913. Later, Stalin formally incorporated the idea of popular sovereignty and self-determination into Articles 15 to 18 of the 1936 Constitution of the Soviet Union, which granted the *right* of secession to the constituent republics that made up the Union.¹²⁸

However, Stalin's view on self-determination was different from Lenin's, or, rather, it was a more circumscribed interpretation of the concept. Stalin held that while self-determination was an indispensable weapon of the proletarian revolution, it applied only to 'fixed' nationalities, which he understood as peoples who had a tradition of national unity and inhabited clearly demarcated territories. More importantly, Stalin felt even more strongly

¹²⁸ For Stalin's statements on nationality and self-determination, see J.V. Stalin, 'Marxism and the National Question' (1913) [<http://www.marxists.org/reference/archive/stalin/works/1913/03.htm#s2>] and A.A. Kristian, *The Right of Self-determination and the Soviet Union* (London: Boreas Publishing Co., 1952), 16-17.

than Lenin did that the exercise of these rights should be firmly subordinated to the goals of socialism.

Accordingly, while it seems that the Soviets were genuinely keen to endorse and even to expand on the Atlantic Charter's commitments to self-determination, their understanding of the concept meant that any application of the principle would be governed by their competing norm of protecting and promoting the world socialist revolution. While in practical terms this gave Stalin immense latitude as to when he could invoke, ignore or overrule the concept, thereby opening his actions and statements up to charges of hypocrisy, the Soviets ensured that self-determination would figure heavily in the discussions of the post-war norms of international behaviour by championing nationality, self-determination and popular sovereignty even more forcefully than the US and its allies did.

While these differing interpretations might have led to a major rift, the demands of the war and the need for a strategic alliance kept these matters on the periphery until such time as victory was within clear sight and the issues could no longer be deferred. In the closing stages of the war, when the uneasy allies met at Yalta and Potsdam to discuss their post-war objectives, self-determination was a critical factor, at once affected by the Cold War tensions and serving to increase these divisions.

At both Yalta and Potsdam, strategic questions about the distribution of power and spheres of influence in Europe and the rest of the world predominated over normative issues such as self-determination. The future of Poland and Germany was an obvious as well as vital issue in which self-determination was germane, but Russian security interests trumped any philosophical or normative commitment to self-determination. Despite the inclusion of assurances about democratic choice in the text of the Yalta and Potsdam declarations, United States and United Kingdom lacked the ability and the will to force the issue. At Yalta, for example, President Roosevelt (and to a lesser extent Churchill) hoped that the soon to be created United Nations Organization would provide a more appropriate forum where their approach to these critical issues could be pressed.

Although there were some *bona fide* democratic procedures and popular consent involved in re-establishing governance in Poland, Romania, Yugoslavia, etc., the Soviet Union used a range of means (some coercive, others less so) to ensure Moscow-friendly administrations. As a result, in the years following the end of the war, the US, the UK and their allies concluded that the Soviet commitment to self-determination was, at best, perfunctory and, at worst, nonexistent. From their vantage, the Soviets deduced that efforts such as the

Marshall Plan were nothing short of American attempts to purchase loyalty, which they saw as a corruption of self-determination.

It is perhaps for this reason that the United States was somewhat surprised when the Soviet Union championed so vigorously the right of self-determination in the drafting of the UN Charter and the International Bill of Rights over the course of the next decade. The *travaux préparatoire* of the Charter, discussed previously, indicate that both sides greatly desired some inclusion of the concept as one of the founding principles of the UN, however, the Soviets' insistence that it be regarded as a right and that it should apply to all peoples seemed deeply hypocritical to the United States and other liberal democracies. By 1950 the nuclear arms race was at full pace, China had fallen to the communists, NATO and the Warsaw Pact were created and Berlin, indeed Germany as a whole, had been divided into semi-autonomous 'sectors' that looked increasingly permanent. Even more importantly, the conflict over the Korean peninsula, a dispute that heavily involved the idea of national self-determination, became a 'hot' war that brought the superpowers into another more deadly confrontation. One of the principal effects of the Korean War and these other events was that the Security Council, indeed the whole United Nations system, became frozen. For example, the Security Council passed a mere five resolutions a year on average in the early 1950s, representing a sharp decline from the years just before and reflecting the inability to develop consensus in the very body that was meant facilitate international compromise and harmony.

This freezing of the Security Council and other United Nations bodies as well as the constraints that the Cold War placed on international affairs generally had a pronounced effect on the evolution of self-determination both within the UN system and within international relations as a whole. For example, during the drafting of the International Covenants, Cold War politics and antagonism nearly blocked all progress. In numerous exchanges between the representatives of the Soviet Union and the Soviet satellite states and the representatives of the United States and the United Kingdom about the meaning and application of self-determination, the discourse became heated, with each side pointing out the 'failings' of the other.¹²⁹ On one occasion, the Soviet Union argued that, if the US was committed to self-determination and genuinely wanted it included in the Covenants, then they would have to do something about the racial discrimination within their own country.¹³⁰ In a similar vein, the representative of the Soviet Union questioned the commitment

¹²⁹ See, for example, UN, A/C.3/SR.402, 649 and 668 (1952).

¹³⁰ UN, A/C.3/SR.402 (1952).

of the UK to self-determination given its refusal to permit plebiscites within its colonies, to which the British representative retorted that the same question could be asked of the Soviet Union given the absence of plebiscites in Latvia and Poland.¹³¹

Thus, self-determination was increasingly used as a debating point in the rhetorical battle of Cold War ideals, or, more frequently, its validity was made tangential to the workings of international politics, which were heavily dominated by *Realpolitik*. In several situations where the emerging norm of self-determination could have been applied in a way that might have reduced tensions, calculations of raw power and self-interest predominated. One such example is Vietnam, particularly the events surrounding and following the Geneva summit in 1954.

The situation in Vietnam in 1954 was one over which the international community had tremendous potential to influence events given that the warring factions within Vietnam desired a settlement and needed outside help to achieve lasting peace, territorial solidarity and economic and cultural cohesion.¹³² To be sure, the divisions (political, ethnic and religious) were intense, but the general desire for a settlement made the situation ripe for resolution through international mediation. Tragically, not all sides appreciated this and some did not desire it, and because of Cold War wranglings and French interests, the UN, in particular the Security Council, was not involved. As a result, international action to use the proposed countrywide elections as a means of establishing a representative government together with adequate minority and human rights protections, regardless of whether new state was ultimately communist or not, was not ever seriously considered.

The United States, directed principally in this matter by Secretary of State, John Foster Dulles, purposely engaged in a limited manner in the proceedings and had very little interest in the countywide election method, as intelligence revealed that this would most likely result in a victory for the communist Vietminh. On the other side of the Cold War divide, for internal and geopolitical reasons far removed from the Vietnamese situation, the Chinese communist government and (to a lesser extent) the Russians forced the Vietminh, at the very time the Vietminh military strength was at its apogee, to agree to a 'two state' settlement with the prospect of elections within two years.

While the communist-proposed elections might at first sound like a plan for a plebiscitary expression of self-determination, this was not advanced owing to any concerns about human rights but rather as a tactic to decrease regional

¹³¹ UN, A/C.3/SR.668 (1952).

¹³² Stanley Karnow, *Vietnam: A History* (New York: The Viking Press, 1983), 188-205.

tensions while still expanding the communist sphere of influence. The possibility of reconciling these two goals does not appear to have been considered. Following the division of the country and the formation of the demilitarized zone, the United States assumed a much larger role in the direction of internal affairs within the South, but this did not render a more democratic or a more rights-oriented, internal expression of self-determination and the plans for an election in 1956 were abandoned on American orders as it became evident that a genuine expression of public will in the South at this time would lead to a communist victory and a single communist state. Whether a communist victory might have enhanced the well-being of the Vietnamese or brought more humane governance was simply not a point that was remotely considered, as the answer to this was assumed to be negative, given the Cold War mentality at the time. Put simply, for the Americans, self-determination, as they understood it, could *not* take place in a Soviet-style state, rather, self-determination was a key objective for their involvement.

Interestingly, as the war dragged on and its costs rose in human, political and economic terms, self-determination, which was long seen as a US war aim, became the preferred way to de-escalate the conflict for both the Johnson and the Nixon administrations. While the ultimate goal for all American administrations from Eisenhower to Ford was to foster a stable and democratic (i.e. pro-American) government in the South, Johnson increasingly stated in public that the United States merely desired to end to the interference by the North in the self-government of the South. Both Johnson and his Secretary of Defence, Robert McNamara noted in explicit terms that the main reason for 'Rolling Thunder', the extensive bombing campaign against North Vietnam, and the ground war against the Viet Cong guerrillas, was to defend the self-determination of the people of South Vietnam.¹³³ In talks with the Russian Prime Minister Kosygin in 1967, Johnson stressed that 'that any stable peace in Southeast Asia must give full weight to the wishes of the people concerned, a principle which is most often referred to as self-determination'.¹³⁴

President Nixon placed self-determination at the heart of his vision of the 'just peace' that America sought in Southeast Asia. In a televised interview in 1970, Nixon clarified:

¹³³ Meeting between UN Secretary General U Thant and President Johnson, 21 February 1968, in *Foreign Relations of the United States (FRUS)*, Johnson Administration, Vol. VI, Doc. 81. [<http://www.state.gov/r/pa/ho/frus/johnsonlb/vi/13692.html>]; and *FRUS*, Johnson, Vol. V, Doc. 84, n2 [<http://www.state.gov/r/pa/ho/frus/johnsonlb/v/>].

¹³⁴ Memorandum of Conversation between President Johnson and Prime Minister Kosygin, 23 June 1967 in *FRUS, Johnson*, Vol. XIV, Doc. 229, [<http://www.state.gov/r/pa/ho/frus/johnsonlb/xiv/>].

What I mean is not victory over North Vietnam - we are not asking for that - but [a just peace] is simply the right of the people of South Vietnam to determine their own future without having us impose our will upon them, or the North Vietnamese, or anybody else outside impose their will upon them.¹³⁵

In this light, 'Vietnamization', Nixon's policy for handing over the responsibility for conduct of the war and the settlement to the South Vietnamese, could be seen as an exercise of self-determination as they interpreted it or at least of the US attempting to ensure that self-determination took place while acting as a muscular guarantor of democratic values.

However plausible this reading of policy might be, it is a rather different from the understanding of self-determination that was developing in the UN system and somewhat distant from the interpretation outlined in this study, as both Nixon and Johnson interpreted self-determination as the defeat of communism, which is perhaps a plausible interpretation but one that carries tremendous difficulties. For example in the same interview referred to above, President Nixon was asked if the administration's previously stated goal of a non-communist Southeast Asia was undermined by this new commitment to self-determination. He was also asked whether the United States would accept the results of a communist victory in free elections and what this would mean for the long-held American belief in the domino theory. In his reply, Nixon indicated that the US might have to accept a 'Yugoslav type' communist government in Vietnam if elections went that way, but he cast grave doubts over whether genuinely free elections could ever lead to choice for communism over democracy. Moreover, despite Nixon's stated willingness to accept the outcome of elections, it must be remembered that Nixon authorized massive military and covert activity to defeat the North Vietnamese and to support the increasingly unpopular and unstable government of the Republic of Vietnam, not to mention that neither Nixon nor Johnson made significant strides to ensure that human rights or democratic processes were at the core of their desired outcome in Vietnam. Both sides were trapped by their conflicting interpretations of what 'national liberation' and self-determination would mean for the people of Vietnam.

The saga of Vietnam, repeated at least in part in many other situations such as Afghanistan, Angola, Guatemala and Czechoslovakia, illustrates well how self-determination was construed as a result of the Cold War. It was used as a political tool when convenient, ignored when not and applied in ways that hardly

¹³⁵ Live television interview with President Nixon, 1 July 1970, in *FRUS*, Nixon, Vol. 1, Doc. 67, [<http://www.state.gov/r/pa/ho/frus/nixon/i>].

reflected the concept's liberal democratic origins.¹³⁶ While this was hardly the first time in the concept's history that such things had happened, the greater frequency of its use and the intensity of the different understandings of the concept meant that self-determination's overall status during this period is harder to gauge. Moreover, these Cold War applications and interpretations skewed the trajectory of the evolution of self-determination that was taking place within the UN system during the same time with the effect that the international community's use and understanding of self-determination was inconsistent and somewhat incoherent. While self-determination was increasingly recognized as a norm of international relations, owing to the contorting and stifling context of the Cold War, there were few situations where the interpretation and application of self-determination was relatively uncontested and widely supported. The most important of these was decolonisation.

(iii) The 'special case' of decolonisation

At the simplest level, decolonisation was the process by which over two-thirds of the world's population moved from a situation in which they were governed by 'others' to a situation in which they became 'self-governing'. Many factors, both ideological and mundane, fuelled this process, but perhaps the greatest catalyst was the concept of self-determination. As examples in earlier sections of this study indicated, there is a fundamental connection between nationalism, self-determination and self-government that propelled numerous revolutions and movements going back to at least the eighteenth and nineteenth centuries, and self-determination was the ideological basis that guided the first structured decolonisation in the British colonies in the early nineteenth century, the devolution of substantial authority to Canada, discussed below, and it continued to be used both by the decolonisers and by those seeking independence from that time on. In short, despite the wide range of factors that played into the process, the debates over decolonisation were either explicitly or implicitly debates about the norm of self-determination. However, many of those involved *on both sides* of this debate argued vociferously that there could be no active application of self-determination's external aspect (i.e. independence or secession resulting in state fragmentation) outside of the context of decolonisation, making decolonisation something of a 'special case'.

¹³⁶ For an interesting overview of the two superpower's guiding principles related to intervention and self-determination, see Chapters 1 and 2 of Odd Arne Westad, *The Global Cold War* (Cambridge: Cambridge University Press, 2005). A more policy-focused discussion can be found in Peter W. Rodman, *More Precious than Peace* (New York: Scribner's, 1994).

Following the First World War, the leaders of the victorious countries, who faced seemingly endless emerging nationalist movements as they began to embrace the principle of self-determination, established the mandates system in Articles 22 and 23 of the League of Nations Covenant, which set out to create 'a half-way house between outright annexation of former enemy colonial territory and the grant of immediate independence'.¹³⁷ This system was deliberately paternalistic in its approach to non-self-governing territories, employing phrases such as 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world' when referring to the inhabitants of colonies.¹³⁸ The system also categorized colonies according to their 'fitness for democracy', classifying some colonies (those in category 'C' as being unlikely ever to achieve independence. In addition to its paternalism, the mandates system applied only to colonies of the defeated powers and not to those administered by victorious countries. It was, thus, always intended to be a 'top-down' process of decolonisation, however this institutionalized system of decolonisation occurred at the same time and both encouraged and was encouraged by the 'ground-up' movement for decolonisation in British and other European colonies.

The dramatic change of Britain's (and other European countries') overseas empires in the mid-twentieth century is an epic topic, but a few details are extremely relevant here. Despite the reluctance of many within Britain to grant independence or even greater autonomy to colonies, successive governments acknowledged and supported devolution of sovereign powers away from Westminster to dependent territories for nearly 100 years. Since the Durham Report of 1839,¹³⁹ Britain acknowledged that the granting of at least some control to colonies was the wisest course to ensure not only continued loyalty to the Crown but also stable and secure governance. Since that time, with varying degrees of enthusiasm, the British Crown transferred more of the political administration and social control of its colonies to the populations who were the permanent inhabitants.¹⁴⁰ One consequence of this was that in many territories, the permanent and/or indigenous population developed (or constructed) a national identity that accompanied the political systems that had been instituted.¹⁴¹ The effects of the First World War and the Great Depression accelerated both the top-down and the bottom-up motives for

¹³⁷ F.S. Northedge, *The League of Nations* (Leicester: Leicester University Press, 1986), 65.

¹³⁸ Article 22, *Covenant of the League of Nations* (1919).

¹³⁹ Lord Durham, *Report Of Lord Durham on the Affairs of British North America* (1839) [<http://www2.marianopolis.edu/quebechistory/docs/durham/1.htm>].

¹⁴⁰ British India had long been run on a basis of local control with only broad, overarching authority coming from Whitehall.

¹⁴¹ See Elie Kedourie, ed., *Nationalism in Asia and Africa* (London: Frank Cass, 1970) and Rupert Emerson, *From Empire to Nation* (Boston: Beacon Press, 1960), particularly Chapter 13.

greater autonomy. The mounting inability and the declining desire to govern that Britain and the other European colonisers exhibited combined with the increased demands and empowerment of the local intelligentsia for greater freedom. However, prior to the Second World War, the transfers of sovereignty were modest in comparison with those that occurred during and following the conflict.

During the Second World War, the issue of self-determination and decolonisation came up as soon as the war spread to the metropolitan powers. As France, Belgium and the Netherlands became occupied countries, the status of their overseas territories and populations came into question. At the Havana Conference in 1940, the independent states of the Americas discussed the short-term future of the European colonial possessions in the Caribbean. As the states that governed these territories came under Nazi control or had no means of exercising sovereignty over their dependencies, important issues of succession arose. Namely, the question was whether Germany could mount a justifiable claim over these territories, or, put another way, whether the United States and other neutral countries in the Western hemisphere could legitimately deny Germany access to the much desired assets in these colonies. The Havana Declaration set in place a mechanism to govern these territories under a neutral 'trust' for the duration of the war. Although the Havana Declaration was not intended to bring about decolonisation, several states supported the Argentine motion to hold plebiscites to determine the long-term future of these territories in accordance with the wishes of the populations concerned, and the Havana discussions themselves increased internal agitation for independence and ensured decolonisation's place on the post-war political agenda.¹⁴²

Another example of the unintended consequences of events during the war relates to the Atlantic Charter and its emphatic commitment to self-determination. Shortly after the Charter had been drafted the British Foreign Office commented on it, noting the possible practical pitfalls that such philosophical commitments might entail. These remarks highlight a clear appreciation of the difficulties of giving self-determination normative status. The Foreign Office noted that Point One of the Charter, which denied any desire for territorial aggrandisement by the signatories, might prove uncomfortable for the United Kingdom in its colonial dealings, particularly if it chose to maintain a 'protectorate' over less developed territories at the end of the war.¹⁴³ It was also pointed out that the implications of points two and three could cause serious problems as it was unlikely that many in the public,

¹⁴² Russell, *United Nations Charter*, 25-27.

¹⁴³ For the text of the Atlantic Charter, see Appendix A.

particularly in the US, understood the complexity of applying practically what had been agreed in principle.¹⁴⁴

In addition to the concerns over claims within Europe related to self-determination, there was great unease in many circles that the subject populations of Britain's colonies might see in the Atlantic Charter an official endorsement of their aspirations for self-government or even independence. One of the most prominent of these voices of concern was Leo Amery, the Secretary of State for Colonies.¹⁴⁵ These concerns proved well founded and were reflected in the popular press and within the House of Commons, where Churchill was forced to defend the Charter, noting that its provisions were intended to apply only to those countries currently under 'the Nazi yoke'.¹⁴⁶ Although this answer satisfied some, it proved insufficient if not irritating and hypocritical to others, and it certainly failed to take account of the logic implied by the strong commitment to self-determination that the Charter represented.

One of the leading supporters of decolonisation at this time was the United States. The American commitment to self-determination grew as Roosevelt increasingly cast the war as a fight for fundamental liberties, and many Americans made the link between fighting for liberty in the struggle against the fascists and the liberation from colonial rule. Vice President Wallace wanted the immediate granting of independence of the colonial areas held by *all* combatants at the end of the war and urged Roosevelt to press for this. Secretary of State Cordell Hull spoke of a 'palpable surge' for independence amongst colonial nations in Asia, and despite the obvious security dangers of endorsing independence in the Asia-Pacific area, the United States had been moving towards granting independence in the Philippines and made a formal declaration in 1942 that it would do so.¹⁴⁷

Hull concluded that the US should advocate a plan to encourage and facilitate decolonisation at the war's end. In preparation for the Moscow Conference of 1943, the US tabled a draft, joint declaration for the United Nations regarding 'National Independence'.¹⁴⁸ This document consciously built on the ideas contained in the Atlantic Charter, at first confirming that self-government would be returned to 'nations which have been forcibly deprived of independence' following the war and then declaring that the 'opportunity to achieve independence for those peoples who aspire to independence shall be

¹⁴⁴ Woodward, *British Foreign Policy*, 203-206.

¹⁴⁵ Russell, *United Nations Charter*, 63-64.

¹⁴⁶ Reynolds, 'The Atlantic Flop'.

¹⁴⁷ Russell, *United Nations Charter*, 76-78.

¹⁴⁸ US draft of a Declaration by the United Nations on National Independence, 9 March 1943, *FRUS*, 1943, Vol. I, Doc. 44, 747-749. All quotations are to this document.

preserved, respected, and made more effective'. The draft declaration noted that this was a 'particular pledge... of concern to all of the United Nations' and stated that it would be 'the duty and the purpose of each nation having political ties with colonial peoples...to fix, at the earliest practicable moments, dates upon which the colonial peoples shall be accorded the status of full independence within a system of general security'. The draft also charged the United Nations 'to assume with respect to all such peoples a special responsibility, analogous to that of the trustee or fiduciary' and advocated the creation of a 'Trusteeship Administration' to manage this process. It was Hull who seems to have coined the term 'trusteeship' and the idea gained much support during the conference, especially from the Soviets who, for their own reasons, sought to dismantle colonial territories. However, owing to pressures from the UK, the draft declaration did not become a formal part of the concluding Protocol, but was instead held over for further discussion at a later stage.

By the time that high-level discussions on colonies were renewed, just prior to the Dumbarton Oaks Conference, American enthusiasm for extending the right of self-determination to decolonisation had cooled somewhat. Two factors account for this: pressure from the United Kingdom and other colonisers in Europe and the growth of Cold War tensions between the US and the USSR. In a letter dated 3 August 1944, the US military's Chief of Staff, General George C. Marshall wrote to the Secretary of State suggesting that discussion of the trusteeship scheme 'should be postponed as the military situation is too fluid'.¹⁴⁹ Marshall highlighted the growing uncertainties of strategic situation in Asia and alluded to the tensions with the Soviet Union, noting that the political and military situation of the post-war world might make the granting of immediate independence to strategically vital territories unwise. He also noted the need to maintain close ties with European countries, such as Britain and France, who held dependent territories and who would be reluctant to relinquish control. In short, the Cold War mentality, which was daily hardening, began to affect policy related to self-determination, in this case with regard to colonial issues. Here again, the pressing weight of practical considerations trumped the more philosophical force of self-determination, and while this correspondence reveals a clear commitment to the concept and its implications for decolonisation, the balancing act that was made for understandable political, economic and, above all, strategic reasons, looked like it would lead to a rather tightly circumscribed

¹⁴⁹ General George C. Marshall, Chief of Staff, to Cordell Hull, Secretary of State, 3 August 1944, *FRUS*, 1944, Vol. 1, 699-703. All quotations are to this document.

norm. As a result, the Dumbarton Oaks proposals contained no reference to a trusteeship system.

However, this proved to be merely a delay, for at the San Francisco Conference in 1945, a more developed proposal by the United States, the United Kingdom, Australia, France, and China (at this time still Nationalist) for a trusteeship system garnered widespread support.¹⁵⁰ The main sticking points had to do with the scope of the trusteeship system, specifically whether existing colonies had to be incorporated and whether independence was the only outcome envisaged. Not surprisingly, the existing metropolitan countries (France, the UK, Belgium and the Netherlands) argued for voluntary admission to the scheme and often pointed out that independence ‘was not the only way of promoting the development of dependent peoples’ and that the goal should be ‘to promote development towards independence *or* self-government as may be appropriate to the particular circumstances of each territory and its people’.¹⁵¹ However, the shift in the attitude of Britain, France and the others is noteworthy, reflecting in part the acceptance of their weakened post-war condition and also their acquiescence to the moral arguments by the United States, the Soviet Union and a host of others. The final wording of Chapters XI through XIII of the UN Charter reflected the compromise made in San Francisco: decolonisation was now an internationally sanctioned and institutionalized *process*, established through the Declaration on Non-Self-Governing Territories (a euphemism for colonies) and the Trusteeship System, but this system was voluntary and employed only moral force to pressure colonial powers to achieve its ends. It also reflected the force of the combined support for decolonisation by the Soviet Union and the US, although they did so for different ideological and strategic reasons.

Over the next few years, a number of new states that had formerly been colonies (e.g. India, Pakistan, Burma/Myanmar) join the United Nations and began to increase the pressure for decolonisation within the General Assembly, which was reflected in a growing number of resolutions aimed at speeding the process. General Assembly Resolution 637, passed in 1952 during the drafting of the International Bill of Rights, provided the strongest articulation yet of the drive for decolonisation, and, notably, it explicitly connected the decolonisation process with the right of self-determination.¹⁵² This resolution called upon all member states to uphold and promote the right of self-determination within Trust territories and in non-self-governing territories alike, and it advocated the

¹⁵⁰ UN, *Documents*, Vol. 10, 433-454, 533-536 and 641-655.

¹⁵¹ Emphasis added.

¹⁵² UN, A/Res.637 (1952).

use of plebiscites, the promotion of indigenous leadership to administrative posts and other mechanisms as a means to achieve the desired end of full independence.

By 1960, following the admission of yet more new states to the UN, most of which had formerly been colonies, the tone of the General Assembly was noticeably more militant. The alteration to the composition of the General Assembly created not only a political and moral force but also numerical one that unified to create Resolution 1514, 'The Declaration on the Granting of Independence to Colonial Countries and Peoples'.¹⁵³ This strongly worded resolution condemned colonialism and alien subjugation as contrary to human rights, affirmed that the right of self-determination applied to all peoples including those within colonies, called on colonial administrators to take 'immediate steps...to transfer all powers to the people of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire...'. Thus, by 1960 a connection between self-determination and the process of decolonisation was made a formal part of the international system and its scope was beginning to extend to territories that were not originally part of the Trusteeship system.

This connection was strengthened and evolved gradually through a string of resolutions over the next ten years, during which time the pace of decolonisation quickened. These General Assembly resolutions displayed a forceful tone that reflected the frustration of many states that desired a more rapidly paced end to colonial rule. For example, Resolution 1541 sought to enlarge the situations in which the Trusteeship system applied and to increase the pressure on metropolitan states, and it employed the moral force of self-determination to accomplish this.¹⁵⁴

Similarly in Resolution 2131, passed in 1965, the General Assembly denounced the interference by outside countries in the affairs of newly independent countries and called upon all states to recognize and respect the right of self-determination for the purpose of achieving independence and 'the complete elimination of discrimination and colonialism in all its forms and manifestations'.¹⁵⁵ Resolutions 2621 and 2649 of 1970 affirmed the right of colonial peoples to struggle to achieve self-determination 'by all means available' and 2649 called upon all countries to lend assistance to those struggling for independence.¹⁵⁶ These and other resolutions employed language accepting and

¹⁵³ UN, A/Res.1514 (1960).

¹⁵⁴ UN, A/Res.1541 (1960).

¹⁵⁵ UN, A/Res.2131 (1965).

¹⁵⁶ UN, A/Res.2621 and 2649 (1970).

promoting ‘national liberation’¹⁵⁷ and the ‘crime’ against humanity that colonialism reflected.¹⁵⁸

By the mid-1970s, there was virtually no opposition remaining to decolonisation in either the UN or in the international community more generally, not least because there were so few non-self-governing territories left. The right of self-determination championed originally by the US and the USSR had seemingly found an acceptable normative outlet, where the difficulties about applicability and limits seemed to clash less with the strategic and ideological objectives of both superpowers despite the differences between their interpretations of the concept. In addition to this, for a range of political, economic, emotional and moral reasons, the states that had been least likely or were openly unwilling to extend the right of self-determination to the decolonisation process immediately following the Second World War were far more inclined to accept it as the middle decades of the twentieth century wore on. By the late 1960s, France, the United Kingdom, and Belgium, for example, were either passively accepting or were actively assisting the fragmentation of what had previously been their sovereign territory.¹⁵⁹ For all these reasons, decolonisation appeared to be a very special case indeed.

However, the application of self-determination for decolonisation was a special case for two other reasons beyond this. Firstly, it was the one area where the right of self-determination was accepted as applying *in extremis*, meaning it not only included a right of secession but, in fact, assumed that secession was the legitimate and expected outcome of its exercise. As the foregoing sections have tried to reveal, throughout most of the history and the debates about self-determination within the community of states, the assumption has been that secession was either illegitimate or an exception to the exercise of the right. Decolonisation seemed to turn this assumption on its head.

Secondly, and more importantly, the use of self-determination in the context of decolonisation seemed at odds with the more human rights oriented normative model that had been simultaneously evolving within the UN system. The greatest point of difference between this emerging view of self-determination and decolonisation was decolonisation’s prioritization of ‘national liberation’ over the rights of individuals as well as groups within the new states. In a way this is surprising because the tone of the arguments against colonial empires was overtly moral, presenting decolonisation as bringing to an end to

¹⁵⁷ UN, A/Res.2186 (1966)

¹⁵⁸ UN, A/Res.2621 (1970)

¹⁵⁹ The big exception to this trend was Portugal.

what had been roundly declared a hideous institution and a large-scale violation of human rights.

To be sure, much of the motivation for decolonisation was based around human rights oriented arguments and many condemnations of colonialism in UN instruments and resolutions indicate this. The text of Article 73 and 76 of the UN Charter, dealing with the Trustee Council and non-self-governing territories focuses on the benefits to be gained from democratic institutions and protection of fundamental human rights, placing these concerns at the highest level. Moreover, the ethos behind the charge given to the administering powers is to act in the best interests of the individuals within non-self-governing territories and to promote the 'political, social, economic and educational advancement of the inhabitants' above all else. Numerous General Assembly resolutions related to self-determination had reiterated this as well, particularly Resolution 648, which laid out the standards that would indicate whether independence had been achieved.¹⁶⁰ In the second part of the annex of this resolution, democratic standards of government, including equality of citizenship, protections of ethnic and cultural rights of minorities and the promotion of social and economic advancement of all inhabitants are listed as indicators of and requirements for granting independence.

Resolution 1514, the landmark 'Declaration on the Granting of Independence to Colonial Countries and Peoples',¹⁶¹ also indicated a need to establish inclusive, humane governance in the newly established states. This resolution sets out clearly that 'alien subjugation, domination and exploitation' are the specific wrongs of colonial administration that are to be reversed with the establishment of government based on the right of self-determination and the 'free' institutions and practices that will follow. Similarly, Resolution 2131 prohibited outside interference in the affairs of newly established countries, so as to protect their 'national identity', the inalienable right of peoples within a territory to determine their own future and to promote the new state's social, economic and political advancement.¹⁶² Likewise, Resolution 2144, while specifically condemning the regimes in South Africa and Southern Rhodesia, sought the broader aim of ending the kind of human rights violations that the perpetuation of colonialism engendered.¹⁶³

However, the actual process of decolonisation as encouraged, legitimized and recognized by the UN and various member states at this time did not adhere closely to these contemporaneous understandings and statements about

¹⁶⁰ UN, A/Res.648 (1952).

¹⁶¹ UN, A/Res.1514 (1960).

¹⁶² UN, A/Res.2131 (1965).

