



This work is protected by copyright and other intellectual property rights and duplication or sale of all or part is not permitted, except that material may be duplicated by you for research, private study, criticism/review or educational purposes. Electronic or print copies are for your own personal, non-commercial use and shall not be passed to any other individual. No quotation may be published without proper acknowledgement. For any other use, or to quote extensively from the work, permission must be obtained from the copyright holder/s.

INTERNATIONAL LAW AND TITLE TO TERRITORY IN AFRICA.

by MALCOLM SHAW LL.M

Submitted to Keele University for the
degree of Ph.D.

1979

CONTENTS

Abbreviations	1
Abstract	11
 Territory in International Law	 1
I The Role of Territory	2
II Territorial Sovereignty	22
III Title to Territory	34
IV The Acquisition of Territorial Sovereignty	34
V Africa and Territory	45
 The Colonisation of Africa	 51
I The Modes of Acquisition of Territory in Africa in Colonial Times	54
(1) Effective Occupation and the Concept of Terra Nullius	54
(2) Cession	66
(3) Conquest	79
II Colonial Protectorates	80
III Spheres of Influence and the Hinterland Doctrine	84
IV Consideration of Geographical and Ethnic Factors during Colonisation	87
V Legal Ties	90
VI The Problem of Legal Particularism	97
 The Establishment of the Legal Right to Self-Determination	 102
I Historical Introduction	102

II	Charter Interpretation	114
	(a) General	114
	(b) Self-Determination	134
	(1) General Approach	134
	(2) Specific Approach	152
III	Customary International Law	158
IV	Conclusions	164
4	Self-Determination, Decolonisation and Territory	171
I	Self-Determination and Decolonisation: The Western Sahara Analysis	173
II	The Nature of the "Self" and Territory	183
III	The Spatial Factor - State Practice	191
	(a) Namibia (South-West Africa)	191
	(b) Pre-Independent Kenya and Somali Claims for Self-Determination	200
	(c) British Togoland	204
	(d) British Cameroons	206
	(e) Ruanda-Urundi	208
	(f) Cabinda	211
	(g) Equatorial Guinea	212
	(h) Comoros	212
	(i) Eritrea, 1941-1952	215
	(j) The French Territory of the Afars and Issas	220
	(k) Mauritania	223
	(l) Spanish Sahara	227
IV	The Spatial Factor - Conclusions	239
V	Special Cases	245
	(i) Colonial Enclaves	245
	(ii) Apartheid	257

5	Territorial Integrity	268
I	The Concept of Territorial Integrity	268
	(a) Generally	268
	(b) African Practice	272
	(c) The Temporal Definition of Territorial Integrity	280
	(d) Territorial Integrity and Self-Determination	286
II	The Nature of Claims against Territorial Integrity	289
	(a) Historical Claims	290
	(b) Ethnic Claims	292
	(c) Geographic Claims	293
	(d) Economic Claims	294
III	State Practice	295
	(a) Irredentist Claims	295
	(1) Moroccan Claims to Algerian Territory	295
	(2) Somali Claims to Ethiopian and Kenyan Territory	297
	(3) Ghana's Claims to the Ivory Coast	304
	(4) Ghana, Togo and the Ewe Question	304
	(b) Secessionist Claims	306
	(1) Katanga	306
	(2) Biafra	316
	(3) Southern Sudan	322
	(4) Eritrea	323
	(5) The Dissolution of the Mali Federation	326
	(c) Conclusions	329

6	Statehood, Territory and Title	332
	I Statehood and Territory	333
	(1) The Criteria	333
	(a) A Defined Territory	334
	(b) Government	335
	(c) Independence	336
	(2) Self-Determination	340
	(a) As Modifying the Traditional Criteria of Statehood	340
	(i) Defined Territory	340
	(ii) Government	340
	(a) The Congo, 1960	341
	(b) Ruanda-Urundi, 1962	342
	(c) Guinea-Bissau, 1973	342
	(d) Angola, 1975-6	347
	(iii) Independence	351
	(b) An Additional Requirement of Statehood	351
	(i) Rhodesia	352
	(ii) The "Independent" Bantustans	355
	(3) Recognition	358
	Conclusions	366
	II New States and Title to Territory	368
	III The Status of National Liberation Movements and the Question of Title	376
7	The Use of Force	387
	I The Use of Force by the Colonial Powers	389
	(a) International Doctrine	389

