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The Self-determination Trap

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ABSTRACT This article deconstructs the classical doctrine of self-determination, asserting that it serves to disenfranchise populations, instead of enfranchising them. Accordingly, self-determination discourse is not likely to satisfy those struggling for sovereign statehood, resulting instead in prolonged and bloody internal armed conflicts. The article then considers new state practice that accepts the application of self-determination in the sense of secession outside of the colonial context, but only under the very narrow criteria of the new doctrine of constitutional self-determination. Finally, the article asks whether a new generation of self-determination settlements is pointing a way out of the deadlock that is generated through the application of classical self-determination rules.

"It is for the people to determine the destiny of the territory and not the territory the destiny of the people."[1] This renowned definition of the right to self-determination, expressed by Judge Dillard in his Individual Opinion in the 1975 Western Sahara case, proves two things. First, it confirms that lawyers too can manage a pretty turn of phrase. Second, this statement, perhaps like no other famous dictum in international law, demonstrates the dangers of well intentioned judicial activism: for there has rarely been a pronouncement more dangerously mistaken than this one.

Judge Dillard proposes, most sensibly it seems at first sight, that people must triumph over the accidents of geography and of historically established territorial divisions. People act according to their free will and must therefore be able to shape their destiny through collective decisions. Since 1945 this view underpins the international system as a legitimizing myth. The legitimacy of its most basic building block, the 'sovereign' state, is derived from the assumption that the state is nothing other than a machine to form and implement an aggregated common will of its people. Accordingly, the state itself is supposed to have been formed by an act of will of its citizens. If the creation of the state is the product of an act of will, then a further collective decision should also suffice to undo it. Moreover, human beings do not surrender their free will by deciding to join into, or form, a collectivity. Hence, one would presume that groups within an existing state must also be able to assert their will by deciding to leave an existing state and

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form a new sovereign unit. Such a decision would be made manifest by an expression of will of the population concerned, for instance through a referendum.

While this sounds logical, reality is of course very different. The international system has 'balanced' the competing aims of accommodating the ideology of free will against the purported aim of maintaining stability, order and peace. Accordingly, the international system has developed in a way that it can, on the one hand, draw legitimacy from a doctrine of popular will. The political principle, and legal rule, of self-determination is the most potent expression of this concept. However, on the other hand, those who operate the system have ensured that the very doctrine of self-determination that purports to enfranchise people actually serves to disenfranchise them, in the interest of maintaining peace and stability. Rather than offering citizens a choice, the doctrine of self-determination has been constructed in a way that limits or denies choice. In fact, generally self-determination is a rule that empowers those who oppose choice, even by violent means, where the territorial definition of the state is concerned. This is justified with reference to the need to privilege the aim of maintaining stability, order and peace over competing values.

Rather than preventing conflict, however, the rule of self-determination has generated a dynamic that sustains conflict. For those who seek to assert their identity are forced into an absolute position. As the international system privileges the interest of the state over the position of groups challenging its territorial unity, most central governments feel under no pressure to accommodate demands for change. Compromise constitutional settlements that might maintain the unity of the state, while permitting a greater expression of diverse identities through the legal and political system, have therefore often been denied. Instead, the state will tend to label groups that agitate for a more pronounced identity secessionists and rebels. Under the cover of international rules, it will attempt to suppress them. However, in most instances, this has not led to a disappearance of the problem. Instead of giving up, in many instances resistance groups have responded by radicalizing their demands, claiming that only outright statehood can preserve the interests of their constituents—as is demonstrated by the very repression that was launched by the central state in response to their original campaign. A vicious circle ensues. Given the absence of any sort of international remedy—states having protected their freedom to engage 'rebellions' of this kind in an undisturbed manner through the doctrine of non-intervention—the opposition movements will often see an armed struggle as the only way of furthering their aims.

These types of conflict have been among the most damaging and protracted to have bedevilled states and the international system since 1945. Marshall & Gurr (2003) list 72 self-determination conflicts that have been conducted over that period, with only 24 of these having been settled or concluded through victory by one side. They have been sustained, rather than resolved, through the doctrine of self-determination. The doctrine has energized secessionist movements, on the one hand, in their mistaken belief that they are engaged in a just struggle that must ultimately be recognized by the international system. On the other hand, the governments have taken comfort from the fact that they have constructed the self-determination rule in a way that does not in any way affect their ability to quash separatist groups.

Accordingly, virtually all the instances of opposed unilateral secession a) resulted in violent conflict and were b) either brought to a close through a bloody and decisive victory of the government or festered for decades. A classical example is furnished by the extremely destructive conflict about Biafra that resulted in a humanitarian catastrophe.

The United Nations refused to intervene during the conflict and only mounted a humanitarian operation after Nigeria had defeated the secession. In another instance, Katanga seceded from the Congo at the point of decolonization. A UN peace-keeping force actually defeated the secessionists under a slightly ambiguous UN mandate. Only East Pakistan managed to obtain statehood through unilateral, opposed secession, although in unique circumstances, and in consequence of an armed action from neighbouring India.

Where there was no decisive military result, conflicts have continued at times over decades. For instance, some of the ethnic self-determination insurgencies in relation to Burma/Myanmar have persisted literally since independence over half a century ago. Others have been concluded only very recently.

Of course, the rigidity of the classical doctrine of self-determination has been subjected to numerous challenges since it consolidated during the 1960s. In particular, the unfreezing of the cold war certainties since 1989 has brought with it significant challenges to the doctrine of territorial unity. However, as this article will argue, even these challenges were addressed in a way that has left the restrictive doctrine of self-determination in place. The result is the fragile insistence on the continued existence or territorial unity of threatened states in Eastern Central Europe. In Bosnia and Herzegovina a massive international military presence has been deployed for a full 10 years now with this end in mind. In relation to Moldova and Georgia, the Organisation for Security and Cooperation in Europe (OSCE) has been attempting for a similar period to negotiate settlements to the Transdnistria, Abkhaz and South Ossetia conflicts that somehow maintain the unity of both states. Similarly, initial pledges were made to maintain the territorial integrity of the former Yugoslav Federation (Serbia and Montenegro) in relation to Kosovo, however impossible that might ultimately appear to be.

Nevertheless, after the disasters of the destructive ethnopolitical and ethnoterritorial conflicts of the Balkans, the Caucasus and other areas in the first half of the 1990s, a ray of hope has emerged. We can now see the emergence of some self-determination settlements that appear to indicate a willingness of central governments, the self-styled self-determination movements and international actors to escape from the trap imposed by the self-determination rule. Hence, new settlements have been emerging that do not always necessarily preclude self-determination in the sense of secession, while at the same time offering a new relationship between the central state and the secessionist unit that could make continued territorial unity possible.

This article dissects the main strands of classical discourse about self-determination. It then turns to consider the development of the doctrine of constitutional self-determination—an innovation of the 1990s. It then briefly addresses the most recent practice of complex power-sharing settlements and asks whether these will indeed point a way out of the self-determination trap.

The Classical Right to Self-determination

Self-determination disenfranchises populations. This process of disenfranchisement has traditionally proceeded in five steps. First, self-determination is intrinsically linked with, and deployed to justify, the disenfranchising doctrine of territorial unity. Second, there is the issue of the definition of the object of protection of the right to self-determination—that is to say, the definition of the types of 'people' entitled to exercise this right. Third, there is the scope of application of the right to self-determination.

That is to say, even if a 'people' is designated as a right holder, does this right trump previously existing territorial definitions, or is it exercised within these confines? Then there is the issue of the singularity of implementation of the right—is it a continuous process, or is it a one-time-only event? Finally, there is the problem of the modalities of achieving the point of self-determination.

Before turning to each of these features of classical self-determination discourse in turn, it might be useful first to distinguish the concept from other contexts in which it is used.