¹⁶³ UN, A/Res.2144 (1966).

self-determination, or, for that matter, to the one advocated in Part I of this analysis, and instead gave priority to other concerns, chiefly to territorial integrity.

In virtually every case of decolonisation, ‘national liberation’ was somewhat of a misnomer in that many colonies could not readily claim continuity between borders and nationality owing to shifting or arbitrarily created boundaries. While many colonial territories had recognizable, politically active and engaged PIFGs, few had developed a coherent and pervasive *national* identity, and of the more developed colonial nationalities, very few were sufficiently inclusive or permeable to encompass the often incredibly diverse PIFGs that were within the borders they inherited from their colonial past.¹⁶⁴ Again, while circumstances such as these were not totally unprecedented during the creation of new states, the scale of decolonisation was so great and the failure to address sufficiently the issue of identity and rights was so considerable that decolonisation presented unprecedented challenges. Given this, greater attention by the international community to a coherent and consistently applied norm of self-determination might have given greater shape and logic to the process.

Instead, territorial integrity, based on the norm of *uti possidetis juris*, played the authoritative role in defining most the territories and, somewhat inadvertently, the ‘nations’ to be ‘liberated’. The principle of *uti possidetis juris* was applied in the decolonisation process in South America during the early nineteenth century and stipulated that newly independent countries should conform to previously extant borders, even if these territorial boundaries failed to account for differences between PIFGs. This norm almost certainly solved many practical difficulties related to decolonisation, but the concept, which is fundamentally legal, ignores entirely the essential issues related to identity and the ethical basis of government discussed in Part I above by assuming that one, unified nationality exists in the territory in question, and that if not, either a nationality can be constructed readily or that nationality and identity is or can be made irrelevant to the process of state formation. The net effect of this was that many newly created states faced the challenge of building a state without any binding national identity, or, worse, with competing identities that could not be reconciled easily.

The troubled and all too often violent post-colonial histories of Nigeria, Sudan, Iraq, the Congo and Indonesia, to name but a few, reflect the short-

¹⁶⁴ India was an excellent example of this latter situation, as there was a discernable and growing sense of an ‘Indian nationality’ prior to independence but even this (largely) constructed and relatively permeable identity was not broad enough to incorporate all PIFGs in the sub-continent as became painfully clear as independence beckoned.

sightedness of granting or recognizing independence in a way that privileged territorial considerations while paying scant attention to the complexities of national identity and PIFGs that exist on the ground.¹⁶⁵ In most of these examples, the international community and the administering power made few efforts to obtain information related to the PIFGs within each of the countries or, when that information was known, they avoided using it to guide the process of decolonisation, opting instead to deal with and recognize whatever ‘national’ leaders with whom they were confronted. While these indigenous leaders were frequently popular (e.g. Mobuto, Sukarno, Nkruma) and sometimes reflected the will of the peoples within their territories, the nationalism they inspired was often centred on them and their vision of the country and did not account for the diversity of identities and aspirations of individuals within the territories or these groups’ aspirations.

Even where efforts were made in good faith to understand the demographic complexities and to blend this with an accounting of the genuinely expressed will of the population in question, difficulties persisted. To take one, fairly representative example, in his masterful, contemporaneous study of self-determination and decolonisation, Rupert Emerson examined the twisted and fraught process that eventually led to the creation Togo and Ghana.¹⁶⁶ Emerson notes how the Trust territories of British Togoland, Gold Coast and French Togoland each lacked anything approaching a national identity and how the borders of these colonies carved across the increasingly assertive ethnic Ewe people. Despite this and the fact that the British had governed their two Trust territories in a manner that frequently ignored the existing colonial boundaries, the UN Trusteeship Council pressed heavily to move each colony toward independence separately, weakening the viability of each while building in ethnic and linguistic minorities without regard to their status.

In response, the British and the French sought to apply the right of self-determination actively through the use of plebiscites, but the perennial difficulties of assessing ‘the peoples’ wishes’ frustrated these efforts. Firstly, the plebiscites were administered only within the existing territorial boundaries, thereby delivering a gerrymandered result by dividing up ethnic enclaves. In short, no one had determined who ‘the people’ were before asking what ‘they’ wanted. Secondly, because two European countries administered these three separate colonies, coordination was haphazard at best between the French and the British, leading to the rapid, unilateral granting of independence to French

¹⁶⁵ See Kedourie, *Nationalism in Asia and Africa*, and Alexis Heraclides, *The Self-determination of Minorities in International Politics* (London: Frank Cass, 1991) for insight into many such cases.

¹⁶⁶ Emerson, *From Empire to Nation*, 320-328.

Togoland. This lack of coordination and guidance by the international community and the Trusteeship Council's insistence upon territorial boundaries cannot account entirely for the instability Ghana and Togo experienced in their first decades of sovereign statehood but it certainly contributed to it. What is certain is that it was, at best, a partial application of the liberal democratic components of self-determination.

More importantly, the decolonisation process deviated most from the normative framework of self-determination suggested in Part I by giving limited attention to human rights protection in the post-colonial states. As noted before, the UN resolutions and many statements from governments presumed that decolonisation *per se* would advance human rights, but, despite the tremendous improvement that self-government promised, many post-colonial states failed to improve the human rights of their inhabitants. This was particularly the case in states that contained PIFGs that were either minorities or that were majorities but not dominant in the post-colonial state. In the resolutions and actions aimed at ushering in decolonisation, the international community neglected to insist upon or even encourage specific protections for these groups as a condition for recognition and took few steps if any to ensure that decolonisation would enhance the well-being of those groups and individuals after sovereignty was transferred. By failing to connect fully and forcefully the right of self-determination to the protection of human rights, the international community missed a significant opportunity to shape the future of these countries and to strengthen the norm of self-determination that was taking shape. While the failure to seize this chance is explicable given the other competing forces and norms affecting this remarkable transformation of the geopolitical landscape, this missed opportunity also affected the internal development of many newly created countries.

In Resolution 2131, the General Assembly reiterated the long-standing principle of non-intervention, condemned any armed intervention as an act of aggression and outlawed all forms of direct and indirect interference in the political, economic and social arrangements within newly created (and all other) states.¹⁶⁷ This prohibition, repeated numerous times, was intended to strengthen nascent states, but the assertion of the principle of sovereignty and non-interference also had the effect of solidifying these often arbitrary and problematic boundaries and strengthening governments that frequently did little to protect let alone enhance the rights and well-being of their citizens.

¹⁶⁷ UN, A/Res.2131 (1966).

Even where the stability of borders was a strategic necessity or a practically sound decision, the repeated, vehement assertions of the absolute inviolability of domestic affairs weakened the case for legitimate humanitarian interventions as well as for less invasive attempts to enforce existing human rights mechanisms. It also reduced the force of normative arguments to support and ensure the rights of non-dominant PIFGs and individuals within newly independent states. While many new states strived to be inclusive and to ensure meaningful participation in the public life of the state for all citizens while also respecting and promoting their rights within the private sphere, the record indicates that far too many emerging nationalist movements in the post-colonial world did not follow this path and that this was a direct causal factor in numerous insurrections and movements for secession in the post-colonial era.¹⁶⁸

This situation is essentially what Nigel Harris defined as ‘perverse national liberation’¹⁶⁹ and what Michla Pomerance identified as ‘the new UN law of self-determination’ in her scathing critique of the management of decolonisation¹⁷⁰. Too much of the decolonisation process fits exactly Harris’ definition of perverse national liberation in that it imposed ‘subordination on the inhabitants of a territory, not emancipation’¹⁷¹. In Pomerance’s view, the national liberations that were deemed acceptable by the UN under the banner of self-determination are troubling on many fronts but not least because many of them are not democratic. As she points out:

Not to a disturbing extent, the ‘new UN law’ exploits the democratic penumbra and respectability of ‘self-determination’ while scorning the essence of the democratic credo...in the ‘new UN law of self-determination’, however, democratic methods have always been strictly subordinate to the attainment of often preconceived ‘non-colonial’ results.¹⁷²

One is tempted to reach the conclusion that the various peoples within colonies were accorded better protections of their human rights under colonial rule than they were following independence. Without a doubt, ‘self-rule’ sometimes delivered fewer protections of human rights and less beneficial outcomes than what was experienced under colonial administration, thereby failing the well-being standard on which self-determination’s philosophical core rests. Although there were tremendous benefits that flowed from the numerous

¹⁶⁸ See Ralph Predmas, *et al.*, eds., *Secessionist Movements in Comparative Perspective* (London: Pinter Publishers, 1990) and Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley, CA: University of California Press, 1985).

¹⁶⁹ Nigel Harris, *National Liberation* (London: I.B. Taurus, 1990).

¹⁷⁰ Michla Pomerance, *Self-determination in Law and Practice: The New Doctrine in the United Nations* (The Hague: Martinus Nijhoff, 1982).

¹⁷¹ Harris, *National Liberation*, 225.

¹⁷² Pomerance, *Self-determination*, 75.

transfers of sovereignty, many of these transfers ought to have been managed very differently or, at the extreme, should not have happened at all, *if*, as Part I suggested, the legitimacy of self-determination is based on the improvement of human rights, the development of humane governance and the fulfilment of individuals within the new state. While the capacity and the will of the international community to effect such a decision were both absent during the process, the position merits discussion.

To be sure, this is an unpopular argument, and it was unpopular during the era of decolonisation when it was known as ‘the Belgian thesis’. This thesis was posited during the 1950s by the Belgian government, which argued that, while it was not entirely opposed to granting independence to its colonies, it remained sceptical of the endeavour, as it was likely to significantly drop the quality of government and perhaps even lead to systematic violations of human rights. As one Belgian diplomat put it in 1950, if self-determination were applied quickly within territories such as the Congo ‘the people would elect chiefs who would deprive them of many of the human rights accorded by the authorities responsible for their administration.’¹⁷³ Although the Belgian thesis has been rightly condemned as a desperate defence of a dying system and as an assertion that was almost certainly disingenuous,¹⁷⁴ it remains true that there were few efforts to place human rights standards ahead of the rush to decolonise, thereby calling into question the extent to which the concept of self-determination was actually employed during decolonisation and what this meant for the evolution of the norm. As Snyder warns, the ‘democratic’ transfer of authority can be disastrous in areas where there are multiple PIFGs, uncertain power structures and a limited infrastructure for human rights and humane governance, yielding results that stand in stark contrast to the intended democratic aims.¹⁷⁵

The international community did not apply the right of self-determination during decolonisation in a way that ensured ‘national liberation’ would lead to clear and discernible improvement in the lives of all inhabitants of all of the newly created states. By not seeking more complex and more dynamic solutions to the challenges of emerging nationalism, including the controversial possibility of not recognizing or not facilitating independence, the international community and the administering powers, at the least, missed an opportunity and, at worst, failed to live up to the ‘sacred trust’ they were charged to fulfil. By opting for rapid, territorially delimited transfers of sovereignty, the international community and the colonisers built in many problems.

¹⁷³ UN, A/C.3/SR.310 (1950).

¹⁷⁴ Emerson, *From Empire to Nation*, 309-311; UN, A/C.3/SR.402 (1952) and A/Res.1514 (1960).

¹⁷⁵ Jack Snyder, *From Voting to Violence* (New York: W.W. Norton, 2000), particularly Chapter 6.

On top of this, decolonisation caused the international community to focus on the denial of self-determination in just one category of non-self-governing peoples, namely those ruled from afar, the so-called 'salt-water' or 'blue-water' colonies, while losing sight of the denial of self-determination to PIFGs within established states. There was limited international attention directed to festering questions about the plight of, for example, the Kurdish people, the Basques or the native people in Central America, all of which, in addition to damaging human rights standards domestically, threatened the stability of international relations in these regions.¹⁷⁶ Again, if the great evil of colonialism was abuse of rights and a denial of internal self-determination, then the physical distances between those suffering and those committing the abuses should be irrelevant.

Decolonisation, like the Cold War and the formation of the United Nations system, had a profound impact on the evolution of the norm of self-determination. Over the course of the late-twentieth century, self-determination was, at various times, an official war aim, a founding principle of the United Nations Organization, a peremptory norm of the UN human rights regime, a justification for national liberation and for the struggle against racist regimes and a major point of division between the superpowers as well as one of their most cherished principles. Also during this time the international community's interpretation and application of the right of self-determination, in some important ways at least, moved closer to the model outlined in Part I of this study, however, this overall trajectory of its evolution was dominated by the ideological and strategic limitations of the Cold War.

However, the contextual transformations wrought by the end of the Cold War, the stuttered search for a 'New World Order' and a dramatic upsurge of emerging nationalist activity and the fragmentation of states in the early 1990s ushered in a new chapter in the history of the right of self-determination. Once again, a change in the context of international affairs led to new approaches to self-determination and nationality, but the contextual shift that came at the end of the Cold War was uniquely transforming. The expansion of liberal democratic ideas and practices, the resurgence of concern for human rights, the elimination of many crippling strategic constraints and the growth of identity-based political agitation all served as catalysts for a dramatic increase of nationalist challenges to existing states. Within the span of one decade, the concept of self-

¹⁷⁶ The United Nations did investigate many situations like these, but the attention of the organisation was limited mostly to studies as opposed to action of a concrete nature. One study that not only reviews the history of some of these problems but also implicitly reveals the limited nature of international action during this time is Jose R. Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (New York: United Nations, 1987).

determination evolved as much as it had in the previous five. Part III examines the contextual shift and selected events that followed the demise of the Cold War to discern more clearly the current status of the norm.

Part III – Praxis

Chapter 5

Towards coherent normative responses? – Self-determination and emerging nationalism in the post-Cold War era

The end of the Cold War was one of the most surprising and transforming events of the twentieth century. It was surprising in the sense that it came so soon on the heels of a nearly decade-long escalation of tensions following the Soviet invasion of Afghanistan; because it ended so rapidly and in no small part owing to genuinely democratic action, and because it involved, relatively speaking, extremely limited bloodshed. It was transforming in that it not only led to an immediate redrawing of the map of Central and Eastern Europe (and eventually of other parts of the globe) but also because it reshaped the theoretical assumptions on which the international community rested, altered the economic and social patterns of trade, finance and business and changed the strategic priorities of the international agenda.

The history of these remarkable events will be touched upon but only to show how certain events, ideas and forces coalesced to bring about to this dramatic contextual shift in international society and how these, in turn, affected the evolution of self-determination. The first section of Part III highlights how the sudden demise of the Cold War's ideological and strategic constraints created an environment that cultivated demands for new political arrangements within states and challenged global norms about territorial boundaries, sovereignty and intervention. On the theoretical level, liberal democratic principles became far more significant, evidenced by a rapidly growing global respect for human rights, humane governance and democratic practices. This was accompanied by the spread of economic liberalization and an increased faith in international institutions and global approaches to problem solving. The more tangible aspects of this new international environment stemmed above all from the near-total alteration of the strategic realities that had so tightly bound political and military action during the Cold War.

Suddenly, institutions that had been sedentary became active, others were transformed or disappeared and new ones were created as patterns and structures of power shifted, all of which produced a new dialogical space in which genuinely collective, international institutions, norms and action could be created, but, *at the same time*, this dialogical space also transformed the situation of many of Primary Identity Forming Groups (PIFGs), some of which yearned

for the opportunity to promote their cause and found in this new context tangible enhancements to help them achieve their aims. For many leaders caught up in this, with the demise of previously existing conditions and loyalties, the appeal of 'identity', real or imagined, new or ancient, became a magnetic force that could be employed to unite and motivate their peoples. The net effect of these forces and the resulting contextual shift was an increase in the relevance of self-determination and emerging nationalism in world politics, leading to rapid and dramatic evolution in the international community's understanding and application of self-determination as a norm. While this new context presented opportunities to construct a normative framework that adhered closely to the more coherent understanding of the concept outlined in Part I of this examination, the momentous upheaval of the new paradigm meant that the competition with other political realities and norms, many of which were newly created or undergoing a similar process of adaptation, was perhaps even greater than it had been in the past. Putting it another way, just as the dialogical space was opening up to discussions that might clarify self-determination in a positive way, the space got a lot more crowded.

Building on the general contextual observations in section (i), the middle sections of the chapter critically review a few aspects of two examples of emerging nationalism since the end of the Cold War, both from the region that experienced the greatest amount of state creation since 1989, Eastern Europe. The aim is not to give a narrative of these events, a comprehensive analysis of the international involvement in these movements or to narrow the perspective to just one region. Instead, the aim is to highlight the specific elements within these international responses that indicate the general trajectory of the norm of self-determination in the post-Cold War era. The international responses and debate surrounding each of them in their own way serve as guideposts marking the shape and trajectory of self-determination's most recent evolution and indicating in what ways and how completely the responses conform to the more coherent normative framework outlined in Part I.

The final and longest section of this chapter explores the case of Kosovo and the international actions and reactions to the events there. Over the past ten years, these responses have led to a contested, quasi-independence, in which state Kosovo currently finds itself. Without a doubt, Kosovo is the best illustration of the current position of the evolution of self-determination, not least because it demonstrates well the limits of consensus on the meaning and application of the norm but also because the international involvement in Kosovo represents, by most any measure, the international community's most

extensive intervention into a case of emerging nationalism, at least, since the 'fall of the Wall' if not ever.

(i) *Theoretical and tangible changes to the context of international relations*

The end of the Cold War created a new environment in which international relations took place, and the alteration to the established context of political, social and economic interactions across defined borders was dramatic and transforming. While not all of these changes are relevant to the evolution of self-determination, many are important to note. Although these changes represented a sometimes jarring fusion of high-minded ideas and base realities, the transformations can be broken down roughly into those that were predominately theoretical and those that were more tangible and concrete.

One very pronounced theoretical change was an upsurge of liberal democratic ideas and practices. Within just a few years after the Cold War ended, public discourse throughout the international community was steeped in the vocabulary of liberal democracy if not actually reflective of a genuine, growing commitment to its principles. Even when states such as Myanmar, Zimbabwe and Cuba defend illiberal and un-democratic practices today, the most common arguments they offer tend to reflect rather and reject the language of liberal democracy.¹ Although Thomas Franck's conviction that a normative right to liberal democratic governance had emerged by 1992 was overstated, the last seventeen years have seen a dramatic, global spread of the very liberal democratic ideas and practices that he outlined, at least suggesting that his conclusion might have greater credibility now, and however incomplete and qualified the growth of liberal democracy, there is no comparable ideological alternative to oppose it on the global stage today.² Thus, while a 'right of democratic governance' has not fully taken shape either as a norm or in practice and while there remains a sizable gap between the rhetoric of democracy and its reality since 1989, it is accurate to conclude that an imperative for states to

¹ David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Government* (Cambridge: Polity Press, 1995), 12-14, considers the 'democratic' language of such states as reflecting what he terms 'one-party democracy', which is anything but liberal. While such states in their acts and structure fit his typology, their rhetoric is more aligned to that of liberal democracy, which has become the *lingua franca* of international relations since the end of the Cold War. For example, rarely do states or leaders deny liberal democratic obligations such as free elections, human and civil rights protections or press freedom, instead giving the appearance of adhering to such standards.

² Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86 (1992).

ensure 'meaningful participation' has become more pronounced in the post-Cold War era.³

While democracy's increased global appeal in the post-Cold War era has not always brought with it a uniform commitment to all aspects of liberal democracy, one facet of liberalism, economic freedom and faith in 'the market', has experienced undisputed global uptake. Few transformations in world history have been as dramatic or as rapid as the globalization of the world economy since the end of the Cold War. The massive growth of liberal, market-oriented policies is not difficult to quantify: world trade has mushroomed, far more than doubling in the 1990s,⁴ regional trade agreements have spread to literally every part of the globe and have increase six fold in the past twenty years,⁵ capital flows freely and in staggering quantities,⁶ and the absolute number of people living on less than one dollar per day has dropped dramatically, in no small part owing to the globalization of the free market during this time.⁷

Measuring the impact of these changes on self-determination is difficult, but they have acted both as a stimulant and a deterrent to emerging nationalism. The spread of free-market economics and the resulting boost to the global economy has made it easier for nationalities to become economically independent, thereby increasing the likelihood of their political independence or autonomy. In brief, it has never been easier 'to go it alone'. Of course, globalization also dissuades potential secessionists, as there may be little economic incentive to separate when economic liberalization has reduced the comparative advantage of independence.⁸ Nonetheless, the growth of free markets has probably been more of a spur to demands for self-determination than a hurdle.

Economic liberalism has had an impact on sovereignty as well. As financial and trade integration expanded throughout the 1990s, discussions about the erosion of state sovereignty, some of which had been common in

³ Edward Mansfield and Jack Snyder rightly warn that democratization does not necessarily lead to either peace or increased respect for human rights and often to the opposite of these. See Mansfield and Snyder, 'Democratization and War', *Foreign Affairs*, 73:4 (1995) and Snyder, *From Voting to Violence* (New York: W.W. Norton, 2000).

⁴ WTO, World Merchandise Exports, 1994-2004. [http://www.wto.org/English/res_e/statis_e/its2006_e/its06_bysubject_e.htm]; WTO, World Commercial Services Exports, 1995-2005. [http://www.wto.org/English/res_e/statis_e/its2006_e/its06_bysubject_e.htm].

⁵ World Bank, *Global Economics Prospects 2005: Trade, Regionalism and Development* (Washington, DC: World Bank, 2004), xi.

⁶ UNCTAD, *World Investment Report 2006*, Key Data from Annex; FDI inflows and FDI stock outflow. [<http://www.unctad.org/Templates/Page.asp?intItemID=3277&lang=1>].

⁷ David Dollar, 'Globalization, Inequality and Poverty since 1980', World Bank Policy Research Working Paper, 3333, (2004), 12-14. [<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTD EC/EXTRESEARCH/EXTPROGRAMS/EXTMACROECO/0,,menuPK:477880-pagePK:64210511-piPK:64210513-theSitePK:477872,00.html>]

⁸ To use Viva Ona Bartkus' language, these shifts have both lowered 'the costs of membership' and raised 'the benefits of secession' for groups. See Bartkus, *The Dynamics of Secession* (Cambridge: Cambridge University Press, 1999).

Europe for twenty years, also globalized. Economic liberalization forced states to open boundaries and to loosen their grip on economic controls, which are, after all, a key element of sovereignty. While there may be a limited causal link between the decline of economic and political sovereignty, there is little room to deny that, regardless of the causes, some of the political aspects of sovereignty do not appear as 'rigid' as they did before 1989 and that this alteration represents a shift in the context of international relations that is very relevant to self-determination.

In his *Agenda for Peace*,⁹ UN Secretary General Boutros Boutros-Ghali pointed out that '[t]he time of absolute and exclusive sovereignty...has passed; its theory was never matched by reality.'¹⁰ As a UN study on sovereignty released shortly after the publication of the *Agenda* clarified, 'a shift in perceptions seems to be underway, suggesting that there may be limits to national sovereignty when human rights are grossly violated.'¹¹ This shift of perceptions had been noted by Boutros-Ghali's predecessor, Javier Pérez de Cuellar, who felt that sovereignty and non-interference 'cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.'¹² Article 2, Paragraph 7 of the UN Charter denies the right of the United Nations to interfere 'in matters which are essentially within the domestic jurisdiction of any state', however, since the end of the Cold War, this position seems more assailable, at least when a connection to human rights is made, even if the threat to international security is not immediately clear.¹³

While there is limited evidence of an emerging international *duty* or norm to intervene in the domestic affairs of a state to address human rights abuse or to correct the denial of democratic rights, the post-Cold War era has seen a vastly elevated concern for human rights abuse within states and a connection being made between the failure to protect human rights and sovereignty, a connection that *should* be made, as Chapter 2 of this study contended. The United Nations' interventions in Rwanda, Iraq (in 1991 to assist the Kurds), Haiti, and (to an extent) Darfur, to name but a few, indicate that human rights abuse can trigger the intervention of the international community within the established borders of a sovereign state even when the case for international stability is rather weak and/or when the state's explicit approval is

⁹ Boutros Boutros-Ghali, *Agenda for Peace*, A/47/277, (New York: United Nations, 1992).

¹⁰ Boutros-Ghali, *Agenda for Peace*, para. 17.

¹¹ United Nations (UN), 'The Limits of Sovereignty', DPI/1178 (February 1992).

¹² Javier Pérez de Cuellar, quoted in UN, 'Sovereignty', 1.

¹³ Paul Taylor, 'The United Nations in the 1990s: Proactive Comopolitanism and the Issue of Sovereignty', *Political Studies*, 47 (1999).

not entirely forthcoming.¹⁴ This reprioritization of human rights has also been accompanied by a shift in attitude amongst humanitarian non-governmental organisations (NGOs) and, more recently, at the governmental level, away from neutral, dispassionate, ‘need-based’ intervention that aims to alleviate the *effects* of suffering to targeted, ‘rights-based’ intervention that advocates particular outcomes which were deemed to be more humane and aims to correct the conditions *causing* the suffering.¹⁵ The renewed concern for human rights and the greater willingness to engage in humanitarian interventionism in the post-Cold War era constitutes an important opportunity for reifying those elements of the norm of self-determination that was taking shape within the UN system before the end of the Cold War, which were traced out in Chapter 4. However, while there is increased *potential* for this happening on the normative level in the post-Cold War era, as later sections of this chapter attest, not all aspects of this potential have been realised.

Another component of the shifting context of international affairs of the post-Cold War period that relates directly to self-determination is the upsurge of identity politics. This shift occurred on both the theoretical and the tangible level, and it is one that interlinks with the increased concern for human rights that occurred at this time. The demise of Cold War presented many PIFGs with ripe opportunities to assert themselves politically, economically and socially within and frequently against the state in which they found themselves. In the early 1990s, this was frequently described as ‘the lid coming off’, suggesting that that the Cold War has somehow contained ethnic, religious and cultural hatreds that were ‘waiting to boil over’. Although many rightly suggested this account was too simplistic,¹⁶ the Cold War not only barred the genuine expression of many non- or sub-state PIFGs but the Cold War also created an odd *status quo* that shoved many real issues of identity within established states to the side. Not surprisingly, when the conditions that created this *status quo* came to an end, the issues surrounding identity were unlikely to evaporate. Helped by the changed agenda of the international community after 1989, the protection of rights of PIFGs emerged as a normative focus of the international community in the 1990s, while at the same time, the absence of the Cold War’s strategic, political, economic and cultural agenda, identity emerged as a new filter through which many peoples surveyed the political and strategic landscape.

¹⁴ For a range of examples, see Mats Berdal and Spyros Economides, eds., *United Nations Interventionism, 1991-2004* (Cambridge: Cambridge University Press, 2005).

¹⁵ Chandler, *From Kosovo to Kabul*, Chapter 2.

¹⁶ A good example is Rogers Brubaker, ‘Myths and Misconceptions in the Study of Nationalism’ in Margaret Moore, ed., *National Self-determination and Secession* (Oxford: Oxford University Press, 1998).

One of the first developments on the normative level came from the Conference for Security and Cooperation in Europe (CSCE, later the OSCE) in the concluding document of the Copenhagen meeting in 1990 on the ‘human dimensions’ of the CSCE¹⁷, which suggested a broad definition of such concerned groups along the lines of PIFGs and took the human rights based approach to establish rights of national minorities, and, in doing so, outlined the very hierarchy of rights advocated in Part I. This was followed in 1992 by the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities¹⁸, which ensures protections of PIFGs in a way that had not been fleshed out in Article 27 of the ICCPR.¹⁹ There has also been an expansion of claims from and attentions given to ‘indigenous’ groups. Despite the difficulties of differentiating between the ethical value of ‘indigenous claims’, as opposed to ‘minority’ and ‘human rights claims’, the United Nations has been active on such matter since 1989, declaring 1993 the ‘International Year of the World’s Indigenous Peoples’, commissioning several reports on the subject, declaring 1995–2004 as the ‘International Decade of the World’s Indigenous People’, and, most importantly, drafting and recently passing the Declaration on the Rights of Indigenous People.²⁰ As such, issues of indigeneity are part of the overall increase in identity politics that is a distinguishing characteristic of international landscape of the post-Cold War era.

Regardless of the impact of such documents on the normative level, the tangible impact of the increased salience of identity politics was palpable and immediate as the Cold War drew to a close. Anthony Smith has speculated that nationalism, which in many ways hastened the end of the Cold War and then flourished after its demise, was not caused by globalization but, instead, helped to give meaning to people’s lives as their identities became assaulted and contested in an ever-shrinking world.²¹ In a similar vein, Lijphart also contends that the decreased salience of ideological conflict has led to a re-emergence of identity cleavages, which, Lijphart concludes, are less salient than others, but more persistent.²² As the Cold War’s strategic and ideological milieu disintegrated, the significance of identity politics became more evident, and

¹⁷ CSCE, *Document on the Copenhagen Meeting of the Conference on the Human Dimensions of the CSCE* 29 June 1990 [http://www.osce.org/documents/odihr/1990/06/13992_en.pdf]

¹⁸ UN, *Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities*, A/Res./47/135 (1992)

¹⁹ See Appendix C.

²⁰ See United Nations Office of the High Commissioner for Human Rights (UNHCHR), *Fact Sheet No. 9, The Rights of Indigenous Peoples* [http://www.unhchr.ch/html/menu6/2/fs9.htm], which outlines all these developments and extracts from the Declaration are in Appendix F.

²¹ Anthony D. Smith, *Nationalism in a Global Age* (Cambridge: Polity Press, 1995), vii.

²² Arendt Lijphart, ‘Ethnic Conflict in the West’, in John Hutchinson and Anthony D. Smith, eds., *Nationalism* (Oxford: Oxford University Press, 1994) 258–261.

while identity politics is not necessarily violent, it does, orient politics around 'relatively non-tradable issues. Nationality, language, territorial homelands and culture are not easily bargained over. They create zero-sum conflicts, and therefore provide ideal materials for political entrepreneurs interested in creating or dividing political constituencies.'²³ Thus, in the search for new sources of political, cultural and ideological capital that the end of the Cold War created, identity politics has had a natural and irresistible logic.

However, such appeals have to be authentic, in the sense that attempts to motivate groups have to resonate with individual member's belief in the shared identity. Again, Smith is instructive: a movement's success 'depends on specific cultural and historical contexts'.²⁴ In other words, attempts to foster identity politics without a believable and/or sufficiently incentivised method to elicit support will most likely flounder, but as Part I posited, identity formation can and does often rest on myth, distorted history and propagated traditions and modalities, and as the chronology of the post-Cold War era indicates, many leaders, governmental or otherwise, found ample sources on which to base their actions, be it 'common heritage', 'brotherhood' or 'homeland'. Thus, it was not so much a case that the collapse of communism opened a lid revealing 'angry nations', as it was that the removal of the lid permitted and encouraged the conditions for the formation and flourishing of identity politics.