	(b) Practice Relating to Africa	404
	(1) The Tunisian Question	404
	(2) The Question of Portugal's African Territories	406
	(3) Portuguese Attacks on Neighbouring States	413
	(4) The United Kingdom and Rhodesia	421
II	The Use of Force by Illegal Regimes	423
	(1) The Case of Rhodesia	425
	(2) The Case of Namibia	427
III	The Use of Force by Peoples Entitled Under International Law to Self-Determination	429
	(a) International Doctrine	429
	(b) Practice Relating to Africa	447
	(i) Portugal's African Territories	448
	(ii) Namibia	450
	(iii) Rhodesia	454
	Conclusions as to the Use of Force in Recognised Self-Determination Situations	458
IV	Apartheid and the Use of Force	459
V	Intervention by Third Parties	464
	1 Intervention Contrary to Self-Determination	467
	2 Intervention to Promote Self-Determination	483
	UN Practice	483
	African Practice	490
	3 Intervention in Post-Self-Determination Situations	503
	(a) Intervention in Struggles to Overthrow Governments	504
	(i) The Zaire-Shaba Crisis, 1977-78	504
	(ii) Chad	506

	(b) Intervention in Struggles for Secession	507
	(i) The Congo, 1960-64	507
	(ii) Nigeria, 1967-70	508
	(iii) Eritrea	509
	(iv) The Ogaden	511
	(c) Intervention in Situations of Authority Vacuum	515
	Angola	515
	(d) Conclusions	522
VI	The Use of Force to Acquire Territory	525
8	Boundaries	534
	I The Nature of Boundaries	534
	II Boundary Treaties	549
	(a) The Rebus Sic Stantibus Rule	549
	(b) State Succession	555
	(1) The Opinion of Jurists	556
	(2) State Practice	559
	(i) The Somali Disputes	562
	(ii) The Algerian-Moroccan Boundary	566
	(3) The International Law Commission and the Vienna Convention on Succession of States in Respect of Treaties	570
	(c) Conclusions	577
III	Other Territorial Regimes	579
	(a) African Practice	580
	(i) US Military Bases in Morocco	580
	(ii) The Belbase Agreements of 1921 and 1951	582
	(iii) The Nile Waters Agreement of 1929	584
	(b) The Vienna Convention on Succession of States in Respect of Treaties, 1978	585

IV	The Delimitation and Demarcation of African Boundaries	586
	(a) Delimitation Disputes	587
	(i) The Ethiopian-Somali Dispute	587
	(ii) The Algerian-Moroccan Dispute	590
	(iii) The Sudanese-Egyptian Dispute	591
	(iv) The Libya-Chad Dispute	594
	(v) The Tanzanian-Malawi Dispute over Lake Malawi	595
	(vi) The Dahomey-Niger Dispute	601
	(vii) The Ghana-Upper Volta Dispute	602
	(viii) The Mali-Upper Volta Dispute	603
	(ix) The Gabon-Equatorial Guinea Dispute	605
	Conclusions	606
	(b) Demarcation Problems	609
	The Ethiopian-Sudan Dispute	611
	The Mali-Mauritanian Dispute	612
	Bibliography	614

ABBREVIATIONS

AFDI	Annuaire Francais de Droit International
AJIL	American Journal of International Law
BFSP	British and Foreign State Papers
BYIL	British Yearbook of International Law
Canadian YBIL	Canadian Yearbook of International Law
CLJ	Cambridge Law Journal
GAOR	General Assembly Official Records
HR	Recueil des Cours de l'Academie de Droit International, Hague
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILM	International Legal Materials
ILR	International Law Reports
JMAS	Journal of Modern African Studies
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
LQR	Law Quarterly Review
MLR	Modern Law Review
PASIL	Proceedings of the American Society of International Law
SCOR	Security Council Official Records
UNMC	United Nations Monthly Chronicle
UNTS	United Nations Treaty Series
YBWA	Yearbook of World Affairs

ABSTRACT

Territorial issues have historically assumed a central role in international relations. Despite considerations relating to, for example, human rights and economic and social cooperation, the territorially based view of international law remains the fundamental model and is subscribed to by third world States.

The acquisition of territory in Africa by the European powers in the nineteenth century involved the characterisation of the status of the various African communities. These were accepted as holding title to their territory, but not regarded as full subjects of international law. Cession was the primary technique used in the colonisation of Africa.

The right of peoples to self-determination is today one of the leading principles of international law and this has implications as regards the law of territory. The right, which has emerged through the United Nations by means of Charter Interpretation, has been fairly specifically defined in State practice. It may be seen as the right of the people of a non-self-governing colonial territory to determine its own political future within the borders of the colonially defined territory. The obligatory nature of the colonially determined borders is reinforced in international law by rules about succession to boundary treaties. Self-determination has also had an impact as regards the recognised criteria for Statehood, but it has not been deemed applicable to secession from independent States.

Also relevant to the law of territory is the question of the use of force, both particularly with regard to, for example, the acquisition of territory by force, and more generally as regards wars of self-determination.

