

# THE RIGHT TO SELF-DETERMINATION AND ITS ENFORCEMENT

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## I. INTRODUCTION

The right to self-determination of peoples, alongside the equality of nations, large and small, has been recognized as a basic norm of international law. It is mentioned in the Charter of the United Nations,<sup>1</sup> and has been afforded a special place of prominence in the *International Covenant on Economic, Social and Cultural Rights*<sup>2</sup> and in the *International Covenant on Civil and Political Rights*.<sup>3</sup> It features prominently in the United Nations *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 1960<sup>4</sup> and the *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations* of 1970.<sup>5</sup> On the regional level, it has been endorsed by no less than the *Helsinki Final Act* of 1975.<sup>6</sup>

## II. THE RIGHT TO SELF-DETERMINATION

There are few concepts in international law that have been distorted as much as the right to self-determination in attempts to afford credibility to group-

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1. U.N. CHARTER arts. 15 and 73 [hereafter U.N. Charter].

2. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3.

3. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171.

4. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1414, U.N. GAOR, 11th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

5. *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

6. Final Act of the Conference on Security and Co-operation in Europe, para. VIII, 14 I.L.M. 1292 (1975).

related aspirations. This is partly due to the fact that the right to self-determination over time acquired different shades of meaning that are not always clearly distinguished or evaluated in their proper historical context.

The idea of a right to self-determination of peoples originally emerged from socialist economic thought. Lenin (1870-1924) and Joseph Stalin (1879-1953) invented the concept in the early parts of the twentieth century to explain the standing of political communities within the over-arching and universal economic structures of communism.<sup>7</sup> The prominence of the right to self-determination in international law has been attributed to the American President, Woodrow Wilson (1856-1924), whose Fourteen Point Address of January 8, 1918 has been cited as “transforming self-determination into a universal right.”<sup>8</sup> President Wilson included in those Fourteen Points one that proclaimed, “[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of government whose title is to be determined.”<sup>9</sup> This statement has come to be regarded as the basis of the League of Nations policy for dealing with the subordinate communities of the world empires that were defeated and dissolved through World War I.<sup>10</sup>

The substance of the right to self-determination has not remained static. In fact, four quite different meanings of the right to self-determination can be distinguished, depending in each instance on the nature and disposition of the peoples claiming that right.<sup>11</sup>

7. According to Antonio Cassese, “the first forceful proponent of the concept [of self-determination] at the international level” was Lenin. See A. CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 15 (Cambridge Univ. Press 1995). Earlier, Joseph Stalin had written a detailed pamphlet on self-determination, entitled: *Marxism and the National Question* (1913). See CASSESE, *op. cit.*, at 14. But, according to Cassese, Lenin’s *Thesis on the Socialist Revolution and the Right of Nations to Self-Determination*, published in March 1916, contained “the first compelling enunciation of the principle” of self-determination of peoples.

8. Robert Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 MICH. ST. DCL L. REV. 71, 73 (1975).

9. *Fourteen Points Address delivered on January 8, 1918 to a joint session of Congress by President Woodrow Wilson*, Point 5. See 1 PUB. PAPERS OF WOODROW WILSON: WAR AND PEACE, at 155-59 (eds. R.S. Baker & W.E. Dodd. New York/London: Harper & Bros. 1927).

10. V. VAN DYKE, *HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY* 86 (New York: Oxford Univ. Press 1970).

11. See Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT’L L. REV. 321, 395-416 (1991); Johan D. van der Vyver, *Self-Determination and the Peoples of Quebec*, 10 J. TRANSNAT’L L. & POL’Y 1, 14-19 (2000); JOHAN VAN DER VYVER, *Self-Determination and the Right to Secession of Religious Minorities under International Law*, in PROTECTION THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 251, 258-61 (Peter G Dachin & Elizabeth A. Cole. eds., Colum. Univ. Press 2002); J.D. van der Vyver, *Cultural Identity as a Constitutional Right in South Africa*, 14 STELLENBOSCH L. REV. 51, 53-56, 58 (2003).