Identity politics needs only a minor nudge to develop into emerging nationalism, which creates pressure for self-determination within or apart from the existing state, and the instability wrought by the end of the Cold War increased the logic of such movements. Donald Horowitz coined the phrase 'the logic of secession' to analyze the rational incentives that ethnic groups (here one could substitute any PIFGs) have before them when determining courses of action, and, as the upsurge of identity politics took place in the 1990s, Viva Ona Bartkus examined the motivations of such groups afresh.²⁵ While different, their analyses show that many factors play a part the decision to oppose a state, ranging from emotional anxiety to calculations of economic gain or perceived benefits, and that state reactions are crucial in altering these calculations. Both of these studies indicate that group interests are calculated (and recalculated frequently) and that the reactions of the international community are critical to their decisions. As Horowitz puts it:

²³ John McGarry and Brendan O'Leary, 'Eliminating and Managing Ethnic Differences' in John Hutchinson and Anthony D. Smith, eds., *Ethnicity* (Oxford: Oxford University Press, 1996), 337.

²⁴ Smith, *Nationalism in a Global Age*, viii.

²⁵ Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley, CA: University of California Press, 1985); Viva Ona Bartkus, *The Dynamics of Secession* (Cambridge; Cambridge University Press, 1999).

Whether and when a secessionist movement will emerge is determined mainly by domestic politics, by the relations of groups and regions within the state. Whether a secessionist movement will achieve its aims, however, is determined largely by international politics, by the balance of interests and forces that extend beyond the state.²⁶

To paraphrase slightly Steven Van Evera, emerging nationalist groups that threaten to fragment states are affected by the 'plausibility of statehood',²⁷ and given all the other post-Cold War contextual shifts, the 'plausibility' of statehood has increased dramatically since 1989, which has in turn increased the debate over self-determination's meaning as a norm.

Another important tangible alteration and perhaps the most obvious of them all was the near total demise of East-West military tension following the rapid collapse of the Soviet Union and the Warsaw Pact. As James Mayall points out, this did not change the fundamentals of the international system of states, merely the dominant strategic and security dynamic; however, this change 'open[ed] the floodgates'.²⁸ In terms of emerging nationalism, this opening up meant there were far fewer strategic barriers to abate 'active' applications of the right of self-determination. The rapidity of the strategic shift is easy to chart. Taking Gorbachev's announcement of Soviet troop withdrawals from Afghanistan on 8 February 1988 as a starting point, less than three years elapsed until the Soviet Union itself ceased to exist (31 December 1990). Although the Cold War was officially declared over by Russian President Boris Yeltsin and the American President George H.W. Bush on 1 February 1992, the strategic, military and economic rivalry that had gripped the world for over five decades was over well before then.

The protean political events of 1988 to 1990 in Eastern Europe (and elsewhere) were all the more dramatic owing to their highly democratic nature.²⁹ Throughout these three crucial years, the success of popular movements bred more movements and more success, indicating in each case both the desire for change and the unwillingness and/or inability of the communist governments to stand in the way of it. Given the highly democratic nature of the events, and the fact that most movements rapidly led to free elections, free press and

²⁶ Horowitz, *Ethnic Groups*, 262.

²⁷ Stephen Van Evera, 'Hypotheses on Nationalism and War' in Michael E. Brown, ed., *Nationalism and Ethnic Conflict* (Cambridge, MA: MIT Press, 1997), 37.

²⁸ James Mayall, 'Sovereignty, Nationalism and Self-determination', *Political Studies*, 47 (1999), 475.

²⁹ For a general history of these intricate events see Michael Beschloss and Strobe Talbott, *At the Highest Levels: The Inside Story of the End of the Cold War* (Boston: Little Brown and Co., 1993), and John Lewis Gaddis, *The Cold War: A New History* (New York: Penguin Books, 2005) and the Cold War International History Project at the Woodrow Wilson Center [http://www.wilsoncenter.org/index.cfm?fuseaction=topics.home&topic_id=1409].

movements towards free markets, etc., neither Washington nor other power centres sought to or could place significant hurdles in the way. As American Secretary of State James Baker said at the time, '[l]egitimacy in 1991 flows not from the barrel of a gun but from the will of the people.'³⁰ It seemed as though the merger of democratic theory and practice was taking place exactly as many hoped as the repressive 'lid' was removed from Eastern European and world politics.

Outside of Europe, the end of the Cold War led to greater democratization, though the link was not immediately causal. Despite the questionable legitimacy of many processes on the African continent, '[a]lmost all of the African countries south of the Sahara have held elections since 1989.'³¹ One study noted that with 'the fading of geopolitical rivalries, the United States and other Western powers felt freer to urge autocratic regimes to adopt political reforms. But officials and experts agree that the African people themselves are the main force behind the movement toward democracy.'³² In Asia and Latin America too, the end of the Cold War helped stimulate democratic practices including free and fair, multi-party elections, human rights protections and increased governmental transparency and responsiveness.³³ As the UN Development Programme reported, 'since 1980, eighty-one countries have taken significant steps towards democracy, with thirty-three military regimes replaced by civilian governments. 140 of the world's nearly 200 countries now hold multi-party elections, more than at any time in history.'³⁴ This tangible and rapid expansion of democratic governments and practices in the first decade after 'the fall of the Wall' helped make self-determination more of an evident and important (if contested) norm, made it a tangible reality for millions and, simultaneously, increased its appeal to those seeking to utilize it.

However, this rise in the appeal of self-determination was affected greatly by the lack of an evident security paradigm, as the fundamental dynamic of politics ceased to be East-West or even core and periphery. While the form and substance of the new dynamic was not immediately certain, it was clear that military forces of the scale and type needed for superpower conflict and for deterrence were unsuitable as well as untenable. As 'peace' flourished between the superpowers, massive reductions in nuclear arms and some sizable ones to

³⁰ Quoted in Franck, 'The Emerging Right', 46.

³¹ Kenneth Jost, 'Democracy in Africa' *CQ Researcher*, 5:11 (1995).

³² Jost, 'Democracy in Africa'.

³³ See Freedom House indices for regional changes. [www.freedomhouse.org]. It is worth noting that the Middle East's transition to democracy (NB *not* liberal democracy) as mentioned above, seems slower and more of a normative shift as opposed to a tangible one, and it is less directly connected with the end of the Cold War than those elsewhere.

³⁴ United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford University Press, 2002), 10.

conventional forces took place in the US and the former Soviet Union, as well as in most of Europe.³⁵ However, the larger question of what the new security paradigm was remained unanswered. As the new UN Secretary General, Boutros Boutros-Ghali, noted in 1992, '[t]he concept of peace is easy to grasp; that of international security is more complex'.³⁶

While it is certainly true that during the Cold War, the superpowers frequently restrained in their proxies and contained within those countries many situations that might have brought instability to international affairs, and that the subsequent termination of the Cold War threatened to unleash these forces, the 'seething cauldron' metaphor that was often used does not entirely hold. On many occasions, the Soviets and the Americans repressed tensions within and between states to serve their purposes, but they also stimulated and even created conflict when exploitation served their larger strategic agenda. With the demise of this agenda, the warping effect of such policies disappeared, often stimulating in new ways previously extant instability within these states and regions.

The end of the Cold War also transformed the tools available for war. 'The end of the Cold War...left a legacy of massive military expenditures and arsenals of deadly weapons entirely disproportionate to any rational assessment of threats to security.'³⁷ As a result, arms, particularly small arms, were (and remain) widely available, as weapons manufacturers and governments that had built up defence industries for years sought out new markets.³⁸ The growing availability of arms not only increased instability, it offered previously unparalleled opportunities to those willing to use armed force to advance whatever claims they were making. There was a painful irony here: at the very moment the world was getting safer by eliminating a nuclear arms race, the profusion of less advanced, more portable and cheaper weapons systems provided the fuel for smaller, potentially less controllable conflicts.

A final tangible component of the changed context of the post-Cold War world is the reinvigoration of the United Nations Organization as well as the expanding role other governmental and NGOs at the international level. The potential for genuinely international activity on matters related to emerging nationalism was extremely limited during the Cold War, particularly within the UN system, as was discussed in Chapter 4, owing to a 'frozen' Security Council.

³⁵ Mohammed Ayoob, *The Third World Security Predicament* (Boulder, CO: Lynne Reiner Publishers, 1995), 106-108; Timothy Kane, 'Global US Troop Deployment, 1950-2003', Heritage Foundation, 27 October 2004 [<http://www.heritage.org/Research/NationalSecurity/cdao4-11.cfm>].

³⁶ Boutros-Ghali, *Agenda for Peace*, para.12.

³⁷ Bhaskar Menon, *Disarmament: A Basic Guide*, United Nations Basic Guide Series, (New York: United Nations, 2001), 7.

³⁸ Stockholm International Peace Research Institute (SIPRI), 'Trends in Arms Production' [<http://www.sipri.org/contents/milap/milex/aprod/trends.html>], and Menon, *Disarmament*, 7-11.

Although there was considerable movement at the normative level related to self-determination through General Assembly resolutions and the work of the Economic and Social Council, the lack of international ‘weight’ behind such measures prior to the end of the Cold War contributed to the lack of a discernable connection of norms to responses. However, with the passing of the Cold War and its adversarial security paradigm, and the growth of democracy and the emerging consensus about human rights, the UN and particularly the Security Council now had an opportunity to address such issues and build consensus-based responses to emerging nationalism, making connections to the normative framework that had begun to form while perhaps also reshaping these norms closer to those outlined in Part I.

This renewed vigour was exemplified in the expansion of human rights activities and the promotion of democracy, some elements of which were mentioned before. There were signs of an expanded role and an attitudinal shift in key departments within the UN, especially the Department of Peacekeeping Operations,³⁹ however, much like the human rights NGOs mentioned above, the UN faced a choice between being a neutral, peaceful observer in conflicts, patiently waiting for permission to respond; or would it seek a new path, involving advocacy of particular ends, the pursuit of which might involve taking sides as well as taking forceful actions, including military responses that might challenge the position of a sovereign state? Given the military capability that was a left over ‘benefit’ of the Cold War, the reach, technological capacity and firepower of the assets that could be made available for such operations was astounding. Could the UN employ what James Mayall has called ‘a Chapter VI and 1/2 solution’?⁴⁰ The turmoil running through the *Agenda for Peace* over the meaning and role of ‘peacekeeping’ and ‘peacemaking’ reflects the desire and need for this debate that existed in the early 1990s.

Unfortunately, United Nations had virtually no time to deliberate such weighty matters before it had to respond to provocative challenges such as Somalia, Rwanda and the disintegration Yugoslavia and, perhaps not surprisingly, these responses were patchy, disjointed and at times reflected both the ‘advocacy’ and the ‘neutral’ courses of action. It is important to note that, despite the lack of clarity in these early post-Cold War responses, the UN and other international actors developed important infrastructural tools to permit greater fusion of practical and normative responses. The effect of this has been the creation of patterns of behaviour at an institutional level, which, over time,

³⁹ See Boutros-Ghali, *Agenda for Peace*, paras. 42 and 43 and Thomas G. Weiss, ‘The Humanitarian Impulse’ in David Malone, *The UN Security Council from the Cold War to the Twenty-first Century* (Boulder, CO: Lynne Rienner Publishers, 2004)

⁴⁰ James Mayall, ‘Introduction’ in Berdal and Economides, eds., *United Nations Interventionism*, 8.

'have reflected and promoted moral interdependence.'⁴¹ The development of an expanding, more interventionist role for the UN and its subsidiary bodies provided a new or, perhaps, revived apparatus for responding to and debating the challenges thrown up by emerging nationalism and self-determination. As the Cold War came to an end, it became apparent that such issues were unavoidable and that such an apparatus was extremely necessary.

Firstly, the increased willingness of the international community to intervene on humanitarian grounds has boosted the likelihood of success of all secessionist groups, particularly those who could convincingly claim the abuse of human rights. Additionally, because of the growth of the free market and trade penetration, the economic incentives of 'going it alone' never looked better. The demise of the strategic constraints of the Cold War and the increased availability of conventional arms provided secessionists with the means to struggle against states. Finally, the normative acknowledgment and the tangible growth of identity based politics ensured that nations as well as the states from which they were attempting to secede had less ground to compromise, as the stakes in identity politics tend to be non-negotiable. As Horowitz pointed out recently:

All of this surely means that people who were resigned to living together, no matter how uncomfortably, may now think they no longer need to be so resigned. Secessionist movements did not need much encouragement before, when their prospects for success were very slim. Now they need less.⁴²

Taken together, these normative and tangible changes have resulted in a major alteration to the context of international relations that, in turn, had an effect on and continues to shape the evolution of self-determination. Not all of these factors have influenced the concept in the same manner, nor have they all worked in the same direction or at the same time. Indeed, most of the individual components of the contextual shift are themselves evolving. Nonetheless, they have had a powerful impact on both emerging nationalism and self-determination. This has both increased the significance of self-determination and, importantly, has created a climate in which more consistent responses to emerging nationalism and the development a more coherent norm of self-determination seem possible.

What remains is to examine a few cases that highlight the degree to which this has come to pass since 1989. Almost as soon as the 'Wall' fell, emerging nationalism seemingly burst onto the centre of the international stage

⁴¹ Taylor, 'The United Nations', 538.

⁴² Horowitz, 'Self-determination', 190.

in a series of conflicts, some of which were armed and extremely violent, necessitating responses by the international community. Challenges such as these have continued unabated since that time, often leaving the international community little time for deliberation or reflection on the norm of self-determination or the wider implications of the precedents their reactions set. Any cursory glance at these recent struggles reveals the range and complexity of 'internal' conflict in the post-Cold War world, and although there were many that involved the international community to a greater or a lesser extent, a few of these particularly impacted the evolution of the right of self-determination.

(ii) *The break up of the Soviet Union*

The rapidity of the deterioration of the Soviet Union caught almost all contemporary observers off guard. While the world was only just getting its head around the tumultuous events in Berlin, Tiananmen Square and in Eastern Europe, the disintegration, and then the disappearance, of the Soviet Union unfolded. The chief catalyst of this disintegration was emerging nationalism, first in the 'union' republics of the Soviet Union, but the assertion of other PIFGs within Russia and the other republics soon followed, adding to the complexity of the situation.⁴³

It is important to understand the nature of the Soviet federal structure to appreciate the significance of its decomposition to self-determination and to the emergence of identity politics and nationalism. To call the Soviet Union a mosaic of PIFGs is an understatement of enormous proportion, and the Soviets had been conscious of the potential force of identity since the Bolshevik Revolution, both as an asset and as a potential force for the destruction of the Union. While brutal repression and exceptionally heavy-handed manipulation of identities were commonplace during the Soviet period, the USSR had long acknowledged the power of identity and nationality and decided, consciously, to use it to best effect for as long as possible to support the wider state ends.

The most significant federal layers of the Soviet state (much like that of the Russian Federation today) were, from the top down, union republics, autonomous republics, and provinces or *oblasti*, some of which were also autonomous. Many of the boundaries of these units, but particularly the *oblasti*, were consciously associated with a given PIFG, normally an ethnicity or

⁴³ For more detailed accounts of the internal politics and some of the external relations as they related to the collapse of the Soviet Union, see David R. Marples, *The Collapse of the Soviet Union, 1985-1991* (Harlow: Pearson Longman, 2004); John B. Dunlop, *The Rise of Russia and the Fall of the Soviet Empire* (Princeton, NJ: Princeton University Press, 1995) and John Keep, *Last of the Empires* (Oxford: Oxford University Press, 1995).

nationality, arrangements that would prove significant not only within the USSR during the break-up but also in the international responses to it.

The first formal act of disintegration of the Union came when the three Baltic union republics declared their independence from Moscow, starting with Lithuania on 11 March 1990, although a few PIFGs within the Soviet Union and several republics and *oblasti* as a whole had asserted claims of self-determination prior to this. Despite General Secretary Gorbachev's predictably negative response to all these moves and his initial decision to use limited force and, subsequently, negotiations to try and dissuade the Baltic States from their course of action, the tide could not be stemmed. When Gorbachev proposed a new union arrangement and a broad referendum for 17 March 1991, an act designed to elicit expressed consent and an internal application of self-determination in favour of the Soviet Union, his gambit failed. In six of the union republics (Estonia, Latvia, Lithuania, Georgia, Moldavia and Armenia), the referendum was either voted down, amended to reflect greater autonomy than Gorbachev ever intended or boycotted in favour of statements about independence.⁴⁴ Preceding and surrounding all the actions of the union republics, emerging nationalism was at fever pitch in some of the *oblasti*, most notably Nagorno-Karabakh, as well as in some autonomous republics, particularly Abkhazia, with demonstrations and rival parties pressuring for greater recognition of national demands and even independence, adding further to the complexity and urgency of the challenges brought by self-determination and the concomitant sovereignty crisis.

The international reactions varied but were generally supportive of the democratic nature of the shifts but some were also cautious.⁴⁵ The position of the United States was crucial, owing to its unique and rapidly changing strategic relationship with the Soviet Union. Given that the United States and most European countries had never recognized, *de jure*, the Soviet takeover of the Baltic states in 1940, there was no shortage of calls for the US and European governments to acknowledge these declarations of independence. However, President George H.W. Bush's reluctance to do so was roundly attacked and he was accused of choosing Moscow over the legitimate, democratic nationalist movements. During his visit to Russia and the Ukraine, he outlined his

⁴⁴ Of greatest significance was the addition of a question about the establishment of an independently elected Russian president, which passed, leading to the election of Boris Yeltsin in June, who worked fervently *against* the continuation of the Union.

⁴⁵ It is worth remembering that these events coincided with the invasion of Iraq and the UN sanctioned expulsion of Iraqi forces from Kuwait as well as the humanitarian interventions in the Shia populated sectors to the south of Iraq and Kurdish areas of the north, both of which increased the complexity of international responses, especially as Soviet approval of actions against Iraq in the Security Council was essential. Additionally, the crisis in Yugoslavia, discussed below, was beginning to unfold.

administration's position.⁴⁶ Bush warned his audience that 'freedom is not the same as independence' and cautioned them that America 'will not aid those who promote a suicidal nationalism based on ethnic hatred'. This led many then and even now to dismiss Bush's commitment to the right of self-determination, perhaps the most famous dismissal coming from conservative commentator William Safire, who claimed that Bush had sided 'against self-determination' and whose sobriquet for Bush's address, 'the chicken Kiev speech', persists even to the present.⁴⁷

However, to do so is to miss the subtlety of the position on self-determination and emerging nationalism that Bush and many European countries were developing. Despite a preference for the integrity of the Soviet Union, Bush's main objection to secession was his concern for human rights and minority protections. As he noted in the speech, '[i]n Ukraine, in Russia, in Armenia, and the Baltics, the spirit of liberty thrives. But freedom cannot survive if we let despots flourish or permit seemingly minor restrictions to multiply until they form chains, until they form shackles.' In what even Bush feared sounded like a lecture, he rehashed to his audience Acton's dictum that a truly free society should be judged on how well it protects its minorities.

In a subsequent article, which like Bush's speech is still widely dismissed and ridiculed (not least because of its publication on 18 August 1991, the day before the coup that ultimately brought down Gorbachev and the Soviet Union), Brent Scowcroft, the National Security Adviser, clarified the administration's position, stating:

...we will build our policy on principles, not around personalities. Two corollaries flow from this. First, we will support leaders in the republics and the center who pursue democracy, but we won't choose sides between and among them. Second, democracy requires respect for minority rights... the United States will not support independence movements *per se*, anymore than it will support the central government *per se*...The president's plea for tolerance arises from legitimate concerns...Nationalities have been scattered throughout the USSR...If they do not develop habits of pluralism and respect for individual and minority rights, they will face a bleak Hobbesian future.⁴⁸

It is possible to spot within these statements a belief that, however enthusiastically supported, emerging nationalism stripped of the commitment to individual and minority rights did not constitute a legitimate exercise of the right of self-determination.

⁴⁶ President George H.W. Bush, speech in Kiev, Ukraine (1 August 1991). [http://en.wikisource.org/wiki/Chicken_Kiev_speech]

⁴⁷ William Safire, 'After the Fall' *The New York Times* (24 August 1991).

⁴⁸ Brent Scowcroft, 'Bush Got It Right in the Soviet Union' *The New York Times* (18 August 1991).

It is interesting to note the difference between this qualified and cautious endorsement of nationalism inside the Soviet Union and that of Woodrow Wilson seventy years before. Wilson's hopeful ideological commitment to democracy and self-determination had been modified by one of his successors to reflect not only strategic limitations but also human rights concerns, and as such, it represents a significant transformation of the understanding of the concept over time. Moreover, while it is possible to interpret this shift of attitude as indecision or an inflexible commitment to borders, the international community's 'slowness' to recognize the 'breakaway' republics and Bush's much criticized willingness to work with the Soviet Union can also be seen as a recognition that human rights *might* be best served within existing boundaries as opposed to new ones. Whatever the case, the approach adopted by the US and Europe did not take on the view either that secession might be recognized only as a last resort and/or only in the face of massive suffering (a case that might be made with regard to Abkhazia or Lithuania but not very plausibly for Georgia, the Ukraine or Byelorussia).

Yet before any fuller discussion of principles could take place on the international stage, the fast-paced nature of events in the Soviet Union led to further disintegration and the recognition of successor states without a clear framework laid out in advance. Following the failed coup of hardliners in August, the subsequent unilateral declarations of independence of other union republics and the agreement, negotiated without Gorbachev, to form a new association of independent states (the Commonwealth of Independent States or CIS), the Soviet Union effectively ceased to exist. In the wake of this and the unfolding events in Yugoslavia (discussed below), the European Community (EC), hastily, yet still after the fact, established guidelines for the recognition of independent states.

On 16 December 1991, the EC foreign ministers issued what amounted to a statement of norms on the conditions necessary for the legitimate exercise of the right of self-determination for the purpose of state creation.⁴⁹ The connection with self-determination was overt and bold, appearing in the first sentence of the first operative paragraph, tracing the EC's commitment to the idea to the Helsinki Final Act and the EC's 1990 'Charter of Paris for a New Europe', both of which endorsed the right of self-determination and made a direct connection to legitimacy and human rights.⁵⁰ The guidelines then list

⁴⁹ European Community (EC), 'Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (1991). The full text is in Appendix G.

⁵⁰ CSCE, 'Final Act of the Conference' (1975). [<http://www1.umn.edu/humanrts/osce/basic/finact75.html>]; and EC, 'Charter of Paris for a New Europe' (1990) [<http://www.osce.org/item/4047.html>].

conditions that nationalities are expected to meet to gain recognition. Above all, to gain recognition, these emerging nations must 'have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations' and, a second time, the document stresses the need for new states to adhere to 'the rule of law, democracy and human rights' as well as to accept that change must come through peaceful mechanisms and negotiation. Moreover, the guidelines stipulate that recognition also requires new states make 'guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'.

These new guidelines reflect the growth of democratic norms and imply a coupling of democratic practices with human rights regimes, including an explicit stipulation of a duty to protect the rights of 'minority' PIFGs within the boundaries of any new states. As a result, these guidelines go far towards conforming with the normative framework that Part I outlined and, thereby increasing the likelihood of more coherent response that avoided at least some of the perennial problems with applying self-determination. However, there were three significant shortcomings related to this document. The first is theoretical and is caught up in the use of the term 'minorities', which, as mentioned before, obscures the aim of such protections, namely the promotion of *all* human rights, not just those of designated minorities. The second shortcoming was the lack of any mechanisms for protection of these rights within the new states *after* recognition. While it is difficult to consider how mechanisms could have been constructed to do so, much less constructing them on the abbreviated timetable on which events were unfolding, the lack of any attempt to do so or to consider how violations could be reported or dealt with meant that there would be little opportunity to place pressure on the new states to meet any standards once recognition had been granted. Finally, the document failed to address the larger issue of emerging nationalism within the autonomous republics and in the autonomous *oblasti* and whether such areas could secede or whether their use of the right would be limited to 'internal' self-determination.

The implication of not tackling this point suggests that the EC was only thinking of recognizing union republics, thereby adhering to the standard of *uti possidetis juris*. Again, while the practical utility of the norm is unquestionable, *uti possidetis juris* has little theoretical connection to identity or to the emotion of nationalism, and while this may not always be a bad thing, it removes critical decisions about land and sovereignty from the ethical context of human rights

and the well-being of individuals and groups, where issues related to self-determination are correctly located. *Uti possidetis juris* and self-determination were clearly in the minds of those drafting the guidelines, as well as a host of other strategic and political concerns, but the tensions between the two norms were not resolved, nor were many of the issues within self-determination itself, as the leaders hammered out an understanding as rapidly as they could.

However, despite these difficulties, these guidelines helped to clarify the normative framework of self-determination in the new context of international affairs that was developing. Within days of the publication of the guidelines, the Soviet Union was dissolved and most of the union republics were recognized as independent states, but this fact reflected less an adherence to the list and its ideas than a recognition *de jure* of the *de facto* independence of these territories. It is important to note that the *de facto* independence of these republics adhered to the EC guidelines in that they had taken place through peaceful processes (for the most part), although not entirely through negotiation with the Soviet government, which despite its rapid disintegration at first opposed the unilateral nature of the secessions.

Of perhaps more significance is the fact that recognition was granted without any further undertakings related to guaranteeing PIFG rights other than taking the word of the seceding republics that the specified commitments would be met, raising serious questions about the effectiveness of human rights protections, particularly in the case of states such as Georgia, Armenia and Azerbaijan where emerging nationalism within these new states had already resulted in considerable tension and, in some cases, serious violence. The failure to address these issues left not only the normative aspects of self-determination in limbo but also the status of the peoples of Nagorno-Karabakh, Abkhazia, Transdnistria and the Crimea, to name but a few. However, the problems related to the disintegration of the Soviet Union, while great, proved to be both less challenging and less deadly than those connected to the fragmentation of Yugoslavia.

(iii) The collapse of Yugoslavia – Act I: Badinter and recognition

Accepting for a moment that, in the post-Cold War era, self-determination has an increasingly important role in justifying international actions to protect human rights for marginalized or persecuted groups, and that the perennial aim of supporting territorial integrity is to achieve stability and prevent conflict, then collapse of Yugoslavia serves as an example where *both* of these ends were pursued by the international community and where *neither* of

them were achieved. Much has been written about the carnage and the failed efforts of the international community to preserve peace, to enforce a settlement and to prevent human suffering, and the role self-determination and emerging nationalism played in creating, sustaining and defining the conflict has also been hotly debated.⁵¹ Regardless of the many other conclusions that can be drawn from all this, it is abundantly clear that the conflict had a massive impact on the international understanding and application of the right of self-determination, and the international responses to the situation greatly shaped the trajectory of the norm in the post-Cold War period.

The outbreak of violence as well as the first formal moves towards and subsequent declarations of independence in Yugoslavia predated most similar actions in the Soviet Union. However, the roots of the collapse of Yugoslavia ran as deep as those in the USSR, and, as was the case in the Soviet Union, many of the components of the new context of international relations stimulated its destruction and the responses to it. The demise of communism and the long-standing role of identity in the political structure and the history of the Balkans were the two most significant factors leading to the destruction of the Yugoslav state, but of equal significance were the resonance of identity politics and the increased logic of secession that influenced the major parties at the end of the Cold War. The involvement of the international community, particularly the United Nations, in the Yugoslav crisis was greater than in the Soviet case because the Soviets had fewer reasons to veto UN actions there, because of Yugoslavia's traditional 'sideline' role in the power dynamics of the Cold War and because the degree of violence and suffering in Yugoslavia was so much greater. As a result, the international community, and specifically the United Nations, found itself drawn very deeply into an intense and complex conflict involving emerging nationalism and self-determination, and, like the situation in the Soviet Union, the rapidity of events left limited scope for the discussion of principles prior to the implementation of responses. Not surprisingly, these responses were chaotic and frequently contradictory.

The initial international reactions to the collapse of Yugoslavia are fascinating to review from the standpoint of the development of self-

⁵¹ For a treatment of the international aspects of the Yugoslav crisis, see James Gow, *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (London: Hurst Publishers, 1997); Spyros Economides and Paul Taylor, 'Former Yugoslavia' in Berdal and Economides, *United Nations Interventionism*; Stephen L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (New York: M.E. Sharp, 2000); Marc Weller, 'The International Responses to the Dissolution of the Socialist Federal Republic of Yugoslavia', *American Journal of International Law* 86:3 (1992); Misha Glenny, *The Fall of Yugoslavia* (London: Penguin Books, 1996); Alistair Finlan, *The Collapse of Yugoslavia, 1991-1999* and Ivo H. Daalder, 'Fear and Loathing in the Former Yugoslavia', in Michael E. Brown, ed., *The International Dimensions of Internal Conflict* (Cambridge, MA: MIT Press, 1996).

determination, especially as the early stages of the country's destruction coincided with the demise of the USSR. At first, the international community was unwilling even to consider the possibility of a divided Yugoslavia, indicating a clear preference for a continued federal solution as late as June of 1991.⁵² However, as Payam Akhavan speculates, this was unlikely to work as negotiations for a restructuring of the constitutional arrangements had already floundered in March owing to Serbian intransigence.⁵³ Some member states of the European Community, most notably Germany, indicated an early shift in opinion regarding rigid adherence to territorial integrity and pressed for greater recognition of the rights of the constituent republics.

Such ideas, while reasonable on one level, presented difficulties in Yugoslavia (as in most federal unions) because virtually all the constituent republics contained significant levels of interspersed PIFGs, and, by design, the federal territorial structures did not accurately conform to internal identity demographics. As Roland Rich points out, the Yugoslav Constitution distinguished between 'republics' (the six geographically specific federal entities) and 'nations' (the major identity groups within Yugoslavia) without specific reference to their 'homelands', granting both the right of self-determination but only the former and not *specifically* the latter, the right of secession.⁵⁴ However, as Rich continues, there was no extension of either the right of self-determination or secession to 'nationalities' (identity groups with close ties to other countries), such as the Albanians in Kosovo. Nor was there any mention of the mechanisms by which self-determination or secession could be exercised by those to whom such rights had been granted, thereby plunging the whole issue into confusion.

The unity of the EC member states supporting territorial integrity held firm for much of the summer of 1991 until the level of violence and splits between EC members required a re-evaluation. The EC governments established a peace conference at The Hague, chaired by Lord Carrington, which called for the cessation of violence and stressed the need for protection of minority rights but which also hinted to the possible alteration of internal borders through diplomatic means by creating an Arbitration Committee, more commonly known as the Badinter Committee, after its leader, Robert Badinter the President of the French Constitutional Council. The aims of the Badinter

⁵² Renaud Dehousse, 'The International Practice of the European Communities: Current Survey' *European Journal of International Law (EJIL)*, 4 (1993)

⁵³ Payam Akhavan, 'Self-determination and the Disintegration of Yugoslavia: What Lessons of the International Community?' in Donald Clark and Robert Williamson, eds., *Self-determination: International Perspectives* (London: Macmillan Press, 1996).

⁵⁴ Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', *EJIL*, 4 (1993) and Gow, *Triumph*, 70-74.

Committee were somewhat unclear as its mandate was vaguely worded,⁵⁵ but its establishment reflected a desire on the part of the EC to place norms at the centre of its approach to creating peace in Yugoslavia. Its role in shaping the responses and interpretation of self-determination would ultimately prove highly significant.