CHAPTER 1 - TERRITORY IN INTERNATIONAL LAW

The international community is formed first and foremost by States, which were defined by Vattel as "political bodies, societies of men who have united together and combined their forces in order to procure their mutual welfare and security".¹ The element missing from this definition relates to the need for a territorial basis for such political bodies. This necessity, however, is self-evident. As Oppenheim has noted, "a State without a territory is not possible".² This does not mean that territoriality is a criterion of personality in international law, but Statehood is inconceivable in the absence of a reasonably defined geographical base. The frontiers of such an entity need not be established beyond dispute, nor is there any prescribed minimum of territory for the existence of a State, but some piece of land is essential before one can accept the establishment and continuation of a State.

Territory is, of course, itself a geographical conception relating to physical areas of the globe, but its centrality in law and international law in particular derives from the fact that it constitutes the tangible framework for the manifestation of power by the accepted authorities of the State in question. The principle whereby such a State is deemed to exercise exclusive power over its territory can be seen as a fundamental axiom of classical international law.³ More than this, Hill declares that "international relations in

(1) The Law of Nations or the Principles of Natural Law, vol.2, 1758, p.3.

(2) International Law, vol.I, 8th ed. 1955, p.451.

(3) See Delbez, "Du Territoire dans ses Rapports avec l'Etat" 39 *Revue Générale de Droit International Public*, 1932.

their more vital aspects, revolve about the possession of territory".⁴ This crucial role, thus played by territory and its attendant legal concepts, has been evident in all stages of the development of international law and changes in the nature and structure of international law cannot but be expressed in the light of this fact.

I - The Role of Territory

The notion of territory as an essential element in the sovereignty of a particular society geographically located was known to the ancient Greeks.⁵ The Roman attitude was predicated upon the creation and defence of a large empire, with relatively fluid borders, and subsisted in the light of a belief in the universality of its domination, but the post-Roman era saw for many reasons, including religion, the rise of the concept of society as based primarily upon personal allegiance rather than territory. As Gottmann puts it, "for a millenium the significance of territory in Europe was to be reduced to very little indeed, even on the local scale".⁶ Political and social life revolved around individual and tribal allegiance to a sovereign and to the Church. From about the fourteenth century-communities began to be seen in terms of territorial entities and the notion of a State as understood in contemporary thought began to develop.⁷ It was, however, the Peace of Westphalia of 1648 that marked a crucial point towards the creation of modern international law, based as it has been upon defined territorial units.⁸ The

(4) Claims to Territory in International Law and Relations, 1945, p.3.

(5) See Plato's Laws, Bk.4, 704-10, and Bk.5, 737. Aristotle's Politics, Bk.7, Chapters IV and V. See also Gottmann, The Significance of Territory, 1973, pp.17-26.

(6) Op.cit. p.27.

(7) Ibid pp.36-44.

(8) See Nussbaum, A Concise History of the Law of Nations, 1954, p.115.

Treaties of Westphalia taken as a whole may be regarded as the first sustained attempt to establish a world order "on the basis of States exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority".⁹ This order involved the recognition of all independent States as having equal rights of sovereign jurisdiction over a determined territory. This sovereign equality of States was founded upon the exclusivity of action of each State within its defined territory and the right of all States to participate within the sphere of international relations. Since such States were territorially delineated, the introduction of the Westphalia system marked the demise of the concept of personal allegiance as the foundation of political society. But the break between the two was not clean. The concept of sovereignty drew to some extent upon the ideas associated with feudalism, since the latter defined power in terms of territory,¹⁰ while the State developed into the framework and symbol of national identity to which citizens owed a form of personal allegiance. Nevertheless, the development of international law upon the basis of the exclusive authority of the State within an accepted territorial framework meant that territory became, as O'Connell has suggested, "perhaps the fundamental concept of international law".¹¹ From this Westphalian view, it follows logically that "this problem of the legal ordering of territorial stability and territorial change lies at the heart of the whole problem of the legal ordering of

(9) Gross, "The Peace of Westphalia, 1648-1948" in International Law in the Twentieth Century (ed. Gross), 1969, p.25.

(10) See eg. Schoenborn, "La Nature Juridique du Territoire", 30 HR (1929 V) pp.85, 97-8.

(11) International Law, 2nd ed. vol.1, 1970, p.403.

international society".¹² The Westphalian concept of the territorial sovereign State, therefore, has remained the basis of most analyses of international law, although not without challenge. Before the territorial basis of international society is further considered, however, a few comments will be made regarding the functions of territory.

