

THE IMPLEMENTATION OF THE RIGHT TO SELF-DETERMINATION AS A CONTRIBUTION TO CONFLICT PREVENTION

REPORT OF THE INTERNATIONAL CONFERENCE OF EXPERTS HELD IN
BARCELONA
FROM 21 TO 27 NOVEMBER 1998

Organised by the UNESCO Division of Human Rights, Democracy and Peace and the
UNESCO Centre of Catalonia

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NOTE:

The email copy of this report corresponds to pp. 13-37 of the volume of conference proceedings published as: M. van Walt & O. Seroo (Ed.) The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention. Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, UNESCO Division of Human Rights, Democracy and Peace & Centre UNESCO de Catalunya. Centre UNESCO de Catalunya, 1999. ISBN 84-920375-9-8. 288 pp (<http://www.unescocat.org/pubang.html>)

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I. INTRODUCTION

“In the framework of the fiftieth anniversary of the Universal Declaration of Human Rights we have a future-oriented contribution to make. We realise that it is not enough just to remember the initial list of human rights established in 1948, or the successive additions by later declarations and by international conventions in matters of human rights. We have tried to centre our seminar on a particularly delicate and complex issue, in the conviction that, if we clarify a few points and study the way to make implementation of the right of self-determination of peoples viable, we shall be contributing to the prevention or solution of many present and future conflicts. It is with this in mind that we have designed our seminar.” *Fèlix Martí, Director of the UNESCO Centre of Catalonia, Inaugural Speech, 22 November 1998.*

Message from the Director-General of Unesco to the International Conference on “The Implementation of The Right to Self-determination as a Contribution to Conflict Prevention”

"The subject of this conference seems to me to be especially important for the international community. So many of today's conflicts take place within states where communities are aspiring to greater recognition of their cultural and political identity. We must study these situations in detail and decide to what extent international texts on the right to self-determination are really suited to today's circumstances and are able to prevent this sort of conflict.

One of UNESCO's missions is to further research on the culture of peace. Other organisations in the United Nations system will have to take care of the operative aspects of the right to self-determination. Our contribution must centre on improving the moral and juridical definition of this right. I think the Barcelona Conference will do a great service if, at the same time as it goes deeper into conceptual aspects of the right to self-determination, it examines how this right can be implemented. In my opinion there are three things to keep in mind.

First of all, the full development of democratic processes. I see around me a universal desire by individuals and communities for greater political participation. This makes me optimistic about our ability to shake off old models of politics by domination. A process has begun whereby new international authorities are being created and old sovereignties challenged. There is a growing wish to reform the United Nations and make it into a global authority able to respond to global challenges: unequal distribution of wealth, unsustainable development and denial of cultural identities, amongst others. But democratic aspirations are also manifested in the gradual awakening of many human communities and their determination to participate in decision-making.

Democracy is firmly established only when individual citizens and freely constituted groups can enjoy full participation in every aspect of society.

UNESCO wants to help devise new ways of exercising political power. In today's global world, the old borders between states have been relativized. New and more suitable political structures must be developed. Everything possible must be done to ensure that the immediate political interests of states do not compromise the aspirations of all peoples for freedom and other legitimate rights. There must be negotiation among all the parties involved so that conflict is prevented and peaceful solutions found. We must open the way to multi-community states, establishing a universal human family where special privileges and exclusion are unknown.

Secondly, we must bear in mind the need to ensure the unimpeded development of community identities within the context of a global economy and communication network. Although globalisation opens up exciting new prospects for all societies and cultures, it also poses threats for those that are small or weak. We at UNESCO feel that science, technology and education must be used in favour of cultural diversity. We also feel that each of the world's religious and cultural systems must be free to determine its own priorities with respect to those common human values expressed in the Universal Declaration of Human Rights whose 50th anniversary we are celebrating this year.

Whatever the case, we need to design a future which will allow all human communities to live without fear and to develop in peace. The right to self-determination must include cultural, linguistic and communication rights alongside of social, economic and political rights. One depends on the other. If we want to preserve the wealth of our diversity, we must have ethical principles and juridical instruments capable of advancing both the cultural rights and the political rights of all communities. We must be bold enough to seize the positive aspects of globalisation without renouncing our marvellous cultural diversity. The proposal by the City of Barcelona to celebrate a Universal Forum of Cultures in the year 2004 represents an important step in this direction.

The third idea I think we should keep in mind is the notion that the right to self-determination is a specific contribution to building a culture of peace. The world is tired of violence and wars. There is growing recognition that war is a poor means indeed of resolving conflicts. We aspire to something better. Therefore it is not utopian to believe that in a few decades we might abolish war, in the same way that at other moments of human history we have rejected slavery, fascism and totalitarianism. Concepts of security must change. Until now we thought that investment in arms was the key to security. Now we know that our real enemies are poverty, ignorance, the destruction of the environment - that is, the violation of human rights.

In line with this thinking it is appropriate to speak of the security of peoples who identify with a particular cultural community and wish to be accepted in their own right as actors on the international stage. Cultural repression, the denial of the rights of peoples and the political marginalization of many communities are causes of insecurity. If we want political stability and peace in all parts of the world, we must progress in our respect for the cultural and political identities of all peoples. We need moral criteria and legal frameworks to help us. We must understand how implementation of the principles of

self-determination can take place in different ways, but that a degree of self-government is necessary prevent conflict.

Sometimes the right to self-determination is viewed too simplistically as a rigid choice between all or nothing - between the forming of an independent state or complete denial of a cultural and political identity. I think we must seek those processes and paths that are suited to diversity and we must begin some imaginative experiments in different forms of self-administration. We have already managed to recognise the legitimacy of international intercession and mediation under humanitarian law. Now is time to reflect on ways of ensuring human rights and cultural rights.

I know these issues will be discussed here with intellectual rigour and wisdom. For my part, I am convinced that the delicate and complex questions concerning self-determination are the same ones to be found at the roots of today's great debates on the future of democratic life, cultural diversity and peace in the world. I have every confidence that your deliberations will help to move us forward."

Federico Mayor

Conference Objective

The objective of the conference was to explore ways in which the implementation of the right to self-determination can contribute to the prevention of conflicts. Fèlix Martí, the Director of the Centre UNESCO de Catalunya, the convenor of the conference, expressed his conviction in his opening statement that proper implementation of self-determination as a dynamic and ongoing process could serve to prevent future conflicts. It was necessary, he said, to explore how political structures inherited from the past could be replaced by more rational and fairer ones that take into account the needs of peoples for self-expression and self-governance.

In order for the conference participants to achieve this objective, they were asked to first examine the nature of the right to self-determination and its evolution and then to examine ways in which the right can be constructively and effectively applied.

Context of the Conference

On the occasion of the Fiftieth Anniversary of the Universal Declaration of Human Rights, numerous conferences and seminars have been organised to reflect upon the progress which has been made in the field of human rights since the Declaration's adoption, on December 10, 1948. The Preamble of the Universal Declaration of Human Rights emphasises the need to respect human rights so that people will not be forced in the last resort to seek recourse to rebellion against tyranny. Self-determination itself is a human right and a prerequisite to the full enjoyment of other human rights. At the same time, the implementation of this right is often perceived by peoples as a means to free themselves from oppression and tyranny. Many of today's armed conflicts are centred around claims for self-determination.

Although the right of individuals to self-determination is no longer seriously questioned, that of peoples is controversial especially where it is perceived to threaten the territorial integrity of states. Sometimes it is argued that acceding to claims for self-determination precipitates conflict. But Nobel Peace Laureate Jose Ramos-Horta and Carlos Spottomo, Secretary General of the Spanish UNESCO Commission, reminded participants at the opening session that more frequently it is the refusal to apply the right to self-determination which causes conflict and wars. They pointed out that constructive and effective implementation of this right has resolved conflicts in the past and can prevent the occurrence of new conflicts in the future.