On the ground in Yugoslavia, actions and reactions increasingly centred on PIFG cleavages, as political elites drew upon the resonating theme of identity. A new term, 'ethnic cleansing', came into being to describe the horrific events unfolding. As numerous cease-fires were organised, broken and then renegotiated, the United Nations Security Council passed a string of resolutions, including Resolution 713 setting up an arms embargo, which given the recent growth of arms trafficking and sales, proved thoroughly ineffective.⁵⁶ As the warfare intensified and declarations of independence were issued first by Slovenia and Croatia, the Serbian 'rump' of the old Soviet Federal Republic of Yugoslavia (SFRY) claimed to be the sole legitimate heir of the federal structure and mobilized irregular forces as well as the Serbian dominated Yugoslavia National Army (JNA) to thwart these 'secessions'.⁵⁷ As the bloody summer of 1991 turned into a bloodier autumn and as more republics edged closer to independence, the likelihood and efficacy of maintaining the antebellum structure of Yugoslavia declined considerably. In light of these events, Lord Carrington submitted a letter requesting an opinion from the Badinter Committee as to whether Yugoslavia continued to exist and on what basis the competing claims of 'sovereignty', 'succession' and 'independence' should be judged.⁵⁸

In the first of the opinions it delivered (dated 20 November 1991), the Badinter Committee addressed the various declarations and positions of the constituent Yugoslav republics and, intriguingly, the existence and effectiveness of the federal government within the SFYR, concluding that it was 'in the process of dissolution', an understated but nonetheless profound conclusion. In this and all of its subsequent opinions, the Committee stressed the need for peaceful interactions and the adjustment of borders only through negotiation.

⁵⁵ See Alain Pellit, 'The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples' *EJIL* 3 (1992)

⁵⁶ For a highly detailed account of UN efforts, see Economides and Taylor, 'Former Yugoslavia', and Economides and Taylor in James Mayall, ed., *The New Interventionism, 1991-1994* (Cambridge: Cambridge University Press, 1996), Appendix B.

⁵⁷ It is perhaps significant that Serbia never really tried to restrain either Montenegro, a close, ethnic ally, or Slovenia, thereby casting doubt over the seriousness of their claim to desire a perpetuation of the SFYR. In essence, this confirms that the goal of leading Serbian politicians with the creation of a 'Greater Serbia'.

⁵⁸ *Opinions of the Arbitration Committee of the International Conference on Yugoslavia* (Badinter Committee), 'Opinion 1' (1991) [<http://www.ejil.org/journal/Vol3/No1/art13.html>]. Extracts of this and other opinions of the Badinter Committee form Appendix H.

However, the process by which this ‘dissolution’ had taken place was anything but peaceful and only the most sanguine of observers could conclude that the diplomatic squabbling between the republics was anything more than calculated, *Realpolitik* manoeuvrings. In effect, the Committee had done exactly what the EC had explicitly declared earlier that it would not do, *viz.*, ‘accept a policy of *fait accompli*’⁵⁹ with regard to territorial changes, as the excessive use of force and the unwillingness to compromise were exactly what brought about the dissolution.

Nonetheless, as in the first opinion, the issue of self-determination was explicitly at the heart of the Committee’s reasoning in their second and third opinions, issued on 11 January 1992.⁶⁰ Despite finding itself overwhelmed and overtaken by events on the ground, the Badinter Committee at numerous points in Opinions 2 and 3 stressed the centrality of the right of peoples to self-determination and that fulfilling this right for all persons within a territory hinged on the robust protection of ethnic, religious and cultural minorities. Paragraph 3 of Opinion 2 makes a direct link between the situation in Yugoslavia and the explicit reference to self-determination in Article 1 of the ICCPR, noting that self-determination ‘serves to safeguard human rights. By virtue of that right *every individual may choose* to belong to what ever ethnic, religious or language community he or she wishes’⁶¹, and according to the Opinions, this commitment creates strict obligations on all republics that aspire to international recognition. The text’s direct linkage between self-determination and the rights of individuals and, from there by extension, to PIFGs of which individuals may be a part, reflects a position that is virtually identical to the interpretation of self-determination presented in Part I. In other words, the newly emerging political entities in Yugoslavia would have to replicate such an understanding of self-determination in their constitutional structure and state practices to be considered legitimate, and in an effort to cement such commitments, the Committee stressed the ubiquity of self-determination and the right of every person to exercise it.

Despite such a bold commitment to self-determination, the Committee sought to limit its exercise to internal practices, indicating that ‘the right of self-determination must not involve changes to existing frontiers at the time of independence’. While this limitation had been employed frequently in the past, its use here made little sense. Stressing the importance of self-determination as

⁵⁹ EC, ‘Press Release 81/91’, 27 August 1991, quoted in Renaud Dehousse, ‘The International Practice of the European Communities: Current Survey, European Political Cooperation 1991’, *EJIL*, 4 (1993), 146.

⁶⁰ Badinter Committee, ‘Opinions 2 and 3’, (1992). Extracts in Appendix H.

⁶¹ Emphasis added.

a right, linking it to the protection and enhancement of human rights, but then limiting its application to internal affairs within existing boundaries seemed to deny implicitly or to ignore the centrality of self-determination and emerging nationalism to the fragmentation of Yugoslavia. The opposing sides' desire for self-determination and nationalism including the protection and advancement of their human rights (as *they* understood it) fuelled the desire for territorial change. By not taking the next step and articulating a link between rights and territory, the Committee missed an opportunity to set normative conditions of why and when borders should shift and to incentivise the parties and the international community to understand and enforce rights based norms ahead of territorial demands.

The Committee's evident desire to divorce self-determination from territorial issues was furthered by their efforts to show the applicability of *uti possidetis juris* in a case that did not specifically involve decolonisation and the frequent reminders that any border shifts outside of the standard of *uti possidetis juris* could only come about through mutual consent. While the norms of inviolability of frontiers and of *uti possidetis juris* do not necessarily conflict with self-determination, they were not sufficiently practicable normative responses in and of themselves given the circumstances on the ground in Yugoslavia. Firstly the norm for inviolability of frontiers had already been pushed aside, as mentioned above, as Yugoslavia was now officially 'dissolving', and if borders could be altered through force once, their future inviolability was also suspect. The emphasis on the norm of *uti possidetis juris* and the comparison to decolonisation had merit but overlooked the massive human rights violations already occurring within such internal boundaries, such that, to those on the ground, the creation of states along such lines *without* credible and internationally supported protections of human rights could well have meant national suicide and it certainly made a *willingly* negotiated settlement extremely unlikely. The norms of territoriality seemed to outweigh the norm of self-determination in the Committee's thinking but, in reality, both norms were being applied and ignored to a similar degree and in ways that papered over the realities on the ground, as it became clear that internal borders were likely to be as violated as the integrity of Yugoslavia had been, given the intensity of fighting. As it happened, it was also too little too late, as some members of the EC were already moving towards recognition without regard to the Badinter Opinions.

In December, the EC attempted to draft general 'guidelines' on recognition for the whole of Eastern Europe in hopes of establishing consistent and coherent norms to respond to the simultaneous fragmentation of the Soviet

Union and Yugoslavia. This sensible approach resulted in the general statement of principles, discussed in the previous section, plus a supplemental declaration specifically relating to the situation in Yugoslavia that went over and above the conditions set down relating to the Soviet republics.⁶² The separate declaration on Yugoslavia invited the pre-existing republics (and only these) to indicate formally: whether they desired independence and the recognition of the EC, their willingness to adhere to the conditions set forth in the general guidelines for recognition for new states in Eastern Europe and the Soviet Union, their agreement to avoid or denounce irredentist activity within or from without their territory and, importantly, their acceptance of additional conditions stipulated at The Hague Conference to protect the human, national and ethnic rights of persons within their territories.

However, while the Badinter Committee reviewed the correspondence of the four republics that had applied for recognition and drafted its opinions on this subject⁶³, Germany independently recognized Slovenia and Croatia on 23 December 1991. The debate over the effects of the German recognition has been intense and remains unresolved, but from the standpoint of the norm of self-determination, the impact was as clear as it was destabilizing. The newly unified government in Bonn had been edging towards an 'unconditional' recognition of Slovenia for some time and had indicated the likelihood of doing so for Croatia, particularly in light of the increased Serbian irregular and JNA aggression towards Croatia during the summer, thus the announcement before Christmas of formal recognition came as no great shock. It did, however, scupper any effort to achieve normative cohesion related to the application of self-determination in Yugoslavia, and it suggested that Germany, at least, was interpreting self-determination in a manner that was noticeably different from the framework of the Badinter Committee as well as Part I of this investigation.

When the Badinter Committee published its fourth through seventh opinions on 11 January 1992,⁶⁴ it was akin to slamming the barn door closed after the horse has bolted. The separate opinions reflected the Committee's considered statement on how fully each of the republics requesting recognition met the criteria outlined in both the general and the specific guidelines published earlier, as well as how fully committed the republics were to meeting

⁶² EC, 'Declaration on Yugoslavia' (16 December 1991) [<http://www.ejil.org/journal/Vol4/No1/art7.html>].

⁶³ Serbia stated that it was 'not interested in secession' and that its international standing was, in effect, unchanged by events, having been part of the Kingdom of Serbs, Croats and Slovenes in 1918 and, subsequently, the Socialist Federal Republic of Yugoslavia. Montenegro responded to the invitation but denied the guidelines' relevance to their declarations of independence. See Badinter Committee, 'Opinions 4-7 (11 January 1992)' [<http://ejil.org/journal/Vol4/No1/art8.html>].

⁶⁴ Badinter Committee, 'Opinions 4-7'.

the obligations related to minority rights protection. In the case of Bosnia-Herzegovina⁶⁵, the Committee was not satisfied that the will of the peoples within the republic had been assessed, and the opinion implied that an independent Bosnia-Herzegovina could not satisfy the aspirations or guarantee the protection of ethnic Serbs, noting the recent (un-monitored) plebiscite for independence held by Bosnian Serbs. With respect to Croatia, Opinion 5 notes similar concerns about the constitutional protections for ethnic minorities within its borders and indicated that Croatia was in need of supplementing its proposed constitution accordingly. Of the republics requesting recognition under the guidelines, only Slovenia and Macedonia were judged to have met fully the criteria for recognition in the guidelines, and the Committee was clearly impressed by and took pains to highlight the specificity and encyclopaedic nature of the minority rights protections promised by these two aspiring states.

Given this, it is ironic that the EC elected to follow the German lead and recognize Croatia and, within a month, Bosnia-Herzegovina as well, while not recognizing Macedonia for a few years.⁶⁶ While the 'early' recognition of the more ethnically homogenous and virtually conflict-free Slovenia is more understandable, especially given that it was a situation in which the norms of *uti possidetis juris* and self-determination could be conjoined, the actions of the EC and the host of other states who followed them failed to provide either clarity or consistency to the application of the right of self-determination and the responses to emerging nationalism. An opportunity to establish workable and coherent norms was pursued and, as the Badinter Opinions indicate, the EC came close to producing normative mechanisms and approaches to the conflict that include many of the key components outlined in Part I, but the opportunity was squandered and the actual responses spoke more of the divisions within and between the 'new Europe' and the international community than about normative cohesion.

However, an assessment of these responses needs to acknowledge the repeated failure of *any* responses on the ground aimed at stemming the violence that took place during the first years of Yugoslavia's dissolution. On the one hand, the combatants were engaged in what they felt was a mortal struggle based on respective identities that deeply resonated and motivated all sides. As for the international dimension, as James Gow notes:

⁶⁵ The term 'Bosnia-Herzegovina' refers to the pre-dissolution republic within the SFYR. As noted below, following the Dayton Accords, the name is changed to 'Bosnia and Herzegovina', a seemingly small but important shift in the 'final' political settlement.

⁶⁶ In short, the reluctance to recognize Macedonia was down to the objections of the Greek government and did not reflect the general attitude of the other eleven member states. In time, the European Union recognized the clumsily, if appropriately, named Former Yugoslav Republic of Macedonia.

in the space of the year the EC had moved from the position on the maintenance of the Yugoslav state, through growing internal dispute in disarray on how to handle the war, to a common but partially discordant policy on inviting those republics seeking independence to submit applications and undergo the procedure identified.⁶⁷

These rapidly shifting goalposts were as much the effect of the intransigence of the parties within former Yugoslavia as they were the cause. It should be remembered that the theoretical and tangible context of international activity reviewed in section (i) was still a work in progress in 1991 and 1992, making the coordination of norms and policy doubly difficult. In short, the lack of a coherent response reflected, in no small part, the absence of a cohesive international community that understood itself and its priorities.

Perhaps the most relevant manifestation of this was the perpetually 'evolving mandate' given to the UN Protection Force (UNPROFOR) in 'former' Yugoslavia through successive resolutions of the Security Council, as the organisation and its member states struggled to define and shape their responses.⁶⁸ Greater cohesion, increased dialogue and a fulsome backing of the Badinter-Carrington process, might have provided the normative basis on which robust, concrete enforcement measures could be constructed, but this opportunity was not seized and while it probably would not have affected the realities on the ground, it might have given better shape to the efforts and provided a more reasoned basis for the reactions.

The absence of an agreed understanding of self-determination, of how it might fit together with *uti possidetis juris* in this circumstance served to fuel rather than deter the combatants. The heavy emphasis that the EC and the UN placed on the inviolability frontiers served, at first, to encourage Serbian hopes of creating a 'Greater Serbia', and, then, when the EC dropped its idea of a united Yugoslavia without any concomitant standard of minority protections, it increased the efforts of all parties within the newly recognized republics to fight ferociously in what warped into a profoundly vicious, 'winner take all' land-grab. The absence of any mechanisms for enforcing human rights deepened and solidified the roots of the conflict, making it even more intractable than it already was. Without any willingness to develop and then to enforce normative principles related to self-determination and emerging nationalism, the EC and subsequently the United Nations condemned themselves to negotiations between parties that routinely used excessive and occasionally genocidal levels of force and who became committed to a war of attrition achieve their aims.

⁶⁷ Gow, *Triumph*, 63-64.

⁶⁸ See Economides and Taylor, 'Former Yugoslavia'.

Without any guiding, normative standards around which they could construct and enforce a settlement, the EC and, in turn, the UN opted to chart a 'neutral' course, neither condemning nor using force to counter acts of ethnic cleansing by Serbs and (to a lesser extent) others.

Only with the Dayton Accords in 1995 and the introduction of the relatively sizable NATO-led international force (IFOR) did a degree of peace return to the area, and this agreement was brokered through force as much as it was by the weight of ideas. Nonetheless, the Dayton Accords provide great insight into where the norms of self-determination rested at 'the end' of the conflict and serve as another guidepost outlining the evolution of the right in the post-Cold War era.

(iv) The collapse of Yugoslavia – Act II: Dayton

There were numerous diplomatic and military shifts that brought the parties to the negotiation tables at Wright-Patterson Air Force Base near Dayton, Ohio (the location being a reflection of the increased American engagement in the search for peace), and the talks were especially intense and complex, even by the standards of former Yugoslavia.⁶⁹ Despite the inherent difficulties, the parties concluded the Accords, comprising the 'General Framework' and twelve supplementary annexes.⁷⁰

The most striking characteristic of the General Framework and the relevant annexes is the attention given to the practical enforcement of the norms set out within the document. The Accords contain numerous general as well as many specific pronouncements related to the rights of individuals and of PIFGs, but unlike virtually all of the other documents examined throughout this study, they specify elaborate mechanisms for the enforcement of such rights. Moreover, enforcement mechanisms are frequently overlapping, and non-Balkan individuals or groups are charged with oversight in numerous instances. The net effect of these mechanisms is a transformation in the understanding of sovereignty through a dynamic enforcement of the norm of self-determination.

For example, the General Framework's Annex 4, which deals with the constitutional structure of Bosnia and Herzegovina, provides for a consociational power sharing arrangement between the three PIFGs⁷¹ within the

⁶⁹ See Gow, *Triumph*, 276-286 for an effective survey.

⁷⁰ *The General Framework Agreement for Peace in Bosnia and Herzegovina* (General Framework), 14 December 1995 [http://www.ohr.int/dpa/default.asp?content_id=380]. Relevant extracts are in Appendix I.

⁷¹ Muslim, Croat and Serb, though unspecified 'others' are added as a blanket protection.

two constituent ‘entities’⁷² that make up the, in effect, new state of Bosnia and Herzegovina, but the intervention into ‘domestic’ matters did not stop there.⁷³ Several key governmental posts including the Supreme Court were to be occupied and appointed by the foreigners, and any person convicted of, indicted for or evading charges of war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was beginning its work at The Hague, was barred from holding office at *any* level of government. A third of the judges in the highest court of the land had to be drawn from non-neighbouring countries and were appointed by the president of the European Court of Human Rights. The security of the state was, to begin with at least, almost entirely in the hands of the international community, with the Implementation Force (IFOR) and the International Police Task Force (IPTF) managing security on the ground, arrangements that persisted for nearly a decade after the agreement.

The monitoring and enforcement of human rights and protections of PIFGs, covered in Annex 6, provide the most insight into how Dayton reflects the further evolution of self-determination, and the first thing that is apparent is the invasive and extensive nature of the protections. As one scholar has noted, ‘it would be difficult to construct an international treaty in which more human rights are guaranteed in more ways.’⁷⁴ The normative basis of the protections is nothing beyond what had been outlined in earlier documents of the UN and the EU, but what sets Dayton apart from any previous international response, even in the post-Cold War period are the multiple layers of enforcement mechanisms, all of which involved not only oversight but the active and ongoing involvement of the international community in, literally, the daily life of the citizens of Bosnia and Herzegovina. The main organ for the enforcement of rights in Annex 6 is the Human Rights Commission, which is itself made up of two principle bodies: the Ombudsman and the Human Rights Chamber. As elsewhere in the Accords, the intrusion of the international community is institutionalized. As the Annex indicates, for the first five years of the Commission’s operation, the Ombudsman is to be appointed by the OSCE and the Chamber is made up of four members from the Federation of Bosnia-Herzegovina, two from the Republika Srpska and eight, the majority, are appointed by the Council of Europe. The involvement of such offices in guaranteeing the respect and promotion of rights is, while very bureaucratic,

⁷² The Muslim and Croat dominated Federation of Bosnia-Herzegovina (NB the return of the hyphen that had been substituted with ‘and’ in the country’s new name) and the Serb-dominated Republika Srpska.

⁷³ Gow, *Triumph*, 288-292 and James Sloan, ‘The Dayton Peace Agreement: Human Rights Guarantees and Implementation’, *EJIL*, 7 (1996), provide clear, detailed yet concise reviews of the salient details.

⁷⁴ Sloan, ‘Dayton’ 207.

extensive and open, creating a climate of government and civil society that is disposed towards achieving the kind of meaningful exercise of the right that is entailed in the concept.

In addition to establishing and authorizing these formal governmental bodies, Annex 6 contains a section encouraging and facilitating the involvement of domestic and international NGOs in the affairs of the new political entities. While such provisions might be desirable or even expected in any post-conflict treaty, the extensive powers granted to NGOs are sweeping and unique. Under the General Framework, NGOs are permitted ‘full and effective facilitation, assistance and access’ to the governmental institutions, and the entities are bound to ‘refrain from hindering or impeding [NGOs] in the exercise of [their] functions.’

While self-determination is not explicitly mentioned in the General Framework or in its annexes,⁷⁵ the right pervades the documents, above all in the Framework’s desire to ensure meaningful participation in the life of the state for all individuals and for the PIFGs to which they belong. Moreover, Dayton goes beyond the international community’s other normative responses to emerging nationalism, in the Balkan or elsewhere, by stipulating *concrete means* to achieve the ends desired. For its attempts at establishing enforcement mechanisms alone, the Dayton General Framework Agreement represents a significant moment in the evolution of self-determination and responses to emerging nationalism. It also reflects a dramatic shift in the understanding of sovereignty in the face of state fragmentation, particularly for those cases involving identity. The document permits such a large amount of international intrusion into affairs of traditionally reserved to sovereign states that it *at least* confirms a shift away from a Westphalian view sovereignty in the post-Cold War context.

The General Framework could be seen as heralding what might be called a ‘return to trusteeship’, for in essence, the Dayton Accords established a quasi-independent state, created through the managed application of self-determination in the hope of mitigating the negative effects of emerging nationalism. Space and the nature of this study do not permit a review of the effectiveness of the enforcement mechanisms,⁷⁶ but the absence of armed conflict and the (albeit slow) return to peaceful, civil society indicates a tangible

⁷⁵ However, Annex 6, Article 1, which serves as a bill of rights, includes as its last point a ‘condominium’, extending the rights protected to all those mentioned in the list of international treaties and covenants listed in the appendix of the Annex. This list includes agreements that explicitly include the right of self-determination, most notably the ICCPR, which, as noted in Chapter 4 is a major development in the evolution of the right. If one were to speculate on reasons for its explicit absence, the best conclusion is probably fear of use by secessionists.

⁷⁶ Sumantra Bose, in *Bosnia after Dayton: Nationalist Partition and International Intervention* (New York: Oxford University Press, 2002), provides an excellent evaluation of the implementation of the Dayton Accords.

degree of success. As an indicator of the post-Cold War evolution of self-determination, the creation of a quasi-sovereign, trusteeship in Bosnia and Herzegovina is extremely significant as it seems to confirm the intention of the international community to place human rights above the standard of non-interference, particularly in the face of well-documented, widespread and serious violations of human rights.

(v) *Kosovo's 'quasi-independence'*

The case of Kosovo is by far the best indicator of self-determination's current status as in international norm, as it not only reveals much about how the international community currently understands and applies the norm, but also because the responses to emerging nationalism in Kosovo have involved NATO, the OSCE, the EU and the UN in a colossal intervention that has seen a massive, intensive and prolonged use of diplomatic, economic and military force in a nation-building process. While Bosnia and Herzegovina involved both a large-scale military and diplomatic intervention, the size and duration of this has been greater in Kosovo, and the initial use of force in Kosovo and Serbia by NATO without UN Security Council authorization added to the complexity and the challenges in finding a solution. The subsequent (and ongoing) implementation of the 'final' settlement in Kosovo represents a protracted, pervasive and complex management process that is unprecedented in the history of responses to self-determination.

a) *Post-Dayton challenges*

Although Kosovo is examined here for the reasons mentioned above, the largely coincidental fact that it is another example drawn from Eastern Europe and the collapse of Yugoslavia in particular, is also important. Having both deeper historical roots and more recent triggering events than the conflict in Bosnia and Herzegovina, the present situation in Kosovo is a direct consequence of the Dayton Accords, specifically the relevant parties' failure to apply the right of self-determination more broadly so as to consider Serbia's ethnic Albanian minority in Kosovo as a part of that settlement.⁷⁷ In fact, at the negotiations in Dayton, there was a conscious decision to limit the scope of the discussions to

⁷⁷ While it is generally agreed that the failure to include the issue of self-determination for Kosovo (or for other areas and peoples) in the negotiations played at least some part in the ensuing violent struggle, the opinion of the Independent International Commission on Kosovo (IICK), that there was only a limited chance of dealing with Kosovo at the time given the parties' positions and focus on Bosnia, seems correct. See IICK, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 58-59. It is also worth noting that the Dayton Accords were also silent regarding Serbia's other highly significant minority PIFG, the ethnically Hungarian peoples of the Vojvodina autonomous region.

'Bosnian' issues and to ignore (at least for the moment) questions related to other aspects of the Yugoslav labyrinth. While there were excellent practical reasons for doing so, the effects on the situation in Kosovo were dramatic.

Since the withdrawal of autonomy in 1990 by the increasingly nationalist President of Serbia, Slobodan Milosevic,⁷⁸ Kosovo's political situation had been in a troubled limbo. Following the revocation of autonomy, a rival, parallel government emerged, led by the Kosovo Albanian intellectual, Ibrahim Rugova of the League for a Democratic Kosovo (LDK), which subscribed to a policy of non-violent resistance.⁷⁹ In the midst of the conflicts during the dissolution of Yugoslavia between 1991 and 1995, the clashes in Kosovo, though frequent, remained fairly contained and the violence relatively limited despite the overall repressive nature of the actions in the region. However, almost immediately following the conclusion of the Dayton Accords, tensions in Kosovo increased significantly, and the already unstable and frequently violent situation between Serbs and Kosovars⁸⁰ took a dangerous turn. The failure of the LDK to achieve significant progress with their non-violent, moderate strategy, the growth of repressive actions by the Serbian dominated government of the Federal Republic of Yugoslavia (FRY)⁸¹ and the lack of international attention to Kosovar appeals during the Dayton negotiations all contributed to the emergence of the Kosovo Liberation Army, a somewhat disorganised but determined, well armed and violent force for independence.⁸²

By 1998, the spiral of tit-for-tat actions by the KLA and the Serbian police and occasionally the FRY army, the VJ, had escalated to such a degree that the situation prompted an international response. The international community had been concerned with the situation in Kosovo for some time, though the responses to violence in the rest of Yugoslavia took precedence. This fact, though, made little sense to Kosovars, who considered their right to self-determination as equal to that of any other peoples within the Balkans and

⁷⁸ Milosevic was also the President of the Soviet Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia after the breakup.

⁷⁹ Noel Malcolm, *Kosovo: A Short History* (New York: Harper Perennial, 1998), Chapter 13; Tim Judah, *Kosovo: War and Revenge* (New Haven, CT: Yale Nota Bene Press, 2002), Chapter 3. Like Kosovo, Vojvodina in northern Serbia also had its autonomous status stripped at this time.

⁸⁰ The two main PIFGs in Kosovo are the Serbs (less than 10% of the population today) and the Kosovar Albanians, who are referred to as Kosovars or Albanians depending on who is writing or speaking, who make up almost 90% of the population at present. This study tries to use 'Kosovar' to refer to members of this latter group and uses the term 'Kosovans' to refer to all persons within the territory of Kosovo when a single collective noun is used. That it is rarely used is telling of the divisions in Kosovo.

⁸¹ The FRY was composed of the Republic of Serbia and the Republic of Montenegro, until 2003 when it became the State Union of Serbia and Montenegro, which lasted until 2006 when Montenegro became independent, which Serbia accepted peacefully.

⁸² See in particular, Judah, *Kosovo*, Chapter 4 and Julie A. Mertus *Kosovo: How Myths and Truths Started a War* (Berkeley, CA: University of California Press, 1999), 5-13.

those who supported the LDK felt that their movement was superior given its peaceful nature.

By 1998, however, many within Kosovo drew new and important lessons from the violence in Croatia and Bosnia and from the international responses to emerging nationalism there, the chief lesson being that the international community would probably remain on the sidelines until the level of violence and the repression of human rights reached a humanitarian tipping point (as it did in Bosnia) or if the conflict looked likely to spread outside of the confines of the FRY's boundaries. As one scholar has noted, '[t]he Albanians regarded the peace deal as both cynical and promising. If the Bosnian Serbs could win their own republic within Bosnia through war, why were Albanians expected to tolerate their status in Kosovo, deprived in even the smallest degree of autonomy?'⁸³ The calculation that the deployment of much tougher tactics would trigger a 'helpful' intervention were premised on there first being a violent counter-reaction from Belgrade, a response likely to come given Milosevic's temperament and rhetoric regarding Kosovo and his track record with such tactics.⁸⁴ As a result, not only did the KLA emerge in the late 1990s as a more popular force promoting Kosovar nationalism, but it also stepped up its attacks on Serbs within Kosovo *with the exact intent* of provoking a backlash from the FRY government.

The Serbians and Milosevic in particular also drew important conclusions from Dayton and the earlier international responses to the fragmentation of Yugoslavia. They concluded that it was possible in negotiations to maintain territory acquired through force of arms, that minority rights guarantees tended to be enforced better for non-Serbs than for Serbs, and that the UN (and the rest of the international community) could be counted on to act slowly if at all. It is also clear that Milosevic counted on Russia to preserve Serbia's territorial integrity and to protect Serbian interests, certainly through diplomacy but perhaps also through the threat or the use of force.

In some ways, these lessons were accurately drawn, but whether accurate or not they had the effect of emboldening Milosevic in his desire to pursue an aggressive nationalist agenda to further his vision for the FRY and, particularly, to further his own power. In the run up to the elections within the FRY in 1997 in which Milosevic faced serious challenges, he increased his rhetoric against the

⁸³ Duska Anastasijevic, 'The Closing of the Kosovo Cycle: Victimization versus Responsibility' in Albrecht Schnabel and Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention* (Tokyo: United Nations University Press, 2000), 54.

⁸⁴ In the interest of avoiding the charge of 'Milosevic bashing', it should be noted that few sovereign states, even pre-9/11, would respond to the kind of terrorist tactics employed by the KLA with anything other than force, at least in the first instance.

Kosovar Albanians as a means of shifting focus, while, at the same time signing a statement of understanding with Rugova to promote identity-sensitive education policies for ethnic Albanians, thereby fulfilling the lone requirement within the Dayton agreement related to Kosovo.

Milosevic's strident rhetoric resonated with most Serbians at the time, given the intensification of KLA activity against Serbs as well as the historical stereotype of Albanians as ruffians and 'indoctrinated Serbophobes'.⁸⁵ Milosevic was thus able to denounce credibly the actions of the KLA as terrorism, both to domestic and international audiences. In fact, in February 1998, Robert Gelbard, the US Special Representative for the implementation of the Dayton Accords, spoke extremely harshly of the KLA's actions, labelling them terrorists, signalling, in the opinion of the Independent International Commission on Kosovo (IICK), a clear signal to Belgrade 'that the FRY could act ruthlessly in Kosovo without arousing any strong critical response from the West, so long as its primary target appeared to be the KLA challenge rather than the Kosovar civilian population.'⁸⁶

A Contact Group, consisting of Russia, Italy, Germany, France, the US and the UK⁸⁷ took the lead in addressing the degenerating situation in Kosovo and produced a series of memoranda that formed the basis of UN Security Council Resolution 1160.⁸⁸ As Groom and Taylor note, in this initial UN resolution and in subsequent resolutions prior to NATO intervention, the Security Council spoke even-handedly in its condemnation of the acts of violence by the KLA and the Serbian forces, going so far as to use the word 'terrorism' to describe the actions of the KLA and other Kosovar paramilitaries.⁸⁹ This even-handedness extended to the inclusion of an arms embargo, which implicitly acknowledged the reality that the both parties to the conflict were being supplied with arms from abroad via the ever-increasing free market for weapons, which was highlighted in section (i).

It was only after the Serbian attacks expanded in scope and intensity (albeit mostly in response to the KLA's stepped-up assaults) that the UN and the Contact Group began to signal that Serbian supported and perhaps even sponsored ethnic cleansing was taking place, leading to a massive displacement of Kosovars. The Contact Group at first adopted a more explicit position on

⁸⁵ Anastasijevic, 'The Closing of the Kosovo Cycle', 50; and, more generally, Mertus, *Kosovo*, especially 231-234.

⁸⁶ IICK, *Kosovo Report*, 146-147.

⁸⁷ Japan and Canada were also involved the Group's work.

⁸⁸ UN, S/Res.1160 (31 March 1998). Extracts in Appendix K.