Gottmann specifies two main functions, viz. the need for a shelter for security and the possibility of acting as a springboard for opportunity. Both these functions require an internal organisation of the territory and a subsequent organisation of its external relations.¹³ They are complementary in that once a community feels secure in its land, it will seek to develop relations with other communities, but both processes are closely linked. One influences and sometimes determines the other. The nature of a community's success in achieving a measure of stable tenure over its territory will often have a profound impact upon neighbouring societies, both in a positive sense as an example and in a negative sense as an area for satisfaction of acquisitive instincts. On the other hand, the search for security may conflict with the desire for developing horizons of opportunity. Self-sufficiency and international intercourse do not always complement each other. The concept of territory will not only express the power-balance between co-existing or competing entities, it also reflects the relationship between the people and the geographical space they inhabit. The mystical nature of territory is not a new

(12) Jennings, The Acquisition of Territory in International Law, 1963, p.87. See also Judge Huber in the Island of Palmas case, 2 RIAA (1928) pp.829, 838.

(13) Op.cit. p.14.

phenomenon. It was known and manifested in religious terms in the civilisations of Egypt, Greece, Ancient Israel and Rome.¹⁴ Modern nationalism in the vast majority of cases points to a deep almost spiritual connection between land and people. This can be related to the basic psychological needs of mankind, in terms of the need for security and a sense of group identity, for instance. Scelle has written that "the concern for the preservation of habitat exists as a passionate psychological reflex in all human communities".¹⁵ Gottmann declares that territory is a "psychosomatic phenomenon of the community"¹⁶, since it is intimately involved in the purposes and aims of the particular society in question, as perceived by its inhabitants. Territory is the physical aspect of the life of the community as an entity and therefore reflects and conditions the identity of that community. It has also been the prime means by which in modern international relations peoples have conducted their external affairs.

Territory therefore plays not only a definitional role, but a constitutive one historically as well. It is the link between a people, its identity as a State and its international role. It has thus been of crucial importance in Westphalian international law, and even more so since the American and French revolutions in the eighteenth century inaugurated the era of that people-territory nexus recognised as nationalism.

If the notion of territory in international law has evolved in response to the needs of peoples and individuals and as a result

(14) See eg. Schoenborn loc.cit. pp.92-4.

(15) Introduction a l'Etude du Droit, 1951, vol.I, pt.1, p.87 quoted in Gottmann op.cit. p.14.

(16) Op.cit. p.15. Emphasis in original.

of historical developments affecting the world order, and if, as will be seen, fundamental principles of international law reflect and reinforce this, the question arises as to the functions of territory today. As far as security is concerned, modern developments have shown that the mere possession of territory cannot of itself guarantee the protection of its inhabitants. The era of aviation, missiles and various devices of mass destruction has meant that no State can provide absolute security for its people. Therefore, States have sought to establish their security by other means, such as mutual deterrence, international agreements, international organisations and so on. Boundaries as the geographical barriers protecting the inhabitants of a territory now play a much more humble role. Modern technology has also meant that the function of territory as a means of excluding the activities of other entities has been much diminished. Pollution and the after-effects of other industrial and scientific advances cannot always be confined within the territorial limits of the State wherein the process takes place. The problem of nuclear fall-out affecting third States is just one further example of this.¹⁷ The growth of multi-national industry and the development of international economic institutions has meant that in this sphere also, the power and influence of States within their own territories is much circumscribed. Ball has been quoted as saying that the multi-national corporation "not only promises the most efficient use of world resources, but as an institution it poses the greatest challenge to the power of the nation-State since the temporal position of the Roman Church began to decline in the 15th

(17) See the Nuclear Tests case, ICJ Reports, 1974, p.253.

century".¹⁸

These factors have led a number of writers to postulate the decline of the Westphalian system of international law based fundamentally on sovereign territorial States. De Visscher noted that territory, which since the end of the middle ages had provided the firmest base for international relations and ensured their stability, no longer possessed the same significance.¹⁹ Gottmann has stressed that the movement toward Statehood and national sovereignty based upon exclusive territorial jurisdiction seems to have reached its apogee and that "by 1970 sovereignty has been by-passed, and a new fluidity has infiltrated the recently shaped map of multiple national States".²⁰ Dembinski writes that new technological developments have minimised the importance of the territorial factor,²¹ while international law specialists have not really appreciated the changes that have occurred that impinge upon the theory of the supremacy of the territorial State.²² Indeed, one of the reasons for the failure of international law to adapt to the problem of contemporary international relations is seen as its concentration upon territory as the fundamental