The Director General of UNESCO convened a series of four international meetings of experts with the object of furthering the elucidation of the general concept of peoples' rights, with particular emphasis on cultural identity. The first meeting was held in Harare. It dealt with the problems concerned with the rights of peoples and the historical and practical significance of these problems (See Final Report SHS-85/Conf.613/10). The second meeting took place in Canberra in 1987. It concentrated on clarification of the relationship between the rights of peoples and human rights as defined in existing universal international instruments (See Final Report SHS-87/CONF.802/7). The third meeting was held in Paris in 1989. The final report of that meeting (SHS-89/CONF.602/7) reaffirmed the existence of the rights of peoples as an accepted concept of international law and examined the controversy that had surrounded the elaboration of peoples' rights. The fourth meeting, which was held in Budapest in 1991, looked at issues related to self-determination and cultural rights in particular (See Final Report, SHS-91/CONF.605/3). While recognising the sensitivity and complexity of debates on the right of peoples to self-determination, the experts agreed that the right to self-determination was not confined to peoples formerly subjected to colonial rule, as some had argued before. They found that the right to self-determination is conferred on peoples by international law itself and not by states. They also emphasised that its exercise must be given content within the context of the wider purposes of international law, which include the need to ensure peace and security as well as economic and social development. Reaffirming that respect for peoples' rights is a precondition for the enjoyment of human rights, the experts urged UNESCO to "continue its pathfinding work of elucidation of the rights of peoples." It was particularly important in the face of the political changes taking place around the world that attention be given to the issue of self-determination and cultural identity and that an entirely new initiative be undertaken within the United Nations to address the question of derogation of peoples' rights including the right to self-determination.

Since the 1991 International Meeting of Experts, no new meetings have taken place and little new work was undertaken by UNESCO with respect to the rights of peoples and the right to-self-determination in particular. There is at present no program within UNESCO which focuses specifically on peoples' rights. Nevertheless, according to Janusz Symonides, self-determination is being dealt with every day within the UNESCO programs on democratisation and human rights which he heads. This is being done from the individual rights perspective rather than from that of peoples' rights.

Janusz Symonides pointed out in his opening remarks to the present conference, that this meeting takes place at a time when people shake off the politics of domination.

People want their cultural identity recognised and feel the need to ensure the free expression of that identity in the face of yet another challenge, that of globalisation. The importance of the concept of self-determination has only increased in recent years. It has become a central issue in many disputes and conflicts, both intra-state and, at times, inter-state. Discussions are often polarised between those who argue that every ethnic group has the right to unilaterally secede and form a new state and those who defend the status quo and the territorial integrity of states at all costs. It is in this situation that the discussion on “the application of the right to self-determination as a contribution to conflict prevention” described in this report takes place.

Methodology and Program of the Conference

The meeting was a five day conference of a small group of persons from all continents with extensive knowledge and experience in issues related to conflict and the right to self-determination. Participants included experts in the field of international law and academicians of other fields of study related to the subject; officials of international organisations; representatives of peoples and leaders of self-determination movements; and experts in the area of conflict resolution and peace research.

Intensive discussion was conducted in an informal manner which allowed for all participants to express their opinions, exchange views and develop a consensus on important issues. The discussion was divided into nine sessions, covering eight distinct but interrelated topics. The ninth session was a concluding one. Each session was introduced by two or three speakers invited to do so, followed by lively discussion.

The program was as follows:

Session I: The right to self-determination: evolution, limits & challenges

Session II: The right to self-determination as a tool for conflict prevention

Sessions III and IV: Options to implement the right to self-determination

Session V: Procedures to execute the right to self-determination

Session VI: Actors in the implementation of the right to self-determination

Session VII: Implementation of the right to self-determination within the concept of human security

Session VIII: The implementation of the right to self-determination in relation to the UN reform

Session IX: Conclusions

Participants to the Conference

Gudmundur ALFREDSSON, Co-Director, Raoul Wallenberg Institute, Lund University

Jose Antonio AMORIM DIAS, representative of East Timor to the Unrepresented Nations and Peoples Organization

James ANAYA, Indian Law Ressource Centre

Aurelí ARGEMI, Secretari General of CIEMEN

Paul ARTHUR, Magee College, Northern Ireland

Salvador CARDÚS, Autonomous University of Barcelona

Francesc CASARES, President of the Catalan Commission for the 50th Anniversary of the UDHR

Estebancio CASTRO, Kuna Indigenous fellow at the Office of the UN High Commissioner on Human Rights

Helen CORBETT, General Secretary, Unrepresented Nations and Peoples' Organization (UNPO)

Wolfgang DANSPECKGRUBER, Director of the Liechtenstein Research Programme on Selfdetermination, Princeton University

Jonan FERNÁNDEZ, Coordinator of the Elkarri movement

Vicenç FISAS, Coordinator of the UNESCO Chair on Peace & Human Rights, Autonomous University of Barcelona

Enric FOSSAS, Autonomous Univ. of Barcelona

Johan GALTUNG, Director of TRANSCEND

Seif Sharif HAMID, Vice-president of the CUF Party, Tanzania; Chairman of the General Assembly of the UNPO

John HENRIKSEN, Indigenous Team of the Office of the UN High Commissioner on Human Rights

Gurutz JAUREGUI, University of the Basque Country

Hanauni KAY-TRASK, KaLahui Hawai'i, University of Hawai'i

Michael KEATING, University of Western Ontario

Sebastian LARA, Documentation Centre on Indigenous Peoples, Vitoria (Basque Country)

Fèlix MARTÍ, Director of the UNESCO Centre of Catalonia, Barcelona

Martin MIRIORI, Secretary of the Bougainville Interim Government

Paul ORTEGA, Director of the UNESCO Centre of the Basque Country

John PACKER, Legal Advisor to the OSCE High Commissioner on National Minorities

Pau PUIG I SCOTONI, Doctor in History, Lund University

José RAMOS HORTA, Nobel Peace Prize Co-Laureat 96

Jaume RENYER, Rovira i Virgili University

Onno SEROO, International Relations Officer of the UNESCO Centre of Catalonia

Edi SHUKRIU, Edi, University of Pristina

Mohamed SIDATI, Minister-Adviser of the Presidency of the RASD

Carlos SPOTTORNO, Secretary General of the Spanish Commission for UNESCO

Janusz SYMONIDES, Director of the UNESCO Division of Human Rights, Democracy & Peace

Edita TAHIRI, Foreign Relations Advisor to President Ibrahim Rugova, Kosova

Leonie TANGGAHMA, West Papuan Peoples Front

Tracey TE AROHA WHARE, Maori Indigenous fellow at the Office of the UN High Commissioner on Human Rights

Michael C. VAN WALT VAN PRAAG, Peace Action Council; former General Secretary of the UNPO

Joe L.WASHINGTON, SIM-Utrecht University

Myo WIN, Vice-President of the Shan Democratic Union

Note:

At the last moment Gudmundur Alfredsson and Helen Corbett were unable to attend the conference. However, the papers they had prepared and sent were distributed and shaped the work of the conference.

II. CONCLUSIONS AND RECOMMENDATIONS OF THE CONFERENCE

The participants to the Conference reached and adopted the following conclusions on 27 November 1998, after extensive and profound debate:

The principle and fundamental right to self-determination of all peoples is firmly established in international law, including human rights law, and must be applied equally and universally.

The peaceful implementation of the right to self-determination in its broad sense is a key contribution to the prevention and resolution of conflicts, especially those which involve contending interests of existing states and peoples, including indigenous peoples, and minority communities. In this respect it is important to understand self-determination as an ongoing process of choice for the achievement of human security and fulfillment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.

Self-determination is achieved by fully participatory democratic processes among the people who are seeking the realisation of self-determination, including referenda where appropriate. Effective prevention of conflicts must be pro-active and requires immediate and committed action. It is imperative to prevent all actions by any relevant actors, which include governments, international and other organizations, individuals and corporations, which may result in the denial of the exercise of the right to self-determination, such as demographic aggression or manipulation, cultural assimilation and the destruction of the natural environment of importance to the survival of peoples.