⁸⁹ A.J.R. Groom and Paul Taylor, 'The United Nations System and the Kosovo Crisis' in Schnabel and Thakur, eds. *Kosovo*, 295-297. For specifics of the resolution, see United Nations (UN), S/Res/1160 and 1199 (1998) in Appendix K.

the matter than the UN, labelling the actions of FRY forces and Serb police in Kosovo as disproportionate to the level of violence inflicted on the Serbs and other minorities of the region.⁹⁰ Based on the Contact Group's findings and opinions and on UN assessments, UN Security Council Resolution 1199 of September 1998 stiffened the tone, referring to the 'impending humanitarian catastrophe' and pointing out that the FRY had the responsibility to facilitate the return of refugees and to end attacks by FRY forces.⁹¹ It also repeatedly calls on the Serb forces to cease all attacks on civilians, facilitate the entry and activity of international monitors from the OSCE and the UN and to identify and hand over to the ICTY its personnel suspected of mistreatment of civilians and private property.

While both the Contact Group and the Security Council consistently affirmed the territorial integrity of the FRY (a point returned to later), their respective statements and resolutions rejected any idea of non-intervention and asserted a right, and almost suggested a *duty*, to intervene to ensure the rights of the Kosovars. As British Foreign Secretary Robin Cook bluntly put it, 'We do not accept that this is merely an internal matter.'⁹² All the UN resolutions on the matter placed the response within scope of the Charter's Chapter 7 provisions, defining the matter as a 'threat to international peace and security'. Moreover, while both the UN and the Contact Group urged both sides of the conflict 'to enter immediately into a meaningful dialogue without preconditions', the premise that guided the international community's efforts was that the *status quo ante* was unacceptable. Negotiations were aimed at 'an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration'.⁹³

Accordingly, from the standpoint of the international community, these responses reflect the advancement of a human rights oriented understanding of self-determination. While the term 'self-determination' does not appear in any of the statements of the Contact Group or in the resolutions, the idea suffuses and informs the documents.⁹⁴ Even the Russian government supported the expansion of autonomy and relatively strong international actions to curtail ethnic cleansing, which is quite surprising considering that Russia was a long-standing supporter of Milosevic, extremely wary of NATO and very concerned about setting a precedent for intervention in cases of emerging nationalism,

⁹⁰ IICK, *Kosovo Report*, 137-142.

⁹¹ UN, S/Res/1199 (1998).

⁹² Quoted in IICK, *Kosovo Report*, 138.

⁹³ UN, S/Res/1160 and 1199 (1998).

⁹⁴ In fact, it is absent in an explicit form from almost all documents related to Kosovo. The simplest explanation for this is the international community's long running fear of making a connection between self-determination and secession.

given the situation in Chechnya and elsewhere in the Federation.⁹⁵ While Russia was not supportive of either the threat or the use of military force to bring Milosevic to heel, it did not stand in the way to the extent that it could have when the US increased the pressure on the FRY and threatened NATO air strikes, which is, in itself, highly indicative of the changing context of international relations and, perhaps, also of the new understanding of self-determination that was beginning to take shape.

b) Rambouillet

During the autumn of 1998, following expanded media coverage of the frequent atrocities, intense diplomacy by an ever more divided Contact Group, and the first of a number of threatened NATO air strikes, Milosevic agreed to a ceasefire, a reduction of police and FRY forces in the region and the deployment of unarmed international monitors. These concessions were collectively known as the Holbrooke Agreement, after the chief American envoy, Richard Holbrooke. When this agreement failed, owing to violence by both the KLA and Serbian forces, the Contact Group tried brinkmanship diplomacy in the Parisian suburb of Rambouillet.⁹⁶ Many things affected the flow of discussions at Rambouillet including the spoiling efforts of both the KLA and Serbian officials, the half-hearted participation of the Russians and the unstated but almost exasperated desire of the American and European negotiators to achieve a settlement that would end the ethnic cleansing and, if possible, assert the credibility of NATO as a post-Cold War political and security actor.⁹⁷ The talks reveal well how the international community struggled with the perennial challenges of self-determination and emerging nationalism as it worked to forge shared understandings and actions.

On one level, the Rambouillet conference was perhaps doomed to fail given the lack of attention paid to it by the FRY. Indeed, Milosevic did not attend, but there was also a lack of unity amongst the Kosovar representatives that confused matters. More importantly, there were overarching obstacles blocking the efforts of the diplomats. The draft proposals on which the talks

⁹⁵ The role of Russia in the diplomacy leading up to the commencement of bombing in March is difficult to interpret, but while the Russian Federation was in 1998 and remains today the least willing member of the Contact Group to intervene in the affairs of the Serbians, their intense involvement in the unfolding crisis in Kosovo indicates a willingness to support diplomatic intervention in certain cases involving self-determination even while eschewing the use of the term. For a discussion of the Russian involvement during this period, see Spyros Economides, 'Kosovo' in Berdal and Economides, *United Nations Interventionism*, 233-234; IICK, *Kosovo Report*, 143-151; and Judah, *Kosovo*, 182-187.

⁹⁶ For details of the Rambouillet talks, see Judah, *Kosovo*, Chapter 7; Marc Weller, 'The Rambouillet Conference on Kosovo' *International Affairs*, 75:2 (April 1999); IICK, *Kosovo Report*, 151-161.

⁹⁷ Judah, in *Kosovo*, 211-220, conveys the sense of desperation very effectively.

were based contained a section of 'non-negotiables', which reflected the Contact Group's understanding of self-determination, the chief of which was a renewed assurance of the territorial integrity of the FRY.⁹⁸ While the application of *uti possidetis juris* in the former Soviet Union and in former Yugoslavia had, to date, indicated a willingness to recognize new states provided their boundaries were those of 'republics' within a federal structure, there had been no suggestion that autonomous territories such as Kosovo or the former Soviet *oblasti* could be recognized as sovereign on this basis.

The unwillingness of the international community to consider the *possible* legitimate fragmentation of a sovereign state as a premise of discussions drastically limited the likelihood of success, and it flew in the face of the lessons each community learned from Dayton, where facts on the ground had shown the limitation of *uti possidetis juris* as a tool when boundaries were first shattering and then resetting in new position due to fighting. The guarantee of borders ran directly counter the one unshakeable and absolute demand of the Kosovar community, which was (eventual) independence. On the Serbian side, the promise of territorial integrity might have incentivised Milosevic to engage in the Rambouillet discussion, but it is unlikely he found the Contact Group's assurance entirely convincing given the history of diplomatic intervention in former Yugoslavia, where boundaries were asserted, then negotiated away. Thus the talks offered little to Serbia other than the potential to avoid armed intervention by the UN or NATO. However, action sanctioned by the UN Security Council was extremely unlikely owing to Russia's support of Serbia (although this proved to be more limited than Milosevic thought it would).

Milosevic's unwillingness to negotiate was probably based on a reasonable calculation that the Kosovars would not accept any agreement that did not promise a clear path to independence, thus limiting the likelihood of an agreement regardless of Serbian actions. Since the primary 'non-negotiable' that the Contact Group and NATO set out, territorial integrity of the FRY, was not at all acceptable to their adversaries, Milosevic and the Serbs had no pressing reason to invest in the discussions at Rambouillet. Milosevic's fundamental miscalculation was his failure to predict that the Contact Group might entertain the idea of independence during the discussion, which, in the end, they did. As for the Kosovars, having witnessed the multiple fragmentations of Yugoslavia that occurred despite international insistence on territorial integrity, their intransigence on the demand for independence was neither unwarranted nor unwise.

⁹⁸ Weller, 'Rambouillet', 225-226 contains the full text of the proposals.

This is the critical point about Rambouillet and the self-determination challenge in Kosovo: by *appearing* to prioritize territorial integrity over the goal of ensuring human rights, humane governance and meaningful participation of all groups in the civic life of Kosovo, the Contact Group boxed itself in with both parties and refocused the discussions in a way that had drastic practical effects, namely an escalation of the armed conflict and NATO bombing that soon, directly and indirectly, led to the death and displacement of thousands. There was an opportunity before and at the Rambouillet discussions to prioritize a human rights oriented, normative framework of self-determination above territorial integrity, while at the same time stressing the importance of territory to any settlement, and there is evidence that the Contact Group could have made this the focus of the negotiations.

Most of the conditions needed to formulate such a response were present at Rambouillet. The Contact Group was motivated above all by a genuine desire to alleviate human suffering and enhance democratic norms, and the Group was constructing a 'Dayton-like' plan for the region. The UN Security Council had repeatedly invoked Chapter 7 in its condemnations of atrocities, thereby classifying the human rights violations as a 'threat to international peace and security', and NATO and its political wing, the North Atlantic Council (NAC), seemed increasingly willing to bypass the UN Security Council to threaten and, if needed, to use force to implement the protection of rights. Nonetheless, despite the heavy emphasis on self-determination running throughout the 'Interim Agreement' produced at the end of the deliberations (discussed below), the talks never seriously dealt with these points as core issues but only on the periphery of the issue of independence and territorial integrity, which were, and remain even today, non-negotiable positions for both Serbs and Kosovars.

Rethinking the approach to Rambouillet within the human rights oriented normative framework for self-determination outlined in Part I serves to highlight the differences between this and how self-determination was interpreted at the normative level at Rambouillet. This normative stance would have made the issue of Kosovo's future sovereignty and the FRY's territorial integrity *dependent* on the willingness or, more accurately, on the tangible results of both parties' protection and promotion of individual and group rights within Kosovo. In other words, had the Contact Group adopted something closer to this approach, it would have purposely left the issue of Kosovo's independence in limbo and used the Group's formidable diplomatic, economic and military power to push each of the parties forcefully to put an end to their activities that ran so counter to the concept of self-determination.

This pressure could have forced the Serbs to restrain and/or withdraw their forces and engage in building mechanisms of humane governance or risk losing Kosovo once and for all with the blessing and support of the international community. It could have led the KLA to halt their own ethnic cleansing and their efforts to destabilize the region and provoke Serb retaliation and, instead negotiate with the Serbs to construct meaningful representation and participation of their nationality in Kosovo. Their failure to do so would have led not to independence but would have added weight to *legitimate* Serbian efforts to use their armed forces and police to protect their co-nationals and other FRY citizens under their jurisdiction. This might have slowed or ended the ethnic cleansing or at least duplicitous endeavours to draw in the West, which was the clear intent of the KLA.⁹⁹

While not wishing to engage in too much counterfactual speculation, it is fair to point out that Milosevic probably would not have drastically changed his policies as a result of such methods. Milosevic frequently and eloquently spoke of a multi-ethnic future for Serbia and Montenegro and his willingness to accept outside assistance to achieve these ends,¹⁰⁰ but Christopher Hill, the US Ambassador to Macedonia and Special Envoy to Kosovo during the talks, called this ‘a kind of self-hypnosis’ with ‘a high bullshit quota’.¹⁰¹ Nonetheless, this approach would have forced him to live up to his rhetorical commitments to multi-ethnic democracy, or, at the very least it would have revealed him more overtly to international and domestic audiences as the charlatan that he actually was, as it would have stolen his argument that the FRY alone was the legitimate protector of non-Albanian PIFGs against the terrorism of the KLA. As for the Kosovars, such an approach *might* have dissuaded them from their entrenched demand for independence, as there is some evidence that many Kosovars and even some KLA commanders would have accepted this, if only as an interim step towards independence.¹⁰²

In reality, rather than appearing even-handed and deeply concerned with the protection of all PIFGs, the international community at Rambouillet under-emphasized, and to Serbian minds effectively ignored the legitimate right of self-determination of the non-Kosovar peoples of the province, especially the rights of the Serbians. The Contact Group also left virtually untouched the idea of

⁹⁹ See, for example, the interview with Hashim Thaci, then the leading KLA negotiator at Rambouillet, later the leader of the Democratic Party of Kosovo (PDK) in the Provisional Government of Kosovo (QPK) and most recently the Prime Minister of Kosovo, on 29 September 1999, in William Joseph Buckley, ed., *Kosovo: Contending Voices of the Balkans Intervention* (Grand Rapids, MI: William B. Eerdmans Publishing Co., 2000), 282-290.

¹⁰⁰ See Milosevic's interview of 30 April 1999, in Buckley, *Kosovo*, 273-281.

¹⁰¹ Quoted in Judah, *Kosovo*, 201.

¹⁰² See Judah, *Kosovo*, 220.

intervening to stem the flow of arms across the Albanian and Montenegrin borders to the KLA, opening itself to the charge of one-sidedness.

However, to be fair, the Interim Agreement of 23 February 1999 dealt at length with establishing genuinely consociational arrangements within Kosovo, including internationally managed systems like those used in Bosnia.¹⁰³ The Agreement includes an ombudsman for human rights protection, externally appointed, non-Balkan Supreme Court judges, guaranteed representation of Kosovars in the government of Serbia and the FRY and a Presidential-Prime Ministerial system that divided executive power in the hope of containing it. The most striking feature of the Interim Agreement is the lengthy attention given to ‘national communities’, assumed to be the most relevant PIFGs in Kosovo.¹⁰⁴ While a definition of what constitutes a ‘national community’ and how these groups derive their significance are not explicitly given in the text, it is obvious that the Contact Group had in mind not only the Serbian and Albanian ethnic nationalities but also the Roma, the Montenegrins and other numerically smaller PIFGs in the area, and left open the possibility of recognizing other PIFGs as such by explicitly mentioning identity-forming affinities like religion, language and culture.¹⁰⁵

What is unique is that such groups are given protections for their identity though guaranteed participation in the proposed Assembly, the Constitutional Court and other inferior courts, and guaranteed representation at all levels in the administrative offices and bureaucracy, all this in addition to the protections of language, religion, education, public nomenclature and (importantly for Serbs) access to and protection of historically significant locations for the national communities and for the individual constituent members. As with the Dayton Accords, the entire document is also premised on an acceptance of the undertakings of the Helsinki Final Act and its explicit commitments to self-determination as an integral part of ensuring human rights. As such, the Interim Agreement represents the international community’s commitment to ensure self-determination and suggests that their understanding of the concept was increasingly linked to human rights and focused on ensuring the well-being and meaningful participation of all individuals within a territory.

However, the Interim Agreement was stillborn, as neither side initially signed the document. Although many accounts at the time and subsequently

¹⁰³ *Interim Agreement for Peace and Self-government in Kosovo* 23 February 1999, [<http://jurist.law.pitt.edu/ramb.htm#Frame>].

¹⁰⁴ *Interim Agreement*, Chapter 1, Art. VIII.

¹⁰⁵ Such groups include the Gorani and the Serb Muslims (often called Bosniaks). For more on the numerically small PIFGs in Kosovo, see ‘The minorities within the minority’, *The Economist* 2 November 2006.

indicated that the Kosovar Albanians signed, in fact, they only agreed to the Interim Agreement following intense and dramatic negotiations at Rambouillet and subsequent talks back in Kosovo. As it became clear that the Serbians, for reasons discussed above, were not likely to engage, the Contact Group responded in a fragmented manner, with US Secretary of State Madeline Albright taking personal charge of the negotiations with the Albanians, pushing them to sign in a direct effort to single out the Serbs as a 'guilty' party.¹⁰⁶

The motivation for this seems to have been a desire to have an agreement, *any* agreement that allowed NATO to use force to pressure Serbia to accept intervention on the ground in order to protect human rights and democratic norms, the Contact Group's ultimate aims.¹⁰⁷ While this might have been a just aim, and even one that ultimately might have conformed to a human rights based understanding of self-determination, the means proved too unseemly and appeared one-sided (as indeed they were) to Milosevic and to many in the Group. Milosevic did not move and the Kosovars held out long enough to secure a highly ambiguous text that envisaged a three year period of managed government of Kosovo followed by an:

international meeting...to determine a mechanism for the final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.¹⁰⁸

There is language here to suggest that implementation would be fairly and evenly adjudicated and that the ultimate test for the future status of Kosovo would be dependent on progress made towards improving the respect for human rights and the well-being of all individuals and communities. This would certainly constitute an active application of self-determination that would fully conform to the human rights oriented normative framework suggested in Part I.

However, the ambiguous text left all parties unsatisfied, and rather than using this ambiguity to bolster rights of all communities and form the basis of agreement, Madeline Albright drafted a letter of understanding to the Kosovar delegation indicating that this would be interpreted to mean holding a plebiscite, a position that was thoroughly unacceptable to both Serbia and

¹⁰⁶ Judah, *Kosovo*, 211-218.

¹⁰⁷ James Rubin, US State Department Spokesperson, officially said as much in the middle of the crisis. See Marc Weller, *The Crisis in Kosovo, 1989-1999: International Documents and Analysis* (Cambridge: Cambridge University Press, 1999), 451.

¹⁰⁸ *Interim Agreement*, Chapter 8, Art. 1, para. 3.

Russia.¹⁰⁹ While this secured the eventual signature of the Albanian Kosovar delegates on 15 March, it guaranteed the non-participation of the Serbs and paved the way for NATO's military action on 24 March 1999.

Rambouillet thus stands as a tremendous missed opportunity for some of the most important voices in the international community to hammer out a more coherent normative understanding of self-determination at the very time when the international community desperately needed logical and consistent principles to guide its actions. This missed opportunity did not come about because the diplomats eschewed the idea of self-determination or had radically different interpretations of its meaning and its connection to human rights, for, as demonstrated, a human rights oriented understanding is evident in and clearly informed much of the thinking behind the document. Instead, the diplomats missed the chance to reconcile successfully this norm with matters of territoriality and sovereignty. The central dialogue in the talks was not located sufficiently on the causes of crisis, namely, the human rights catastrophe, which was precisely where it needed to be, and instead centred on the political and strategic effects. While this pattern was not new to crises involving state fragmentation, the initial and sustaining motivations for the intervention were the severe violations of human rights and the denial of internal self-determination for the Kosovars, so the failure to create a response that fused together self-determination with territorial and strategic issues was unfortunate to say the least. Doing so *probably* would not have changed the attitude of the combatants or the course of events at this stage of the conflict, for, as noted at the start of this subsection, the real opportunity to employ the norm of self-determination in such a way was probably during the Dayton talks when such issues and approaches were discussed regarding Bosnia and before the level of violence and agitation in Kosovo had risen to such a level that positions became hardened and relatively untradeable. Notwithstanding this backwards glance, an agreement at Rambouillet might have mitigated to some extent the extreme brutality, the ethnic cleansing and the humanitarian crises that flowed from the NATO bombings that followed the agreement's collapse. As Judah puts it, 'Rambouillet is now the greatest "What if...?" of modern Balkan history'.¹¹⁰

c) *The search for 'standards' and 'status'*

Regardless of the questions about settlements that did not happen and other 'might have beens', it is clear that the NATO-led military action did not

¹⁰⁹ The text of the Albright letter is in Weller, *The Crisis in Kosovo*, 452.

¹¹⁰ Judah, *Kosovo*, 221.

yield a rapid end to the violence or a solution to the sovereignty issue, thus the parties had to confront the challenges of self-determination again in the years following the cessation of bombing. The NATO bombing ended on 10 June 1999 with an agreement that was based on proposals by the Group of Eight states (G-8) and negotiated by Viktor Chernomyrdin and Martti Ahtisaari, respectively, the Russian and EU envoys. Seventy-eight days of destruction had led to the death of tens of thousands and the displacement of hundreds of thousands in addition to the creation of a tremendous amount of, at best, ill-will and distrust and, at worst outright hatred, on all sides. This agreement was reached in no small part by an acceptance that while NATO had dropped the bombs without UN sanction and without Russia's expressed approval, the UN (including the Russians) would be in control of the post-conflict situation. This was confirmed by the passing of UN Security Council Resolution 1244 on the day that NATO's offensive actions came to a halt. This document and the steps it outlined have framed the political, social and economic changes since 1999 in Kosovo, and it is a crucial piece of evidence in revealing the current normative framework of self-determination today.¹¹¹

Not long after the bombing was over and the United Nation's administration of Kosovo was underway, it was said that 'NATO has won the war. Now the United Nations has to win the peace.'¹¹² While the legality and the morality of NATO's 'humanitarian intervention' was, and still is, heavily debated, a deliberate decision was made at the end of the NATO bombing to place Kosovo under UN auspices (albeit with substantial NATO involvement), thereby lending credibility to the claims of the humanitarian nature of the intervention and widening the international legitimacy of future actions. Much of this shift was accomplished in resolution 1244, which picked up almost exactly where previous resolutions left off prior to the bombings in its equal condemnation of 'terrorists acts by any party' within Kosovo, its focus on the 'humanitarian crisis' and the right of all refugees to return to their homes regardless of their PIFG, the commitment to the principles of the Helsinki Final Act and, very importantly, in its repeated affirmation of the territorial integrity of the FRY.

Although the Rambouillet discussions and the Interim Agreement never entered into force as such, the persistent reassertion of territorial integrity in 1244 stood in contrast to the understanding given to the Kosovar Albanians and the expressed commitments of the United States, thereby raising the spectre of

¹¹¹ UN, S/Res.1244 (10 June 1999), in Appendix K. This also contains the G-8's principles, mentioned above, in Annex I of the resolution.

¹¹² IICK, *Kosovo*, 97.

renewed conflict over this issue. A glimmer of hope was perhaps nestled in the text as the earlier resolutions had mentioned ‘an enhanced status’ and ‘a substantially greater degree of autonomy’ for Kosovo, while 1244’s language called for ‘substantial autonomy’, a small but perhaps tangible shift in attitudes.

The text of 1244 (like the diplomacy that led to it) is confused and at times contradictory while at other points there is a high degree of clarity. Points of clarity include the security arrangements, the details and timetables for withdrawal of FRY forces and the demilitarisation of the KLA, the emphasis on an economic element to the settlement of the crisis and the absolute demand that conditions improve to permit the return of refugees.¹¹³ The powers given to the body coordinating the implementation of 1244, the United Nations Interim Administration Mission in Kosovo (UNMIK), headed by a Special Representative of the Secretary General (SRSG), appear broad, including the ability to call upon not only NATO forces but also other member states’ armed forces, known collectively as KFOR, standing for Kosovo International Security Force, to demilitarise the KLA and to enforce the pullout of VJ troops and Serbian police; to enforce human rights standards; to run local government and administration at virtually all levels; to prepare for democratic elections; and to deploy police forces from member states to ensure law and order.

The layers of international cooperation and action are impressive on paper (if not always in action). For most of its operational history, UNMIK has been structured around four ‘pillars’ each directed by an organisation under the general supervision of the SRSG and UNMIK: Pillar 1 was established as humanitarian assistance and refugee returns directed by the UN High Commission for Refugees (UNHCR); Pillar 2 was civil affairs and administration headed by UNMIK itself; Pillar 3 was ‘institution building’ and the promotion of democracy and human rights directed by the OSCE, an extension of the Kosovo Verification Mission or KVM, the OSCE’s monitoring role prior to the NATO bombing; and lastly, Pillar 4, directed by the EU was set up to facilitate economic development.¹¹⁴ In addition, the SRSG was given the power to issue Executive Regulations, which have the force of law, and Administrative Directives, which are binding guidelines for actions. Many have concluded accurately that such powers amounted to a return to trusteeship or to something like the League of Nations’ mandates system and it is worth noting the human, financial and material commitment to the effort, which have made the Kosovo

¹¹³ See in particular Art. 10 and Annex 2, in Appendix K.

¹¹⁴ The Pillars have been altered and some have been removed over the past decade and, where relevant, these changes will be discussed.

intervention one of, if not the, largest and most extensive peacekeeping missions in history on a per capita basis.¹¹⁵

However Economides suggests there was a remarkable lack of clarity about the ultimate objective of the resolution.¹¹⁶ In fact, there is a great deal of clarity on the humanitarian goals, the assertion of human rights and an emphatic endorsement for democratic modalities, all of which are important elements of self-determination, but Economides is correct to indicate that there is no clarity in 1244 about the all-important issue of independence, something that still bedevils efforts to come to consensus about the ‘final status’ of Kosovo. In fact, the situation in the text is worse than unclear, as the wording lends itself to the possibility of both parties seeing and reading into it what they hope for. On the one hand, the territorial integrity of the FRY is either alluded to overtly or stated explicitly no fewer than *five* times (this in a relatively short document). Yet, the ideas of ‘substantial autonomy’ and self-government are repeated frequently, often within the very paragraphs that contain the statements about territorial integrity.

The impact of this cannot be understated, especially with regard to the period immediately after UNMIK’s arrival, for it raised hopes on both sides while at that same time indicating (accurately) that the international community had not come to a consensus about the future of Kosovo. As King and Mason report, as UNMIK commenced its efforts in Kosovo in 1999 and 2000, it was generally greeted with enthusiasm by the Kosovars who took its presence as a pro-Albanian humanitarian intervention and as the first step on road to independence.¹¹⁷ For the Serbs within Kosovo, the international presence failed from the start to protect the population and to dispel the widely held belief that Serbs and other minority PIFGs would be threatened and hunted by the KLA and the majority Kosovar population, thereby hardening Kosovo Serb attitudes and increasing mistrust. Nonetheless, despite the turmoil that was about to unfold within the FRY with the fall of Milosevic, the Serbian government, both before and after Milosevic’s removal in 2000, felt the likelihood of retaining Kosovo was high, especially given renewed Russian support and the strong endorsement of territorial integrity by both Russia and China, who had backed 1244.

¹¹⁵ Richard Caplan, *A New Trusteeship?: The International Administration of War-torn Territories* Adelphi Paper 341 (Oxford: Oxford University Press, 2002) and International Crisis Group (ICG), ‘The New Kosovo Protectorate’, *ICG Balkans Report 69*, (1999) [<http://www.crisisgroup.org/home/index.cfm?id=1594&l=1>]. Michael Ignatieff, *Empire Lite: Nation-building in Bosnia, Kosovo and Afghanistan* (Toronto: Penguin Canada, 2003), coins the interesting term ‘empire lite’ to describe this level of post-conflict control.

¹¹⁶ Economides, ‘Kosovo’, 240-241.

¹¹⁷ Iain King and Whit Mason, *Peace at Any Price: How the World Failed Kosovo* (Ithaca, NY: Cornell University Press, 2006), 79-81.

During the intensely unstable two and a half year period from 1999 to 2002 following UNMIK's and KFOR's arrival, there were numerous, immediate practical challenges related to transferring into action the human rights oriented understanding of self-determination that ran through resolution 1244. These tested the resolve and unity of the society of states on their understanding of these norms and, perhaps more pressingly, constantly forced the interrelated issue of sovereignty towards the surface. The actions UNMIK and the other international bodies took to address these challenges and the debate surrounding the intent and 'success' of their efforts are revealing.

The first and foremost challenge was security, but security not merely in the military sense but also 'human security', an essential prerequisite for the protection of the rights of all and the construction of civil society. Serb and other minority PIFG populations, particularly in the north along the border, were victimized by extremists Kosovars who now sought revenge for the actions of Serb police force and the VJ during the NATO campaign, and the planned demilitarisation of the KLA was, even in the often rose-tinted UNMIK reports, a limited success at best and failed almost totally to avert massive panic and internal displacement. According to UN High Commission for Refugees (UNHCR), International Committee of the Red Cross (ICRC) and UNMIK figures, nearly half of the Kosovo Serb population, along with substantial numbers of other PIFGs, namely the Roma and Turkish, fled their homes or were forced out and, as a result, became internally displaced persons (IDPs) or refugees and, importantly, appeared unwilling to return.¹¹⁸

Creating the conditions to achieve voluntary return was (and remains) a major test of the success of the international intervention and the international commitment to the conditions of 'humane governance' for which the intervention was undertaken. Complicating this situation was a lack of a neutral and credible police force, a problem that took over a year to move from crisis to merely problematic, and the lack of an independent judiciary, as most of Kosovo's judges were ethnically Serbian. Additionally, there was a lack of clarity about which laws to apply, those passed by the FRY, those of the unrecognized Kosovar 'government' (discussed below) or the as yet unpromulgated UN regulations.¹¹⁹ Ethnically motivated murders and arson were commonplace in 1999 and there were many suggestions that these were organised or at least

¹¹⁸ See BBC News Online, 'Refugees', in *Kosovo: An Uneasy Peace* (April 2000) [http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/uneasy_peace/default]; IICK, *Kosovo Report*, 108-112; and UN Security Council deliberations on the Council's mission to Kosovo in UN, S/PV.4138 (2000).

¹¹⁹ OSCE/UNHCR, *[First] Assessment of the Situation of Ethnic Minorities in Kosovo* (11 February 2000) [http://www.osce.org/documents/mik/2000/02/1116_en.pdf] and IICK, *Kosovo Report*, 112-115.

encouraged by the new security force, the Kosovo Protection Corps (KPC in English or TMK in Albanian), which was in theory multi-ethnic and demilitarised but in fact was essentially the demobilised KLA. Even former KLA spokesman Pleurat Sejdiu shared the common Kosovar joke that TMK stood for ‘Tomorrow’s Masters of Kosovo’.¹²⁰ Added to this already complex and bleak situation was the need to alleviate the suffering and to meet the needs of the whole Kosovo population in what was a war-torn area, tasks that, like security, fell under multiple ‘Pillars’ of the UNMIK structure. There was a desperate need for health care, power generation and education, all of which influenced the chances for stability.

The lack of clarity over the issue of sovereignty played into these difficulties by creating a governmental vacuum, and it was into this gap that both Kosovo Serbs and the pre-existing Kosovar ‘government’ attempted to place themselves ahead of UNMIK’s efforts. Since Milosevic revoked Kosovo’s autonomy in 1989, the Kosovars had established a parallel government that not only functioned in name but also worked to provide to their co-nationals many of the basic services of a state. Following the hostilities, this entity, under the leadership of Rugova, claimed legitimacy for such matters and attempted to take charge of many aspects of life in Kosovo, while at the same time, Serbs in the north of Kosovo where their numbers were greater, began to form rival structures to deal with the lack of services and security while still looking to Belgrade for both moral and financial support to preserve these services.¹²¹

Despite these mammoth challenges, UNMIK was able to address many of these issues, in part by leaning heavily on and expanding the role of KFOR, and it did so in a manner that *mostly* maintained the careful and somewhat ambiguous position established in 1244. The demilitarisation of the KPC was accelerated and a new UN sponsored, multi-ethnic Kosovo Police Service (KPS) was launched. The bulk of the refugee crisis, which was a predominantly ethnically Kosovar Albanian issue, was resolved mostly through voluntary return¹²² and the Kosovar parallel assembly was ruled unlawful and replaced with a new system of government, the Joint Interim Administrative Structure (JIAS) was put in its place at the start of 2000. The JIAS was formed around a consociational model, with a small, multi-ethnic assembly, the Kosovo

¹²⁰ BBC News Online, ‘Demobilisation’ in *Kosovo*; IICK, *Kosovo Report*, 117-119.

¹²¹ For more on parallel structures in the Milosevic and UNMIK eras and on the international efforts to reduce or eliminate their impact, see OSCE, *Parallel Structures in Kosovo* (2003). [http://www.osce.org/documents/mik/2003/10/698_en.pdf].

¹²² These returns were so successful that Pillar 1, aimed at refugee issues was phased out as of June 2000, although a new Pillar 1 for policing and justice soon took shape in 2001. This decision took place in spite of the lack of returns of Serbs and other minority PIFGs, especially to the south of Kosovo, although the policy regarding this was essentially subsumed under Pillars 2 and 3.