-
- (18) House Comm. on Foreign Affairs, 93rd Cong. 2d. Sess., Rep. of Official visit to Congress by a Delegation of the European Parliament 40 (Comm. Print. 1973), cited in Falk, "A New Paradigm for International Legal Studies: Prospects and Proposals" 84 Yale Law Jnl. (1975), pp.969, 1006.
- (19) Theory and Reality in Public International Law, 1968, p.405.
- (20) Op.cit. pp.126-7. See also Delbez loc.cit. pp.705-6 for an early view.
- (21) "Le Territoire et le Developpement du Droit International" Annuaire Suisse de Droit International (1975) pp.121, 145.
- (22) Ibid p.123.

concept of international law.²³ This theme has been particularly developed by Falk, who has declared that "the State system is being superseded by a series of interlocking social, economic, political, technological and ecological tendencies".²⁴ The world order system is moving away from the dominant statist conception enshrined in the Westphalian model towards one based upon "an augmented capacity for central guidance and an increased role for non-territorial actors".²⁵ In other words, structural changes in the political, economic, social and cultural environments are altering the fundamental basis upon which the exclusivity of the territorial State developed. As a result of this, the State-centred framework of international law is in the process of being modified to accommodate these changes in the world system. One may add to this the influence of the revival of natural law thinking²⁶ and the consequent growth of an international cooperation approach as the hallmark of developing functional interdependence.²⁷ A further consequence has been the growing emphasis upon human rights in international law and the legal protection of individuals and non-State groups.²⁸

(23) Ibid p.121. See also Schou, "Le Role du Territoire dans le Droit International" Nordisk Tidsskrift for International Ret (Acta Scandinavica Juris Gentium 10), 1939, pp.17, 23.

(24) Loc.cit. p.973.

(25) Ibid p.1020. See also ibid p.969.

(26) See eg. Lauterpacht, International Law and Human Rights, 1950; Jenks, The Common Law of Mankind, 1958.

(27) Eg. Friedmann, The Changing Structure of International Law, 1964.

(28) See generally, Sohn and Buergerthal, The International Protection of Human Rights, 1973.

One may note Article 1(2) of the Charter of the United Nations which declared that one of the purposes of the organisation was the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, while Article 1(3) referred to international cooperation in solving international problems of an economic, social, cultural or humanitarian character and to the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.²⁹ Such principles are primarily applicable to non-State entities and are therefore illustrative of the move away from the dominance of the territorial concept. The principle of self-determination, which it is submitted is now of vital importance with regard to the international law of territory, is specifically stated to be the right of "all peoples"³⁰ and is thus not restricted to established sovereign States. The rise and growth of the increasing number of international organisations also underlines the need felt in the world community for cooperation and coordination beyond that provided within the strict confines of a rigidly territorially based State system. The range and universality of such institutions bears witness to the defects of the territorial State system.³¹ It has also been accepted that the Westphalian State concept of international relations is

(29) See further Articles 55-91.

(30) See eg. Article 1 of the International Covenants on Human Rights, 1966, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970.

(31) See generally Bowett, The Law of International Institutions, 3rd ed. 1975.

inadequate for the exploration and exploitation of areas of relative inaccessibility requiring highly advanced technology, the two examples being outer space and the sea-bed and ocean floor of the high seas. In both cases, the international community has declared that the territorial concept is invalid. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, 1967,³² declared that outer space, including the moon and other celestial bodies, was not subject to national appropriation by claim of sovereignty and that its exploration and use was to be for the benefit of mankind as a whole. Celestial bodies were to be used solely for peaceful purposes and no weapons of mass destruction were to be placed in outer space or in orbit around the Earth.³³ As far as the deep sea-bed is concerned, the Declaration of Principles governing the Sea-Bed and the Ocean Floor and the Subsoil thereof, Beyond the Limits of National Jurisdiction, 1970,³⁴ stated that the area in question, as well as its resources, were the "common heritage of mankind" and were not subject to appropriation by States or persons and that no State could claim or exercise

(32) Entered into force on 10 October 1967. See also General Assembly Resolutions 1721 (XVI), 1962 (XVIII) and 1884 (SVIII).

(33) See on the law of space, Fawcett, International Law and the Uses of Outer Space, 1968; Jenks, Space Law, 1965 and McDougall, Lasswell and Vlasic Law and Public Order in Space, 1963.

(34) Adopted on 17 December 1970 in resolution 2749 (XXV) by 108 votes to 0, with 14 abstentions. See also Assembly resolutions 2340 (XXII), 2467 (XXIII) and 2574 (XXIV).

sovereignty or sovereign rights over any part thereof.³⁵ The recourse to a collectivist doctrine of use in the one case and ownership and use in the other reveals the perceived limitations of the territorial doctrine. Certain interests were deemed common to all mankind and a territorial solution deemed inappropriate, impossible and inequitable.