The development of a universal sense of respect for cultural and national diversity and a deeper understanding of self-determination is essential to the promotion of peace in all parts of the world. In order to foster this culture of self-determination, special attention should be given to the potential positive role of the media and to the development of self-determination education and its inclusion in human rights education.

Recommendations

The Conference recommends

To the United Nations:

to pro-actively engage itself in the prevention and resolution of conflicts involving states and peoples or minority communities. In doing so the United Nations should respect and

promote the implementation of self-determination in the broad sense affirmed by this conference, as a means to advance peace with justice;

to create an effective mechanism within the United Nations to assist in the resolution of self-determination claims and conflicts;

to create a permanent forum of peoples within the United Nations system which would have consultative status with the UN.

To UNESCO:

to undertake further work on the right to self-determination and to consider preparing special publications on the subject;

to place special emphasis on the positive role of self-determination within the framework of its programmes of the culture of peace, democratisation and cultural pluralism and to incorporate this in UNESCO's national programs of culture of peace and reconciliation.

To Intergovernmental and Regional Organisations:

to place self-determination on the agenda of those organisations and to take account of the work of the United Nations on the rights of indigenous peoples and include them in their activities.

To Non-governmental Organisations:

to promote the right to self-determination, support those peoples struggling for its implementation and to raise specific cases before the United Nations Commission on Human Rights and other appropriate fora.

Decisions

The Conference decides

To promote the utilisation of existing mechanisms of the United Nations and other organisations to promote a better understanding and broader application of the right to self-determination in an effort to promote peace and justice and, in particular,

- to raise the question of self-determination and the issues discussed at this and future conferences at the United Nations Commission on Human Rights.

- in order to build on and continue the work of this Conference, to create an expert working group on self-determination which would meet every year before the discussion by the UN Commission on Human Rights of its agenda item relating to self-determination.

To organise regional meetings on self-determination and related subjects.

To explore the possibility of publishing a periodical publication on self-determination and legitimacy of states.

To create an E-mail list of the conference participants to maintain communication among them on developments in the field of self-determination and to exchange useful documents on the subject.

The Conference further decides that these Conclusions and Recommendations will be transmitted to the Secretary General of the United Nations, the Director General of UNESCO, the Chairperson of the UN Commission on Human Rights, the Chairperson of the Working Group on Indigenous Populations, and will be published as part of the final report of the Conference.

III. REPORT AND ANALYSIS OF THE CONFERENCE

by Michael van Walt van Praag

The conclusions reached by the Barcelona Conference in the course of five days of intense discussion and debate are very significant. They set the ground for a constructive and proactive use of the concept and right of self-determination as an integral part of conflict prevention and resolution. The Conference addressed self-determination as a process for the prevention and resolution of conflicts as well as a core principle for the substantive resolution and prevention of conflicts.

The Conference participants reached a clear consensus that the principle and fundamental right of self-determination is firmly established in international law. They found that it can contribute significantly to the prevention and resolution of conflicts if the right is understood and used in its broad sense and they agreed on the need to apply it extensively. But the participants also recognised the anxiety which the notion of self-determination causes among the governments of states and intergovernmental organisations. These institutions fear the application of this principle because they believe it threatens the sovereignty and territorial integrity of existing states and, thereby, has the potential to cause tensions, conflicts and instability rather than prevent or resolve them. The Conference further acknowledged the power of the notion of self-determination in creating often unrealistic or unhelpful expectations among communities, especially those that feel deprived or oppressed.

Many of the armed conflicts that have raged in the world this century, and the vast majority of those that have taken place since the end of the Cold War and continue today centre around peoples' drive to self-determination, whether explicitly stated as such or not. Precisely for this reason, the Conference felt it imperative to explore ways to transform the perception of self-determination as a contributing factor or even cause of conflict into the notion of self-determination as a foundation and instrument for the effective prevention and resolution of conflicts.

Of essence to this transformation is the development of a clearer understanding of the meaning of self-determination and its possible applications. As long as self-determination means everything to everyone, the concept will continue to evoke passions, expectations and fears that are, for the greatest part, unnecessary, unhelpful and unjustified.

As important as the conclusions that were reached, is the substance of the discussion that took place. The participants, all of whom came to the table ready to contribute their particular expertise, had diverse and at times strongly held opposing views on issues. Some participants were people who are directly involved with struggles for self-determination or with conflict prevention and resolution. Others were officials of international organisations and academics. No participant was indifferent to the issues at stake. Given this background, it is all the more significant that this diverse expert group

came, by means of extensive and intensive discussion, to a common understanding and a shared view of self-determination in the context of conflict prevention and resolution.

Self-determination is Firmly Established in International Law

A thorough analysis of the evolution and present status of self-determination leaves no doubt that it is today, and indeed has been for a long time, a core principle and fundamental right in international law.

The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations. Earlier it was explicitly embraced by US President Woodrow Wilson, by Lenin and others, and became the guiding principle for the reconstruction of Europe following World War I. The principle was incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals which evolved into the United Nations Charter. Its inclusion in the UN Charter marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognised as a *right* of all peoples in the first article common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which both entered into force in 1976¹. Paragraph 1 of this Article provides:

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

¹ The right had already been recognised in 1960 in the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV).

The right to self-determination of peoples is recognised in many other international and regional instruments, including the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States adopted by the UN General Assembly in 1970,² the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe (CSCE) in 1975,³ the African Charter of Human and Peoples' Rights of 1981,⁴ the CSCE Charter of Paris for a New Europe adopted in 1990,⁵ and the Vienna Declaration and Programme of Action of 1993.⁶ It has been affirmed by the International Court of Justice in the *Namibia case*⁷, the *Western Sahara case*⁸ and the *East Timor case*,⁹ in which its *erga omnes* character was confirmed. Furthermore, the scope and content of the right to self-determination has been elaborated upon by the UN Human Rights Committee¹⁰ and the Committee on the Elimination of Racial Discrimination¹¹ and numerous leading international jurists.

That the right to self-determination is part of so called hard law has been affirmed also by the International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples brought together by UNESCO from 1985 to 1991¹². It came to the conclusion that (1) peoples' rights are recognised in international law; (2) the list of such rights is not very clear, but also that (3) hard law does *in any event* include the right to self-determination and the right to existence, in the sense of the Genocide Convention. The Barcelona Conference concluded that the principle and fundamental right to self-determination of all peoples is firmly established in international law.

The inclusion of the right to self-determination in the International Covenants on Human Rights and in the Vienna Declaration and Programme of Action, referred to above, emphasises that self-determination is an integral part of human rights law which has a universal application. At the same time, it is recognised that compliance with the right of self-determination is a fundamental condition for the enjoyment of other human rights and fundamental freedoms, be they civil, political, economic, social or cultural.

The concept of self-determination is a very powerful one. As Wolfgang Danspeckgruber put it: "No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination." It evokes emotions, expectations and fears which often lead to conflict and bloodshed. According to one participant to the conference, 50 conflicts in the world today are related to antagonism between claims to self-determination and to state sovereignty. Conference participants were convinced that in most cases it is not the assertion of claims by oppressed communities but the

² Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV).

³ International Legal Materials Vol. 14, p. 1292 (1975).

⁴ Adopted 27 June 1981, International Legal Materials Vol. 21, p. 59 (1982).

⁵ International Legal Materials Vol. 30, p.193 (1991).

⁶ Adopted by the World Conference on Human Rights, UN Department of Public Information (New York, 1995.)

⁷ 1971 ICJ 16

⁸ 1975 ICJ 12

⁹ 1995 ICJ 102

¹⁰ 1984. UN doc. HRI/GEN/1/Rev. 3.