A Concept with Multiple Meanings

This article addresses self-determination as the right of all peoples freely to determine their political, economic and social status—the formulation used in virtually all relevant UN documents addressing the issue. However, this definition is broad and can be taken to encompass both external and internal self-determination. External self-determination will normally be taken to include the right to secession. Internal self-determination concerns the choice of a system of governance and the administration of the functions of governance according to the will of the governed. The following are examples of the different layers of meaning of self-determination in a legal sense:

- *Self-determination as an individual right.* Self-determination is not only a right exercised by peoples or groups. It is also a human right of individuals. Hence individuals are entitled to participation in the political, economic or cultural system of their state. In that sense, the individual right to self-determination might be seen to be co-extensive with the right to some form of democratic governance. However, for a long time this 'right' has been reduced to an underlying political doctrine that was not actionable. It is only now, albeit somewhat hesitantly, surfacing as a firm legal entitlement.
- *Self-determination as a right appertaining to members of groups and perhaps groups themselves.* Self-determination is also a right that can be invoked by members of certain groups, such as national, religious, ethnic or linguistic minorities. In this sense, self-determination is congruent with minority rights. Minority rights protect the existence of national, religious, linguistic or ethnic groups, facilitate the development of their identity and ensure that they can fully and effectively participate in all aspects of public life within the state. While it was previously argued that minority rights are only held by members of minorities individually, it is clear that they can be exercised in community with others. There may also be emerging a recognition of a group identity as an object of legal protection, although this remains controversial. This includes entitlements to cultural autonomy. Some would argue that there may also be an entitlement to territorial autonomy where national minorities constitute a local majority, but this is not yet accepted in general practice.
- *Self-determination and indigenous peoples.* In addition to their cultural identity, indigenous populations tend to claim a historic and particularly strong bond with certain territories they have occupied since time immemorial. Indigenous rights, therefore, not only seek to enhance the maintenance of the cultural identities of indigenous peoples but they may also extend to land rights and political/territorial autonomies. While the technical term 'people' is applied to indigenous populations in ILO Convention 169, the Convention immediately clarifies that this is not meant to imply a people's right to external self-determination in the sense of international law.[2]

- *Self-determination in case of a limited territorial change.* Where a significant tranche of territory is moved from one sovereign state to another, the population of that territory may be entitled to express and subsequently exercise its preferences through a plebiscite. As opposed to the self-determination of peoples, this entitlement does not extend to a free determination of the international legal status of the territory—for instance to opt for independence or association with a third state. Instead, it is limited to an endorsement or rejection of the change that is proposed by the governments concerned. This doctrine is, however, displaced in certain circumstances, for instance in cases of territorial change that are anticipated in historical arrangements such as the hand-over of Hong Kong. At times it may be contested whether the inhabitants of the territory in question are a 'people' entitled to self-determination of *peoples*, or merely a *population* attached to a stretch of territory and hence only entitled to a plebiscite. For instance, the population of Gibraltar might argue that they are a people entitled to full self-determination, while Spain and the UK take somewhat differing views in relation to a more limited form of self-determination that may apply subject to the provisions of the Treaty of Utrecht of 1713. That treaty provides a right of first refusal for Spain in relation to the territory should the UK ever withdraw from it.
- *External self-determination of peoples.* Self-determination of peoples implies a right unilaterally to initiate a change in the status of a territory through an act of will of the population of that entire territory. In this way, self-determination of peoples differs from the right of a population to co-determine the future of a portion of territory through a plebiscite that was noted above. This latter kind of 'self-determination' is ancillary to a decision of states to effect a transfer of territory. A population rejects or ratifies the decision of the states involved. Self-determination of peoples, on the other hand, is an original right that is vested in 'a people' merely by virtue of the fact that the technical label 'people' attaches to a specific population and territory. Whether the state involved favours any sort of territorial change is inconsequential; the exercise of the will of the 'people' so nominated is alone decisive.

Manifestly, the doctrine of self-determination has different legal consequences in these different contexts. Within the confines of this discussion the principal focus must lie in self-determination as an entitlement of 'peoples' freely to determine the international legal status of a territory.

The Issue of State Consent

Virtually all inhabitable portions of the globe are subject to the territorial jurisdiction of one state or another. Virtually all human beings also find attached to themselves the claim to jurisdiction of at least one state. Hence, if people wish to form a new state, this can only occur at the expense of an existing one, both in terms of human and territorial resources. This can occur either with the consent of the central government concerned or, more likely, against the opposition of the government. In the former case, it is of course not necessary to rely on a right to self-determination.

A divorce by agreement has occurred in a few instances (e.g. Malaysia/Singapore). Where this consent from the central government is lacking, the international system will tend to deny legal personality to those seeking separation. This may appear illogical, as the relevance of 'sovereign' acts, such as the granting of consent, of the central government

in relation to the entity seeking secession constitutes, of course, the very essence of any self-determination dispute. However, the legal system protects the claims of governments and will normally only offer status if the government concerned consents.

Changes of status by consent occur in a number of instances. These include:

- *Instances where one state joins another*. For instance, when the new German Federal states of the former German Democratic Republic joined the Federal Republic of Germany, the legal personality of the latter persisted, with the former being extinguished. There can also be state unions, where a new composite state is formed, with both constituent entities relinquishing their international legal personality.
- *Instances of dissolution of composite states*. The division of Czechoslovakia into the Czech and Slovak Republics serves as an example. Czechoslovakia disappeared as a sovereign entity. In contrast, the new constitution of Serbia and Montenegro provides for the continuation of legal personality of the overall state for Serbia, should Montenegro opt to leave. Similarly, when the USSR dissolved, all its successor states agreed that the Russian Federation would continue the legal personality of the former Union.
- *Instances of secession*. In such cases, it is clear that only one element of a composite state splits off, without bringing into question the legal personality of the state. An example is furnished by the secession by agreement of Eritrea from Ethiopia.

The manifestation of an act of will of the population is necessary even where a government agrees to the separation of certain territories. Hence, the agreement on the possible secession of Eritrea required the holding of a referendum after an interim period to confirm that this change in status would indeed be in accordance with popular will. Again, however, there remains a crucial difference between this and cases of opposed secession. The exercise of the will of the population followed on from a previous agreement by the central government that a referendum could be held and that its results would be respected. An international legal entitlement to self-determination was not necessarily the trigger for this process at the outset. Instead, the exercise of self-determination flowed from a previous, voluntary decision of the newly constituted central Ethiopian government that consisted of the victorious former rebel movements. Subsequently, Ethiopia entered into its constitution a provision permitting in advance the secession of its remaining constituent units—a case of constitutional self-determination that will be considered later.

In contrast, the essence of the traditional right of self-determination of peoples is that it in itself constitutes a valid basis for a claim to secede, irrespective of the wishes of the central government. Therefore, one is really talking about a right to unilateral and mostly opposed secession. Naturally, such a right is perceived to be very dangerous by governments, as it can be exercised autonomously from their consent and control. It is not surprising that the right to self-determination in the sense of unilateral and opposed secession has been defined very restrictively. After all, it is governments that make the law in the international sphere, and they can be expected to do so according to their shared perception of central state interests.

Self-Determination as an Exceptional Right

The right to opposed unilateral secession stands in obvious tension with the claim to territorial integrity and unity of existing states. Governments have enshrined the doctrine of

territorial unity in countless international declarations and other instruments, often tied to, or twinned with, declarations concerning self-determination. The first element of disenfranchisement lies in the very existence of a right to self-determination. While this right purports to enfranchise populations wishing to exercise their will, it does the opposite. In generating what is an exceptional entitlement to secession, self-determination appears to confirm that secession is not otherwise available in circumstances where the central government refuses to consent to a separation. This strengthens the view that a secession that is not covered by the exceptional right to (colonial) self-determination amounts to an internationally unlawful act. This, for example, was the view (wrongly) taken by the rump Yugoslavia in relation to Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia. The consequence of this—mistaken—view would be that an entity that succeeds in secession would be an unlawful entity.