Initially, when World War I was drawing to a close, the idea of self-determination of peoples was advanced to legitimize the disintegration of the Ottoman, German, Russian and Austro-Hungarian empires,<sup>12</sup> and within that context the right to self-determination vested in "ethnic communities, nations or nationalities primarily defined by language or culture" whose right to disrupt existing States derived justification from its substantive directive:<sup>13</sup> self-determination here denoted the right of "peoples" in the sense of (territorially defined) nations to political independence.<sup>14</sup>

Following World War II, the emphasis of the concept of self-determination shifted to the principle "of bringing all colonial situations to a speedy end,"<sup>15</sup> the repositories of the concerned right in this sense were colonized peoples, and the substance of their right denoted political independence "of peoples that do not govern themselves, particularly peoples dominated by geographical distant colonial powers."<sup>16</sup>

12. See A. CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 131-34 (Oxford: Clarendon Press 1986); Rupert Emerson, *Self-Determination*, 66 AM. J. INT'L L. 459, 463 (1971); Friedlander, *supra* note 8, at 71.

13. Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 86-87 (1988).

14. It should be noted, though, that even then secession from existing empires was not a right in itself. In the advisory opinion of the International Committee of Jurists in the *Aaland Island Case* it was pointed out that "the right of disposing of national territory" was essentially an attribute of sovereignty and that "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation." *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O. J. (Supp. 3) at 5 (1920). It was only when "the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by applying the normal rules of positive law" that "peoples" may either decide to form an independent State or choose between two existing ones. *Id.* at 6. In such circumstances, when sovereignty has been disrupted, "the principle of self-determination of peoples may be called into play": new aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may surface and produce effects which must be taken into account in the interests of the internal and external peace of nations. *Id.*

15. Western Sahara, 1975 I.C.J. 1, 31 (May 22); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 31 (June 21) (holding that the right to self-determination was applicable to "territories under colonial rule" and that it "embraces all peoples and territories which 'have not yet attained independence'").

16. Berman, *supra* note 13, at 54. See also CASSESE, *supra* note 12, at para. 43, at 76; VAN DYKE, *supra* note 10, at 87; Lynn Berat, *The Evolution of Self-Determination in International Law: South Africa and Namibia, and the Case of Walvis Bay*, 4 EMORY INT'L L. REV. 251, 283 (1990) (referring to self-determination and the equal right of peoples as "twin aspects of decolonization"); Emerson, *supra* note 12, at 463; O. Schachter, *The United Nations and Internal Conflict*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 401, 406-07 (J.N. Moore ed., John Hopkins Press 1974); G. Tesfagiorgis, *Self-Determination: Its Evolution and Practice by the United Nations and its Application in the Case of Eritrea*, 6 WIS. INT'L L.J. 75, 78-80 (1987).

In the 1960's, yet another category of "peoples" came to be identified, namely those subject to racist regimes, and here the concept substantively signified the right of such peoples to participate in the structures of government within the countries to which they belong:<sup>17</sup> the "self" in self-determination was no longer perceived to be territorially defined sections of the population in multinational empires, and did not only comprise peoples under colonial rule or foreign domination, but also came to be identified with the entire community of a territory where the social, economic, and constitutional system was structured on institutionally sanctioned racial discrimination.<sup>18</sup>

Finally, the right to self-determination has been extended to national or ethnic, religious and linguistic minorities within a political community whose particular entitlements are centered upon a right to live according to the traditions and customs of the concerned group. In terms of the *Covenant on Civil and Political Rights*, self-determination as currently perceived thus entails the following principle: "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 practice their own religion, or to use their own language."<sup>19</sup>

*The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* similarly speaks of "the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."<sup>20</sup>

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17. The linkage within the confines of the right to self-determination of systems of institutionalized racism and colonialism or foreign domination may be traced to the United Nations General Assembly's *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* of 1965, in which the United Nations demanded of all States to respect "the right to self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms," and to this end proclaimed that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations." *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).

18. This development was probably prompted by the claim of South Africa that the establishment of independent tribal homelands as part of the apartheid policy constituted a manifestation of the right to self-determination of the different ethnic groups within the country's African population. Not so, responded the international community. The tribal homelands were a creation of the minority (white) regime and did not emerge from the wishes, or political self-determination, of the denationalized peoples themselves.

19. International Covenant on Civil and Political Rights, *supra* note 3, at art. 27; see generally Felix Ermacora, *The Protection of Minorities Before the United Nations*, IV RECUEIL DES COURS 246 (1983).

20. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/136, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/RES/47/135 (1992).