¹¹ 1996 UN doc. CERD/C/49/CRP.2/Add.7.

¹² See above, under section "*Context of the Conference*," for details.

denial of self-determination by state authorities which cause armed conflicts. In order to suggest ways to prevent and resolve these and related conflicts, the conference participants explored and discussed various and sometimes conflicting approaches to the implementation of self-determination. Some experts argued that the title holders should be or are limited in international law. Others believed in the need to limit the possible outcome for all or categories of title holders. Ultimately, the conference agreed that the best approach is to view the right to self-determination in its broad sense, as a process providing a wide range of possible outcomes dependent on the situations, needs, interests and conditions of concerned parties.

The Title Holders of the Right to Self-determination

The international legal instruments on self-determination refer to the right of self-determination as belonging to “all peoples.” Some participants to the conference argued that in determining who are title holders to the right of self-determination the plain meaning of the language should be taken as the starting point. It is a well established maxim of international law, contained in the Vienna Convention on the Law of Treaties and affirmed by the International Court of Justice, that terms in international legal instruments ordinarily are to be interpreted according to their plain meaning.¹³

The English language Webster’s dictionary defines a people as “the entire body of persons who constitute a community or other group by virtue of a common culture, religion, or the like.”¹⁴ A more detailed description was developed in 1989 specifically for the purpose of identifying the holders of the right to self-determination by the UNESCO International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples. This description (sometimes referred to by participants as the “Kirby definition” after its principal drafter, Justice Michael Kirby), identifies a people as :

a group of individual human beings who enjoy some or all of the following common features:

- (a) a common historical tradition;
- (b) racial or ethnic identity;
- (c) cultural homogeneity
- (d) linguistic unity;
- (e) religious or ideological affinity;
- (f) territorial connection;
- (g) common economic life.¹⁵

The UNESCO experts further stated that “the group as a whole must have the will to be identified as a people or the consciousness of being a people,” the key subjective element common to other legal definitions of peoples. The people must be of a certain number, which need not be large but must be more than “a mere association of

¹³ See Vienna Convention on the Law of Treaties, Art. 31, para. 1, 1155 U.N.T.S. 331. *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 ICJ 4, 8 (“If the words in their natural and ordinary meaning make sense in their context, that is the end of the matter”).

¹⁴ *Webster’s Collegiate Dictionary* (Random House ed., 1955), p.1000.

¹⁵ UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations* UNESCO doc. SHS-89/CONF.602/7, pp. 7-8.

individuals within a state,” according to those experts, who also considered the existence of “institutions or other means of expressing its common characteristics and will for identity to be of importance.”

The plain meaning of the term “all peoples” includes peoples under colonial or alien subjugation or domination, those under occupation, indigenous peoples and other communities who satisfy the criteria generally accepted for determining the existence of a people.

John Packer argued that under existing international law self-determination extends only to an entitlement held by peoples under subjugation suffering colonial, racist and occupying regimes (as a remedial entitlement) and to the whole population of all states, in terms of the right to determine their political status and their economic, social and cultural development (primordial entitlement). This view was not widely shared, as it was felt that the right to self-determination under contemporary international law did extend beyond these limited categories and included groups within the population of states that are considered “peoples.” It was agreed that many peoples suffer under contemporary forms of colonialism which do not fit into the traditional and arbitrary concept of “salt water colonialism.” Indigenous peoples, for example, continue to suffer from ongoing forms of colonialism or the consequences of earlier colonialism.

Nations, Indigenous Peoples and Minorities

It may be important to differentiate between peoples, nations, indigenous peoples and minorities to the extent that the entitlements of each group are distinct.

Nations

The concepts ‘nation’ and ‘people’ are closely related and difficult to distinguish. Thus, the criteria for a nation can be regarded as similar to those for a people. One participant described peoples as nations without a state. Johan Galtung defines a nation as a group of people that holds certain points in space and time as sacred. In this analysis, space is the motherland and time refers to points in history, often trauma. That definition does not use criteria such as commonality of language, ethnic identity or shared religion to identify a nation but gives much importance to territorial attachment. Without abandoning the Kirby criteria, participants agreed on the need to recognise the importance of symbols and myths which bind and move people in their identification with a nation or people. Michael Keating identified a nation as a group that makes a claim to self-determination, not necessarily an ethnic or homogenous group. Quebec, he argued, is a nation with the right to self-determination although here the concept of nation is not an ethnic one. The United States is a multi-ethnic and multi-cultural nation, but it could be argued that it is still a nation in formation. Michael Keating advanced various definitions but argued against any one clear definition, because in different places the concept of nation has different meanings, and a uniform definition could even cause conflict. The tendency to identify nations as monolithic units, occupying mutually exclusive territories, is particularly insensitive to nuances, and was found to be incompatible with the indigenous perception of nationhood.

The assumption by some people that states should be formed on the basis of the distinctness of each nation, the principle which led to the formation of nation-states in Europe in the nineteenth century, is today flawed and can be dangerous. The reality is the existence of overlapping ethnicities and multiple identities. Indeed there are very few true nation-states. At the same time, the concept of the nation is also a reality, and one with a tremendous force. Whereas states are created, fall apart or disappear, nations tend to survive. This is not to say that some nations have not been eradicated. A number of first nations of the Americas, for example, no longer exist as a result of genocide. The point is that whereas states are but artificial and pragmatic constructs for effective exercise of jurisdiction, and whereas many of them have been imposed by outside colonial powers without any regard to the geographic, ethnic or historical realities, nations are an ancient and deeply felt reality which binds people from generation to generation and survives changes in boundaries and rulers. Many nations have survived concerted efforts to eliminate their distinct existence. Thus, for example, after centuries of systematic efforts by the French state authorities to absorb all national groups and eradicate their distinctive identities in order to create a French national identity, the Breton, Corsican, Alsatian and Basque nations continue to exist.

Indigenous Peoples

From the indigenous perspective the term “indigenous peoples” has no intrinsic meaning. It is just a technical term which allows a number of peoples to participate, albeit in a limited way, in international discussions affecting their situation. Indigenous people identify themselves by the name of their distinct nation or people: Quechua, Saami, Maori, Navajo, Naga, Maasai, Papuan etc. Professor Erica-Irene A. Daes, the Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations is not persuaded that “there is any distinction between “indigenous” peoples and “peoples” generally, other than the fact that the group typically identified as “indigenous” have been unable to exercise the right of self-determination.”¹⁶

A “working definition” of indigenous peoples, which continues to serve as an important reference point in United Nations debates, was formulated by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and on Protection of Minorities, José Martínez Cobo, in his Study of the Problem of Discrimination against Indigenous Populations. He wrote:

¹⁶ Quoted in John Henriksen, *Implementation of the Right to Self-determination of Indigenous Peoples Within the Framework of Human Security*, p. 8, prepared for this Conference and included in this publication.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁷

Whether one uses this definition of indigenous peoples or other similar ones, the foremost elements are those of self-identification, and a special attachment to and priority in time with respect to ancestral territory.

Minorities

What constitutes a minority is also largely a question of self-identification. However, the principal elements in any definition include numerical inferiority, ethnic, linguistic, cultural or religious characteristics distinct from those of the rest of the population of a state and the non-dominant position of the minority. Many minorities are related to the population of a kindred state, often a neighbouring one, but this is not necessarily the case. The consequence of identification as a minority can be important, since it is generally understood that whereas peoples have the right to self-determination under international law, minorities do not possess such a right.

The categories just discussed are not necessarily mutually exclusive, and some groups may evolve from one category to another as circumstances change. Thus, whereas a community may be entitled to the protection afforded to minorities under the United Nations Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, that same group may also consider itself, and be recognised as, an indigenous people possessing the rights contained in the ILO Convention 109 and covered by the draft Declaration on Rights of Indigenous Peoples. It should also be noted that some communities appear to fit none of the categories precisely and yet contain elements of one or more of the categories. Kosova, for example, is considered by some to be an Albanian national minority region within Serbia, but is not so defined by the Kosovars themselves. The Albanians of Kosova are part of the Albanian people and nation (which is greater than the state of Albania). But Kosova is also a distinct political entity in its own right with a credible claim to self-determination.