Thus, it appears that trends are emerging in international relations challenging or at least restraining the dominant territorial conception of world affairs. It remains to be seen how far such trends have become enshrined in contemporary international law and more particularly how far African States and practice have accepted either the territorial or global approaches. But first one must note the extent of State territory. It clearly includes its land areas, subterranean areas, waters, rivers, lakes, the airspace above the land, etc. and the territorial sea. The exclusive economic zone concept would not, it appears, fall within the territory of a State. Article 55 of the 1977 Informal Composite Negotiating Text declares that "the exclusive economic zone is an area beyond and adjacent to the territorial sea subject to the specific legal regime established in this Part, under which the rights and jurisdictions of the Coastal State and the rights and freedoms of other States are governed by the relevant provisions

(35) Those principles were reaffirmed in Articles 3 and 4 of Part I, Informal Single Negotiating Text produced in 1975 by the Chairmen of the three main committees of the Third UN Conference on the Law of the Sea, A/Conf.62/WP.8/Part I and in Articles 136 and 137 of the Informal Composite Negotiating Text of the 6th session of the Conference in July 1977, see A/Conf.62/WP.10. They would clearly appear, therefore, in any new Convention on the Law of the Sea.

of the present Convention".³⁶ Oppenheim declares that in addition to the "real parts" of State territory, there exist also certain "fictional parts". As examples, he cites the cases of the official residence of foreign diplomatic envoys, public vessels on the high seas and in territorial waters of foreign States and merchant vessels on the high seas.³⁷ However, this would appear to involve a confusion between territory and jurisdiction. A State may exercise its jurisdiction perfectly legitimately in situations that are not to be classified as territorial. There is no requirement in international law for State territory to be geographically indivisible and contiguous. Pakistan prior to 1971 was divided into two widely separated geographical parts.

Many of the most fundamental principles of international law are predicated upon the concept of the territorial exclusivity of the State, and are aimed at protecting it. The sovereignty and equality of States, the "basic constitutional doctrine of the law of nations" in Brownlie's words,³⁹ involves

(36) Article 56 specified the rights, jurisdiction and duties of the coastal State, and Article 58 sets out the rights and duties of other States in the exclusive economic zone.

(37) Op.cit. p.461.

(38) Note that the International Law Commission in its commentary on the Draft Articles relating to Diplomatic Immunity declared that it was guided by the theory of functional necessity justifying diplomatic privileges and immunities while bearing in mind the representative character of the mission and head of mission. It clearly rejected the extraterritoriality theory, see Yearbook of the ILC, 1958, vol.II pp.94-5. See also Sahovic and Bishop, "The Authority of the State: Its Range With Respect to Persons and Places" in Manual of Public International Law (ed. Sørensen), 1968, pp.311, 313-4.

(39) Principles of Public International Law, 2nd ed. 1973, p.280.

a number of crucial propositions. These were expressed in the 1970 Declaration on Principles of International Law in the following terms: "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: (a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the States are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."⁴⁰ The rules relating to the use of force are similarly based on and intended to protect the territorial concept. Article 2(4) of the UN Charter declares that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State".⁴¹

(40) Brownlie expresses the principal corollaries of the sovereignty and equality of States as "(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other States; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obliger." op.cit. p.280 (footnotes omitted). Article 2(1) of the UN Charter states that "the Organisation is based on the principle of the sovereign equality of all its Members".

(41) Note that Article 51 of the Charter refers to the "inherent right of individual or collective self-defence". See further *infra* Chapter 7, p.443 et seq.

Article 1 of the Consensus Definition of Aggression adopted in 1974⁴² stated that "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition".⁴³ In the sphere of State responsibility for internationally unlawful acts, the International Court of Justice emphasised "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"⁴⁴ and this was extended in the 1972 Declaration of the UN Conference on the Human Environment, principle 21 of which stated that "States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".⁴⁵ The Lotus case emphasised that

(42) Without a vote, in General Assembly resolution 3314 (XXIX).

(43) Article 3 specifies that the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof would qualify as aggression. Article 5 emphasises that no territorial acquisition or special advantage resulting from aggression are or shall be recognised as lawful. See generally Stone, Conflict Through Consensus, 1977.

(44) The Corfu Channel case, ICJ Reports, 1949, pp.6, 22. The Court noted that the exclusivity of control of the territorial State might affect the proof obtainable by the other State in the former's territory and thus a more liberal recourse to inferences of fact and circumstantial evidence, *ibid* p.19. See also the Trail Smelter arbitration, 3 RIAA p.1905, and Eagleton, Responsibility of States in International Law, 1928 and the Draft Articles of the International Law Commission, Yearbook of the ILC, 1976, vol.I, pp.19-81, and vol.II, part 2, pp.69-122.