Transition Council (KTC), that included representatives of virtually all PIFGs as well as a spectrum of local community leaders to advise on broad policy issues, and the Interim Administrative Council (IAC) that developed policy, which was composed of four UNMIK representatives, four Kosovar leaders (the heads of the main political parties) and one Serb observer, who eventually took his seat in April 2000. The driving idea of the JIAS was that *all* parties in Kosovo were to have a meaningful role in the reconstruction process, *regardless* of the questions related to sovereignty.¹²³

Although the lack of progress on some these challenges certainly frustrated UNMIK's early efforts, the tangible successes of establishing at least a modicum of law and order and something approaching stable, humane governance did crack open a space to focus on 'standards' and not just on Kosovo's 'final status'. This approach, arising out of the international community's inability to reach agreement on the sovereignty issue, produced an opportunity to focus on human rights, democracy and other 'internal aspects' of self-determination, on which agreement was almost immediate, and to make the 'external aspects' of self-determination (independence, autonomy, etc.) *contingent* upon the outcome of such efforts. During the UN Security Council's fact-finding mission to Kosovo and to neighbouring states in mid-2001, it was clear that this approach garnered the support of all parties, even ones with widely varying attitudes on the issue of territorial integrity of Kosovo. Most Kosovo Serb leaders were cautiously working with UNMIK, not least because of the 'firm' pressure to do so exerted by the new President of the FRY, Vojislav Kostunica. Russian President Vladimir Putin, who was visiting Kosovo at the same time, met with the group and stressed 'the need to strive towards a multi-ethnic Kosovo' and that this 'was an even more pressing task than the establishment of law and order', lending weight to the idea of finding a *way* of governing over and above a particular *structure* of government.¹²⁴

In fact, elements of this approach became the stated policy for Kosovo in 2002 when Michael Steiner took the helm at UNMIK as the SRSG and coined the slogan 'standards first, then status'.¹²⁵ Upon taking office in February 2002, Steiner signalled a shift from his predecessors and for UNMIK. 'Under Kouchner [the first SRSG], Kosovo was in an emergency phase. Under Haekkerup [the second], it was in an administrative and design phase. Today Kosovo is in a transfer phase.'¹²⁶ At the centre of this shift was a concerted

¹²³ UNMIK, *UNMIK-JIAS Fact Sheet* [<http://www.unmikonline.org/1styear/jias.htm>].

¹²⁴ UN, S/2001/600 (19 June 2001).

¹²⁵ SRSG Michael Steiner speaking to the Security Council, in UN, S/PV.4518 (24 April 2002).

¹²⁶ UNMIK News (14 February 2002). [http://www.unmikonline.org/archives/news02_02_full.htm#1402]

effort to refocus UNMIK's efforts to build on the tangible but sluggish progress towards improving material conditions on the ground, especially for the minority PIFGs within Kosovo. This effort was hinged on the successful implementation of the Constitutional Framework for Provisional Self-government, which outlined the Provisional Institutions for Self-government.¹²⁷

Launched in mid-2001 by UNMIK, having been drafted with substantial input from the OSCE, which had responsibility for Pillar 3 (i.e. promoting democracy and civil society), the Constitutional Framework and the Provisional Institutions had both normative and practical aims. On the normative level, the Framework sought to establish a pattern of governance that was fully democratic, rights respecting and rights enhancing, multi-ethnic and consociational at all levels. On the practical level, the Provisional Institutions tried to meet the aspirations of Kosovars who were keen to take over governing from UNMIK, which, in turn, was overstretched by providing such a broad and deep level of administration, and they sought to create a model of government that would meet the normative goals while also working within whatever sovereign structure Kosovo found itself following the withdrawal of the international community. As for this last point, the fusion of normative and practical aspirations was seen as integration within the EU at some future point.

The normative commitments can be seen clearly in the lengthy, recurring and emphatic statements linked to liberal democratic ideas that pervade the document. Chapter 2 highlights that all institutions and all officers within the Provisional Institutions must accept the conditions of resolution 1244, with all its commitments to human rights; they must '[p]romote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation'; and, in case there was any doubt, Chapter 3 explicitly commits them to observe and implement all of the major international and European human rights agreements and commitments of the past fifty years, making them 'directly applicable in Kosovo as part of the Constitutional Framework'. Chapter 4, dealing with the 'Rights of Community Members', commits the Provisional Institutions to support 'coexistence and support reconciliation between Communities and to create appropriate conditions enabling Communities to preserve, protect and develop their identities.' Interestingly, regarding identities, the Framework does not name or specify these, merely referring to PIFGs generally, and stresses that membership to a 'community' is determined through an individual's declaration, or non-declaration, or, to use the

¹²⁷ Relevant sections of the Constitutional Framework form Appendix L. The abbreviation for the Provisional Institutions is PISG, but, as this might cause confusion with this study's frequent use of the 'PIFG' abbreviation, it will not be employed.

language of Part I, through their choice.

On the practical side, the Framework stipulates that the Assembly of 120 members is elected through a party list system, with a single, Kosovo-wide constituency with no minimum threshold to encourage broad participation and ensure proportional representation, but the Framework also includes a minimum of ten guaranteed seats for the Kosovo Serbs and ten more for other minority PIFGs, which is a slight overrepresentation of minority populations given the ethnic composition of the population in 2001. On the executive side, while the Prime Minister is elected by a majority of the Assembly and can appoint ministers, at least two ministers must be from minority communities or three if the number of ministerial positions rises above 12 (which it did shortly after coming into force). In addition, an Ombudsperson was to be appointed to receive complaints from all persons in Kosovo, to investigate and to report to the Provisional Institutions and to UNMIK on any violation of human rights or of alleged misconduct. UNMIK retained authority over the area on all foreign matters and, ultimately, on most everything else deemed not in keeping with in the implementation of resolution 1244.

The newly established Provisional Institutions came into force late in 2001 following elections in November; however, the implementation was not without measurable difficulties.¹²⁸ Despite the fact that many Kosovo Serbs boycotted the elections in protest against the Provisional Institutions, the Serbian 'Coalition Return' party (KP) received over eleven percent of the vote, but refused to take the allotted Assembly and ministerial seats for almost a year to object to the new body's existence. Added to this, political divisions within the two main Kosovar parties, the Democratic League of Kosovo (LDK) and the Democratic Party of Kosovo (PDK), led to a gridlocked presidential election, which, while eventually resolved, weakened the new body in its first critical months. Internationally, the new structures increased anxiety in the FRY government, who feared not only that Serbs in Kosovo would be powerless in the new institutions but also because this was seen as a first step towards independence. Both the FRY and Russia objected to the permanence of these bodies and sought to limit their development.¹²⁹

Even more troubling was the continued development and strengthening of parallel institutions and the related failure to engage the municipal level of

¹²⁸ See OSCE, *Ninth Assessment of the Situation of Ethnic Minorities in Kosovo* [http://www.osce.org/documents/mik/2002/05/1110_en.pdf], particularly paras. 130-143; and UNMIK News (13 December 2001, 21 January, 13 February and 28 February 2002) [<http://www.unmikonline.org/archive.htm>].

¹²⁹ UN, S/PV.4454, (21 January 2002); and UNMIK News (27 March 2002) [http://www.unmikonline.org/archives/news03_02full.htm].

government in the development of a multi-ethnic, liberal democratic form of governance. Although originally large-scale Kosovar mechanisms to deal with the injustices of the Milosevic era, parallel institutions were now predominately local phenomena employed in an *ad hoc* manner by various groups but mostly by Kosovo Serbs.¹³⁰ While understandable given the levels of violent ethnic cleansing and deep-seated mistrust in Kosovo, these ‘opposition’ arrangements were becoming a major obstacle to the international efforts in the area, hampering work within all the Pillars. In some areas, most notably the ethnically and geographically divided city of Mitrovica/Mitrovica,¹³¹ the parallel structures were the only functioning provider of many vital services such as security, courts and justice, education and health care for minority PIFGs, and some of these services were supported not only through separate, local taxation and administration but also through the assistance of Belgrade. The example of healthcare shows well the extent of the difficulties.¹³² Owing to a potent mixture of mistrust and freedom of movement created by fear, many Serbs relied only on healthcare provided by fellow Serbs, who were paid by the Serbian Ministry of Health (SMH) but offered care in unofficial and often unmanaged facilities (sometimes working out of private houses), as neither the SMH nor the Provisional Institutions’ Ministry of Health exercised direct control. The effect of such structures cannot be underestimated, as they stood out as mammoth obstacles blocking efforts to deliver the *meaningful* participation in the life of the state for all citizens that was outlined in Part I of this study and was an expressed end goal of the intervention.

While not as profound or seemingly intractable, the situation with local government was also troubling and was heightened by the slow start to which the Provisional Institutions got off in 2002. Given UNMIK’s understandable focus on central government, the activities of local authority were somewhat neglected and this accelerated the development and expansion of parallel institutions.¹³³ To be fair, UNMIK and the OSCE designed municipal government to conform to the European Charter for Local Government, which seeks entirely to promote liberal democratic norms, and municipalities were permitted to ‘regulate and manage a substantial share of public affairs’ in the hope that devolution would give a degree of autonomy and protection to ethnic enclaves. Unfortunately, the elections in late-2000 were not very well managed,

¹³⁰ OSCE, *Parallel Structures*, especially Chapters 1 (on security) and 2 (on courts).

¹³¹ Place names in Kosovo vary depending on the language used. Most maps still use Serbian place names yet some use only the Albanian. Following OSCE practice, both are used herein with the Albanian first.

¹³² OSCE, *Parallel Structures*, Chapter 5.

¹³³ UNMIK Reg/2000/45 (11 August 2000) [http://www.unmikonline.org/regulations/2000/re2000_45.htm].

the turnout of minority PIFGs was virtually nil, so much so that certain municipal areas' results were not validated,¹³⁴ and the bodies to which candidates were elected had extremely limited powers because the realities on the ground did not permit significant devolution. The situation looked quite different in 2002 when UNMIK and the OSCE now made a concerted effort to manage the electoral process and to encourage participation from all PIFGs. Much of this encouragement came through a concerted, on-the-ground voter and party education effort by the OSCE¹³⁵ as well as through pressure from the international community, including the FRY government, to get all parties but particularly the Kosovo Serbs to turnout.¹³⁶ Despite these efforts, few Serbs voted, and in areas where elections ran reasonably well, there were numerous boycotts, many unrelated to ethnic divisions, that prevented any forward progress, which prompted SRSJ Steiner to postpone the planned talks for decentralization.¹³⁷

Acting in part to respond to these challenges, the general desire to build on UNMIK's slow but substantial progress since its arrival and the steadily mounting pressure within the international community to develop an exit strategy,¹³⁸ SRSJ Steiner defined the standards of performance that had to be achieved by the newly-created institutions before any decision on Kosovo's final status could be taken.¹³⁹ Having held intensive meetings prior to the speech with UNMIK staff in Kosovo on how best to spell out the process, Steiner produced a list of eight specific standards without which any settlement would be unsustainable. The benchmarks or standards were:

the existence of effective, representative and functioning institutions; enforcement of the rule of law; freedom of movement for all; respect for the right of all Kosovans to remain and return; development of a sound basis for a market economy; clarity of property title; normalized dialogue with Belgrade; and reduction and transformation of the Kosovo Protection Corps in line with its mandate.

As Steiner noted, 'Kosovo can advance towards a fair and just society only when these minimum preconditions are met', and he elevated the standards further by describing them as part of 'an exit strategy which is, in reality, an "entry

¹³⁴ OSCE, *Municipal Election Results* (8 November 2000) [http://www.osce.org/documents/mik/2000/11/20458_en.pdf].

¹³⁵ See OSCE, 'Permanent Council Decision No. 470' (18 April 2002) [http://www.osce.org/documents/pc/2002/04/1129_en.pdf].

¹³⁶ UN, S/PV.4605 (5 September 2002).

¹³⁷ OSCE, *Boycott at the Municipal Level* (15 May 2003) [http://www.osce.org/documents/mik/2003/05/711_en.pdf]; and UNMIK News (30 October 2002) [http://www.unmikonline.org/archives/news10_02full.htm#0210].

¹³⁸ For a sample of these attitudes, see UN, S/PV.4454 (2002).

¹³⁹ UN, S/PV.4518 (24 April 2002).

strategy” into the European integration process. The benchmarks complement the preconditions that Kosovo needs to meet to qualify for the stabilization and association process [i.e. entry to the EU].’ As such, the benchmarks were to serve not only as direct evidence of a human rights norm of self-determination but also of a ‘carrot and stick’ tactic, dangling the prospect of EU entry to *both* the Serbian Government and the Kosovars. As such, the shift to the ‘standards before status’ approach appeared to be a signal moment in the understanding and use of the norm of self-determination, as it not only came extremely close to following the normative framework indicated in Part I, but it also reflected a willingness in international society to make standards the focus and to draw upon a diverse range of tangible forces to ensure that norms are met as a part of the sovereignty question.

However, as close as this formula came to applying these liberal democratic understandings of self-determination, it included several critical normative limitations and deviations and a range of practical impediments that reduced the likelihood that such norms would yield the desired result for the peoples in Kosovo. Most of the limitations stemmed from the aforementioned uncertainty within resolution 1244, specifically, how the new ‘standards’ would fit into the vague wording of those texts regarding final status. This uncertainty allowed the parties to see both what they wanted and what they feared in the standards. For example, at the same Security Council meeting when the benchmarks were announced, Nebojsa Covic, the deputy prime minister of Serbia representing the FRY, spoke out against the continuation of ethnically targeted violence against Serbs and non-Albanian PIFGs as he accepted the vision of a multi-ethnic, democratic and, using the words of 1244, ‘substantially autonomous Kosovo’.¹⁴⁰ However, he also explicitly argued against the idea of an independent Kosovo, called into question the validity of the Provisional Institutions and noted how dangerous a precedent independence in such circumstances would be. The Kosovar Albanians perceived the establishment of the Provisional Institutions and the talk of ‘final status’ as the international community’s decisive move towards independence.

Of more significance was the apparent division within the international community about the meaning and application of the ‘standards before status’ doctrine. Singapore’s representative on the Security Council quoted at some length¹⁴¹ a study by the highly influential International Crisis Group (ICG) that sought to separate the progress on ‘internal’ aspects of Kosovo’s status from the ‘external’ ones, arguing that some form of independence is the *only* viable option

¹⁴⁰ UN, S/PV.4518 (2002).

¹⁴¹ UN, S/PV.4518 (2002).

(an opinion that ICG continues to promote). As the report posits, '[d]emocracy in Serbia is incompatible with absorbing a province most of whose population...wants nothing to do with a Serbian or Yugoslav state', a conclusion that overlooks the fact that Kosovo was *de jure* still a part of Serbia and therefore could not be 'absorbed'.¹⁴² It was also likely that the Kosovars still believed that the US backed the idea of independence, despite official statements in favour of the 'standards before status' approach in the Security Council and from the State Department,¹⁴³ and it is possible that memories of Germany's 'early' recognition of Slovenia and Croatia in 1992 furthered their thoughts in this direction.

After Michael Steiner's term as SRSG came to a close in 2003, the standards process became more formalized with the launch of the Kosovo Standard Implementation Plan (KSIP) which held out the prospect of a line-by-line review of the benchmarks to then feed into an eventual assessment of Kosovo's readiness for final status talks.¹⁴⁴ However, for a range of reasons, including Kosovar frustrations with the lack of progress through UNMIK-sponsored channels, the continuation of political activity in unofficial channels and parallel institutions and the lack of sustained economic growth, the tinderbox was full, and in March 2004, the most serious violence since 1999 ignited in Kosovo. The riots began in response to the drowning of three Kosovar Albanian boys and the false but authoritatively reported story that a gang of Serbs with dogs had instigated the drowning. The ensuing violence involved some 51,000 people, left nineteen dead and nearly 1,000 wounded, included the destruction of hundreds of homes, widespread attacks on Orthodox churches and monasteries and led to the displacement of roughly 4,000 people.¹⁴⁵ It also revealed not only the staggering lack of progress at achieving a multi-ethnic society and trust in Kosovo, but also revealed UNMIK's and KFOR's inability to deliver, respectively, protection of basic human rights and physical security to non-Albanian PIFGs, and it played a part in the resignation of SRSG Harri Holkeri that same year before his term ended.¹⁴⁶

It is perhaps remarkable, given the level and nature of the aggression involved in the riots and the aftermath, that this did not lead to a massive shake-

¹⁴² ICG, *A Kosovo Roadmap (I): Addressing Final Status* Europe Report, 124 (2002) [<http://www.crisisgroup.org/home/index.cfm?id=1640&CFID=25826980&CFTOKEN=78814220>].

¹⁴³ King and Mason, *Peace*, 83-84.

¹⁴⁴ UNMIK, 'Standards for Kosovo' and UNMIK, 'The Kosovo Standards Process, 2003-2007' [<http://www.unmikonline.org/standards/index.html>].

¹⁴⁵ Human Rights Watch (HRW), *Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004* (May 2006) 18:4(D) [<http://www.hrw.org/sites/default/files/reports/kosovo0506web.pdf>].

¹⁴⁶ It is worth noting that the violence was not limited to Serbians but also directed at the Roma and other non-Albanian groups, as well as international workers, and that it also included retaliatory actions by Serbians beyond the level of self-defense. See HRW, *Not on the Agenda*, 1-2, and King and Mason, *Peace*, 9-16.

up of UNMIK's plans for the area. To be sure, there were voices in the society of states that questioned the entire 'standards before status' approach.¹⁴⁷ Perhaps not surprisingly, the Serbian government¹⁴⁸ took the violence as evidence that UNMIK had failed and that Serbia should retake control of the area, arguing, interestingly, that it would do a better job at securing the rights of all people in Kosovo and ensuring a well-functioning multi-ethnic democracy. Some other states questioned the likelihood of UNMIK's success, but the reaction was to reaffirm the goal of a multi-ethnic Kosovo and to achieve the 'standards' but without any new initiatives to make these laudable goals tangible. In fact, the UN indicated that it would attempt to move forward rapidly and undeterred, appointing a new SRSG (the Dane, Søren Jessen-Petersen) and preparing for the scheduled elections for the autumn of 2004 and, subsequently in mid-2005, to commencing the formal review of progress on standards and assessment leading to a decision about final status.

While such decisions may at first seem either unwise given the minimal improvements in the year following the violence in 2004 or as more of an exit strategy than a commitment to delivering self-determination to the peoples of Kosovo, the course charted by then Secretary General Kofi Annan and SRSG Jessen-Petersen was a sound attempt to place the ball in the court of the parties and to increase the pressure to make tangible changes in their behaviour and their performance by moving the matter towards some sort of closure. By beginning to link the discussions about final status directly to a concrete process of gauging the achievement of standards, the Secretary General and the SRSG were signalling an alteration of the 'standards before status' doctrine to something like 'standards *leading* to status'.

The impetus for such a shift increased in 2005 owing in part to the Provisional Institutions elections of 2004, an improving security and infrastructure and a simultaneously worsening economic situation, and, finally, a transition in the Provisional Institutions when the Prime Minister, Ramush Haradinaj stepped aside to face war crimes charges at the ICTY. The 2004 elections, in which most Serbs did not vote, paved the way for expanded cooperation between the Kosovar parties and led to the election of Haradinaj as Prime Minister, who, despite being a former KLA commander, was roundly seen as committed to multi-ethnic efforts, winning praise from UNMIK and some

¹⁴⁷ The future of the 'standards before status' approach was the focus of debate in the Security Council on 5 August 2004. UN, S/PV.5017 (5 August 2004).

¹⁴⁸ As noted before, in 2003, the FRY was reconstituted into the State Union of Serbia and Montenegro, and, in 2006, with the dissolution of this union, it became the Republic of Serbia.

Kosovo Serbs.¹⁴⁹ Following sustained efforts by KFOR and the increasingly well-regarded, multi-ethnic Kosovo Police Service (KPS), personal security and freedom of movement improved greatly in most of Kosovo, which increased the opportunities for meeting the standards. In the midst of these positive developments, the already unhealthy Kosovan economy was weakening, and Prime Minister Haradinaj, when indicted for war crimes, resigned his office and surrendered himself voluntarily to stand trial.¹⁵⁰ These two setbacks, rightly or wrongly, seem to have motivated the international community to accelerate, rather than slow, the standards process and its linkage to discussions of Kosovo's final status.

Kai Eide of Norway was appointed Special Envoy by the Secretary General to conduct the comprehensive review of the standards and the timing of final status discussions, and his report to the Secretary General in October 2005 and its reception reveal much about the standards process and status as well as how the international community interpreted and applied self-determination in this situation.¹⁵¹ Eide's review is far from rosy and is often damning, particularly on the progress towards creating a multi-ethnic society. Like almost every press release and report by UNMIK since the violence of 2004, Eide's report notes the impressive progress in meeting the standards and the desire of all parties to engage with the issue of final status, but it highlights two prominent sources of failure: on the Kosovar side, the lack of progress by the Provisional Institutions to create an environment that encourages the return of refugees and to create credible human security for the non-Kosovar PIFGs, and, on the Serbian side, the persistence of parallel institutions (particularly for health and education) and Belgrade's unwillingness to encourage the dismantling of these institutions and Kosovo Serb engagement with the Provisional Institutions. In Eide's opinion, the root cause for each side's failure is a lack of will and engagement, but, very interestingly, he suggests that this could, perhaps, be corrected by settling the final status issue. Eide's plea for action on final status is based on a deep concern for standards, warning that:

having moved from stagnation to expectation, stagnation cannot again be allowed to take hold. Further progress in standards implementation is urgently required. It is unlikely that postponing the future status process will lead to further and tangible results. However, moving into the future status process

¹⁴⁹ UN, S/PV.5130 (24 February 2005) and BBC Albanian, 'Different Positions for Governance' (6 September 2006) [http://www.bbc.co.uk/albanian/news/2006/09/060906_arber.shtml].

¹⁵⁰ Haradinaj won much praise internationally for doing so and was subsequently released prior to standing trial and, in April 2008, acquitted on all counts.

¹⁵¹ Kai Eide, 'A Comprehensive Review of the Situation in Kosovo', Annex to S/2005/638 (7 October 2005).

entails a risk that attention will be focused on status to the detriment of standards.¹⁵²

Thus, Eide's recommendation seems to suggest that although achieving the standards, and thereby enhancing internal self-determination, should be the top priority, this could happen without a verdict on status, or the external issue of self-determination, and it also implies that this prioritization could be reversed. Of course Eide's report on its own, however well documented and inclusive, is not strong evidence of a normative shift, even a slight one. For that, international reactions must be examined.

What is most striking about the reception of Eide's report is the readiness of the international community to shift the focus on Kosovo back onto status. While this did not move the focus *away* from standards, the change in tone can be spotted easily. Following the formal presentation of the review, the Security Council held informal discussions and then returned to issue a joint statement, which began with an emphatic call for 'undiminished energy and a stronger sense of commitment...to ensure the implementation of standards at all levels, allowing tangible results to be delivered to all Kosovo's citizens.' However, it also noted, 'notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process.'¹⁵³ Shortly afterwards, the Contact Group, which had largely failed to live up overtly to its name after UNMIK's first year, had clearly been working in anticipation of Eide's report and issued a statement of vigorous support for the refocusing of efforts to final status.¹⁵⁴ However, the Group's statement and the attached points articulating it both stressed the standards process and the specific dimensions of the report that related to self-determination, namely the need for responsive, participatory, multi-ethnic government, enhanced action for returns of IDPs and improved primary services for all.

Within days of the publication of Eide's review, the Secretary General appointed former Finnish President and veteran diplomat Martii Ahtisaari to be his Special Envoy to Kosovo and to lead the parties towards discussions on final status. Ahtisaari noted on taking office that 'Status has to go with Standards, and more concrete progress is needed in the implementation of the Standards'.¹⁵⁵ During the ensuing sixteen months, most of which involved direct, intense

¹⁵² Eide, 'Review', 4. Eide reiterated the risks of this approach strongly in his briefing to the Security Council, UN, S/PV.5289 (24 October 2005).

¹⁵³ UN, S/PV.5290 (24 October 2005)

¹⁵⁴ Contact Group, 'Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo' (11 November 2005) [<http://www.unosek.org/docref/Contact%20Group%20%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf>].

¹⁵⁵ UNMIK News (22 November 2005) [http://www.unmikonline.org/archives/news11_05full.htm#0122].

negotiations with all parties in Kosovo, the region and internationally, it became clear that standards and status were not only connected but were in fact working *against* each other, despite the clear endorsement in favour of a standards based model for solving the problem. In his final, detailed report, presented to the Security Council on 26 March 2007, Ahtisaari's frustrations are conspicuous. In curt language, he flatly denies any possibilities other than 'independence, supervised by the international community'.¹⁵⁶ The assumptions on which he based his conclusion and the key intervening events that contributed to their formation are interesting and illuminate much about his interpretation of self-determination, outlining further some of the most recent normative thinking about the concept and its limitations.

In his report, Ahtisaari sees UNMIK's transfer of authority to the Provisional Institutions Kosovo as irreversible (except perhaps through the use of arms), owing in large part to the prolonged experience of self-rule, which raised the expectations of the Kosovar population. In this sense, resolution 1244 and the subsequent actions of UNMIK actually created or at least contributed to the situation the UN faced in 2007. The implicit logic behind Ahtisaari's blunt, final verdict, which he outlines through an historical review of the situation, is that the UN had two choices before it following the NATO bombings: rule Kosovo directly with little or no local input or engage the local population in democratic processes in the hope of imbuing new institutions with liberal democratic norms. While Ahtisaari does not note it explicitly, the UN's decision to try and develop indigenous and rights-respecting institutions rather than 'to impose' a solution, even a temporary one, reflected something of the international community's normative understanding and interpretation of self-determination at this time and led rather naturally to the strong commitment in favour of the standards approach.

However, the report concludes (in keeping with virtually every UNMIK and independent report on Kosovo) that, despite much genuine progress, the fulfilment of the standards is somewhat minimal on the ground, particularly those related to multi-ethnic institutions and integration of non-Kosovar PIFGs into political, social and economic activities. Given the long-standing commitment to the standards, the Special Envoy's final recommendation in favour of independence seems on first inspection to be a premature step or a last desperate act (or both). However, two factors, both of which are touched on in the report, explain this apparently puzzling conclusion: the specific limits to the

¹⁵⁶ Martii Ahtisaari, 'Report of the Special Envoy of the Secretary General on Kosovo's future status', in S/2007/168 (27 March 2007), in Appendix M.

progress of meeting the standards, and the qualification Ahtisaari made on his recommendation for independence.

As for the first of these, it has to be noted that after Eide's report and before Ahtisaari's, the international community, UNMIK and the other international organisations involved in Kosovo stepped up their efforts to implement the standards, meeting with some success. To tackle the troubling issue of returns, new guidelines, agencies and policies for 'sustainable returns' were launched.¹⁵⁷ These efforts included greater coordination between the Ministry of Community Returns (headed by one of the two Kosovo Serbs in the government), the Municipal Working Groups and the KPS, a newly revised manual for 'sustainable returns' and the creation of the Kosovo Property Agency, which aimed to address minority property claims and needs. There were plans for a new formulation of municipal governments that aimed to provide greater accountability, more responsive institutions and greater decentralisation.¹⁵⁸ There was also a tremendous effort by the Stability Pact for South Eastern Europe and the EU to boost the trade and financial situation in Kosovo, and, importantly, there was a concerted effort by the entire international community to place the status issue within the context of European Union enlargement, which, as mentioned earlier, was meant to serve as a powerful incentive for all parties to cooperate with the implementation of standards regardless of their position on Kosovo's final status.¹⁵⁹

Unfortunately, progress towards meeting these aspects of the standards was limited by the unwillingness of the Serbian government, Kosovo Serbs and other minority PIFGs to engage with the Provisional Institutions and to cease their support of parallel structures. As noted before, Kosovo Serbs had essentially stopped participating in elections and most other affairs involving the Provisional Institutions, a decision that was supported by Belgrade from 2005 onwards.¹⁶⁰ However well founded the Serbian and other communities' reasons were for not engaging with the power structures and processes in Kosovo, the effect was that the overarching goal of a sustainable, multi-ethnic democracy was not possible, a point that Ahtisaari states forcefully.¹⁶¹ For Ahtisaari, this, combined with the fact that the Kosovar-dominated Provisional Institutions

¹⁵⁷ See OSCE, *Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo* (June 2007) [http://www.osce.org/documents/mik/2007/07/25813_en.pdf].

¹⁵⁸ UNMIK Reg./2007/27 (29 August 2007) and OSCE, *Relationships between Local and Central Governments* (February 2008) [http://www.osce.org/documents/mik/2008/02/29797_en.pdf].

¹⁵⁹ See the Stability Pact for South Eastern Europe [<http://www.stabilitypact.org>], the Contact Group, 'Guiding Principles' and UN, S/PV.5588 (13 December 2006).

¹⁶⁰ See for example the report of SRSG Rucker in UN, S/PV.5522 (13 September 2006).

¹⁶¹ Ahtisaari, 'Report', para. 6 in Appendix M.

had run Kosovo for several years without Serbian influence, made even a nominal return to Serbian sovereignty unworkable.

The other factor that explains Ahtisaari's conclusion is the qualification that independence ought to be 'supervised'. As he notes, 'Kosovo's political and legal institutions must be further developed, with international assistance and under international supervision. This is especially important to improve the protection of Kosovo's most vulnerable populations and their participation in public life.' To achieve this, Ahtisaari calls upon the international community to play a significant role in political and military affairs, particularly in those areas related to minority rights protection, confirming Ahtisaari's conviction that the standards process should still be at the core of the international efforts in Kosovo. This view represented another shift of emphasis from 'standards before status' and from Eide's 'standards *leading* to status' to something like 'standards *within* (protected) final status'.

The Ahtisaari report's affirmation of the standards process in the face of such obstacles stems from and reflects the international community's genuine commitment to ensure that the norm of self-determination was applied internally to achieve meaningful participation and to guarantee the well-being of all communities in Kosovo, but the recommendation for independence begs the question of how this connects to self-determination's external aspects, which also brings in the perennial question of what limits can be placed on the active exercise of the right. Ahtisaari's report and subsequent statements make clear his conviction that, despite UNMIK's tireless (if occasionally flawed) pursuit of the standards process, virtually all roads in Kosovo lead to the issue of status, even if it was not immediately obvious how this could be the case. Ahtisaari notes with some frustration and hints of resignation that '[e]ven on practical issues such as decentralization, community rights, the protection of cultural and religious heritage and economic matters, conceptual differences — almost always related to the question of status — persist, and only modest progress could be achieved.'¹⁶² Ahtisaari's reluctantly reached prescription for an internationally supervised independence appears to elevate and prioritize the connection between the internal and external aspects of self-determination. Although Ahtisaari makes clear that practical circumstances were a major factor in his reasoning, he concludes that a quasi-sovereign statehood for Kosovo, premised on substantial, active international supervision, would have the greatest chance of achieving the ends for which the international presence had

¹⁶² Ahtisaari, 'Report', para. 2, in Appendix M.

worked for so long. As such, his recommendations stand out as an intriguing fusion of normative aspirations in the midst of tangible constraints.