Whereas there may be fluidity in the categorisation of communities and population groups, and precise or inflexible definitions may not do justice to the great diversity of situations in which these groups find themselves, it does remain important to define what the entitlements of these groups are.

¹⁷ José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub.2/1986/7/Add.4, para 379.

Content of the Right to Self-determination: Internal and External Self-determination

The Conference saw much debate in favour of and in opposition to making a distinction between the right to internal and external self-determination. Opposition was especially strong where such distinction leads to discrimination in entitlements among categories of peoples.

By internal self-determination is meant participatory democracy: the right to decide the form of government and the identity of rulers by the whole population of a state and the right of a population group within the state to participate in decision making at the state level. Internal self-determination can also mean the right to exercise cultural, linguistic, religious or (territorial) political autonomy within the boundaries of the existing state.

By external self-determination (described by some as “full” self-determination) is meant the right to decide on the political status of a people and its place in the international community in relation to other states, including the right to separate from the existing state of which the group concerned is a part, and to set up a new independent state.

Some participants argued that external self-determination was an instrument of de-colonisation, which has little applicability under existing international law beyond that situation and that of occupied territories. Under this understanding, few peoples, including indigenous peoples, are entitled to claim the right to external self-determination. Indigenous peoples, most other peoples and minorities may, however, claim rights under the rubric of internal self-determination, according to this view.

In favour of this approach it was argued that the opposition of states to the application of self-determination would be reduced and that more vulnerable groups could exercise a form of self-determination than is possible under current international law.

In opposition, it was argued that this approach is tantamount to saying that there are different categories of “peoples:” a first class that possesses the full right to self-determination, and a lesser class which possesses only a limited right to internal self-determination. The distinction is arbitrary, limits the right of choice and runs counter to the plain meaning of all instruments which state that “all peoples” have the right to self-determination, including the right to “freely determine their political status.” It was pointed out that even using a positivist “hard law” approach, one comes to the conclusion that there is no valid international instrument in force today which makes such a distinction or affirms a right to internal self-determination.¹⁸

¹⁸ It is often pointed out that the International Covenants on Human Rights affirm the right to internal self-determination of the entire population of states, whereas the Vienna Declaration and Programme of Action repeats the traditional decolonisation approach. The distinction, however, is not entirely evident from the wording of the Covenants and the Vienna Declaration, but could be derived from the context and legislative history. The Helsinki Final Act is considered to be broader in scope because it implies that all peoples always have the right to internal and external self-determination. This instrument is limited to Europe, however.

Without fully resolving these differences of approach, it was agreed that internal and external aspects of the right to self-determination could usefully be distinguished when discussing particular forms of implementation of the right. Moreover, it is important to stress that claims of self-determination do not necessarily imply claims to secession, indeed, they generally are limited to demands for rights to be exercised within boundaries of existing states. Consensus was also strong on the need for the recognition of remedial rights to vulnerable groups such as indigenous peoples and minorities.

Consensus: Self-determination in its Broad Sense

Self-determination should be understood or re-cast in its broad sense. If so, it can truly and profoundly contribute to the prevention and resolution of conflict. Participants to the conference arrived at this conclusion after extensive discussion on the meaning and nature of self-determination. This is consistent with understanding and placing self-determination in the overall context of international law, the principal purpose of which is to preserve peace, friendly relations among states and security. It is also the context in which Article 1 of the United Nations Charter places self-determination.

Self determination is a Process with no Predetermined Outcome

Self-determination is a process rather than an outcome. There is, in fact, no one prescribed outcome for the exercise of self-determination. The United Nations General Assembly, in its Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States stipulated that

[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people.¹⁹

According to the International Court of Justice, the essential requirement is that the outcome corresponds to the free and voluntary choice of the people concerned.²⁰

Self-determination is a Right of Choice, of Participation, and of Control

At its core, self-determination means simply that human beings, individually and as groups should be in control of their own destinies and that institutions of government should be devised accordingly. It is this idea that promoted the downfall of classical colonial structures and the abolition of *apartheid* and that today promotes democratic reform the world over.

Self-determination has its roots in and continues to be inseparably linked to the core concept of democracy, understood to mean the right to choose one's rulers and to

¹⁹ GA Resolution 2625 (XXV), Article 1.

²⁰ *Advisory Opinion on Western Sahara*, 1975 ICJ 12, 32-33.

participate in decision-making. Rulers of a polity based on these principles govern by consent of the governed. In this sense, the right to self-determination is a right of choice and a right of participation. But the exercise of self-determination may also involve a choice by a people to be ruled by the leaders of its own community, whether within the framework of an existing state or outside that framework.

Self-determination is an Ongoing Process

Self-determination should not be viewed as a one time choice, but as an ongoing process which ensures the continuance of a people's participation in decision making and control over its own destiny. It is this approach, according to Paul Arthur, which made it possible for Gerry Adams to argue that although the Northern Ireland agreement concluded in 1998 does not result in the immediate creation of a united Ireland, it sets in motion a process of self-determination in which the parties can work towards a change of status through democratic political means. Fèlix Martí also viewed the process in which Catalonia is engaged as a dynamic process of self-determination. This view makes it possible for incremental changes to be implemented rather than forcing parties to agree on definitive changes which can be too radical for some and insufficient for others. In this sense, self-determination should not be regarded as antagonistic to the state or to the situation in which a people finds itself. Rather, it should be seen as a process by which parties adjust and re-adjust their relationship, ideally for mutual benefit.

Self-determination is a Process for the Satisfaction of Human Needs

The object of the exercise of the right to self-determination was formulated in terms of human needs by Joe Washington. Peoples and communities strive to gain control over the means to satisfy the human needs of their members. The most important of these are the needs for human security and welfare. By security, in this view, is included economic, health, environmental, and food security as well as security of the person from physical violence, communal security (for example in terms of cultural integrity), and political security, meaning respect for human rights and freedoms. Thus, a variety of means, political structures and arrangements can be conceived which would satisfy the human needs of communities and their members. Johan Henriksen pointed out that such security exists when the people and its individual members have both verifiable legal and political guarantees for the implementation of their fundamental rights and freedoms, and have the *feeling* of security as well. This subjective element is particularly important at the collective level in the context of self-determination. Especially for peoples who have been disfranchised, oppressed or subjected to deportations, forced assimilation, religious persecutions etc. the need for security can be a prime objective in the struggle for self-determination. Care must, however be taken in the use of the term security so that it does not serve as a pretext for the military to take on unwanted roles in the "provision of security."

Cultural Identity

Culture, being a core element of distinctiveness of peoples and other communities, is often at the centre of a claim for self-determination when the cultural identity and expression of a community is suppressed or threatened. Respect for distinct cultural values and diversity is fundamental to the notion of self-determination. For some communities the recognition within the state of the value and distinctiveness of a group can be an expression of the implementation of their right to self-determination. For others, the authority and capability to exercise full cultural autonomy within a set territory (or to exercise it in a non-territorial manner) is an essential component of their exercise of self-determination.

Control of Natural Resources

Control, management and, in most cases, possession of land and the other natural resources on and in the land can be of crucial importance to a people or community in its struggle to maintain its identity, culture, way of life and autonomy. This has special importance in regard to indigenous peoples whose bond with the land and natural environment is especially strong. But other peoples too may derive their spiritual, cultural or economic strength and vitality from the land and its natural resources. The United Nations, in General Assembly Resolution 1803 (XVII), proclaimed the “right of peoples and nations to permanent sovereignty over their natural wealth and resources,”²¹ and the International Covenants on Human Rights affirm, in their common Article 1(2), the right of peoples to “freely dispose of their natural wealth and resources.”