(45) See Sohn, "The Stockholm Declaration on the Human Environment" 14 Harvard International Law Journal (1973) p.423, and Techoff and Utton (eds), International Environmental Law, 1974.

the exercise of jurisdiction was primarily territorially based,⁴⁶ while within its territory, the laws of a State apply to all except where treaty provisions otherwise stipulate.⁴⁷ The supremacy of the authority of the territorial law was further noted in the Diplomatic Asylum case, in which the court held that "derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each case" and asylum was such a derogation.⁴⁸ The right of passage between Portuguese enclaves over Indian territory was recognised by the International Court as "subject to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal".⁴⁹ The rules governing recognition and State succession are also closely bound up with the territorial conception of international relations. Thus, it can be seen that many of the fundamental principles of international law are aimed at the protection and preservation of the dominant Statist order founded upon territorial exclusivity. Such a system is by its very nature static, with the use of force constituting one of the most dynamic elements regarding the modification of the existing distribution of territory.⁵⁰ The room left for the development and growth of

(46) PCIJ Series A, no.10, p.18.

(47) See U.S. Nationals in Morocco, ICJ Reports, 1952, p.176. The right of a State to apply social legislation to strangers on its territory was affirmed in the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants, ICJ Reports, 1958, p.55.

(48) ICJ Reports, 1950, pp.266, 275.

(49) ICJ Reports, 1960, pp.6, 45. Cf. the Declaration of Judge Basdevant *ibid* p.49, the Separate Opinion of Judge Wellington Koo *ibid* p.68, and the Dissenting Opinion of Judge Spender, *ibid* p.114.

(50) See Dembinski *loc.cit.* p.127.

non-State entities within the dominant order was consequently rather limited. Even the League of Nations was primarily aimed at the preservation of international security and thus the freezing of the territorial status quo in the light of the concept of collective security. Members of the League agreed to respect and preserve the territorial integrity and existing political independence of all members against external aggression.⁵¹ However, in this it failed as the events of the 1930's clearly demonstrated. The Charter of the United Nations marks a change since, as noted above, the concepts of self-determination, human rights and international social, economic and cultural cooperation were firmly inserted and further developed via later resolutions, declarations, conferences, etc. However, the UN itself is founded upon the sovereign equality of Members, the protection of State's territorial integrity and political independence from the threat or use of force, the maintenance of international peace and security and the provision in Article 2(7) preventing the organisation from intervening in matters essentially within the domestic jurisdiction of any State.⁵² In the expansion of State

(51) See Bowett op.cit. pp.15-20; Stone, Legal Controls of International Conflict, 1959, Chapter 4, and Scott, The Rise and Fall of the League of Nations, 1973.

(52) Note also that each Member has one vote in the General Assembly and that the jurisdiction of the International Court of Justice in contentious matters is based on the consent of the parties, see Article 36 of the Statute of the ICJ, while in the case of advisory matters a State cannot be compelled to submit a dispute to a tribunal without its consent, Eastern Carelia case, PCIJ Series B no.5 (1923). But see as regards the modification of this rule, the Peace Treaties case, ICJ Reports 1971, pp.16, 24, and the Western Sahara case, ICJ Reports, 1975, pp.12, 22-27.

jurisdiction and sovereignty this century, it is instructive to note that territorialist conceptions have on the whole prevailed. This is so with regard to the recognition of the sovereignty of States over airspace above their land territory,⁵³ and with respect to the development of the notions of the contiguous zone, continental shelf and exclusive economic zone. In the case of the latter concepts, the principle used has not been that of the extension of territory to comprise such areas but rather the recognition of coastal States' "sovereign rights" with regard to such areas.⁵⁴ While this distinction is a very important one, the point to be made is that the concept of res communis as applied to the high seas and the deep sea-bed and ocean floor has been progressively whittled away in favour of the extension of State authority and control.⁵⁵

Perhaps the major principle of international law that would appear to have challenged the dominant territorial doctrine with success has been that of self-determination.

-
- (53) The customary rule to this effect developed rapidly in the early years of this century, see Oppenheim op.cit. pp.517-9 and Article 1 of the Chicago Convention on International Civil Aviation, 1944.
- (54) See eg. Article 2 of the Geneva Convention on the Continental Shelf, 1958, Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, 1958 (which talks of controls to be exercised by Coastal States in the Contiguous Zone) and Article 56 of the Informal Composite Negotiating Text, 1977, of the Third UN Conference on the Law of the Sea. By way of contrast, Article 1 of the Chicago Convention (see previous footnote) specifies that "every State has complete and exclusive sovereignty over the airspace above its territory". Emphasis added.
- (55) See eg. Phillips, "The Exclusive Economic Zone as a Concept in International Law" 26 ICLQ (1977) p.5.