Of course, like Eide's review, Ahtisaari's report does not, by itself, reflect how the international community understood and applied self-determination in response to the impasse that seemed to have developed in Kosovo. Of course, unlike Eide's situation, Ahtisaari had been called on by the Secretary General to report on the state of affairs, make a recommendation for action and then engage the parties and the international community in the search for a resolution. As a result, the international community immediately engaged with the ideas and recommendations in the report, and the responses to its central recommendation as well as Kosovo's subsequent declaration of independence on 17 February 2008¹⁶³ illustrate the most recent steps in self-determination's evolution as a norm of international activity.

d) Independence(?)

Even before Ahtisaari submitted his formal proposal in March, and perhaps long before that, the likelihood of its acceptance by the Serbs in Kosovo and in the Republic of Serbia was nil. Despite the dramatic changes within Serbia that had taken it far away from the Milosevic era towards liberal democracy and the beginnings of the integration and accession process to the European Union, the Serbian position on Kosovo has remained firm and has long been supported by three lines of argument, all of which are interconnected with the norm of self-determination.

Nationalism, the first of these lines, was the vocabulary of choice for Kosovo's defence in the Milosevic era.¹⁶⁴ Although the use of the nationalist idiom has changed since that time, Serbia still rejects the idea of independence on the grounds that Kosovo's government passively neglects or, at worst, actively abuses their co-nationals' rights as well as the national religious sites, which blends nationalism and the liberal democratic ideas behind self-determination.¹⁶⁵ A major plank of the 'national protection' argument has been the Kosovo Provisional Institutions' (and UNMIK's) failure to achieve significant returns of IDPs to their former homes and the lack of freedom of movement for non-

¹⁶³ The text of the declaration forms Appendix N.

¹⁶⁴ For the use and abuse of history related to Kosovo in the Milosevic era, see Michael A. Sells, 'Vuk's Knife: Kosovo, the Serbian Golgotha and the Radicalization of Serbian Society' in Buckley, *Kosovo* and Malcolm, *Kosovo*, 341-356.

¹⁶⁵ For example, see Serbian President Tadic's statement on Kosovo's declaration of independence in UN, S/PV.5839 (18 February 2008).

Kosovars in Kosovo, two facts that no accurate account could deny.¹⁶⁶

Another long-standing argument on which Serbia rejects Kosovo's independence is that it violates norms of territorial integrity and the concept of sovereign statehood, both of which interact directly with the norm of self-determination. As Prime Minister Kostunica noted before the Security Council in 2005, 'I believe that we all share the conviction that to dismember a democratic State and to change its internationally recognized borders against its will are options not to be contemplated.'¹⁶⁷ The appeal to the norm of territorial integrity appears fairly standard, but the emphasis placed on the *democratic* nature of the Serbian government and likely entry to the EU have been highlighted often by Serbia specifically to weaken the Kosovar argument that independence is necessary to secure democratic outcomes and rights protection for Kosovar Albanians. In his statement before the Security Council immediately following the declaration of Kosovo's independence, President Tadic emphasized Serbia's standing as a *legitimate democracy* by reminding the members that nearly nine years had passed since the NATO intervention and that 'Milosevic is no longer there'.¹⁶⁸ As negotiations on status collapsed in late 2007, the Serbian Foreign Minister Vuk Jeremic conceded that, despite the firmness of his country's position, Kosovo would be given 'the widest possible autonomy in the world' within Serbia.¹⁶⁹ Given these statements, the Serbian position can be seen as not so much an argument for the norm of territorial integrity *against* self-determination but a defence of Serbian sovereignty that folds in many elements of the interpretation of self-determination that were outlined in Part I.

More recently, and especially since Kosovo declared its independence in February 2008, the Serbian government has also argued that any international acceptance of independence would create a powerful, negative precedent that could be used to fragment other sovereign states. Building on the argument that Serbia had become, by 2008, a right-respecting, democratic entity, President Tadic powerfully confronted the Security Council:

If a small, peace-loving and democratic country in Europe that is a United Nations Member State can be deprived of its territory illegally and against its will, a historic injustice will have occurred, because a legitimate democracy has never before been punished in that way...A large number of countries all over the world are plagued

¹⁶⁶ It has been contended that the failures to return and the lack of free movement is a matter of choice, but this does not erase the fact that an integrated, safe, multi-ethnic Kosovo is illusory at present.

¹⁶⁷ UN, S/PV.5289 (2005).

¹⁶⁸ UN, S/PV.5839 (2008).

¹⁶⁹ BBC News Online, (1 August 2007) [<http://news.bbc.co.uk/2/hi/europe/6927080.stm>].

by problems similar to Serbia's...Who can guarantee to you that a blind eye will not be turned...when your country's turn comes?¹⁷⁰

Raising the perennial concerns about setting a precedent for legitimate state fragmentation, this line of argument sought to confront the international community with the question of what coherent limits could be constructed within the norm of self-determination and whether or how these limits might be reconciled with the norms of security and territorial integrity.

Considering the range of international responses to the Ahtisaari recommendations, Kosovo's declaration of independence and the counterarguments made by the Serbian government outlined above, it is interesting to note the near universal lack of concern that Kosovo's independence might seriously jeopardize the democratic and human rights centred goals that led to the intervention and defined the standards approach.¹⁷¹ This lack of concern probably extends from the fact that, as Ahtisaari recommended, Kosovo's independence has been heavily supervised, monitored and supported by the international community. UNMIK, KFOR and the OSCE still have a very large presence there and have recently been joined by the EU's Rule of Law Mission in Kosovo (EULEX), which aims to overhaul Kosovo's police, customs and legal system.¹⁷² It is also likely that the lack of concern is the result of the efforts by the government of Kosovo to create a multi-ethnic society¹⁷³ and the fact that many countries have accepted that both Kosovo and Serbia will eventually join the European Union, which will facilitate the achievement of a multi-ethnic and liberal democratic society.¹⁷⁴ Whatever the case, it appears that independence did not shake the international community's resolve to encourage and affirm the standards process for Kosovo, which can be taken as further evidence of a growing consensus that self-determination has clear links to liberal democratic ideas and practices.

In contrast to this lack of overt concern for creating a multi-ethnic society, most international responses were centred entirely on matters connected to the other two arguments raised by the Serbian government. For example, in an editorial in the *Daily Telegraph* just prior to independence, Russia's Ambassador to the UK, Yury Fedotov, put forward an example of the

¹⁷⁰ UN, S/PV.5839 (2008).

¹⁷¹ The notable exception is the statement by China, which claimed China is 'deeply worried' about the security impact to the Balkans and 'the goal of establishing a multi-ethnic society'. Quoted in Nicholas Kulish, *et al.*, 'US and Much of Europe Recognize Kosovo', *New York Times* (19 February 2008).

¹⁷² [<http://www.eulex-kosovo.eu/?id=2>].

¹⁷³ See the Kosovo's declaration of independence in Appendix N.

¹⁷⁴ Former SRSG and current French Foreign Minister Bernard Kouchner suggested as much when responding to the declaration. Kulish, *et al.* 'US and Much of Europe Recognize Kosovo'.

'official' Russian position, in which he made almost no mention of the plight of the Serbs or the Kosovo standards process and instead argued strongly in favour of territorial integrity, warning that independence could set a precedent for future secessions in other areas where there are 'frozen conflicts'.¹⁷⁵ However, just after Kosovo's independence was declared, both houses of the Russian parliament announced plans to recognize the independence of the breakaway provinces of Abkhazia and South Ossetia in Georgia,¹⁷⁶ which failed to create a stir at the time but may have been a factor that contributed to the brief but intense armed conflict in the summer of 2008 between Georgia and Russia. Despite the resulting appearance of hypocrisy or at least inconsistency given these later events, Russia's position on Kosovo, like that of almost all states that have refused to recognize Kosovo's independence, has more to do with dissuading potential secessionists inside their own borders than with the specific of the Kosovo situation or with norms.¹⁷⁷ Very few countries with a high potential for fragmentation have recognized Kosovo,¹⁷⁸ and of the sixty-one states that have done so to date (early-July 2009), some have followed the French lead and added the caveat that Kosovo is a 'unique situation' and, accordingly, cannot be a precedent for other cases of emerging nationalism.¹⁷⁹

Despite the common themes that run through many these responses, drawing firm conclusions about their impact on the current understanding of self-determination is very difficult. Nonetheless, there are some points that suggest where the norm of self-determination stands at present and highlight the degree to which these responses reflect the normative framework discussed in Part I of this investigation. While the countries that reject Kosovo's independence appear to do so primarily on pragmatic grounds because of circumstances within their country and/or because they see the norm of territorial integrity as being paramount, their statements and actions before and after nonetheless reflect a commitment to the idea of the standards and the creation of a stable, rights respecting, multi-ethnic society in Kosovo.¹⁸⁰ As a result, while there may be no firm consensus in the society of states about the relative importance of territorial integrity and self-determination and how they fit together on the normative level, the Kosovo case seems confirm that the

¹⁷⁵ Yury Fedotov, 'We Risk Danger by Granting Kosovo Independence', *Daily Telegraph* (19 December 2007).

¹⁷⁶ Kulish, et al. 'US and Much of Europe Recognize Kosovo'.

¹⁷⁷ For a collection of official (and some unofficial) statements on the recognition/non-recognition of Kosovo, see [http://en.wikipedia.org/wiki/International_recognition_of_Kosovo#States_which_formally_recognize_Kosovo_as_independent].

¹⁷⁸ Turkey is an interesting counterexample.

¹⁷⁹ UN, S/PV.5839 (18 February 2008). The US also made this point. See Julie Preston, 'UN Report Urges Independence for Kosovo', *New York Times* (27 March 2007).

¹⁸⁰ In fact, no country has opposed them, at least not overtly.

internal aspects of self-determination are of very great normative significance in cases of emerging nationalism today. Moreover, as already noted, the standards process (indeed the entire international intervention after the NATO bombings) was and remains closely aligned with the framework.

The tougher question over Kosovo's quasi-independence and its impact on the concept of self-determination comes when considering what these responses suggest about the limits that can be legitimately placed on the exercise of the concept. Some countries, like Algeria, have been blunt and have denied that self-determination can be applied to permit Kosovo's independence,¹⁸¹ while others, like France, see a connection but not one that could apply to any other case. It is possible that further clarification will come in 2010 when the International Court of Justice (ICJ) will, most likely, render its advisory opinion on the legality of Kosovo's 'unilateral' declaration of independence.¹⁸² While the impact of the Court's opinion on the trajectory of self-determination's evolution is unknown at this time, it is extremely unlikely that the ICJ will call into question the decision to place the standards process at the heart of the intervention in Kosovo, but the Court's opinion might call into question the idea of making human rights and governance standards a litmus test for future status.

In Kosovo, as the Eide and Ahtisaari reports illustrated, the standards process, which aimed to ensure the right of self-determination's internal aspects *irrespective* of status, eventually got caught up on status because of the entrenched positions of the Kosovars, the Serbs in Kosovo and the Serbian government, which were the direct result of the bloody conflict *prior* to the arrival of UNMIK. As a result, the viable options regarding external applications of self-determination were limited at best, and although one could question the exact option that Ahtisaari recommended, it is much harder to deny his conviction that progress on standards separate from status was becoming increasingly difficult. Whether the international community can or will try to limit self-determination to 'internal exercises' of the right, such as the standards process, while leaving status to the side when they confront emerging nationalism in the future is uncertain.

It *might* have been better for the Security Council to insist that the standards process in Kosovo *was* the end and not the means and to stress that

¹⁸¹ [http://en.wikipedia.org/wiki/International_recognition_of_Kosovo#States_which_formally_recognize_Kosovo_as_independent].

¹⁸² UN, A/Res./63/3 and A/PV.22 (8 October 2008). This process began in late-2008 when Serbia (with strong support from Russia) approached a divided General Assembly to seek what would amount to a legal interpretation of the key normative questions behind the Kosovo case. The vote was 77 in favour, 6 against (including the US) with 74(!) abstentions.

the 'final' status, whether independence, quasi-independence or autonomy, would be selected and remain 'final' only if it proved to be the best means of achieving self-determination for all citizens, but this was almost definitely not possible given the realities on the ground. Earlier international intervention based on such norms *prior* to the massive escalation of the conflict in 1998 and 1999, *might* have diverted the parties from the actions that contributed to the hardening of attitudes that resulted in the situation that exists today, but this remains merely speculation.

Conclusion

It is perhaps both fitting and distressing that this study has commenced and ended with examples of the international community's frustrated attempts to come to grips with the challenges of self-determination. The peacemakers of 1919 and those who are responding to the situation in Kosovo today are linked together in their common struggle to solve the perennial questions that surface when confronting self-determination and emerging nationalism. There has been a great desire to find practicable limits to the application of this seemingly irrepressible concept since it emerged as a principle of international interactions in the eighteenth century, but the search for coherent and consistent limits has been fraught with difficulties, many of which have persisted into the post-Cold War era. The challenges and the violence that all too often accompany self-determination and emerging nationalism could lead to the conclusion that the concept should be shunned on all occasions or at least when its application proves messy, that it should be limited to a discrete category of cases which, preferably, do not appear often, that it should not be connected with desirable ideas like democracy and liberalism, or that the correct response is to lament, much as Wilson did, that the genie cannot be put back in the bottle.

Fortunately or unfortunately, neither self-determination nor emerging nationalism is likely to disappear from the face of world politics. As a philosophical concept, self-determination is rooted firmly in the liberal democratic tradition of thought and is intimately connected with human rights, sovereignty and, above all, to individual and group identity, all of which imbue the concept with an undeniable moral significance and value. As Part I explained, the theoretical foundations of self-determination link the autonomy, identity, aspirations and well-being of individuals to the identity, actions and destiny of the collective bodies they form and of which they are a part, whether these groups are Primary Identity Forming Groups (PIFGs), nationalities or states.

Part II highlighted the connection between the context of international affairs and the development and evolution of normative responses to emerging nationalism and state fragmentation, showing that as new dialogical spaces were formed and new forces altered the landscape of international politics and society, these ideas were mutually debated and intersubjectively understood in different ways, leading to new applications. As the international society of states has increasingly accommodated, adopted and institutionalized liberal and democratic principles and practices, including human rights, democratic

standards and popular sovereignty, self-determination's significance has increased rather than declined, making it practically unlikely and theoretically impossible to escape, despite its associated difficulties. In the post-Cold War era, with the global expansion of liberal democratic values and norms, the only realistic approach to meeting the challenges of self-determination is to chart a way through rather than around them.

Part I argued that international norms related to self-determination might come closer to yielding their desired results and have more coherent limits if the international community acknowledged and reflected the liberal democratic tradition from which the concept extended. As a result, the application of these norms would adhere to this if international responses reflected a concern for human rights, humane governance and the value and worth of PIFGs, especially nationality, to the individual members of such groups when balanced against other norms such as territorial integrity. Over time, the international responses to real and potential fragmentations of states have evolved irregularly, but in some ways and at some times they have moved closer towards the normative framework of understanding outlined in Part I. Without a doubt, the dramatic alterations to the environment of international relations ushered in with the demise of the Cold War have led to the greatest opportunity for congruence of concept and context yet seen.

Nonetheless, despite these contextual shifts, the development of theoretically coherent and consistently applied normative responses has not been a given. The recent cases examined above highlight that the international understanding of self-determination has not fully aligned with the theoretical framework outlined in Part I. The challenges of constructing consensus between nearly 200 states is great, especially when some have a warranted fear of fragmentation along identity lines and many have a lacklustre commitment to liberal democratic standards and values. Competition with other norms and a plethora of tangible strategic, political social and economic circumstances have also contributed to the failure of consensus building about the limits of self-determination.

With that said, since the end of the Cold War, it is clear that a renewed and vigorous commitment to self-determination exists, that it is a central idea and a valued *right* in international relations and that it is ethically significant owing to its instrumental function as a means of protecting and promoting the well-being of those seeking to exercise it. Its exercise by states and by nationalities within states forms the basis of state sovereignty and legitimacy, which in turn is respected and accommodated internationally by other states, and, in theory if not in practice, ensures the meaningful participation of all

groups, particularly PIFGs, in the public life of the state of which it is a part. In short, the internal aspect of self-determination forms the central core of the normative standard today.

As has always been the case with nationalism and self-determination, secession and the active, external aspect of the concept is the tipping-point where debates about the limits and validity of self-determination spark divisions in the international community, and the post-Cold War era is proving to be no exception. However, although Kosovo still stands in a state of quasi-independence and is recognized by a (growing) minority of other states, the situation below the surface reveals much alteration to the norm of self-determination since the end of the Cold War. The 'standards before status' doctrine transmitted important messages about political obligations of states and of nationalities and PIFGs hoping to alter their status vis-à-vis the state. The other developments covered in Part III revealed a massive refocusing of attention closer to where the liberal democratic roots of self-determination suggest they should be: on the tangible improvement of the rights and well-being of all individual and groups regardless of their political status. The evolution of normative responses to self-determination and emerging nationalism is still somewhat distant from this point, and the exact trajectory of this evolution is unknown, especially given the constantly shifting nature of international relations in the wake of 9/11, the American invasions of Afghanistan and Iraq, the growing threats of nuclear proliferation and the most serious global economic downturn since the Great Depression.

However, as these dramatic changes unfold and affect the context of international relations in the twenty-first century, if the international community continues to turn its attention to the interplay of human rights, identity, humane governance and sovereignty, it is entirely possible that the understanding and application of the norm of self-determination may incorporate and reflect these ideas even more coherently than it does at the present.

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Appendices

Appendix A

The Atlantic Charter (1941)¹

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;

Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security;

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;

Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measure which will lighten for peace-loving peoples the crushing burden of armaments.

Franklin D. Roosevelt
Winston S. Churchill

¹ 'Joint Declaration of the President of the United States of America and Mr. Winston Churchill, representing His Majesty's Government in the United Kingdom' [The Atlantic Charter], (14 August 1941) [<http://www.yale.edu/lawweb/avalon/wwii/atlantic.htm>].

Appendix B

Extracts from the Universal Declaration of Human Rights (1948)¹

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore the General Assembly Proclaims this Universal Declaration of Human Rights...

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty...

Article 15.

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance...

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or

¹ UN, A/Res.217 (10 December 1948).

through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality...

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection...

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Appendix C

Extracts for the International Covenant on Civil and Political Rights (1966)¹

Preamble

The States Parties to the present Covenant,
 Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Article 1

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

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted...

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

¹ UN, A/Res.2200A (16 December 1966).

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant...

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority...

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public

order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention...

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) 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;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity...

Appendix D

Extracts from the International Covenant on Economic, Social and Cultural Rights (1966)¹

Preamble

The States Parties to the present Covenant,
 Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

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

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals...

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society...

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

¹ UN, A/Res.2200A (16 December 1966).

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein...

Appendix E

The Declaration on Friendly Relations (1970)¹

Preamble

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security, Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

- (a) The principle that States shall refrain in their international relations from the threat

¹ UN, *Declaration On Principles of International Law Concerning Friendly Relations and Cooperation Among States*, A/Res.2526 (24 October 1970).

or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(d) The duty of States to co-operate with one another in accordance with the Charter,

(e) The principle of equal rights and self-determination of peoples,

(f) The principle of sovereign equality of States,

(g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter,

so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. Solemnly proclaims the following principles:

The principle that States shall refrain in their international - relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or

(b) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the Situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as reflecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;

(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of

the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

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

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.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are judicially equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter:-

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

GENERAL PART

2. Declares that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. Declares further that: The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

Appendix F

Extracts from the Declaration on the Rights of Indigenous Peoples (2007)¹

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,...

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,...

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

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 financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as

¹ UN, A/61/L.67 (7 September 2007).

distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture...

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society...

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of

their economic and social conditions...

Article 46

1. 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...

Appendix G

Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (1991)¹

In compliance with the European Council's request, Ministers have assessed developments in Eastern Europe and the Soviet Union with a view to elaborating an approach regarding relations with new states.

In this connection they have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.

The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.

¹ [<http://207.57.19.226/journal/Vol4/No1/art6.html>]

Appendix II

Extracts from The Badinter Commission Opinions (1991-1992)¹

Opinion No. 1

The President of the Arbitration Committee received the following letter from Lord Carrington, President of the Conference on Yugoslavia, on 20 November 1991:

We find ourselves with a major legal question. Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.

Other Republics on the contrary consider that there is no question of secession, but the question is one of a disintegration or breaking-up of the SDRY as the result of the concurring will of a number of Republics. They consider that the six Republics are to be considered equal successors to the SFRY, without any of them or group of them being able to claim to be the continuation thereof.

I should like the Arbitration Committee to consider the matter in order to formulate any opinion or recommendation which it might deem useful.

The Arbitration Committee has been apprised of the memoranda and documents communicated respectively by the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia, and by the President of the collegiate Presidency of the SFRY.

1) The Committee considers:

a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state; that in this respect, the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory;

b) that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty;

c) that, for the purpose of applying these criteria, the form of internal political organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government's way over the population and the territory;

d) that in the case of a federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the state implies that the federal organs represent the components of the Federation and wield effective power;

e) that, in compliance with the accepted definition in international law, the expression 'state succession' means the replacement of one state by another in the responsibility for the international relations of territory. This occurs whenever there is a change in the territory of the state. The phenomenon of state succession is governed by the principles of international law, from which the Vienna Conventions of 23 August 1978 and 8 April 1983 have drawn inspiration. In compliance with these principles, the outcome of succession should be equitable, the states concerned being free of terms of settlement and conditions by agreement. Moreover, the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.

2) The Arbitration Committee notes that:

a) - although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence;

- in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

- in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

- in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav states;

- in Bosnia and Herzegovina, by a sovereignty resolution adopted by Parliament on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Herzegovina.

b) - The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal state;

¹ Extracts from *Opinions of the Arbitration Committee of the International Conference on Yugoslavia* (Badinter Committee), (1991-1992) [<http://www.ejil.org/journal/Vol3/No1/art13.html>] and [<http://www.ejil.org/journal/Vol4/No1/art8.html#TopOfPage>].

c) - The recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people and wrought considerable destruction within a few months. The authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization.

3) - Consequently, the Arbitration Committee is of the opinion:

- that the Socialist Federal Republic of Yugoslavia is in the process of dissolution;
- that it is incumbent upon the Republics 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;
- that it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice.

Opinion No. 2

On 20 November 1991 the Chairman of the Arbitration Committee received a letter from Lord Carrington, Chairman of the Conference on Yugoslavia, requesting the Committee's opinion on the following question put by the Republic of Serbia:

Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?

The Committee took note of the *aide-mémoires*, observations and other materials submitted by the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia, by the Presidency of the Socialist Federal Republic of Yugoslavia (SFRY) and by the 'Assembly of the Serbian People of Bosnia-Herzegovina'.

1. The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.

2. Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.

As the Committee emphasized in its Opinion No. 1 of 29 November 1991, published on 7 December, the - now peremptory - norms of international law require states to ensure respect for the rights of minorities. This requirement applies to all the Republics *vis-à-vis* the minorities on their territory.

The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international convention as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the draft Convention of 4 November 1991, which has been accepted by these Republics.

3. Article 1 of the two 1986 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes.

In the Committee's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned.

4. The Arbitration Committee is therefore of the opinion:

- (i) that the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law and under the provisions of the draft Convention of the Conference on Yugoslavia of 4 November 1991, to which the Republics of Bosnia-Herzegovina and Croatia have undertaken to give effect; and
- (ii) that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality...

Opinion No.3

On 20 November 1991 the Chairman of the Arbitration Committee received a letter from Lord Carrington, Chairman of the Conference on Yugoslavia, requesting the Committee's opinion on the following question put by the Republic of Serbia:

Can the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law?...

2. The Committee therefore takes the view that once the process in the SFRY leads to the creation of one or more independent states, the issue of frontiers, in particular those of the Republics referred to in the question before it, must be resolved in accordance with the following principles:

First - All external frontiers must be respected in line with the principles stated in the United

Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties.

Second - The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at.

Third - Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice...

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles...

The principle applies all the more readily to the Republic since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent...

Appendix I

The Dayton Accords – Extracts from the ‘General Framework’ (1995)¹

The Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (the "Parties"),

Recognizing the need for a comprehensive settlement to bring an end to the tragic conflict in the region,

Desiring to contribute toward that end and to promote an enduring peace and stability...

Have agreed as follows:

Article I

The Parties shall conduct their relations in accordance with the principles set forth in the United Nations Charter, as well as the Helsinki Final Act and other documents of the Organization for Security and Cooperation in Europe. In particular, the Parties shall fully respect the sovereign equality of one another, shall settle disputes by peaceful means, and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State...

Article III

The Parties welcome and endorse the arrangements that have been made concerning the boundary demarcation between the two Entities, the Federation of Bosnia and Herzegovina and Republika Srpska, as set forth in the Agreement at Annex 2. The Parties shall fully respect and promote fulfillment of the commitments made therein.

Article IV

The Parties welcome and endorse the elections program for Bosnia and Herzegovina as set forth in Annex 3. The Parties shall fully respect and promote fulfillment of that program.

Article V

The Parties welcome and endorse the arrangements that have been made concerning the Constitution of Bosnia and Herzegovina, as set forth in Annex 4. The Parties shall fully respect and promote fulfillment of the commitments made therein.

Article VI

The Parties welcome and endorse the arrangements that have been made concerning the establishment of an arbitration tribunal, a Commission on Human Rights, a Commission on Refugees and Displaced Persons, a Commission to Preserve National Monuments, and Bosnia and Herzegovina Public Corporations, as set forth in the Agreements at Annexes 5-9. The Parties shall fully respect and promote fulfillment of the commitments made therein.

Article VII

Recognizing that the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace, the Parties agree to and shall comply fully with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6, as well as the provisions concerning refugees and displaced persons set forth in Chapter One of the Agreement at Annex 7...

Article IX

The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.

Article X

The Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States within their international borders. Further aspects of their mutual recognition will be subject to subsequent discussions...

Annex 4 - Constitution of Bosnia and Herzegovina

Preamble

Based on respect for human dignity, liberty, and equality,

Dedicated to peace, justice, tolerance, and reconciliation,

Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,

¹ *The General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995 [http://www.ohr.int/dpa/default.asp?content_id=380].

Guided by the Purposes and Principles of the Charter of the United Nations,
Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,

Determined to ensure full respect for international humanitarian law,

Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,

Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

Article I: Bosnia and Herzegovina

Continuation. The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

Democratic Principles. Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Composition. Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities")...

All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.

No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly.

Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.

A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina. Each Entity may issue passports of Bosnia and Herzegovina to its citizens as regulated by the Parliamentary Assembly. Bosnia and Herzegovina may issue passports to citizens not issued a passport by an Entity. There shall be a central register of all passports issued by the Entities and by Bosnia and Herzegovina.

Article II: Human Rights and Fundamental Freedoms

Human Rights. Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Enumeration of Rights. All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

The right to life.

The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

The right not to be held in slavery or servitude or to perform forced or compulsory labor.

The rights to liberty and security of person.

The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

The right to private and family life, home, and correspondence.

Freedom of thought, conscience, and religion.

Freedom of expression.

Freedom of peaceful assembly and freedom of association with others.

The right to marry and to found a family.

The right to property.

The right to education.

The right to liberty of movement and residence.

Non-Discrimination. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Refugees and Displaced Persons. All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

Implementation. Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

International Agreements. Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

Cooperation. All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

Article III: Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities

Responsibilities of the Institutions of Bosnia and Herzegovina.

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

Foreign policy. Foreign trade policy. Customs policy. Monetary policy as provided in Article VII. Finances of the institutions and for the international obligations of Bosnia and Herzegovina. Immigration, refugee, and asylum policy and regulation. International and inter-Entity criminal law enforcement, including relations with Interpol. Establishment and operation of common and international communications facilities. Regulation of inter-Entity transportation. Air traffic control. Responsibilities of the Entities.

The Entities shall have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.

Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization.

The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate.

Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.

Law and Responsibilities of the Entities and the Institutions.

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

Coordination. The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case.

Additional Responsibilities.

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and

international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects...

Article IV: Parliamentary Assembly

The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

House of Peoples. The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska.

Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present.

House of Representatives. The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement...

Powers. The Parliamentary Assembly shall have responsibility for:

Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

Approving a budget for the institutions of Bosnia and Herzegovina.

Deciding whether to consent to the ratification of treaties.

Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

Article V: Presidency

The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska...

Procedures.

The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.

The Members of the Presidency shall appoint from their Members a Chair. For the first term of the Presidency, the Chair shall be the Member who received the highest number of votes. Thereafter, the method of selecting the Chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV(3).

The Presidency shall endeavor to adopt all Presidency Decisions (i.e., those concerning matters arising under Article V(3)(a) - (e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed.

A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

Powers. The Presidency shall have responsibility for:

Conducting the foreign policy of Bosnia and Herzegovina.

Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

Representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member.

Negotiating, denouncing, and, with the consent of the Parliamentary Assembly,

ratifying treaties of Bosnia and Herzegovina.

Executing decisions of the Parliamentary Assembly.

Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

Coordinating as necessary with international and nongovernmental organizations in Bosnia and Herzegovina.

Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities.

Council of Ministers. The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).

No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives.

The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly...

Article VI: Constitutional Court

Composition. The Constitutional Court of Bosnia and Herzegovina shall have nine members.

Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state...

For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights...

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

Whether any provision of an Entity's constitution or law is consistent with this Constitution...

Article VII: Central Bank

There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.

The Central Bank's responsibilities will be determined by the Parliamentary Assembly. For the first six years after the entry into force of this Constitution, however, it may not extend credit by creating money, operating in this respect as a currency board; thereafter, the Parliamentary Assembly may give it that authority.

The first Governing Board of the Central Bank shall consist of a Governor appointed by the International Monetary Fund, after consultation with the Presidency, and three members appointed by the Presidency, two from the Federation (one Bosniac, one Croat, who shall share one vote) and one from the Republika Srpska, all of whom shall serve a six-year term. The Governor, who shall not be a citizen of Bosnia and Herzegovina or any neighboring state, may cast tie-breaking votes on the Governing Board.

Thereafter, the Governing Board of the Central Bank of Bosnia and Herzegovina shall consist of five persons appointed by the Presidency for a term of six years. The Board shall appoint, from among its members, a Governor for a term of six years...

Article IX: General Provisions

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed

to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.

Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.

Article X: Amendment

Amendment Procedure. This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

Annex 6 – Human Rights

Chapter Two: The Commission on Human Rights

Part A: General

Article II: Establishment of the Commission

To assist in honoring their obligations under this Agreement, the Parties hereby establish a Commission on Human Rights (the "Commission"). The Commission shall consist of two parts: the Office of the Ombudsman and the Human Rights Chamber...

Article IV: Human Rights Ombudsman

The Parties hereby establish the Office of the Human Rights Ombudsman (the "Ombudsman").

The Ombudsman shall be appointed for a non-renewable term of five years by the Chairman-in-Office of the Organization for Security and Cooperation in Europe (OSCE), after consultation with the Parties. He or she shall be independently responsible for choosing his or her own staff. Until the transfer described in Article XIV below, the Ombudsman may not be a citizen of Bosnia and Herzegovina or of any neighboring state. The Ombudsman appointed after that transfer shall be appointed by the Presidency of Bosnia and Herzegovina.