The importance of this aspect becomes particularly evident where a people is denied the right to control its land and natural resources by the state. This is typically the case where those resources have great economic value. They are then exploited by the dominant people or elite for their own benefit, for the state as a whole or to benefit foreign (transnational) corporations. This exploitation usually results in major changes to the living environment of the people whose territory is being used. Sometimes sacred places are desecrated, pristine forests are destroyed, fertile lands are ruined, entire villages or towns are displaced, and communities are no longer able to maintain their way of life. Stated differently, the people’s right to self-determination is violated in a fundamental way and sometimes irreversibly.

The Indigenous Peoples’ Conception of Self-determination

Indigenous peoples advance their claims primarily in terms of self-determination. This is often interpreted as a challenge to the territorial integrity of existing states, because it is feared that indigenous peoples want to form their own states. Underlying this fear is the assumption that the state is the basic but also the highest form of organisation to which all communities, including indigenous peoples, aspire. But indigenous peoples articulate their right “to live freely and to determine their own destiny” without relating this to the

²¹ See also the Charter of Economic Rights and Duties of States, GA Res. 3291 (XXIX).

idea of states with mutually exclusive territories and sovereignties, according to James Anaya and others. "Instead, the backdrop is interrelationships. Emphasis is not so much on separation: rather, the goal is relations and connections. Separation in this context is only a transition to break away the negative, to create new bonds."²² Although the backdrop is different, the aspirations of indigenous peoples relate to the core concept of self-determination: the need for governing institutions to exist in such a way as to allow the people to live freely and determine their own destiny. The determination of indigenous peoples to change the situation under which they live today derives from the experience that the institutions under which they have been forced to live since they were colonised were established illegitimately and suppress their ability to live freely and determine their own destiny.

A central part of the indigenous way of life and spiritual belief is the maintenance of a nurturing bond with nature, with Mother Earth which is the very source of our sustenance. The destruction and over exploitation of the earth and its resources not only damages the living environment, but destroys the ability of the earth to sustain future generations and violates our duty to protect and care for Mother Earth and her natural resources. No one, in this view, owns nature nor land. It does not exist for the personal benefit or enrichment of any individual or group, but for the collective benefit of this and future generations. At the same time, the human security need of indigenous peoples always includes proper guarantees concerning ownership, possession or control over the land and natural resources. This is because under present realities the lack of such guarantees makes it impossible for indigenous peoples to maintain their fundamental relationship with the land and natural resources which is at the core of their diverse cultures.

External Elements of Self-determination

The external aspect of the right to self-determination is generally considered to be the right to separate from the existing state. But there are other external aspects which are of considerable relevance to the exercise of a peoples right to self-determination, but which do not necessarily entail the creation of an independent state. A good example is provided by the importance given by indigenous peoples to the need to protect and nurture Mother Earth and her natural resources. This need transcends artificial administrative and state boundaries. The earth and its resources cannot be protected by one community if they are being subjected to large scale destruction elsewhere. Indigenous peoples, therefore, consider it important to participate in the decision making processes at national and international levels relating to the conservation of nature or its exploitation. By the same token, any people or community may consider it of importance to include in its exercise of self-determination the authority to participate in international discussions or be included in international organisations where decisions are taken that affect core aspects of their existence and development. This could include participation in economic fora (examples are Tatarstan's separate representation at international economic conferences and Hong Kong's separate membership of international economic organisations), in regional organisations (examples include the Sami Council's membership in the Nordic Council and the Circumpolar Conference), global

²² James Anaya, oral presentation at the Barcelona Conference on 23 November 1998.

organisations (the establishment of a Permanent Forum for Indigenous Peoples within the United Nations system could be an example of such participation) or in cultural or religious organisations (Catalonia's desire to participate in UNESCO could be regarded as an example). Peoples may also wish to claim the right to be included and not excluded from decision making processes on such vital matters as war and peace, issues typically reserved for the exclusive authority of states. There are examples of regions or communities declaring neutrality or nuclear free zones, despite the fact that they are part of states with contrary policies. Exercise of self-determination could also entail the non-participation of an autonomous unit in an international organisation of which the state is a member (an example is provided by the withdrawal of Greenland from the European Union, of which Denmark remains an active member).

The perception that only fully independent states can conduct international relations and participate in decision making leads to the interpretation that demands for international participation by non-independent peoples threatens the territorial integrity and sovereignty of states and is even tantamount to separatism. To be sure, the extent to which non-independent entities can participate in decision making at international levels is limited by the concept of state responsibility in international law. Under current international law only states are endowed with legal responsibility and can be held responsible for the implementation of international treaties. Nevertheless, non-state entities can be recognised as representing legitimate interests internationally without threatening the continued existence of the state of which they form a part. Thus, under the constitution of Finland, the Sami not only have regional autonomy, but their elected body, the Sami Parliament, also possesses the authority to represent the Sami community of Finland at the international level. Similarly, Catalonia and Quebec have their own representative offices in foreign capitals for the promotion of tourism and trade.

Secession or Separation from the State

In the broader context of self-determination, separation or secession from the state of which a people forms a part should be regarded as a right of last resort. Thus, if the state and its successive governments have repeatedly and for a long period oppressed a people, violated the human rights and fundamental freedoms of its members, excluded its representatives from decision making especially on matters affecting the well-being and security of the people, suppressed their culture, religion, language and other attributes of the identity valued by the members, and if other means of achieving a sufficient degree of self-government have been tried and have clearly failed, then the question of secession can arise as a means for the restoration of fundamental rights and freedoms and the promotion of the well being of the people. This right could be regarded as analogous to the right of last resort of rebellion against tyranny and oppression referred to in the Preamble to the Universal Declaration of Human Rights.

Peoples and communities may attempt to secede because independent statehood appears to them to form the only means of obtaining the level of freedom and security which they aspire to. In part, this is because the international legal and political system does not provide adequate forms of protection and guarantees to communities that are within the borders of independent states, regardless of their status within that state.

Concepts of minority rights, indigenous peoples right, and human rights have many a time proved insufficient to protect communities against collective persecution, exploitation and suppression. Even genocide, such as that in Rwanda, and massive armed attacks, such as that in Chechenya, have taken place without effective action being taken by the international community. But the desire for independent statehood also exists because insufficient attention has been drawn to the positive experiences resulting from the implementation of other forms of self-determination than secession. The more it can be demonstrated that individual and collective human needs of communities, especially those for survival and development within a secure environment, but also for dignity and international acceptance, can be adequately guaranteed through arrangements that do not amount to secession, the more attractive these other options will become.

Self-determination is not an Absolute Right

Hardly any right recognised by law is absolute. This is true also of the right of self-determination, which is not self-executing nor unilaterally applicable. When the right, in the manner in which it is claimed, clashes with other international legal principles and rights, all of these rights and principles should be weighed and balanced, keeping in mind the overall international law objective of maintenance of peace and security.

Other rights and principles which may have to be considered in this process include: the rights of minorities or indigenous peoples and other peoples and population groups within the territory of the people claiming the right to self-determination; the territorial integrity of the state, where a people's claim may entail separation from it; rights and obligations to which the parties involved may be bound, for example, by treaties; and provisions of human rights law. Most often, reference is made to antagonism between the right to self-determination and the principle of territorial integrity of states.