The repositories of a right to self-determination are “peoples.” According to Yoram Dinstein, peoplehood comprises two elements: an objective component, designated by the factual contingencies upon which the unity of the group depends; and a subjective component, constituted by a certain state of mind—the consciousness of belonging, and perhaps the will to be associated with the group.<sup>21</sup>

The concept of “peoples” is not territorially defined. On September 30, 1996, the Governor in Council of Canada referred numerous questions pertinent to the secessionist policy of Quebec’s ruling Party to the Supreme Court of Canada for its opinion.<sup>22</sup> Those questions included one inquiring whether or not there is a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect secession of Quebec from Canada unilaterally. The Canadian Supreme Court for several reasons answered this question in the negative.<sup>23</sup> It should be evident to everyone that the inhabitants of Quebec, being composed of a variety of ethnic or cultural, religious and linguistic population groups, do not constitute a people as defined in international law, and for that reason alone cannot claim a right to self-determination. Sections of the population of Quebec, united by a common ethnic extraction, cultural heritage, religious affiliation, or linguistic preference could of course lament the denial of their right to self-determination on the grounds that they are not permitted to accede to a life-style dictated by their national or ethnic, religious or linguistic identities. But that is *de facto* not the case—at least not as far as (Francophone) Quebecois are concerned.

In virtue of the right to self-determination, governments, through their respective constitutional and legal systems, are required to secure the interests of distinct sections of the population that constitute minorities in the above sense. The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* clearly spells out that obligation: protect, and encourage conditions for the promotion of, the concerned group identities of minorities under the jurisdiction of the duty-bound State;<sup>24</sup> afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong;<sup>25</sup> do not discriminate in any way against any person on basis of his/her group identity,<sup>26</sup> and in fact take action to

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21. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT’L L. Q. 102, 103 (1976).

22. REFERENCE RE SECESSION OF QUEBEC, [1998] 2 S.C.R. 217.

23. *Id.*; see also van der Vyver, *Self-Determination and the Peoples of Quebec*, *supra* note 11.

24. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 20, at arts. 1.1 and 4.2.

25. *Id.* at art. 2.3.

26. *Id.* at art. 3.

secure their equal treatment by and before the law.<sup>27</sup> The Declaration further provides that, “[s]tates shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards.”<sup>28</sup>

It is submitted that the national-law limitation is to be conditioned by the international-standards criterion: it presupposes municipal regulation that remains within the confines of international standards and does not place undue restrictions upon the group interests of minorities.

The Council of Europe’s *Framework Convention for the Protection of National Minorities* specified minority rights in much the same vein: it guarantees equality before the law and equal protection of the laws;<sup>29</sup> States Parties promise to provide, “the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”<sup>30</sup> States Parties recognize the right of persons belonging to a national minority, “to manifest his or her religion or belief and to establish religious institutions, organizations and associations,”<sup>31</sup> and the Framework Convention guarantees the use of minority languages, in private and in public, orally and in writing.<sup>32</sup>

Failure of national systems to provide such protection to sectional interests of peoples within their area of jurisdiction, or merely the perception of being marginalized, must be seen as an important contributing cause of the tireless aspirations toward the establishment of homogenous States for sections of the political community with a strong group consciousness: the Muslim community of Kashmir, the Basques in Northern Spain, the Hindu factions in Sri Lanka, the Catholic minority in Northern Ireland, the Christian community in Southern Sudan, the Kurds in Iraq and Turkey, people of Macedonian extraction in Florina (Northern Greece), and many others.

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27. *Id.* at art. 4.1.

28. *Id.* at art. 4.2.

29. European Framework Convention for the Protection of National Minorities, art. 4.1., 1995 E.T.S. 157, reprinted in 34 I.L.M. 35 (1995).

30. *Id.* at art. 5.1.

31. *Id.* at art. 8.

32. *Id.* at art. 10.1; see also the European Charter for Regional Minority Languages, 1992 E.T.S. 148 (1992), available at [www.conventions.coe.int/treaty/en/Treaties/Html/148.htm](http://www.conventions.coe.int/treaty/en/Treaties/Html/148.htm) (last visited Feb. 18, 2004).