Unlawful entities are well known in international law. These are entities that have come into being in violation of essential rules of the international community as a whole, such as the prohibition of the use of force by states (Northern Cyprus), the right to self-determination (Southern Rhodesia after its Unilateral Declaration of Independence by the white minority government), the prohibition of apartheid (the so-called Banthustans), or the prohibition of genocide and ethnic cleansing (the Republika Srpska and Herzeg Bosna). Such entities may display the objective criteria of statehood, of territory, population and government. However, this will not trigger the consequence of statehood that would ordinarily result. Instead, these entities are non-states and all states may be under an obligation not to recognize them as states or assist them in maintaining their illegal status.

Practice shows that opposed unilateral secession that does not involve the unlawful use of external force, genocide, apartheid, etc., is not in itself internationally unlawful. An entity that manages to secede and to maintain itself effectively can over time obtain statehood and have this fact confirmed through international recognition, even if the central government objects. However, in its attempts to obtain statehood the entity is not legally privileged—it enjoys no right as a legal subject in and of itself. Therefore, the central government will continue to claim an entitlement to incorporate the seceding entity through fire and sword if necessary. This entitlement would persist until the time when the entity had demonstrated its effectiveness to the extent necessary for statehood. However, in the absence of external recognition, it is difficult to identify this point in time. After all, the central government (or former central government) can argue that the entity is not effective, and will never be effective, as it only exists so long as it is not forcibly reincorporated. And such an act can occur at any moment chosen by the central government. One might say that Somaliland is at present in such a state of legal uncertainty. As was already noted above, Biafra and Katanga are examples of entities that were forcibly reincorporated without much international opposition. Chechnya, too, was subjected to armed reincorporation, despite assurances to the contrary that had been given by Moscow in a series of peace settlements.

It is by way of a lack of international legal protection of its status that an 'effective entity' differs greatly from a 'self-determination entity'. The self-determination entity is internationally privileged long before it obtains effective independence. Indeed, it is the essence of the right to self-determination to ensure that a self-determination entity can freely exercise the option of independence if it so wishes. An unprivileged entity, on the other hand, has to fight the threat or attempt of forcible reincorporation and will only mature into a state if it wins decisively and with a prospect of permanence in its new status. An armed contest is

therefore a structural element of discourse about self-determination outside the context of self-determination entities as they have been classically defined.

The Definition of the Entity

The classical right of colonial self-determination is now a core part of international law and enjoys a status that is legally superior to other international norms that do not enjoy this elevated position (*ius cogens*). However, it is applied only to colonial and non-self-governing territories, of which there are practically none left. This is the second disenfranchising aspect of the doctrine of self-determination: it is established as an exception to the doctrine of territorial unity (above) but the exception is framed so narrowly that it does not apply to many (or any) situations of struggle for independence outside the colonial context.

There is no formal definition of what constitutes a colonial territory.[3] However, as a rule of thumb it only includes those territories that one would intuitively recognize as such. These are territories that were forcibly acquired by a racially distinct metropolitan power, divided by an ocean during the time of imperialism and subjected to a colonial regime for the purposes of economic exploitation. The long list of qualifications contained in this sentence indicates the lengths governments have gone to in order to ensure that self-determination cannot ever be invoked against themselves. Colonial self-determination only consolidated into a firm legal rule in the early 1960s, when the only remaining colonial powers resisting decolonization were international pariahs. These were principally Portugal and Spain, both held in the grip of dictatorships. Analogous situations to which the rule of colonial self-determination was also applied (Palestine and South Africa) were similarly unique. Hence, it was safe for the rest of the governments of the world to consecrate the doctrine of self-determination as a firm legal rule, provided it could only be applied to these 'others'. In relation to these 'others', self-determination was framed as a very aggressive doctrine in order to help address the historic injustice that was, by then, clearly recognized in relation to these special cases.

Of course, many populations in other circumstances claim to be disenfranchised or suppressed. They will argue that they too have been subjected to colonialism. However, they are excluded from the application of the concept. For example, Chechnya argued that it was forcibly incorporated into Russia during the period of imperialism and colonially exploited. Nevertheless, its claims to colonial self-determination have simply been brushed aside on the international stage. Some politicians in Kosovo were tempted to make a similar argument in relation to Serbia. Again, this argument would not have offered a chance of success. Kosovo therefore instead opted for making an argument based on constitutional self-determination.

As was already noted, in addition to genuine colonies, it is accepted that peoples living under alien occupation (Palestine) and under racist regimes (formerly South Africa) are entitled to the right of self-determination. The same applies to 'secondary' colonies. These are entities that were entitled to colonial self-determination in the first place. However, when they were at the very point of administering the act of self-determination, they were forcibly incorporated into another state. East Timor and Western Sahara are the two principal examples of this phenomenon. The recent holding of a referendum in East Timor, although held with some delay, and its independence are therefore an example of colonial self-determination in the classical sense rather than constitutional self-determination.

Scope of Application

While self-determination is an activist right that is intended to overcome the evils of colonialism, it is in fact administered in a way that is consistent with the territorial designs and administrative practices imposed by the colonizers. This is the third level of disenfranchisement administered through the doctrine of self-determination. For the definition of the entity that is entitled to exercise the right of self-determination is in itself a product of colonial administration. Self-determination does not aim to restore ethnic or tribal links among populations that were artificially divided by the colonizers. Instead, the 'people' entitled to self-determination are those who happen to live within the colonial boundaries drawn by the colonial powers.

Accordingly, the International Court of Justice confirmed in relation to the Western Sahara that links may have existed between that territory and Morocco before colonialism. However, these would not be restored through self-determination. The pre-existing links were not of a kind that could displace the right to separate identity that was actually manufactured through the process of colonial administration—the very evil the doctrine of self-determination purports to overcome. Morocco had argued that the people of the Western Sahara had previously owed allegiance to its leadership. This relationship had been artificially disrupted by the imposition of Spanish colonial rule in the Western Sahara. Now that colonialism was in the process of being dismantled, the previous status should be restored and the Western Sahara should fall to Morocco once more.

This view was rejected by the Court. While the Court confirmed that there may have been some pre-existing legal links between the two territories, the very act of colonialism is constitutive of a new legal status for the colonial entity. Colonialism generates the self-determination entity and therefore defines the state that may ensue. That entity holds original rights that displace legal ties that might have existed before. Most strikingly this was also affirmed in relation to the island of Timor. Once Portugal withdrew from East Timor, Indonesia claimed that the island should be unified again and the eastern part would naturally merge with the western section. However, the separate colonial administration of the East by Portugal, as opposed to Dutch administration in the West, had rendered it a separate self-determination entity. Indonesia's occupation of the island was therefore internationally opposed as an act undertaken in violation of the right to self-determination. As was noted above, eventually Indonesia consented to the holding of a referendum on genuine self-determination. That referendum was strongly in favour of independence, which was subsequently implemented with the assistance of an international peace-keeping/enforcement mission.

The aim of decolonization is therefore not the restoration of the situation that may have existed before colonialism. Instead, action is taken in a way that does not fully overcome, but merely reshapes, facts on the basis of the reality of colonial administration. And it is the territorial shape of that administration that defines the self-determination entity, not the will of the people. Herein lies the third element of disenfranchisement. Contrary to the dictum of Judge Dillard, quoted at the outset, it is not the act of free will of populations that can fully assert itself. Instead, their will can only apply itself within boundaries that have been colonially defined. For instance, different ethnic groups within a colonial territory would not be entitled to form separate states, or perhaps to associate in part with neighbouring ethnic kin states. Instead, the entire territory, as defined by the colonial masters, must exercise the right to self-determination as one whole and undivided entity.