Participants in the conference remarked that whereas the principle and right of self-determination had a profound ethical and moral basis, this was not the case with the principle of territorial integrity, which is a legal, political and pragmatic construct. On the other hand, the principle of territorial integrity serves a very important practical purpose in the overall objective of maintenance of peace and security, and is based on the principle of non-interference in the internal affairs of states. The principle of territorial integrity is clearly invoked in connection with self-determination in the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the Declaration on Friendly Relations (1970), and most recently in the Vienna Declaration and Programme of Action (1993). The latter Declaration (which uses virtually the same language as the Declaration on Friendly Relations) recognises the right of all peoples to self-determination but states that this

shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government*

*representing the whole people belonging to the territory without distinction of any kind. (Emphasis added).*²³

This paragraph imposes a requirement of legitimacy on a state invoking the principle of territorial integrity against a self-determination claim which threatens that integrity. This means that a state that oppresses, destroys or unduly exploits a people or community instead of protecting it or representing its interests has no legitimate right to invoke the principle of territorial integrity against that people or community. A state that gravely violates its fundamental obligations to its citizens loses the legitimacy to rule over them. This also applies with respect to a state's obligations towards a distinct people or community within its boundaries.

Jose Ramos-Horta concluded that the maintenance of territorial integrity lies in the hands of the governments in power. By accepting its obligations, including full respect for the right to self-determination with all its consequences, and engaging in dialogue with all sectors of society, a government can maintain the territorial integrity of the state or ensure that peaceful change occurs in a manner beneficial to the state.

Self-determination also imposes responsibilities on the claimants to respect the human rights, including the rights of minorities and indigenous peoples and of other peoples and communities within their jurisdiction, and to constructively resolve problems that arise from the implementation of the right.

The Broad Concept of Self-determination

The above analysis results in a concept of self-determination which is much broader and more flexible and complex than a definition which limits self-determination to separation. Understood this way, self-determination need not threaten the territorial integrity of states and can be quite compatible with its preservation. The major obstacles to an understanding and acceptance of this concept of self-determination are attachment to the dogmatic concept of the nation state, the extreme notion of sovereignty as an exclusive attribute of independent statehood, and territorial fixation.

Application of the broad concept of self-determination can lead to numerous arrangements in relations between states and population groups within those states tailored to the precise needs of the parties concerned. These arrangements can have territorial dimensions but also non-territorial functional ones. They can have internal but also external components. In developing appropriate arrangements, the most important attributes are creativity and flexibility and a profound understanding of what the people claiming self-determination seek to achieve in concrete terms, and what the vital legitimate interests of other parties concerned are. It is helpful not to be limited by traditional concepts of statehood in developing solutions appropriate to each specific case. It is also essential to develop forms of self-determination which provide sufficient guarantees for the long term effective implementation of agreements that are arrived at.

²³ Vienna Declaration and Program of Action, *supra* note 6, para. 2.

John Packer explained how the OSCE High Commissioner on National Minorities approached the question of division of jurisdiction between the Ukrainian state and the Crimean autonomous republic. Instead of exploring what could fall within the jurisdiction of the Crimean authorities, the High Commissioner chose to work backwards from what would reasonably not be within their jurisdiction. He found “only four subject-matters: national defence, monetary policy, maintenance of national frontiers, and certain aspects (not all) of international diplomacy (including notably the capacity to be held responsible at international law).”²⁴ Other creative examples include the Philippines Indigenous Peoples Rights Act (1997); provisions of the Finnish Constitution relating to the territorial and functional autonomy of the Sami people; Greenland home rule, which has far reaching internal and external aspects; the Nunavut arrangement in Canada with respect to the Inuit people, who now have a separate government, including a representative assembly, an executive branch, a court and a civil service and a limited capacity to engage in international diplomacy; the territorially based autonomy of the Kuna Yala in Panama, which recognises and incorporates indigenous institutions of leadership and provides for protection of the virgin forests which form the basis for the Kuna way of life; and the Chittagong Hill Tracts accords which, if implemented properly, could provide a considerable degree of self-government to the indigenous peoples of this region of Bangladesh. Johan Galtung suggested models of confederation of autonomies of peoples of the same nation (e.g. Kurds or Mayans) across the boundaries of the different states in which they find themselves, in ways that would not affect the territorial integrity of the respective states. Northern Ireland provides a recent very creative example which allows for multiple identities that have been de-linked from the limiting concept of territory and exclusive jurisdiction.

Effects of Increased Interdependence, Regionalisation, Globalisation and Supra-national Structures

The increased interdependence in economic, environmental and political spheres of all states has resulted in a dilution of the traditional notion of state sovereignty. State sovereignty is also being eroded by the growth of free market economies and the increasingly important role played by some 18,000 to 20,000 non-governmental organisations (NGOs) world wide.

A factor in the development of arrangements for autonomy and self-governance and other expressions of self-determination may be the role of supra-national institutions, such as the European Union, the North American Free Trade Area and the Commonwealth of Independent States. These kinds of institutions and international agreements have the effect of breaking the monopoly of the state. Sovereignty is no longer exercised exclusively by the state, but also by supra-state bodies. Together with this, the progress of democracy and increased relevance of human rights all strengthen the potential for the expression and realisation of the right of self-determination in its broader sense.

²⁴ John Packer, -----, p. 10, prepared for the Conference and included in this publication.

On the other hand, the current domination of world affairs by the United States and the growing globalisation, which increases the concentration of power in very few hands, could have a negative impact on a greater acceptance of self-determination.

The Broad Concept of Self-determination in International Law

Although, as stated above, the Conference reached full agreement on the incorporation of the right to self-determination in international law, there was considerable discussion among participants on whether the *broad* interpretation of the right to self-determination is also recognised in international law.

One view articulated was that international law today only recognises the right to self-determination of a narrow category of peoples, namely those under colonial or alien domination and subjugation or racist regimes. This form of self-determination, it was argued, entails the right to form a separate state. Other arrangements, such as regional or functional autonomy do not fall within the legal concept of self-determination and should therefore be handled under other rubrics. Such arrangements fall within the exclusive jurisdiction of the state, and are therefore not a matter of international law. It is for the authorities of the state alone, without external interference, to define the form of self-government or other arrangements.

The other view presented was that the broad concept of self-determination is accepted under international law and that its implementation does not fall exclusively within the domestic jurisdiction of the state but, on the contrary, is very much the concern of the international community. In the first place, it is argued, international instruments, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, state that the modes of implementation of the right to self-determination extend beyond the right of secession. The Declaration states:

the establishment of a sovereign an independent State, the free association or integration with an independent State *or emergence into any other political status freely determined by a people* constitute modes of implementing the right to self-determination by that people...(emphasis added).

This language clearly covers autonomy, self-government and any other arrangements whether within the framework of the state or not. Since self-determination is part of the human rights law, as was stated earlier, it is by definition not a matter that falls exclusively within the domestic jurisdiction of states, but is very much a matter of international responsibility and concern.

In the second place, international law is constantly evolving, and state practice as well as the opinion of international law publicists and scholars (which are also considered valid sources of international law) increasingly interpret self-determination to include forms of self government, autonomy and other arrangements within the framework of the state. The many self-government and autonomy arrangements implemented within states, such as those relating to Greenland, the Inuit, the Kuna Yala and other cases

described elsewhere in this publication, attest to an evolving state practice which views self-determination as including these arrangements. This view is supported by the current language of the draft Declaration of Rights of Indigenous Peoples, which has been adopted by the Working Group on Indigenous Populations and by the UN Sub-commission on Prevention of Discrimination and Protection of Minorities. Article 31 of this draft declaration states that:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 31 is not regarded as a qualification of the right to self-determination (as recognised in Article 3 of the same draft Declaration) but as a particular way of implementing it with regard to indigenous peoples.²⁵

In order to promote acceptance and application of the broad concept of self-determination --which all participants felt to be an important step in preventing the outbreak of armed conflict-- it was stressed by some that it is important to highlight the emerging customary law in this regard.

Means of Attainment of Self-determination

The exercise of self-determination requires, by its very nature, the expression of the will of the people. This can be conceived of in terms of one or more well defined acts or by ongoing processes of consultation, participation and inclusive decision making.