### III. SELF-DETERMINATION AND A RIGHT TO SECESSION

It must be emphasized, though, that the right of peoples to self-determination does not include a right to secession.<sup>33</sup> Not even in instances where the powers that be act in breach of a minority's legitimate expectations. Three compelling arguments are decisive in this regard:

- The right to self-determination is almost invariably mentioned in conjunction with the territorial integrity of States,<sup>34</sup> and reconciling the two principles in question necessarily means that self-determination must be taken to denote something less than secession.
- The right to self-determination vests in a people, while a new State created through secession is essentially territorially defined<sup>35</sup> (it is a defined territory that secedes from an existing State and not a people).<sup>36</sup>
- The right to self-determination is a collective group right (entitlements included in that right can be exercised by individual members of the concerned group, either individually or collectively) while a right to secede is an institutional group right (where permissible, the decision to secede must be taken by a representative organ of the territorially defined group on behalf of the group as a whole).

General definitions of the right to self-determination, such as the one contained in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* proclaiming the right of peoples to "freely determine their political status" and the right to "freely pursue their economic, social, and

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33. See VAN DYKE, *supra* note 10, at 88; Berman, *supra* note 13, at 87; Emerson, *supra* note 12, at 464-65.

34. See, e.g., Final Act of the Conference on Security and Co-operation in Europe, *supra* note 6, at arts. IV (territorial integrity) and VIII (equal rights and self-determination of peoples).

35. According to Hermann Mosler, "States are constituted by a people, living in a territory and organized by a government which exercises territorial and personal jurisdiction." H. Mosler, *Subjects of International Law*, VII ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442, 449 (R. Bernhardt ed., Elsevier, North Holland 2000) (1984). Karl Doehring defined a State in international law as "an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals." K. Doehring, *State*, in X ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 423 (R. Bernhardt ed., 1987); Herman Dooyeweerd defined the foundational function of a State in terms of "an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries." H. DOOYEWEERD, III A NEW CRITIQUE OF THEORETICAL THOUGHT 414 (1969) (maintaining that the leading or qualifying function of the State finds expression in a public legal relationship which unifies the government, the people and the territory constituting the political community into a politico-juridical whole). *Id.* at 433ff.

36. See Dinstein, *supra* note 21, at 109 (noting that peoples seeking secession must be located in a well-defined territorial area in which it forms a majority).

cultural development”<sup>37</sup> should therefore not be seen as a general sanction of a right to political independence but must be limited and understood in the context of the subject-matter of the document from which they derive: peoples subject to colonial rule or foreign domination do have a right to political independence; national or ethnic, religious and linguistic minorities in an existing State do not. The definition of self-determination in international instruments including in that concept the right of peoples “freely [to] determine their political status and freely [to] pursue their economic, social and cultural development”<sup>38</sup> was similarly not intended to undermine the rule of international law proclaiming the territorial integrity of States. The United Nations’ 1993 World Conference on Human Rights said it all when the right of peoples to “freely determine their political status, and freely pursue their economic, social and cultural development” was expressly made conditional upon the following proviso:

This [definition of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.<sup>39</sup>

The Supreme Court of Canada in a judgment pertaining to the legality of cession from Canada of the province of Quebec<sup>40</sup>—should a majority of the residents of that province through a referendum seek to effect the severance of that territory from Canada—summarized as follows the distinction between self-determination (referred to in the judgment as “internal self-determination”) and secession (referred to in the judgment as “external self-determination”):

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37. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, *supra* note 4.

38. *See* International Covenant on Economic, Social and Cultural Rights, *supra* note 2, at art. 1(1); International Covenant on Civil and Political Rights, *supra* note 3, at art. 1(1); Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 4, at art. 2. *See also* *The Principle of Equal Rights and Self-Determination of Peoples in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, *supra* note 5, at para. 5; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, para. 5, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11-12, U.N. Doc. A/6014 (1965); Final Act of the Conference on Security and Co-operation in Europe, *supra* note 6, at art. VIII.

39. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, art. 1.2, U.N. Doc. A/CONF.157/24 (25 June 1993), *reprinted* in 32 I.L.M. 1661, at 1665 (1993).

40. *See* van der Vyver, *supra* note 11.