While some might regard this practice of retaining 'artificial' colonial boundaries as reprehensible, it was accepted by the African states upon independence. In fact, it has been fiercely defended by them. This principle of *uti possidetis* has been described by the international Court of Justice as follows:[4]

> 21. . . . The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope . . .
> 23. . . . The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved . . .
> 24. . . . There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence, the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.
> 25. However, it may be wondered how the time-hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, have induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

Subsequently, this doctrine was endorsed by the Badinter Commission appointed by the European Community to advise on international legal issues in the context of the dissolution of Yugoslavia. According to this view, *uti possidetis* applies as a universal principle in all regions of the world.

Self-determination as a Singularity

The fourth layer of disenfranchisement relates to the fact that colonial self-determination is an 'act' which occurs only once, and not an ongoing process. Of course, self-determination continues to occur in its internal sense, according to the doctrine of democratic governance. However, in its external sense, it is a once-in-a-lifetime opportunity. Once a colonial territory has exercised the option of independence or integration (the

exception being, theoretically, association[5]), the right to external self-determination expires.

Self-determination is not available to distinct ethnic entities within the self-determination unit that may feel that they too should have had the option of secession from secession. The doctrines of territorial unity and *uti possidetis* protect the territorial identity of the self-determination entity before, during and after the act of self-determination. The present dispute involving Comores and Mayotte may serve as an example, as does the following extract from a submission to the United Nations by Sri Lanka:[6]

> 2. It is the position of the Government of Sri Lanka that the words "the right to self-determination" ... apply only to people under alien and foreign domination and these words do not apply to sovereign independent states or to a section of a people or nation. It is well recognized in international law that the principle of self-determination cannot be construed as authorizing any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent States. This article of the Covenant cannot therefore be interpreted to connote the recognition of the dismemberment and fragmentation on ethnic and religious grounds. Such an interpretation would clearly be contrary, *inter alia*, to General Assembly Resolution 2526 (XXV) on the Declaration of Principles of International Law and incompatible with the purposes and principles of the Charter.

In the context of the dissolution of Yugoslavia, the Badinter Commission ruled that the constituent republics of the Socialist Federal Republic of Yugoslavia might turn into states in accordance with a new doctrine of constitutional self-determination. However, entities within the republics, for instance the mainly ethnic Serb-inhabited Krajina region, could not make a similar claim. There would be no secession from secession, it was held, evidencing a view that self-determination, including the constitutional self-determination that was at issue in that instance, is not an open-ended, ongoing process where possibilities of secession are concerned. Confirming the doctrines of territorial integrity and *uti possidetis*, the Badinter Commission proposed that other entities might only claim territorial autonomy within the new state boundaries. It will be convenient to return to this issue when considering the new practice of constitutional self-determination. Before doing so, however, it is necessary to consider the fifth step in the chain of disenfranchisement that lurks within the doctrine of self-determination.

Modalities of Reaching the Point of Self-determination

We have already noted that self-determination exceptionally enfranchises colonial peoples struggling for the right to opt for a new status within colonial boundaries at one unique point of decision. All other cases are excluded and therefore subjected to the negative, disenfranchising element of the doctrine of self-determination. These are:

- Cases that arise outside a colonial context. As the colonial context is defined so restrictively that there are virtually no more instances of application, this includes many instances of perceived colonialism on the part of historically disenfranchised populations (Corsicans, Basques, Chechens, Kosovars, etc.).

- Cases that arise within the colonial context but where populations want to escape from the colonial definition of the self-determination entity and the subsequent state (India–Pakistan (Kashmir), Comores and Mayotte, Bougainville, Burma, Sri Lanka, Sudan, etc.).
- Cases where the entity in question opposes the purported initial act of self-determination, in the form of association or integration, and seeks to replay its decision (formerly Eritrea and Somaliland, which violently questioned their integration at the point of decolonization with Ethiopia and Somalia respectively).

The treatment by the international system of classical colonial cases of self-determination is very different from the vast majority of self-determination conflicts that remain. Those entities that qualify as classical self-determination entities are legally entitled to mount a struggle in response. If the colonial state resists and represses the struggle, there is a right to wage an armed struggle. While this struggle has the form of a civil war as a matter of fact, on the legal plane the national liberation movement representing the self-determination entity is entitled to turn it into an international conflict in terms of international humanitarian law. That is to say, national liberation fighters are to be treated according to the same privileges enjoyed by combatants in international armed conflicts, including prisoner of war status. Moreover, and controversially, the self-determination entity is entitled to receive military support from abroad. This would probably not include the direct support of foreign armed forces, but would include the basing of national liberation fighters in neighbouring territories, and training, equipping and supplying them there. The government, on the other hand, is not entitled to receive international support. In short, the system has been arranged in a way to ensure that the national liberation struggle will ultimately be a success. Given the 'corrective' nature of the doctrine of self-determination in relation to the evil of colonialism, this should not be controversial. However, it is important not to confuse national liberation warfare with an open licence to engage in acts of terrorism or other grave violations. Such atrocities are never permissible, even in the cause of an internationally lawful struggle of anti-colonial liberation.

In cases outside the colonial context, the system is rigged in order to ensure that the state prevails. However unjustly treated by history a self-styled 'national liberation movement' may feel, its struggle is legally classified as a purely internal domestic rebellion. The central state can use its military or police power to repress and defeat such a movement. No external assistance may be given to those struggling against the central government. Instead, traditionally the government has been taken to be entitled to receive as much military support and assistance, including probably the involvement of foreign forces it may invite into the country, it deems necessary to crush the rebellion. The rebels themselves are not elevated by humanitarian law to the status of combatants who enjoy the full protection of the law of international armed conflict. The government would claim the right to treat them as traitors and bandits under the domestic law of the state. Instead of being treated as prisoners of war they can be criminally convicted and shot. Their only hope lies in the minimal protection of the law of internal armed conflict if the rebellion has taken on a significant territorial scope and of general human rights.

The fifth element of disenfranchisement therefore relates to the imbalance in the status of those struggling for independence outside the colonial context and the state. Unless another state is willing to break the rules and intervene (as occurred when India invaded East Pakistan in an operation that led to the establishment of the state of

Bangladesh), self-determination struggles could classically only result in a crushing defeat for the rebellion (Biafra) or an eternal stalemate, sustained over decades through low-intensity fighting and perhaps terrorist campaigns that cannot be decisively defeated by the central government.

The imbalance in status not only relates to the fact that the government can treat those struggling for purported liberation as criminals in its domestic law. Those engaged in the struggle are disenfranchised twice in this instance—domestically, where their status is determined by their opponents, and internationally. As has already been noted, at the international level the doctrine of non-intervention ensures that even those secessionist groups which control large slices of the territory and population of a state cannot attract international support or recognition, or significant international entitlements that would flow from some sort of international legal personality. An outside government that offers support to a secessionist movement is guilty of an act of unlawful intervention. External agencies have in the past even been cautious about political initiatives aimed at settling a self-determination conflict, lest this be considered illegitimate interference. Accordingly, the government seeking to oppose secession has classically also been largely immune from diplomatic pressure or even external sanctions in relation to its attitude.

The doctrine of non-intervention has provided a cover for quite brutal uses of force against secessionist entities, often at the cost of significant civilian suffering. While other governments may have on occasion feebly requested that at least systematic and grave human rights abuses should cease (most recently in relation to Chechnya), they have traditionally not felt able to insist that violence cannot be a means of settling self-determination conflicts. Force being an acceptable option, or even the expected, routine response, threatened governments have therefore generally done their utmost to achieve a military defeat of secession. Negotiations on a settlement were not foreseen in the international script and international pressure for a negotiated settlement would have been deemed intervention. Hence, it was victory for the state and crushing defeat for those that claim an entitlement to self-determination or, where a decisive result cannot be achieved, a prolonged, mutually harmful stalemate.