The holding of a referendum in order to establish the will of the people with respect to a change of status and other matters is a widely accepted act of self-determination. Difficulty arises, especially in referenda on issues related to territorially based rights, in areas which the community wishing to exercise self-determination shares with other peoples and communities. Where those other inhabitants are settlers, it was felt by many of the participants to the conference that they should not be entitled to take part in such referenda. This is particularly true where settlers have been moved to indigenous regions or encouraged to do so under a government program aimed at changing the demographic composition of the region in question. Such practices, whether overt or covert, have caused many peoples to be reduced to a numerical minority in their own homelands. Western Sahara, New Caledonia, but also West Papua, Hawaii, Zanzibar and Tibet were mentioned as examples of regions where large numbers of settlers have changed and continue to change the demographic balance. In these cases, a referendum in which all inhabitants have equal voice can not be deemed to be an act of self-determination by the aggrieved people. A case in point is the referendum in the Western Sahara which is now scheduled to take place in December of 1999. The United

²⁵ John Henriksen, *supra* note 16, at p. 19.

Nations has decided that persons transferred to the region or encouraged to move there by the Moroccan government, since 1975, do not have the right to vote in the referendum.

Implementation of self-determination does not necessarily require a one time act. The will of the people can be effected within a democratic system by use of the existing institutions of the state. This assumes a truly democratic fully participatory system, not one that limits the concept of democracy to "decision by the numerical majority." Where only votes count, a people or community which is numerically inferior, has no control over its destiny.

Self-determination can also be realised through one or more processes of negotiation, dialogue, and the conclusion of agreements between the state authorities and representatives of the people concerned. Sometimes the assistance of third parties can be useful in such processes. The good offices of the United Nations Secretary General and others have been used, most recently in advancing the peace process in Bougainville. Dialogue at the community level is just as important in a self-determination process. This was undoubtedly an important factor in making the Northern Ireland peace accords possible. Both in Bougainville and in the Basque country, major initiatives are also under way to build consensus among the people through a very inclusive processes of dialogue and consultation among all sectors of society as primary instruments of self-determination. The act of self-determination is not reduced to a referendum, but is seen as an integrated process of which the referendum is but one element.

There are few well defined procedures for adjudication of claims for self-determination or for their implementation. This is part of the reason why so many disagreements over self-determination lead to armed conflicts.

The International Court of Justice has rendered judgements and advisory opinions on issues involving self-determination, notably in the case of the right of Sahrauis to self-determination, but it has no ability to enforce its decisions. Other international judicial avenues include the Inter-American Court of Human Rights and the European Court of Human Rights.

To the extent that self-determination claims involve demands for the respect of human rights or rights of minorities, the procedures of the United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination can provide avenues for addressing them. The UNESCO procedure on cultural rights can also provide a useful avenue. But these bodies also lack the means to enforce any decision.

What is lacking is an effective international body, for example within the United Nations system, which adjudicates claims to self-determination and is mandated to actively assist in ensuring its peaceful implementation. The state of Liechtenstein, at the initiative of its Head of State, H.S.H. Prince Hans Adam II, presented a draft convention on self-determination through self-administration for consideration by the United Nations General Assembly in 1993. That proposal does contain provisions for procedures and

structures to assist in the peaceful implementation of self-determination. Unfortunately it has thus far received no meaningful support from UN member states.

Armed Conflict

In all regions of the world conflicts turn violent over the desire for full control by state governments, on the one hand, and claims to self-determination (in a broad sense) by peoples, minorities or other communities, on the other. Where governments recognise and respect the right to self-determination, a people can effectuate it in a peaceful manner. Where governments choose to use force to crush or prevent the movement, or where they attempt to impose assimilationist policies against the wishes of a people, this polarises demands and generally results in armed conflict. The Tamils, for example, were not seeking independence and were not using violence in the 1970's. The government response to further deny the Tamil people equal expression of their distinct identity led to armed confrontation and a war of secession. The tendency of the international community to accept self-determination primarily when presented with a *fait accompli*, and to give attention to conflicts only when they turn violent, encourages violence and penalises those who attempt to use peaceful and democratic means.

In many cases self-determination struggles turn into armed conflicts. A case in point is the thirty year struggle of Eritrea. The inaction of the United Nations and its members left Eritreans no choice. The Albanians of Kosova, under the inspired leadership of Ibrahim Rugova, have tried for a decade to obtain the necessary international support in keeping their movement non-violent. The issue was taken seriously abroad only once armed conflict finally did brake out. The conflicts in Abkhazia (which was not triggered, as often assumed, by a claim to secession) and in Chechenia (initiated by a massive Russian military attack) received serious attention only when the horrors of war were displayed on television screens world wide. Despite the attention, however, the issues at the base of these conflicts remain unresolved. At the same time, it should be recognised that some armed struggles, such as that of the Gagauz of Moldova and of the Jummas in the Chittagong Hill Tracts, have led to agreements for a considerable measure of autonomy.

Even if self-determination is achieved after an armed struggle, the armed conflict does not itself secure its realisation. Armed confrontation is often perceived as a necessary element of struggle and can force an unwilling party to the negotiating table, but a lasting solution rarely comes from it, even from victory. Here too, for a lasting solution a mutually satisfactory agreement must be reached through dialogue.

Many industrialised and other countries support corrupt dictators and other repressive regimes to safeguard their own economic or political interests. This, together with the unscrupulous sale of arms to them and to equally repressive non-state actors, reinforce the conditions for armed conflict within states.

Self-determination as a Means to Prevent and Resolve Conflicts: Conclusions

Conference participants were convinced that the increased acceptance of self-determination in the broad sense, as a right which can be exercised by democratic means and through dialogue and which does not in most cases necessitate the break up of a state, would be a major contribution to the prevention and resolution of conflicts. Real prevention should not be aimed at the maintenance of the status quo, but at ways to allow for change to occur peacefully.

This requires the development of a culture of self-determination, as it were, where self-determination is seen as a necessary and positive process of human emancipation and a corollary to democracy, in which people take greater responsibility for their community. At the same time, the traditional notion of the nation state needs transformation. Sovereignty must no longer be understood to be the exclusive prerogative of the central authorities of the state, but, rather, a collection of functions that can best be exercised at different levels of society, depending on the nature of decisions that need to be made and the manner of their most appropriate implementation.

Prevention requires the promotion of dialogue, consultation and other processes to ensure that peoples exercise their right to self-determination, in the broad sense developed at this conference, by peaceful and democratic means. In this context, the present inadequacy of institutions and processes that permit dialogue and promote the resolution of demands for change urgently needs to be addressed.

Non-state actors, including transnational or national corporations, international organisations, organised communities, political movements and individuals must be made accountable for their actions which too can ignite conflict, oppress people, or result in the denial of the right to self-determination.

In such a culture of self-determination, states and other actors should gain prestige by being in compliance with the principle of self-determination and other human rights. There are already today some examples of states that use their compliance (or alleged compliance) with the principle of self-determination as a source of prestige for their own political gain. Thus, the Prime Minister of Belize spent an inordinate amount of time at the most recent UN General Assembly to explain his government's policies towards the indigenous Mayan people in his country. Spain boasts about its enlightened policy with regard to the autonomy of Catalonia, and Panama loses no opportunity to gain praise for its conduct of relations with the Kuna Yala. This trend should be encouraged while at the same time states should be held to task for what they say.

For peace, security and stability to exist, any associations between peoples and communities or between them and the state must be based on genuine and continuing consent, mutual respect and mutual benefit. Peace cannot exist in states that lack legitimacy or whose governments threaten the lives or well being of a section of the population. The international community, its members and institutions have an obligation to act where international law, including human rights and especially the right to self-determination, is violated. The time to act is always now, not when a conflict is "ripe" for resolution, as some would have it. Prevention of conflicts requires proactive measures to persuade states to act in compliance with international legal standards towards their

citizens, including distinct peoples and communities that exist within their borders, and to desist from actions, such as population transfer or forced assimilation, which impede the exercise of self-determination. States must be made to realise that aspirations of peoples and communities cannot be ignored.

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