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of a right to unilateral secession) arises in only the most extreme of cases, and then, under carefully defined circumstances.<sup>41</sup>

There are many compelling reasons why the destruction of existing political communities harboring a plural society should be avoided at all costs: a multiplicity of economically non-viable states will further contribute to a decline of the living standards in the world community. The perception that people sharing a common language, culture or religion would necessarily also be politically compatible is clearly a myth, and disillusionment after the event might provoke profound resentment and further conflict. Movement of people within plural societies across territorial divides has greatly destroyed ethnic, cultural, or religious homogeneity in regions where it might have existed in earlier times, and consequently, demarcation of borders that would be inclusive of the sectional demography which secessionists seek to establish is in most cases quite impossible. Affording political relevance to ethnic, cultural, or religious affiliation not only carries within itself the potential of repression of minority groups within the nation, but also affords no political standing whatsoever to persons who, on account of mixed parentage or marriage, cannot be identified with any particular faction of the group-conscious community, or to those who—for whatever reason—do not wish to be identified under any particular ethnic, religious or cultural label. In consequence of the above, an ethnically, culturally, or religiously defined State will more often than not create its own “minorities problem,” which—because of the ethnic, cultural or religious incentive for the establishment of the secession State—would almost invariably result in profound discrimination against those who do not belong, or worse still, a strategy of “ethnic cleansing.”

Secession is indeed sanctioned by international law—not under the rubric of a right to self-determination but as a permissible political strategy in its own right. The restructuring of national borders is sanctioned by international law in two instances only: (a) if a decision to secede is “freely determined by a people”<sup>42</sup>—that is, a cross-section of the entire population of the State to be

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41. REFERENCE RE SECESSION OF QUEBEC, *supra* note 22, at para. 1R6.

42. *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 5. Providing, under the heading, “The Principle of Equal Rights and Self-Determination of Peoples:” “The establishment of a sovereign and independent State, the free association or integration with an independent State or the

divided and not only inhabitants of the region wishing to secede; and (b) if, following an armed conflict, national boundaries are redrawn as part of the peace treaty.<sup>43</sup> On the first basis alone, could the United Nations find peace with the reunification of Germany, the break-up of the Soviet Union,<sup>44</sup> and parting of constitutional ways of the Czech Republic and Slovakia.<sup>45</sup> The secession of Eritrea from Ethiopia exemplifies the second principle. The disintegration of the former Yugoslavia represents a complicated conglomeration of both principles.<sup>46</sup>

#### IV. ENFORCEMENT OF THE RIGHT TO SELF-DETERMINATION

The primary responsibility to secure the right to self-determination of national or ethnic, religious or linguistic sections of the population within a political community vests in the legislative and executive authorities of the State. Failure of a government to secure that right can possibly provoke the following responses within the international community of States.

Should the Security Council of the United Nations be persuaded that denial of the right to self-determination to a people, and the responses of that people, take on such proportions as to constitute a threat to international peace and security, it can, pursuant to powers vested in it by Chapter VII of the UN Charter, take a decision to that effect and mandate action to bring an end to the situation at hand as it may find expedient, including sanctions of all kinds and,

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emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”

43. See CASSESE, *supra* note 12, at 359-63.

44. It should be specially noted that the USSR Constitution expressly guaranteed the right of each Republic to secede from the Union. SSSR [Constitution] art. 72, available at <http://www.departments.bucknell.edu/russian/const/77cons03.html> (last visited Feb. 18, 2004).

45. Lee Buchheit specified, as elements for legitimizing secession in any given case, that the section of a community seeking partition should possess a distinct group identity with reference to, for example, cultural, racial, linguistic, historical or religious considerations; those making a separatist claim must be capable of an independent existence, including economic viability (but bearing in mind international aid programs that might help a newly established political entity over its teething problems); and the secession must serve to promote general international harmony, or at least not be disruptive of international harmony or disrupt it more than the *status quo* is likely to do. LEE BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 228-38 (New Haven: Yale Univ. Press 1978).

46. The Constitution of Yugoslavia authorized secession of its constituent republics. F.R. YUGO. (1946) art. 1; see also F.R. YUGO. para. I, Introductory Part (Basic Principles) (1963) (depicting Yugoslavia as “a federal republic of free and equal peoples and nationalities” united “on the basis of the right to self-determination, including the right of secession”); and *id.* at art. 1; F.R. YUGO., para. I, Introductory Part (Basic Principles) (1974) (referring to “the right of every nation to self-determination” and “the brotherhood and unity of nations and nationalities”). However, the disintegration of the federation did not occur in accordance with the procedures prescribed for the exercise of the constitutional right to secession, and furthermore included territorial gains through conquest and ethnic cleansing.

in extreme circumstances, even armed intervention.<sup>47</sup> Relying on the Security Council to take action would require quite exceptional circumstances. The Security Council does not readily invoke its Chapter VII powers, its punitive powers can only be applied to States, and the five Permanent Members (China, France, Russia, the United Kingdom, and the United States) can exercise their power of veto in the Council to protect themselves or their allies from condemnation and retributive action.