This has only recently changed in two types of situations. In the first instance, stalemate proved no longer acceptable domestically (Northern Ireland, Sudan, perhaps Sri Lanka). In another kind of case, the humanitarian suffering resulting from the fighting, or the instability brought to neighbouring regions, have been invoked to justify actual external armed intervention. As a result of such intervention, which may have been initially focused on humanitarian concerns, those intervening have found themselves constrained also to address the underlying self-determination conflict. In Bosnia and Herzegovina they found themselves committed to the continued territorial integrity of that state, while initially accepting the reality of its internal division. In relation to Kosovo, an internationalized status settlement is now being prepared. In relation to Northern Iraq, the US government and perhaps the United Nations are now called upon to generate a solution to the Kurdish issue.

The presumption that force is the appropriate remedy to secessionist aspirations has recently been brought into question in the case of the dissolution of the Socialist Federal Republic of Yugoslavia. However, as we shall see, this incident has not established a general inhibition on the use of force as the principal form of discourse in such instances. Instead, it has drawn attention to a new aspect of the right to self-determination that had not been acted upon previously. This is the doctrine of constitutional self-determination.

Constitutional Self-determination

The crucial difference between colonial and constitutional self-determination lies in the fact that, in the former case, the right to secession is based directly in international law. In the latter the claim to self-determination is derived from a constitutional arrangement that establishes a separate legal personality for component parts of the overall state. The constitution of a state is taken to be a manifestation of the sovereign will of the state population. International law now appears to takes note of these features of domestic constitutional law and give effect to them. However, it is not constitutive of the claim to constitutional self-determination.

It is possible to distinguish three different types of constitutional self-determination:

- express self-determination status;
- effective dissolution of a federal-type state; and
- implied self-determination status.

It will be convenient to consider each of these in turn.

Express Self-determination Status

A few constitutions will determine that certain nominated constituent entities enjoy a right to external self-determination. One such clear case is furnished by the Ethiopian constitution that was adopted after the final victory of internal opposition forces that had displaced the central government. Article 39 (5) of the new constitution of 8 December 1994 declares with the greatest clarity that "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession". Paragraph 5 adds an unusual definition:

> A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

Another example is furnished by the Constitution of the Principality of Liechtenstein. Article 4 (2) permits each municipality to "remove itself from the state-community".[7] In both instances, the constitutions provide for a certain process that must be gone through before secession.

An interesting sub-species of express constitutional self-determination is conditional self-determination. For instance, the Law on the Special Legal Status of Gagauzia describes that autonomous territorial unit within Moldova as an "integral part of the Republic" (Article 1(1)). Nevertheless:

> In case of a change of the status of the Republic of Moldova as an independent state, the people of Gagauzia shall have the right to external self-determination (Article 1(4)).

The change that is being contemplated is a possible division of Moldova, with its larger segment possibly joining Romania.

The identity of this conditional constitutional self-determination unit is defined in an unusual way too. Localities in which (ethnic) Gagauzes constitute less than 50% of the population may be included in the autonomous territorial unit "on the basis of the freely expressed will of a majority of the electorate revealed during a local referendum" (Article 5(2)). Accordingly, this would be one of the more recent examples where the will of the people does, after all, triumph over previous administrative/territorial arrangements. This is an interesting departure from the classical colonial self-determination practice.[8]

Ordinarily, constitutional self-determination will assign a right to secession only to federal-type territorial units, such as constituent republics, that are clearly defined in terms of territory. The classical example is furnished in the constitution of the former Union of Soviet Socialist Republics, the USSR. In accordance with Leninist doctrine, Article 70 of the Constitution of 7 October 1977 provided that the Union is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics. Article 72 simply added that "Each Union Republic shall retain the right freely to secede from the USSR".

Of course, it was probably not anticipated that any Union Republic would ever dare to assert this constitutional right of self-determination. When, in 1989–90, the Baltic republics declared their intention to revive their full sovereignty and move towards full independence, this was strongly resisted by Moscow. Given the clear and unambiguous nature of Article 72 of the Constitution, it was not easy to justify such a stance. However, in rather a strained argument, attention was drawn to Article 78 that required ratification by the USSR of changes in Union Republic boundaries to which these have agreed between themselves and to provisions assigning competence in relation to the external boundaries of the federation to the centre.[9] This interpretation would have rendered the unilateral right of secession established in Article 72 meaningless, and a legal race developed on this issue between the Baltic republics and Moscow. The central Congress of People's deputies worked at high speed to prepare a 'Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR'. That instrument, finally brought into effect on 3 April 1990, provided for a lengthy interim period of at least five years, and left to the central Congress of USSR People's Deputies a final decision on giving effect to the will of the population of the republic concerned. However, in the previous month, on 11 March, Lithuania had declared the renewal of its independence.

This event triggered a somewhat ambiguous response, especially on the part of Western states. Many of these had never recognized *de jure* the incorporation of the Baltic republics into the USSR, arguing that this had occurred as the result of an unlawful use of force. Accordingly it was difficult for them to insist on the doctrine of territorial unity in this instance. On the other hand, very few—other than heroic Iceland which did recognize it—were willing to act on principle when confronting this fact. The issue was resolved when the USSR dissolved entirely in the wake of an unsuccessful coup against President Gorbachev. At that point Western governments fell over themselves in seeking to outdo one another in extending rapid recognition.[10]

The case of the USSR therefore became one of outright dissolution of a federal state and the argument of express constitutional self-determination was not fully tested in this instance. While ultimately the Socialist Federal Republic of Yugoslavia (SFRY) also dissolved (see below), there was nevertheless a strand of argument in relation to the secession

of Croatia and Slovenia that can be seen as the point of discovery of this claim to self-determination in international relations.

The 1974 SFRY constitution provided that:[11]

> The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people—the Socialist Federal Republic of Yugoslavia ...

This provision quite clearly assigned to all 'nations' contained in the federation the right to self-determination, including expressly the right of secession. Each of the federal republics was seen as the political expression of the constituent nations. Hence the republics had had assigned to them an express right to self-determination and secession. This proposition was put to the test in 1991.

Under the Milosevic regime, Serbia had gained the ascendancy within the Yugoslav federation during the second half of the 1980s. With the support of some other compliant republics, it was undoing the careful balancing act between the different republics that was reflected in the design of Tito's 1974 constitution. Kosovo, in particular, suffered the virtual unilateral abolition of its autonomy.

Faced with this change in the balance of powers within the Federation, Croatia and Slovenia attempted to protect their position by proposing a new federal constitution that would enhance their status. Negotiations towards this end conducted during 1990 and early 1991 were frustrated by Serbia. Croatia and Slovenia then unilaterally declared independence on 25/6 June 1991. The central government in Belgrade had been unwilling to settle, as compromise would mean a surrender of some of the very powers it had just captured. The republics—and Kosovo—would have no option but to comply. After all, the international system uniquely privileged the central government, permitting it to deploy the armed forces of the state if necessary in order to defend the central value of territorial unity. Based on state practice over the past decades, it was clear that independence was no option.

While international actors tried hard to dissuade Croatia and Slovenia from declaring independence, they rapidly acknowledged this fact once it occurred. When Belgrade proceeded to answer the declarations of independence of Slovenia and Croatia with the use of force, the international community, led by the EU, took a somewhat ambivalent step. While it failed to recognize the two entities until January 1992, it nevertheless adopted the following unprecedented view only a few weeks after the declarations of independence:[12]

> The European Community and its member States are dismayed at the increasing violence in Croatia. They remind those responsible for the violence of their determination never to recognize changes of frontiers which have not been brought about by peaceful means and by agreement ... The Community and its member States

> call on the Federal Presidency to put an immediate end to this illegal use of the forces under its command.

In short, while Belgrade continued to invoke the doctrine of territorial unity, the EU took the view that both entities were either already states or entitled to become states and in possession of pre-state rights. These were the right to territorial integrity and unity, and the protection against the use of force by the central government. The EU then attempted unsuccessfully to negotiate an orderly secession. When this failed, it declared, through the medium of its Badinter arbitration/advisory commission, that the entire Yugoslav federation was in a process of dissolution. Obviously, this was not an agreed dissolution, which would have been legally unproblematic. Instead it would be an effective dissolution that was still being opposed from the centre. Nevertheless, the Badinter Commission held, and the EU government accepted, that the individual republics that wished independence would obtain it unilaterally, provided they complied with a number of requirements, including the holding of a free and fair referendum and the acceptance of minority rights guarantees.