Members of the Office of the Ombudsman must be of recognized high moral standing and have competence in the field of international human rights.

The Office of the Ombudsman shall be an independent agency. In carrying out its mandate, no person or organ of the Parties may interfere with its functions...

Article VI: Powers

The Ombudsman shall have access to and may examine all official documents, including classified ones, as well as judicial and administrative files, and can require any person, including a government official, to cooperate by providing relevant information, documents and files. The Ombudsman may attend administrative hearings and meetings of other organs and may enter and inspect any place where persons deprived of their liberty are confined or work.

The Ombudsman and staff are required to maintain the confidentiality of all confidential information obtained, except where required by order of the Chamber, and shall treat all documents and files in accordance with applicable rules...

Article VII: Human Rights Chamber

The Human Rights Chamber shall be composed of fourteen members.

Within 90 days after this Agreement enters into force, the Federation of Bosnia and Herzegovina shall appoint four members and the Republika Srpska shall appoint two members. The Committee of Ministers of the Council of Europe, pursuant to its resolution (93)6, after consultation with the Parties, shall appoint the remaining members, who shall not be citizens of Bosnia and Herzegovina or any neighboring state, and shall designate one such member as the President of the Chamber.

All members of the Chamber shall possess the qualifications required for appointment to high judicial office or be jurists of recognized competence. The members of the Chamber shall be appointed for a term of five years and may be reappointed.

Members appointed after the transfer described in Article XIV below shall be appointed by the Presidency of Bosnia and Herzegovina...

Article XIII: Organizations Concerned with Human Rights

The Parties shall promote and encourage the activities of non-governmental and international organizations for the protection and promotion of human rights.

The Parties join in inviting the United Nations Commission on Human Rights, the OSCE, the United Nations High Commissioner for Human Rights, and other intergovernmental or regional human rights missions or organizations to monitor closely the

human rights situation in Bosnia and Herzegovina, including through the establishment of local offices and the assignment of observers, rapporteurs, or other relevant persons on a permanent or mission-by-mission basis and to provide them with full and effective facilitation, assistance and access.

The Parties shall allow full and effective access to non-governmental organizations for purposes of investigating and monitoring human rights conditions in Bosnia and Herzegovina and shall refrain from hindering or impeding them in the exercise of these functions.

All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to the organizations established in this Agreement; any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in the Appendix to this Annex; the International Tribunal for the Former Yugoslavia; and any other organization authorized by the U.N. Security Council with a mandate concerning human rights or humanitarian law...

Appendix J

Map of Kosovo¹



¹ [http://www.lib.utexas.edu/maps/ciao8/kosovo_sm_2008.gif]

Appendix K

Extracts of UN Security Council Resolutions related to Kosovo (1998-1999)¹

Resolution 1160, 31 March 1998

The Security Council,

Noting with appreciation the statements of the Foreign Ministers of France, Germany, Italy, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America (the Contact Group) of 9 and 25 March 1998 (S/1998/223 and S/1998/272), including the proposal on a comprehensive arms embargo on the Federal Republic of Yugoslavia, including Kosovo,

Welcoming the decision of the Special Session of the Permanent Council of the Organization for Security and Cooperation in Europe (OSCE) of 11 March 1998

Condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training,

Noting the declaration of 18 March 1998 by the President of the Republic of Serbia on the political process in Kosovo and Metohija

Noting also the clear commitment of senior representatives of the Kosovar Albanian community to non-violence,

Noting that there has been some progress in implementing the actions indicated in the Contact Group statement of 9 March 1998, but stressing that further progress is required,

Affirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,

Acting under Chapter VII of the Charter of the United Nations,

1. Calls upon the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated in the Contact Group statements of 9 and 25 March 1998;

2. Calls also upon the Kosovar Albanian leadership to condemn all terrorist action, and emphasizes that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only;

3. Underlines that the way to defeat violence and terrorism in Kosovo is for the authorities in Belgrade to offer the Kosovar Albanian community a genuine political process;

4. Calls upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues, and notes the readiness of the Contact Group to facilitate such a dialogue;

5. Agrees, without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration;

6. Welcomes the signature on 23 March 1998 of an agreement on measures to implement the 1996 Education Agreement, calls upon all parties to ensure that its implementation proceeds smoothly and without delay according to the agreed timetable and expresses its readiness to consider measures if either party blocks implementation;

7. Expresses its support for the efforts of the OSCE for a peaceful resolution of the crisis in Kosovo, including through the Personal Representative of the Chairman-in-Office for the Federal Republic of Yugoslavia, who is also the Special Representative of the European Union, and the return of the OSCE long-term missions;

8. Decides that all States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related matériel of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there;

9. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council, consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

(a) to seek from all States information regarding the action taken by them concerning

¹ UN, S/Res.1160, 31 March 1998; S/Res.1199, 23 September 1998; S/Res.1244, 10 June 1999.

the effective implementation of the prohibitions imposed by this resolution;

(b) to consider any information brought to its attention by any State concerning violations of the prohibitions imposed by this resolution and to recommend appropriate measures in response thereto;

(c) to make periodic reports to the Security Council on information submitted to it regarding alleged violations of the prohibitions imposed by this resolution;

(d) to promulgate such guidelines as may be necessary to facilitate the implementation of the prohibitions imposed by this resolution;

(e) to examine the reports submitted pursuant to paragraph 12 below;

10. Calls upon all States and all international and regional organizations to act strictly in conformity with this resolution, notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement or of any contract entered into or any license or permit granted prior to the entry into force of the prohibitions imposed by this resolution, and stresses in this context the importance of continuing implementation of the Agreement on Sub-regional Arms Control signed in Florence on 14 June 1996...

18. Affirms that concrete progress to resolve the serious political and human rights issues in Kosovo will improve the international position of the Federal Republic of Yugoslavia and prospects for normalization of its international relationships and full participation in international institutions;

19. Emphasizes that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures;

20. Decides to remain seized of the matter.

Resolution 1199, 31 March 1998

The Security Council,

Recalling its resolution 1160 (1998) of 31 March 1998...

Gravely concerned at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes,

Deeply concerned by the flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries as a result of the use of force in Kosovo, as well as by the increasing numbers of displaced persons within Kosovo, and other parts of the Federal Republic of Yugoslavia, up to 50,000 of whom the United Nations High Commissioner for Refugees has estimated are without shelter and other basic necessities...

Condemning all acts of violence by any party, as well as terrorism in pursuit of political goals by any group or individual, and all external support for such activities in Kosovo, including the supply of arms and training for terrorist activities in Kosovo and expressing concern at the reports of continuing violations of the prohibitions imposed by resolution 1160 (1998),

Deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the impending humanitarian catastrophe as described in the report of the Secretary-General, and emphasizing the need to prevent this from happening,

Deeply concerned also by reports of increasing violations of human rights and of international humanitarian law, and emphasizing the need to ensure that the rights of all inhabitants of Kosovo are respected,

Reaffirming the objectives of resolution 1160 (1998), in which the Council expressed support for a peaceful resolution of the Kosovo problem which would include an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration,

Reaffirming also the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,

Affirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. Demands that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe;

2. Demands also that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe;

3. Calls upon the authorities in the Federal Republic of Yugoslavia and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo, and welcomes the current efforts aimed at facilitating such a dialogue;

4. Demands further that the Federal Republic of Yugoslavia, in addition to the

measures called for under resolution 1160 (1998), implement immediately the following concrete measures towards achieving a political solution to the situation in Kosovo as contained in the Contact Group statement of 12 June 1998:

(a) cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression;

(b) enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic missions accredited to the Federal Republic of Yugoslavia, including access and complete freedom of movement of such monitors to, from and within Kosovo unimpeded by government authorities, and expeditious issuance of appropriate travel documents to international personnel contributing to the monitoring;

(c) facilitate, in agreement with the UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo;

(d) make rapid progress to a clear timetable, in the dialogue referred to in paragraph 3 with the Kosovo Albanian community called for in resolution 1160 (1998), with the aim of agreeing confidence-building measures and finding a political solution to the problems of Kosovo;

5. Notes, in this connection, the commitments of the President of the Federal Republic of Yugoslavia, in his joint statement with the President of the Russian Federation of 16 June 1998:

(a) to resolve existing problems by political means on the basis of equality for all citizens and ethnic communities in Kosovo;

(b) not to carry out any repressive actions against the peaceful population;

(c) to provide full freedom of movement for and ensure that there will be no restrictions on representatives of foreign States and international institutions accredited to the Federal Republic of Yugoslavia monitoring the situation in Kosovo;

(d) to ensure full and unimpeded access for humanitarian organizations, the ICRC and the UNHCR, and delivery of humanitarian supplies;

(e) to facilitate the unimpeded return of refugees and displaced persons under programmes agreed with the UNHCR and the ICRC, providing State aid for the reconstruction of destroyed homes, and calls for the full implementation of these commitments;

6. Insists that the Kosovo Albanian leadership condemn all terrorist action, and emphasizes that all elements in the Kosovo Albanian community should pursue their goals by peaceful means only;

7. Recalls the obligations of all States to implement fully the prohibitions imposed by resolution 1160 (1998);

8. Endorses the steps taken to establish effective international monitoring of the situation in Kosovo, and in this connection welcomes the establishment of the Kosovo Diplomatic Observer Mission;

9. Urges States and international organizations represented in the Federal Republic of Yugoslavia to make available personnel to fulfil the responsibility of carrying out effective and continuous international monitoring in Kosovo until the objectives of this resolution and those of resolution 1160 (1998) are achieved;

10. Reminds the Federal Republic of Yugoslavia that it has the primary responsibility for the security of all diplomatic personnel accredited to the Federal Republic of Yugoslavia as well as the safety and security of all international and non-governmental humanitarian personnel in the Federal Republic of Yugoslavia and calls upon the authorities of the Federal Republic of Yugoslavia and all others concerned in the Federal Republic of Yugoslavia to take all appropriate steps to ensure that monitoring personnel performing functions under this resolution are not subject to the threat or use of force or interference of any kind;

11. Requests States to pursue all means consistent with their domestic legislation and relevant international law to prevent funds collected on their territory being used to contravene resolution 1160 (1998);

12. Calls upon Member States and others concerned to provide adequate resources for humanitarian assistance in the region and to respond promptly and generously to the United Nations Consolidated Inter-Agency Appeal for Humanitarian Assistance Related to the Kosovo Crisis;

13. Calls upon the authorities of the Federal Republic of Yugoslavia, the leaders of the Kosovo Albanian community and all others concerned to cooperate fully with the Prosecutor of the International Tribunal for the Former Yugoslavia in the investigation of possible violations within the jurisdiction of the Tribunal;

14. Underlines also the need for the authorities of the Federal Republic of Yugoslavia to bring to justice those members of the security forces who have been involved in the mistreatment of civilians and the deliberate destruction of property;

15. Requests the Secretary-General to provide regular reports to the Council as necessary on his assessment of compliance with this resolution by the authorities of the Federal Republic of Yugoslavia and all elements in the Kosovo Albanian community, including through his regular reports on compliance with resolution 1160 (1998);

16. Decides, should the concrete measures demanded in this resolution and resolution

1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region;

17. Decides to remain seized of the matter.

Resolution 1244, 10 June 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,

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo,

Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2;

2. Welcomes the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and demands the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation;

3. Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized;

4. Confirms that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2;

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences;

6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;

7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;

8. Affirms the need for the rapid early deployment of effective international civil and security presences to Kosovo, and demands that the parties cooperate fully in their deployment;

9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:

(a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;

(b) Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below;

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;

(d) Ensuring public safety and order until the international civil presence can take responsibility for this task;

(e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;

10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include:

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peacebuilding activities;

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;

(g) Supporting the reconstruction of key infrastructure and other economic reconstruction;

(h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;

12. Emphasizes the need for coordinated humanitarian relief operations, and for the Federal Republic of Yugoslavia to allow unimpeded access to Kosovo by humanitarian aid organizations and to cooperate with such organizations so as to ensure the fast and effective delivery of international aid;

13. Encourages all Member States and international organizations to contribute to economic and social reconstruction as well as to the safe return of refugees and displaced persons, and emphasizes in this context the importance of convening an international donors' conference, particularly for the purposes set out in paragraph 11 (g) above, at the earliest possible date;

14. Demands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia;

15. Demands that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization as laid down by the head of the international security presence in consultation with the Special Representative of the Secretary-General;

16. Decides that the prohibitions imposed by paragraph 8 of resolution 1160 (1998) shall not apply to arms and related matériel for the use of the international civil and security presences;

17. Welcomes the work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation;

18. Demands that all States in the region cooperate fully in the implementation of all aspects of this resolution;

19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;

20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;

21. Decides to remain actively seized of the matter.

Annex 1

Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre, 6 May 1999

The G-8 Foreign Ministers adopted the following general principles on the political solution to the Kosovo crisis:

- Immediate and verifiable end of violence and repression in Kosovo;
- Withdrawal from Kosovo of military, police and paramilitary forces;
- Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;

- Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo;

- The safe and free return of all refugees and displaced persons and unimpeded access to Kosovo by humanitarian aid organizations;
- A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA;
- Comprehensive approach to the economic development and stabilization of the crisis region...

Annex 2

Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:

1. An immediate and verifiable end of violence and repression in Kosovo.
2. Verifiable withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.
3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.
4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.
5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.
6. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions:
 - Liaison with the international civil mission and the international security presence;
 - Marking/clearing minefields;
 - Maintaining a presence at Serb patrimonial sites;
 - Maintaining a presence at key border crossings.
7. Safe and free return of all refugees and displaced persons under the supervision of the Office of the United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations.
8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.
9. A comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.
10. Suspension of military activity will require acceptance of the principles set forth above in addition to agreement to other, previously identified, required elements, which are specified in the footnote below. A military-technical agreement will then be rapidly concluded that would, among other things, specify additional modalities, including the roles and functions of Yugoslav/Serb personnel in Kosovo:

Withdrawal

- Procedures for withdrawals, including the phased, detailed schedule and delineation of a buffer area in Serbia beyond which forces will be withdrawn;
- #### Returning personnel
- Equipment associated with returning personnel;
 - Terms of reference for their functional responsibilities;
 - Timetable for their return;
 - Delineation of their geographical areas of operation;
 - Rules governing their relationship to the international security presence and the international civil mission.

Notes

Other required elements:

- A rapid and precise timetable for withdrawals, meaning, e.g., seven days to complete withdrawal and air defence weapons withdrawn outside a 25 kilometre mutual safety zone within 48 hours;
- Return of personnel for the four functions specified above will be under the

supervision of the international security presence and will be limited to a small agreed number (hundreds, not thousands);

- Suspension of military activity will occur after the beginning of verifiable withdrawals;
- The discussion and achievement of a military-technical agreement shall not extend the previously determined time for completion of withdrawals.

Appendix L

The Constitutional Framework for Self-government in Kosovo (2001)¹

Regulation No. 2001/9

The Special Representative of the Secretary-General, Pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo, For the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections, Hereby promulgates the Constitutional Framework for Provisional Self-Government in Kosovo which is attached to the present regulation...

Preamble

The Special Representative of the Secretary-General (SRSG), Pursuant to the authority given to him under United Nations Security Council Resolution 1244(1999) of 10 June 1999 (UNSCR 1244(1999));

Recalling that UNSCR 1244(1999) envisages the setting-up and development of meaningful self-government in Kosovo pending a final settlement;

Acknowledging Kosovo's historical, legal and constitutional development; and taking into consideration the legitimate aspirations of the people of Kosovo to live in freedom, in peace, and in friendly relations with other people in the region;

Emphasizing that, since its establishment, the United Nations Interim Administration Mission in Kosovo (UNMIK) has supported and assisted the people of Kosovo and has worked towards this aim by enabling them to take responsibility gradually for the administration of Kosovo through the establishment of the Joint Interim Administrative Structure (JIAS);

Considering that, building on the efforts undertaken by UNMIK and on the achievements of JIAS, including the valuable contribution by the people of Kosovo, and with a view to the further development of self-government in Kosovo, Provisional Institutions of Self-Government in the legislative, executive and judicial fields shall be established through the participation of the people of Kosovo in free and fair elections;

Determining that, within the limits defined by UNSCR 1244 (1999), responsibilities will be transferred to Provisional Institutions of Self-Government which shall work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244(1999), take full account of all relevant factors including the will of the people;

Considering that gradual transfer of responsibilities to Provisional Institutions of Self-Government will, through parliamentary democracy, enhance democratic governance and respect for the rule of law in Kosovo;

Endeavouring to promote economic prosperity in Kosovo and the welfare of its people through the development of a market economy;

Affirming that the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244(1999);

Taking into account the Charter of the United Nations; the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights and the Protocols thereto; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; the European Charter for Regional or Minority Languages; the Council of Europe's Framework Convention for the Protection of National Minorities; and other relevant principles reflected in internationally recognized legal instruments;

Recognizing the need to fully protect and uphold the rights of all Communities of Kosovo and their members;

Reaffirming the commitment to facilitating the safe return of refugees and displaced persons to their homes and their exercise of the right to recover their property and possessions, and the commitment to creating conditions for freedom of movement for all persons;

Recognizing the importance of creating a free, open and safe environment which facilitates the participation of all persons including all members of Communities in the process of establishing democratic institutions of self-government;

¹ [http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf]

Hereby promulgates the following...

Chapter 1 - Basic Provisions

1.1 Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.

1.2 Kosovo is an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities.

1.3 Kosovo is composed of municipalities, which are the basic territorial units of local self-government with responsibilities as set forth in UNMIK legislation in force on local self-government and municipalities in Kosovo.

1.4 Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions in accordance with this Constitutional Framework and UNSCR 1244(1999)...

Chapter 2 - Principles to be Observed by the Provisional Institutions of Self-Government

The Provisional Institutions of Self-Government and their officials shall...

(b) Promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation...

Chapter 3 - Human Rights

3.1 All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms.

3.2 The Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in:

(a) The Universal Declaration on Human Rights; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (c) The International Covenant on Civil and Political Rights and the Protocols thereto; (d) The Convention on the Elimination of All Forms of Racial Discrimination; (e) The Convention on the Elimination of All Forms of Discrimination Against Women; (f) The Convention on the Rights of the Child; (g) The European Charter for Regional or Minority Languages; and (h) The Council of Europe's Framework Convention for the Protection of National Minorities.

3.3 The provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as part of this Constitutional Framework.

3.4 All refugees and displaced persons from Kosovo shall have the right to return to their homes, and to recover their property and personal possessions. The competent institutions and organs in Kosovo shall take all measures necessary to facilitate the safe return of refugees and displaced persons to Kosovo, and shall cooperate fully with all efforts by the United Nations High Commissioner for Refugees and other international and non-governmental organizations concerning the return of refugees and displaced persons.

Chapter 4 - Rights of Communities and Their Members
General Provisions

4.1 Communities of inhabitants belonging to the same ethnic or religious or linguistic group (Communities) shall have the rights set forth in this Chapter in order to preserve, protect and express their ethnic, cultural, religious, and linguistic identities.

4.2 No person shall be obliged to declare to which Community he belongs, or to declare himself a member of any Community. No disadvantage shall result from an individual's exercise of the right to declare or not declare himself a member of a Community.

4.3 The Provisional Institutions of Self-Government shall be guided in their policy and practice by the need to promote coexistence and support reconciliation between Communities and to create appropriate conditions enabling Communities to preserve, protect and develop their identities. The Institutions also shall promote the preservation of Kosovo's cultural heritage of all Communities without discrimination.

Rights of Communities and Their Members

4.4 Communities and their members shall have the right to:

- (a) Use their language and alphabets freely, including before the courts, agencies, and other public bodies in Kosovo;
- (b) Receive education in their own language;
- (c) Enjoy access to information in their own language;
- (d) Enjoy equal opportunity with respect to employment in public bodies at all levels and with respect to access to public services at all levels;
- (e) Enjoy unhindered contacts among themselves and with members of their respective Communities within and outside of Kosovo;
- (f) Use and display Community symbols, subject to the law;
- (g) Establish associations to promote the interests of their Community;
- (h) Enjoy unhindered contacts with, and participate in, local, regional and international non-governmental organizations in accordance with the procedures of such organizations;
- (i) Provide information in the language and alphabet of their Community, including by establishing and maintaining their own media;
- (j) Provide for education and establish educational institutions, in particular for schooling in their own language and alphabet and in Community culture and history, for which

financial assistance may be provided, including from public funds in accordance with applicable law; provided that, curricula shall respect the applicable law and shall reflect a spirit of tolerance among Communities and respect for human rights and the cultural traditions of all Communities;

- (k) Promote respect for Community traditions;
- (l) Preserve sites of religious, historical, or cultural importance to the Community, in cooperation with relevant public authorities;
- (m) Receive and provide public health and social services, on a nondiscriminatory basis, in accordance with applicable standards;
- (n) Operate religious institutions;
- (o) Be guaranteed access to, and representation in, public broadcast media, as well as programming in relevant languages; and
- (p) Finance their activities by collecting voluntary contributions from their members or from organizations outside Kosovo, or by receiving such funding as may be provided by the Provisional Institutions of Self-Government or by local public authorities, so long as such financing is conducted in a fully transparent manner. Protection of Rights of Communities and Their Members

4.5 The Provisional Institutions of Self-Government shall ensure that all Communities and their members may exercise the rights specified above. The Provisional Institutions also shall ensure fair representation of Communities in employment in public bodies at all levels.

4.6 Based on his direct responsibilities under UNSCR 1244(1999) to protect and promote human rights and to support peace-building activities, the SRSG will retain the authority to intervene as necessary in the exercise of self-government for the purpose of protecting the rights of Communities and their members...

Chapter 9 – The Assembly

...9.1.3 Kosovo shall, for the purposes of election of the Assembly, be considered a single, multi-member electoral district.

(a) One hundred (100) of 120 seats of the Assembly shall be distributed amongst all parties, coalitions, citizens' initiatives, and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.

(b) Twenty (20) of the 120 seats shall be reserved for the additional representation of non-Albanian Kosovo Communities as follows: (i) Ten (10) seats shall be allocated to parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community. These seats shall be distributed to such parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly; and (ii) Ten (10) seats shall be allocated to other Communities as follows: the Roma, Ashkali and Egyptian Communities four (4), the Bosniak Community three (3), the Turkish Community two (2) and the Gorani Community one (1). The seats for each such Community or group of Communities shall be distributed to parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing each such Community in proportion to the number of valid votes received by them in the election to the Assembly...

9.1.7 The Assembly shall have a Presidency consisting of eight Assembly members who shall be selected as follows:

(a) Two members shall be appointed by the party or coalition having obtained the highest number of votes in the Assembly elections;

(b) Two members shall be appointed by the party or coalition having obtained the second highest number of votes in the Assembly elections;

(c) One member shall be appointed by the party or coalition having obtained the third highest number of votes in the Assembly elections;

(d) One member shall be appointed by the party or coalition having obtained the fourth highest number of votes in the Assembly elections;

(e) One member shall be appointed from among the members of the Assembly belonging to those parties having declared themselves representative of the Kosovo Serb Community; and

(f) One member shall be appointed from among the members of the Assembly belonging to parties having declared themselves representative of a non-Kosovo Albanian and non-Kosovo Serb Community. The method for appointing this latter member shall be determined by members of the Assembly belonging to these same Communities.

9.1.8 The Assembly shall endorse these appointments by a formal vote...

Chapter 10 - Ombudsperson

10.1 Natural and legal persons in Kosovo shall have the right, without threat of reprisal, to make complaints to an independent Office concerning human rights violations or actions constituting abuse of authority by any public authority in Kosovo.

10.2 The Office, in accordance with UNMIK legislation in force, shall have jurisdiction to receive and investigate complaints, monitor, take preventive steps, make recommendations and advise on any such matters.

10.3 The Ombudsperson shall give particular priority to allegations of especially severe or systematic violations, allegations founded on discrimination, including discrimination against

Communities and their members, and allegations of violations of rights of Communities and their members...

Appendix M

The Abtisaari Report (2007)¹

Recommendation: Kosovo's status should be independence, supervised by the international community

1. In November 2005, the Secretary-General appointed me as his Special Envoy for the future status process for Kosovo. According to my terms of reference, this process should culminate in a political settlement that determines the future status of Kosovo. To achieve such a political settlement, I have held intensive negotiations with the leadership of Serbia and Kosovo over the course of the past year. My team and I have made every effort to facilitate an outcome that would be acceptable to both sides. But after more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status.

2. Throughout the process and on numerous occasions, both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept nothing short of independence. Even on practical issues such as decentralization, community rights, the protection of cultural and religious heritage and economic matters, conceptual differences — almost always related to the question of status — persist, and only modest progress could be achieved.

3. My mandate explicitly provides that I determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground. It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

4. Nevertheless, resolution of this fundamental issue is urgently needed. Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.

5. The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence.

Reintegration into Serbia is not a viable option

6. A history of enmity and mistrust has long antagonized the relationship between Kosovo Albanians and Serbs. This difficult relationship was exacerbated by the actions of the Milosevic regime in the 1990s. After years of peaceful resistance to Milosevic's policies of oppression — the revocation of Kosovo's autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life — Kosovo Albanians eventually responded with armed resistance. Belgrade's reinforced and brutal repression followed, involving the tragic loss of civilian lives and the displacement and expulsion on a massive scale of Kosovo Albanians from their homes, and from Kosovo. The dramatic deterioration of the situation on the ground prompted the intervention of the North Atlantic Treaty Organization (NATO), culminating in the adoption of resolution 1244 (1999) on 10 June 1999.

7. For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia — however notional such autonomy may be — is simply not tenable.

Continued international administration is not sustainable

8. While UNMIK has made considerable achievements in Kosovo, international

¹ UN, S/2007/168, 26 March 2007.

administration of Kosovo cannot continue. Under UNMIK authority, Kosovo institutions have been created and developed and have increasingly taken on the responsibility of managing Kosovo's affairs. This has set into motion a dynamic political process, which has reinforced the legitimate expectations of the Kosovo people for more ownership in, and responsibility for, their own affairs. These expectations cannot be realized within the framework of continued international administration.

9. Further, while UNMIK has facilitated local institutions of self-government, it has not been able to develop a viable economy. Kosovo's uncertain political status has left it unable to access international financial institutions, fully integrate into the regional economy or attract the foreign capital it needs to invest in basic infrastructure and redress widespread poverty and unemployment. Unlike many of its western Balkans neighbours, Kosovo is also unable to participate effectively in any meaningful process towards the European Union — an otherwise powerful motor for reform and economic development in the region and the most effective way to continue the vital standards implementation process. Kosovo's weak economy is, in short, a source of social and political instability, and its recovery cannot be achieved under the status quo of international administration. Economic development in Kosovo requires the clarity and stability that only independence can provide.

Independence with international supervision is the only viable option

10. Independence is the only option for a politically stable and economically viable Kosovo. Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With continued political ambiguity, the peace and stability of Kosovo and the region remains at risk. Independence is the best safeguard against this risk. It is also the best chance for a sustainable long-term partnership between Kosovo and Serbia.

11. While independence for Kosovo is the only realistic option, Kosovo's capacity to tackle the challenges of minority protection, democratic development, economic recovery and social reconciliation on its own is still limited. Kosovo's political and legal institutions must be further developed, with international assistance and under international supervision. This is especially important to improve the protection of Kosovo's most vulnerable populations and their participation in public life.

12. Kosovo's minority communities — in particular the Kosovo Serbs — continue to face difficult living conditions. The violence perpetrated against them in summer 1999 and in March 2004 has left a profound legacy. While Kosovo's leaders have increased their efforts to reach out to Kosovo Serbs and to improve implementation of standards, protecting the rights of minority communities requires their even greater commitment. At the same time, Kosovo Serbs need to engage actively in Kosovo's institutions. They must reverse their fundamental position of noncooperation; only with an end to their boycott of Kosovo's institutions will they be able to protect effectively their rights and interests.

13. I therefore propose that the exercise of Kosovo's independence, and its fulfilment of the obligations set forth in my Settlement proposal, be supervised and supported for an initial period by international civilian and military presences. Their powers should be strong — but focused — in critical areas such as community rights, decentralization, the protection of the Serbian Orthodox Church and the rule of law. These powers should be exercised to correct actions that would contravene the provisions of the Settlement proposal and the spirit in which they were crafted. Recognizing Kosovo's current weaknesses, the international community's intensive engagement should extend also to institutional capacity-building. I envisage that the supervisory role of the international community would come to an end only when Kosovo has implemented the measures set forth in the Settlement proposal.

14. Notwithstanding this strong international involvement, Kosovo's authorities are ultimately responsible and accountable for the implementation of the Settlement proposal. They will succeed in this endeavour only with the commitment and active participation of all communities, including, in particular, the Kosovo Serbs.

Conclusion

15. Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.

16. For over a year, I have led the political process envisaged in resolution 1244 (1999), exhausting every possible avenue to achieve a negotiated settlement. The irreconcilable positions of the parties have made that goal unattainable. Nevertheless, after almost eight years of United Nations administration, Kosovo's status must be urgently resolved. My recommendation of independence, supervised initially by the international community, takes into account Kosovo's recent history, the realities of Kosovo today and the need for political and economic stability in Kosovo. My Settlement proposal, upon which such independence will be based, builds upon the positions of the parties in the negotiating process and offers compromises on many issues to

achieve a durable solution. I urge the Security Council to endorse my Settlement proposal. Concluding this last episode in the dissolution of the former Yugoslavia will allow the region to begin a new chapter in its history — one that is based upon peace, stability and prosperity for all.

Appendix N

Kosovo's Declaration of Independence (2008)¹

Convened in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo,

Answering the call of the people to build a society that honours human dignity and affirms the pride and purpose of its citizens,

Committed to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness,

Dedicated to protecting, promoting and honouring the diversity of our people,

Reaffirming our wish to become fully integrated into the Euro-Atlantic family of democracies,

Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,

Recalling the years of strife and violence in Kosovo, that disturbed the conscience of all civilized people,

Grateful that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration,

Proud that Kosovo has since developed functional, multiethnic institutions of democracy that express freely the will of our citizens,

Recalling the years of internationally sponsored negotiations between Belgrade and Pristina over the question of our future political status,

Regretting that no mutually acceptable status outcome was possible, in spite of the good-faith engagement of our leaders,

Confirming that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance,

Determined to see our status resolved in order to give our people clarity about their future, move beyond the conflicts of the past and realize the full democratic potential of our society, Honouring all the men and women who made great sacrifices to build a better future for Kosovo,

1. We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

2. We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

3. We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

4. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organisation to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability.

6. For reasons of culture, geography and history, we believe our future lies with the European family. We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

7. We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy. We are committed to working constructively with the United Nations as it continues its work in the period ahead.

8. With independence comes the duty of responsible membership in the international

¹ [<http://www.assembly-kosova.org/?cid=2,128,1635>]

community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbours. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organizations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

10. Kosovo declares its commitment to peace and stability in our region of southeast Europe. Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation. We shall therefore work together with our neighbours to advance a common European future.

11. We express, in particular, our desire to establish good relations with all our neighbours, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future. We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people.

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

Statement of Length

Total length of the thesis, including text and footnotes, but excluding bibliography, appendices, etc. is 99,643 words.