If denial of the right to self-determination constitutes a consistent pattern of gross and reliably attested violation of human rights and fundamental freedoms, the matter may be taken under advisement by the Human Rights Commission under the public procedure provided for in Resolution 1235 of 1967 of the Economic and Social Council of the United Nations<sup>48</sup> or the confidential procedure provided for in Resolution 1503 of 1970 of the Economic and Social Council.<sup>49</sup> All Member States of the United Nations are subject to the procedures provided for in ECOSOC Resolutions 1235 and 1503 since those procedures stem from the solemn pledge of Member States, in terms of Articles 55 and 56 of the UN Charter, "to take joint and separate action in cooperation with the [United Nations] Organization" for the achievement of "universal respect for and observance of, human rights and fundamental freedoms for all without distinction based on race, sex, language or religion."<sup>50</sup> The proceedings can be set in motion by any person or group of persons who can be reasonably presumed to be victims of "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms," or who has direct and reliable knowledge of such violations.<sup>51</sup> A complaint can also be lodged with the Secretary-General of the United Nations (to be transmitted to the Human Rights Commission) by a non-governmental organization (NGO) acting *bona fide* in accordance with recognized principles of human rights, which does not entertain political stands hostile to the principles contained in the UN Charter, and which has direct and reliable knowledge of such violations.<sup>52</sup> The procedures are aimed at persuading the culprit State to desist from the offensive action, and can also prompt the appointment of a special rapporteur to investigate and report on the situation prevailing in the defendant State.

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47. U.N. CHARTER, *supra* note 1, at arts. 39-42.

48. *Economic and Social Council Resolution 1235 (XLII)*, 42 U.N. ESCOR, 42d Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967).

49. *Economic and Social Council Resolution 1503 (XLVIII)*, 48 U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970).

50. U.N. CHARTER, *supra* note 1, at art. 56 (read with art. 55(c)).

51. SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, 24th Sess., Res. 1 (XXIV), at 50-51, U.N. Doc. E/CN.4/1070 (1971).

52. *Id.*

States Parties to an international covenant or convention may be subject to procedures designed to bring their violations of the treaty provision relating to self-determination to a peaceful settlement, but subject to the constraints applying to the particular covenant or convention. However, procedures provided for in international instruments for accosting States that violate the right to self-determination of a people under their jurisdiction provide cold comfort to victims of such violations. The *Covenant on Economic, Social and Cultural Rights* only makes provision for periodic reports of States Parties on measures adopted and progress made in achieving the rights enunciated in the Covenant.<sup>53</sup> The *Covenant on Civil and Political Rights* entails a similar reporting obligation,<sup>54</sup> but also contains facultative provision for an inter-state adversarial procedure<sup>55</sup> and under its First Protocol in addition makes provision for an individual complaint procedure.<sup>56</sup> The United States has submitted itself to the inter-State adversarial procedure<sup>57</sup> but has not ratified the First Protocol.

Should denial of the right to self-determination amount to the intentional and severe deprivation of fundamental human rights contrary to international law by reason of the political, racial, national, ethnic, cultural, religious, or gender-based<sup>58</sup> identity of the group or collectivity, or on other grounds that are universally recognized as impermissible under international law, the individual responsible for the deprivation may possibly be prosecuted in the International Criminal Court for the crime of persecution,<sup>59</sup> or in a national court with power to exercise universal jurisdiction in the particular case.<sup>60</sup>

The exercise of jurisdiction by the ICC is subject to all kinds of limitations. The Court's jurisdiction may be triggered by the Security Council of the United Nations, a State Party, or the Prosecutor acting *proprio motu*.<sup>61</sup> The exercise of jurisdiction by the ICC in cases of Security Council referrals are not subject to

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53. International Covenant on Economic, Social and Cultural Rights, *supra* note 2, at art. 16.

54. International Covenant on Civil and Political Rights, *supra* note 3, at art. 40.

55. *Id.* at art. 41.

56. *Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, 31st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316, (1976).

57. 138 CONG. REC. 4783, para III(3) (1992).

58. The ICC Statute defines "gender" as "the two sexes, male and female, within the context of society. The terms 'gender' does not indicate any meaning different from the above." This, rather silly, definition was inserted in the Statute as a compromise with the Holy See and certain Arab States with intent to preclude the persecution of Gays and Lesbians from the reach of ICC jurisdiction.