Of course, the thesis of a dissolution of the SFRY was somewhat daring. After all, the federation was only dissolving because Croatia and Slovenia had seceded in the first place. Hence the argument of express constitutional self-determination of these two entities was deployed in addition.

The Yugoslav episode also pointed to the attempts of the international actors to ensure that no wide-ranging precedent would ensue that might encourage secession elsewhere. Hence express constitutional self-determination was framed in a very restrictive way. In relation to federal-type entities, there would be two conditions. First, the constitution would have to assign a right of self-determination to constituent units in a clear and unambiguous way. Second, only the constituent federal republics themselves would be entitled to self-determination. The line was drawn in relation to Kosovo. That territory enjoyed a dual status according to the constitution of the SFRY. On the one hand, it had full federal representation, along with the six constituent republics of the SFRY and Vojvodina. Hence, it was represented equally in the rotating collective federal presidency, it sent directly elected representatives into the federal parliament, etc. Moreover, its substantive competences were similar to those of constituent republics proper, including even the right to maintain its own central bank. On the other hand, Kosovo was also a unit that was legally subordinated to Serbia—a constituent republic in its own right. Thus, in relation to the federation, Kosovo was a federal unit; however, in relation to Serbia, it was an autonomous province.

Kosovo had been subjected to the unilateral abolition of its federal status from 1987 onwards, becoming submerged within Serbia, which launched a campaign of considerable repression in relation to it. Nevertheless, Kosovo claimed that its original status was distinguishable from that of its constituent republics in name only. If they could leave, so could Kosovo.

Kosovo's declaration of independence, and its initially peaceful campaign for international acknowledgement, was internationally ignored. Once again it proved that only violence appeared to be an effective tool to force international attention to be directed towards this situation. In the end, NATO felt constrained to mount a massive armed intervention on the European continent in order to address the Kosovo crisis when it finally spun out of control in 1999. However, the use of military force was justified exclusively

on humanitarian grounds and NATO expressly committed itself to the territorial unity of the then rump Yugoslavia. Upon conclusion of hostilities, the United Nations gave similar assurances when launching an international governance mission for the territory, as is evidenced in Security Council resolution 1244 (1999).

Thus it appears that not all federal units within a federation providing for express self-determination status are entitled to self-determination. Express constitutional self-determination will generally only apply to the entities that are very specifically nominated in the constitution, such as full federal republics.[13]

However limited the construction of the doctrine of express constitutional self-determination may be, it has been regarded with considerable scepticism by some governments. The Yugoslav precedents, in particular, have had some impact on the attempts to negotiate settlements in a number of other secessionist conflicts. The option of a federal-type solution has proven unacceptable to a number of central governments. They presume that the granting of a federal status to an entity in exchange for a cessation of the conflict will inevitably be the first step to an invocation of constitutional self-determination and to eventual independence. To overcome this inhibition to finding a solution, some federal or even confederal settlements have been counter-balanced with 'eternity' clauses. Such clauses confirm that any right to self-determination that may have previously been held by the secessionist unity has been expended in the agreement on a settlement. The federal union that has been achieved is there rendered 'indissoluble'.[14]

Effective Dissolution

As we have seen, some constitutions will confirm that the overall state is composed of former sovereign entities that retain at least the seeds of original sovereignty. They may even confirm a right to self-determination and sometimes refer expressly to secession appertaining to sub-state units. This was the case in the USSR and the SFRY. Nevertheless, the declarations concerning independence of the Baltic Republics, and the secessions of Slovenia and Latvia, were opposed by the centre. In both cases it was convenient to the international agencies addressing this issue to refer to the doctrine of effective dissolution, in addition to considering express constitutional self-determination.

In relation to the USSR the effective dissolution was followed by a regularization of the situation through the Alma Ata Declaration. This document clarified that the USSR had ceased to exist, confirmed statehood for all former Union Republics and nominated the Russian Federation as the universal successor to that state.[15] In relation to the SFRY the dissolution remained opposed by the centre for a considerable period of time. The dissolution thesis was initially offered by the Badinter Commission, which had found that the SFRY was in a 'process of dissolution' during the autumn of 1991. That process had been completed at the end of the year, according to the Badinter Commision, which then recommended recognition of statehood for some constituent republics. The concept assumed that constituent units would gain full sovereignty if the collective institutions of the federation were no longer functioning or representative of all federal units.

Of course, even according to the concept of effective dissolution, a sharp dividing line was drawn. The entitlement was restricted to full federal subjects only. Hence the claim of Kosovo, an entity exhibiting both federal and provincial attributes, to statehood was initially rejected. Kosovo had indeed argued that it previously enjoyed a clear federal

status. With the disappearance of the federation, it too should be allowed to gain direct international legal personality.

Chechnya made a similar argument. The USSR having dissolved, nothing would bar it from achieving statehood during that phase of dissolution. Whatever constitution the Russian Federation had given itself subsequently when turning into a state of its own, this would be irrelevant, as Chechnya had already become fully independent by then, adopting its own constitution and claiming effectiveness of control over territory and population. However, Chechnya had not been one of the full Union Republics. Instead the Soviet constitution recognized a federal status for it, but within Russia. Thus the entity that could emerge and form a sovereign state in consequence was Russia and not, in turn, one of its constituent units. Chechnya's claim that its legal identity was unconnected with that of the new Russian Federation was therefore rejected. Instead, Chechnya was considered part and parcel of the new Russian Federal system and was born into that constitutional structure, even if it violently resisted such a result at that time.

Of course, Chechnya was included as a full federal subject when Russia reorganized itself as the Russian Federation under its new 1993 constitution. But this status was not one derived from original sovereignty of the individual federal entities that composed the Federation. Instead it was one derived from a limited grant of central authority, which left sovereignty vested in the overall Federation. The Constitution provided:

> We, the multi-ethnic people of the Russian Federation, united by our common destiny of our land, seeking to advance human rights and freedoms and promote civil peace and accord, preserving a historically established state unity, guided by universally recognized principles of equality and self-determination of peoples . . . renewing the sovereign statehood of Russia . . .
> Article 3.1. The multi-ethnic people of the Russian Federation shall be the bearer of its sovereignty and the sole source of authority in the Russian Federation.
> Article 4.1. The sovereignty of the Russian Federation shall extend to its entire territory.
> Article 66.5. The status of a member of the Russian Federation may be altered by the mutual consent of the Russian Federation and the member of the Russian Federation in accordance with a federal constitutional law.

In this case, it is the 'multi-ethnic people of the Russian Federation' who are the 'bearer of . . . sovereignty' as a collective entity. Federal entities, such as Chechnya, are not assigned original sovereignty. Sovereignty resides only in the centre. And, in stark contrast to the response of the EU to the Yugoslav crisis, the EU confirmed the territorial integrity of the Russian Federation instead of the claimed rights of Chechnya, for example in the following Declaration of the EU presidency on behalf of the Union of 18 January 1995:

> The European Union would again urge strongly that there should be an immediate cessation of hostilities in order to facilitate the bringing of humanitarian aid to the population and allow negotiations to begin without delay. The European Union takes note in this connection of the proposal made by the Prime Minister of the Russian Federation. It calls for a peaceful settlement to the conflict which respects the territorial integrity of the Russian Federation.

When Russia forcibly reincorportated Chechnya some years later, the international community condemned the excessive brutality of the venture and human rights abuses. But there was little or no support for the suggestion that Chechnya had a claim to independence, notwithstanding the ceasefire agreement of 1996 to which reference will be made below.