59. *Statute of the International Criminal Court*, art. 7(1)(h), read with art. 7(2)(g), U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 1002 (1998) [hereafter ICC Statute].

60. Drafters of the ICC Statute operated under a resolve to include within the subject-matter of the ICC only crimes designated as such in customary international law, and one may therefore safely assume that the crimes over which the ICC can exercise jurisdiction are indeed customary-law crimes and therefore subject to universal jurisdiction.

61. ICC Statute, *supra* note 59, at art. 13.

further constraints,<sup>62</sup> but a Security Council referral can be vetoed by any of its Permanent Members. In cases of State Party referrals, there is a further constraint: the ICC can only exercise jurisdiction in the matter if the State of which the perpetrator is a national (the national State) or the State on whose territory the crime was allegedly committed (the territorial State) has either ratified the ICC Statute, or has on an *ad hoc* basis agreed to the exercise of jurisdiction by the ICC in the particular case under investigation.<sup>63</sup> Investigations conducted by the Prosecutor *proprio motu* are also only feasible if the national State or the territorial State has either through ratification of the ICC Statute or a special declaration agreed to the exercise of jurisdiction by the ICC.<sup>64</sup> But here, yet a further constraint applies: the decision of the Prosecutor to conduct an investigation must be approved by a three-judge Pre-Trial Division of the ICC.<sup>65</sup>

The United States has not ratified the ICC Statute. It is bound to veto a Security Council referral accosting an American national of acts of persecution.<sup>66</sup> If an American national were to be suspected of persecution in a country other than the United States and that other country has either ratified the ICC Statute or has agreed on an *ad hoc* basis to the exercise of jurisdiction by the ICC in the particular case under investigation, then that person can be prosecuted in the ICC, provided the ICC can lawfully acquire custody of the suspect.<sup>67</sup> If there is an extradition treaty in place between the United States and that other State, the latter is given a judicial discretion to either extradite the perpetrator to the United States or to surrender him or her for trial in the ICC, taking into account the respective dates of the request for extradition and the request for surrender to the ICC, the fact that the perpetrator is an American citizen, and the nationality of the victim(s) of the crime.<sup>68</sup> Unconditional preference is given to status-of-forces agreements mandating a State where American troops have been deployed to surrender any of those troop to stand trial in the United States for crimes committed in the other State.<sup>69</sup> The United

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62. However, the Security Council cannot confer powers on the ICC that the ICC does not have by virtue of its Statute. The ICC can, for example, only prosecute persons over the age of 18 years, it only has jurisdiction in respect of crimes committed after July 1, 2002, it cannot exercise jurisdiction while a State with a special interest in the matter is willing and able to investigate the alleged crime and, if appropriate, bring the perpetrator to justice. The Security Council cannot instruct the ICC to deviate from any of these restrictions.

63. ICC Statute, *supra* note 59, at arts. 12(2) and (3).

64. *Id.*

65. *Id.* at arts. 15(3) and (4).

66. American Servicemembers' Protection Act of 2002, 22 U.S.C. 7401 (2002).

67. The duty to cooperate with the ICC to bring the perpetrator of a crime within the Court's jurisdiction is based, in accordance with the Vienna Convention on the Law of Treaties, on state consent. ICC Statute, *supra* note 59, at arts. 86, 87(1)(a), 89(1).

68. *Id.* at art. 90(6).

69. *Id.* at art. 98(2).

States can in all cases foreclose the exercise of jurisdiction over any of its nationals by self-conducting a *bona fide* investigation into the alleged crime.<sup>70</sup>

As far as ICC jurisdiction is concerned, it is in the present context important to note that cultural genocide—deliberate efforts of persons in authority to destroy a particular culture—is not included in the concept of “genocide” as a crime that can be prosecuted in that tribunal.<sup>71</sup> The definition of “genocide” in the ICC Statute<sup>72</sup> is founded on the one in the *Convention on the Suppression and Punishment of the Crime of Genocide*,<sup>73</sup> and that definition cannot be extended by the ICC through analogical interpretation.<sup>74</sup> A proposal to include cultural genocide in the Convention definition of “genocide” was deliberately rejected by the *ad hoc* Committee on Genocide responsible for its drafting.<sup>75</sup> Furthermore, the only category of acts of genocide under which cultural genocide could possibly come into play is the one consisting of deliberately inflicting on an ethnical group conditions of life calculated to bring about its physical destruction in whole or in part. “Physical destruction” is not an element of any of the other enumerated instances of genocide and must consequently be given a definite meaning in the context of deliberately inflicting on a group conditions of life calculated to bring about its physical destruction. “Physical destruction” means the destruction of the group by causing the death of members of the group. Destroying a culture without killing members of the group united by a common cultural extraction does not fall within the ordinary meaning of “physical destruction”.<sup>76</sup>

## V. CONCLUSION

It is the sovereign right of States to regulate their internal affairs in accordance with national predilections, but States ought to do that within the

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70. *Id.* at art. 17(1).