Implied Constitutional Self-determination Status

It is also possible to envisage an implied constitutional self-determination status. This would be the case where a distinct 'nation' or 'people' inhabit a clearly constitutionally defined territory. Where the central government consents to the holding of a referendum on the issue of secession, or where such provision exists according to the constitution in the absence of an express reference to self-determination, there is an expectation that such a referendum would need to be respected by the central authorities. An example is furnished with reference to Scotland. There does not even exist a written UK constitution. Nevertheless, it is clear that referenda on independence can be called with the agreement and cooperation of the central authorities. Should the result be in favour of independence, it is likely that that outcome will attract a significant element of international legitimacy.

This view was strongly confirmed by the Canadian Supreme Court in a reference concerning the possible secession of Quebec. Despite the fact that there is no express constitutional self-determination status for Quebec in the Canadian constitution, the Court found that "a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize". However, the Court also confirmed that independence is not an automatic result. Instead, both sides would have to engage in good faith negotiations about the implementation of the decision to secede.

Self-determination Status Generated through Central Government Conduct?

More recently it has been asserted that a constitutional self-determination status may also be generated through adverse conduct by the central authorities. There are two variants of this argument. One is based in part on the rulings of the Badinter Commission. The Commission appeared to have suggested that independence should be possible for federal-type entities that are being denied effective representation in the legal and political structure of the federation. If negotiations to address this situation have been exhaustively attempted, and if these have been frustrated by the central government, it is proposed that the entity in question should be entitled to secede. However, it has to be admitted that this theory is as yet untested. In the closest case that comes to mind—Kosovo—the organized international community has, at least so far, insisted on the continued territorial unity of the overall state.

A second variant of this thesis would address instances where an entity has suffered actual genocide or ethnic cleansing, or a deliberate campaign to destroy a population by denying to it that which is necessary for its survival (such as emergency food aid) on the part of the central authorities. In such instances some scholars argue that the central government should no longer be entitled to invoke the doctrine of territorial unity in relation to that territory. Again, actual practice does not yet offer any evidence of the acceptance of this view. While armed humanitarian action has been launched in response

to such situations, this has generally been coupled with a strong confirmation of the territorial integrity of the state against which the intervention was directed. Again, Kosovo furnishes an example, as does Iraq, where independence for the long-suffering Kurdish North has not been contemplated.

Effective Entities

Finally, it is necessary to refer to cases where an entity cannot lay claim to any self-determination status, be it colonial or constitutional, but it nevertheless manages to exhibit the facts that fulfil the criteria of statehood (territory, population, effective government). Most cases of secession or dissolution have occurred with the consent of the relevant central authorities (United Arab Republic, Mali Federation, Malaysia/Singapore, Yemen) or in the colonial context. There are hardly any examples of unilateral opposed secessions that were effective in the long term. As was noted above, the case of Bangladesh appears to be truly exceptional given the special role played by India in that instance. In that case, state practice did initially mainly reject the result, as is evidenced in the records of the UN General Assembly, but this position was not maintained over time.

It might be argued that Somaliland constitutes an effective entity. After well over a decade of effective independence, it is tempting to argue that this entity should now at least enjoy pre-state rights. That is to say, it should be protected through the doctrine of territorial integrity from forcible attempts at reincorporation. However, that case is as yet unsettled and its status remains precarious until it is confirmed through an internationalized agreement. The hesitancy with which it has been addressed by the international community confirms the caution that is still being exercised in favour of the maintenance of the doctrine of territorial unity. Similarly, the outcome of the Kosovo issue is also still open, although there are signs that the international community might be willing to exercise a greater degree of flexibility than may have been initially envisaged given the realities on the ground. Nevertheless, even if it becomes clear that Kosovo cannot be forced back into Serbia, international mediators remain insistent that any outcome of status negotiations must either disguise the fact that independence has been obtained, or be based on express consent from Belgrade.

It is possible to analyse the situation of effective entities in two ways. One would simply point to the objective criteria of statehood. If an entity manages to exhibit a defined population and territory that is subjected to an effective government, and if the entity also has made manifest the will to be a state, then it is a state. Recognition is generally only seen as declaratory, that is to say, it reflects a status that already exists, rather than creating it. However, with respect to effective entities, declaratory recognition by other states is particularly important. For, until an entity has attracted such recognition, it is not easily possible to confirm whether it has obtained sufficient effectiveness to merit statehood.

Prolonged effectiveness, even in the absence of recognition, might also yield statehood according to a second view. If a population makes manifest its desire to act together as an organized political community independent of others on a defined territory, then this manifestation of popular will must ultimately be reflected in some form of legal status. For instance, most governments have recognized the People's Republic of China also in relation to the Republic of China. The PRC claims the right to extend its authority also to Taiwan. However, were it to do so without an invitation from Taiwan, for instance by way of an armed invasion, one might argue that this would amount to a violation of

the rights of the Taiwanese population. These rights would be derived from a new variant of the doctrine of self-determination that is reflective of a separate legal identity which, in this instance, has developed over a period of half a century. However, it has to be admitted that this theory is as yet untested.

Escaping from the Self-determination Trap through Internationalized Settlements

Recent practice has sought to address the self-determination deadlock in other innovative ways. The termination of the Cold War not only resulted in the fighting of new wars of secession and purported liberation. A number of others were concluded, either because the parties had fought themselves to a stage of mutually painful stalemate, or because of external political or even armed intervention. Several new techniques have been deployed in this context. In Europe itself there has been an attempt to defend at least the principle of territorial integrity of the successor states of the dissolved USSR and the former Yugoslavia. This technique has conceded wide-ranging self-government of secessionist units, coupled with power-sharing mechanisms, for the continued existence of the threatened state. At Dayton therefore, very extensive powers of self-government were granted to the constituent entities in order to retain the overall state of Bosnia and Herzegovina. Attempts are being made at present by international agencies to advance settlements in Moldova (Transdniestria) and Georgia (Abkhasia, or more likely Southern Ossetia) along similar lines. A less pronounced, modest autonomy settlement appeared sufficient in the attempts to terminate the conflict in Macedonia through the Ohrid agreements of 2002. The attempt to draw Kosovo back into the ambit of Serbia and Montenegro through the passage of time, on the other hand, has failed and international actors are now preparing to negotiate a solution to the status issue that would be more accommodating to the wishes of the ethnic Albanian population. Hence, Kosovo may well become one of the new types of settlements that question the previously unshakeable view that the territorial integrity of the central state must be restored under all circumstances that do not qualify under the doctrines of classical colonial or constitutional self-determination.

Indeed, even the earlier attempt to address the Kosovo conflict through the Rambouillet process also resulted in a formula that is not free of ambiguity. The text, to which Resolution 1244 (1999) of the UN Security Council makes reference, foresees the establishment of an internationalized mechanism that will set up a process for the settlement of the status issue. That process was intended to take account, *inter alia*, of the 'will of the people'.

In fact, a more flexible approach is evidenced in several recent settlements around the word. It was already noted that a number of governments are now willing, often after prolonged conflict, to give in to demands for external self-determination. As was already mentioned, this situation obtained in relation to Eritrea after the change in government in Ethiopia (and before a formal new constitution was adopted, providing for the right to self-determination to all nations and nationalities in Ethiopia). A formal agreement had been struck between rebel forces before the overthrow of the Mengistu regime, which granted Eritrea self-determination status and the right to hold a referendum on independence after the expiry of an interim period. After that referendum confirmed the overwhelming wish of the population to secede, the central authorities implemented this decision.

In terms of a new generation of self-determination settlements, the experience of Chechnya, on the other hand, was less encouraging. In August 1996 Chechnya concluded

an agreement with the Russian Federation, restated in 1997, which expressly recognized Chechnya's status as a self-determination entity and foresaw a resolution of the issue according to that principle, and according to international law, by 31 December 2001. However, after alleged Chechen terrorist attacks in Moscow, the Russian Federation unilaterally annulled that agreement and forcibly reincorporated Chechnya. This example highlights the desirability of seeking to internationalize any agreement granting self-determination status at the point of the termination of a self-determination conflict. Of course, even if Chechnya had taken greater care to entrench the settlement at the international level, this might not have dissuaded Moscow from a forcible incorporation. But it would have made it more difficult for international actors to remain silent.

Despite this negative experience, there is now a significant number of settlements, generally arrived at with international involvement, that address the self-determination status of an area of conflict in innovative ways. Through such internationalized settlements an attempt is made to escape from the self-determination trap. One of the first examples was provided by the Northern Ireland agreement. The agreement confirms in Article 1 that that territory is a self-determination entity, whose status can only be changed on the basis of the wishes of the majority of its population:

> The two Governments ... (i) recognize the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland.

At the same time, the Article also recognizes the legal identity of the island of Ireland, confirming that it is "for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South". In this way, a formula was found that could potentially satisfy both sides. The majority population is reassured that no territorial change can occur without its consent. The republican communities on both sides of the border, on the other hand, are assured of the fact the UK would accept a decision to change the status if it were taken concurrently by both units. Hence there is an alternative to an armed struggle: a change in status can be achieved through gradual demographic change coupled with political persuasion and reassurance of reluctant constituencies.

The Bougainville Peace agreement of 30 August 2001 assigns wide-ranging autonomy to Bougainville, currently part of Papua New Guinea. However, it also provides for a referendum to be held among Bougainvilleans on the future status of the territory, although, somewhat confusingly, this decision is subject to the review of the central government. The referendum is to be held no sooner than 10 years and no later than 15 years after the election of an autonomous Bougainville government. Interestingly, the holding of the referendum is conditional on a holding of the ceasefire and the disarmament of the armed formations. Bougainville must also demonstrate its capacity to deliver good governance before a referendum can be held. This example offers another way of replacing the former mono-dimensional logic of the armed struggle. Here the act of self-determination is conditional on a genuine renunciation of violence, instead of being the product of violence and the victory of one side in an armed struggle. In addition, energy needs

to be focused on achieving viable self-government according to standards of rule of law and genuine democracy if the referendum is to come about.

Another example of conditional self-determination was already noted above. This is provided by the Gagauz settlement within Moldova. According to the Law on the Special Status of Gagauzia of 23 December 1994, that autonomous entity "shall have the right of external self-determination" should Moldova cease being an independent state, for instance through a merger of its larger part (excluding Gagauzia and Transdniestria) with Romania. Present negotiations seeking to establish a federal-type structure for Moldova, including Transdniestria and Gagauzia, foresee a similar reserve for Gagauzia in a future comprehensive constitutional settlement.

The Sudan settlement is of a different type again. In a radical departure from classical practice, the settlement clearly determines that the Southern unit will be entitled to the exercise of the right to self-determination, with no conditions attached. The settlement is contained in the Machakos Protocols of 2002 and a series of further protocols adopted since then. However, in a new twist, the settlement requires that both sides cooperate to their utmost capacity over an interim period of six years to make the option of continued unity attractive in advance of the holding of a referendum in the South. Hence interim governance is to be used to reduce the thirst for independence, however unlikely that may be in practice. In this face-saving way, the central government can consent to an agreement that, in the end, is likely to result in independence of the South, without having to admit it to its constituents.

Conclusion

The right of self-determination was established in the late 1950s and 1960s, when the major instances of decolonization had in fact been completed. It therefore became acceptable to transform this doctrine into a right, given that it would only be enforceable in relation to a small number of governments that continued to cling to colonial rule at that time. The broadening of the application of the right to cases like South Africa also caused no problems given the pariah status of the targets.

The right to self-determination was conceived in a way that made it very potent in relation to the few instances of colonialism or analogous situations that remained. However, even where these cases were concerned, the right to self-determination was constructed in such a way as to yield results that would favour the stability of the ensuing result over restorative justice in relation to colonialism. This is particularly evident in the doctrine of *uti possidetis* and in the view that self-determination, in the sense discussed in this article, is a one-time-only event.

The existence of the right of self-determination therefore served as a convenient legitimizing myth for the existing state system. It made it possible to argue that the economic, social and political status of all states other than colonies must be reflective of the will of the people. The actual representativeness of those exercising a hold over the state structure was of course not questioned. Their status could be entrenched through the application of the doctrine of non-intervention and territorial integrity (preventing challenges from outside) and the doctrine of territorial unity (preventing challenges from inside).

Others, struggling for what they perceived to be self-determination, were left outside the system. Only a very limited corpus of humanitarian and human rights laws (never effectively enforced) would apply to them. In a sense, the state was given a *carte blanche* in

dealing with groups seeking to assert their separate identity. This principle was only disrupted when the rump Yugoslavia was denied the right to use force against Croatia and Slovenia, bringing about the discovery of the doctrine of constitutional self-determination. However, this entitlement too was construed in such narrow terms that it did not really cover a significant number of other conflicts that have been raging around the world for decades.

Self-determination, therefore, can be seen as something of a curse. It appears to offer a promise of independence to populations. However, governments have ensured that this promise is a hollow one. Naturally, the system has been rigged to ensure that central governments will prevail in self-determination conflicts. Over 60 years after the establishment of the post-World War II international system, self-determination conflicts have remained endemic. It has become clear that this system is not likely to generate the peace and stability it is meant to achieve. By privileging stability over 'justice' (at least as seen by those struggling for 'liberation'), peace has been sacrificed.

While post-cold war realignments have resulted in the outbreak of a number of additional catastrophic self-determination conflicts, there have also been a number of positive results. In a number of instances of mutually harmful stalemates, settlements are being achieved. These either circumvent the underlying self-determination issue, by offering wide-ranging self-government (autonomy or even federal status) and power-sharing, or they provide a possibility of separation, often after a prolonged interim period. The latter settlements tend to be obtained with strong international involvement, sought by the conflict parties or imposed on them. There is therefore a sense emerging that it is necessary to escape from the current self-determination trap, either by engineering new forms of co-governance within states or by accepting that secession cannot, in the end, be ruled out if other options do not suffice.

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Notes

1. Western Sahara, 1975 ICJ 12, p. 122.
2. This hitherto settled view is at present being challenged by indigenous peoples' representatives involved in a UN-sponsored attempt to generate a further international instrument on this issue.
3. In the UN framework there exists a technical identification of 'non-self-governing territories'. However, this definition is not particularly useful in new contexts.
4. Burkina Faso/Mali Frontier Dispute, Merits, 1986 ICJ 564.
5. An exception to this rule would relate to a self-determination entity that decides to associate, but not integrate, with another state, instead of opting for independence. Through association the self-determination status of the entity is retained or, one might say, it is transformed into a case of constitutional self-determination. However, there is very little practice of this kind.
6. International Covenant on Civil and Political Rights, Third periodic reports of States parties due in 1991, Addendum, Report Submitted by Sri Lanka, 18 July 1994, CCPR/C/70/Add.6, 27 September 1994.
7. Author's translation.
8. In the Philippines autonomy settlement (Final Peace Agreement between the Government of the Republic of the Philippines and the Moro National Liberation Front of June 1996, available online at www.ecmi.de), the autonomous unit is also constituted through a plebiscite, although no external self-determination is provided for.

9. Article 73(2) assigned to the USSR jurisdiction in relation to the determination of the state boundaries of the USSR and also approval of changes in the boundaries between Union Republics.
10. Latvia and Estonia had adopted declarations concerning full independence in May and August 1990, respectively.
11. Constitution of the Socialist Federal Republic of Yugoslavia, Basic Principles, Section I.
12. European Political Cooperation (EPC) Statement on Yugoslavia, 27 August 1991.
13. The open-ended assignment of external self-determination status in the cases of Liechtenstein and Ethiopia appear extraordinary at present.
14. See for instance the Annan Plan on the Comprehensive Settlement of the Cyprus Problem of 31 March 2004.
15. Alma Ata Declaration of 21 December 2001, 31 ILM (1992) 177.

Reference

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