71. *See contra*, Kai Ambos & Steffen Wirth, *Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 769, 792-93 (Horst Fishcher, et al. eds., Berlin Verlag: Arno Spitz GmbH 2001); Steffen Wirth, *The Subjective State of Affairs of Genocide—A Destruction, Intention and Expulsion Crime*, in *28 ARGUMENT AND MATERIALS TO THE TIME EVENTS* 59, 62 (Munich: Academy and Politics for Time Events 2001).

72. ICC Statute, *supra* note 59, at art. 6.

73. *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9 1948, art. 2, 78 U.N.T.S. 277 (1948).

74. ICC Statute, *supra* note 59, at art. 22(2).

75. *See* U.N. CAOR, 6th Comm., 3d Sess., 83d mtg. at 206, U.N. Doc. A/C.6/SR.83 (1948).

76. *See, e.g.*, Steven R. Ratner, *The Genocide Convention After Fifty Years*, 92 AM. SOC'Y OF INT'L. PROC. 1, 2 (1998); Julio Barboza, *International Criminal Law*, 278 RECUEIL DES COURS 9, 59 (1999); van der Vyver, *Cultural Identity as a Constitutional Right in S. Afr.*, *supra* note 11, at 64-66.

confines of their obligations under international law.<sup>77</sup> As far as the right to self-determination of peoples is concerned, the United States has a fairly good record, but not one that is entirely beyond reproach.

In 1998, the United Nations Special Rapporteur on Religious Freedom, Prof. Abdelfattah Amor of Tunisia, conducted an informal investigation in the United States into compliance in this country with the subject-matter of his brief.<sup>78</sup> Although the state of religious freedom in the United States is by and large satisfactory, the Special Rapporteur found causes for concern in this regard in respect of members of the Arab community being singled out for special scrutiny at airports (which is not a matter of self-determination) and insensitivity of American authorities to the spiritual values of Native Americans (which does implicate the right of Native Americans as a people to self-determination).<sup>79</sup>

The right to self-determination recognizes in broad outline the fact of ethnic, cultural, religious and linguistic diversities within a political community (pluralism) as a salient fact that ought to be accommodated in the political structures and legal arrangements of the State. However, it is equally important that group alliances based on a common ethnic extraction, cultural heritage, religious conviction, or linguistic identity ought not to be afforded a role within the body politic beyond the distinctive attribute that constitutes the bond between members of the group.

It is of the essence of the right to self-determination that the relevance of group interests is to be cut down the size, dictated by the nature of the group. The protected interests of a cultural group are to be confined to cultural interests, of a religious group to matters of religion, and so on. To afford *political* representation in the structures of government to a *cultural* or a *religious* group, would amount to affording to those latter modalities that qualify the group a pertinence beyond the confines of its true (and useful) destination in the aggregate of human society.

Enforcement of the right to self-determination through international mechanisms is problematic, but not hopeless. Existing retributive procedures by and large culminates in no more than international condemnation. However one should not underestimate the long-term potential of international censure

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77. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331 (stating that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

78. The visit to the United States was "informal" because the American government declined to invite Prof. Amor to conduct an investigation in the United States. He came to the country as the guest of several NGOs and was offered the facilities of a number of Law Schools to conduct an *in loco* investigation.

79. Report Submitted by Mr. Abdelfattah Amor, Special Rapporteur in accordance with Commission on Human Rights Resolution 1998/18, U.N. GAOR, Hum. Rts. Comm., 55th Sess., Agenda Item 11(c), Addendum, U.N. Doc. E/CN.4/1999/58/Add.1 (1998).

for bringing recalcitrant States to their senses. International reprobation seldom renders immediate results, but if the condemnation remains widespread and pressures persist, they are bound to have effect in the long run. Governments do not like to be seen to be violators of international standards of human rights protection.