This principle, deemed applicable to all peoples, has been the legal weapon in the process of decolonising the European empires.⁵⁶ In the process, it ensured that the territory of a colony or other non-self-governing territory was accepted as having under the Charter, "a status separate and distinct from the territory of the State administering it" until such time as the people in question had exercised the right of self-determination.⁵⁷ The exercise of the right resulted in the disruption of the recognised territorial sphere of the administering State and to that extent proved an exception to the principle of the territorial integrity of existing States. Although Article 2(7) of the UN Charter was pleaded as a way of forestalling UN debates and resolutions on decolonisation issues, it came to be accepted that such matters did not fall "essentially within the domestic jurisdiction" of States.⁵⁸ The range of concern of international law had moved beyond, it seemed, territorial exclusivity. Such a view, which may be related to the proposition stated by the Permanent Court of International Justice that the question whether a certain matter is or is not solely within the jurisdiction of a State was an essentially relative question which depended upon the development of international relations,⁵⁹ was

(56) See further on the nature and contents of this principle, Chapters 3 and 4, *infra*, pp.102 and 171.

(57) The Declaration on Principles of International Law, 1970, contained in General Assembly resolution 2625 (XXV).

(58) *Infra*, Chapter 3, p.125, note 107.

(59) Nationality Decrees Issued in Tunis and Morocco, PCIJ Series B no.4, p.24.

reflected also in the institution of the mandate and trusteeship systems for these were predicated upon the creation of a special status for particular territories. This special status involved the division of sovereignty with three distinct entities with varying degrees of powers, viz. the people of the territory, the administering power and the League of Nations or United Nations.⁶⁰

Despite the different categories of mandates and the different formulations of mandate and trust responsibilities,⁶¹ and the reference to non-self-governing territories in the UN Charter,⁶² as the International Court of Justice noted, "the subsequent development of international law ... made the principle of self-determination applicable to all of them".⁶³ Therefore, in a sense, the principle of self-determination superseded prior obligations. This does not mean that such obligations ceased to exist, but rather that one could subsume them within the more general category of self-determination. However, as will be seen, self-determination as a legal principle under international law has been restricted to the colonial situation, although it does have greater potential in the light of its meaning in political theory. Where a non-self-governing territory has

(60) See eg. the Separate Opinion of Judge Bustamante, South-West Africa case, ICJ Reports 1962 pp.6, 357, and the dissenting opinion of Judge Nervo *ibid* p.458. See also Wright, Mandates under the League of Nations, 1930.

(61) See Article 22 of the League of Nations Covenant and Chapter XII of the UN Charter.

(62) Chapter XI of the Charter.

(63) The Namibia case, ICJ Reports, 1971, pp.11, 31. See also the Western Sahara case, ICJ Reports, 1975, pp.12, 31.

attained independence, the principle of self-determination coupled with that of territorial integrity will operate to protect the territorial unity and framework of the new State. Indeed, a basic presumption of the application of self-determination is that it will be exercised by the people in question within the territorial framework of the entity as administered by the colonial power before independence. In the light of this, it is to be wondered how far indeed the principle of self-determination has affected the territorial basis of international law. The answer, it appears, is not to a substantial extent. The territorial framework of the non-self-governing entity has been, with only a few exceptions,⁶⁴ substantially accepted as the identification pattern for the exercise of the right to self-determination. Once a State has obtained independence, international law imposes a duty upon other States⁶⁵ to respect and preserve this territorial arrangement.

It is clear that in a number of areas patterns of functional cooperation have modified the Statist-centred conception of international law, while further inroads have been made with regard to the international protection of human rights and self-determination, although in the latter instances, potentiality for change far exceeds actual change. However, the territorially-based view of international law still retains its position as the fundamental paradigm. It is instructive to note that Third World States

(64) Eg. Palestine and Ruanda-Urundi.

(65) Although not upon the citizens of that State, see further *infra* Chapter 5, p.330.

are vitally concerned with the maintenance of their independence and the concept of the sovereign equality of States within a defined territorial sphere is being continually re-emphasised. The first three principles of the Organisation of African Unity, as enshrined in Article 3 of the Charter, emphasise the sovereign equality of States, non-interference in the internal affairs of States and respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence. In the field of economic development, which together with decolonisation has constituted a prime concern of African as well as other Third World States, the notion of State sovereignty has been declared to be the fundamental principle. In the Charter of Economic Rights and Duties of States,⁶⁶ for example, this emerges quite clearly. Article 1 proclaims that States have the sovereign and inalienable right to choose their own economic, as well as political, social and cultural systems without outside interference. Article 2 declares that every State possesses full permanent sovereignty over all its wealth, natural resources and economic activities and provides that States may regulate foreign investment in their jurisdiction, transnational corporation activities and nationalisations of foreign property according to their own domestic laws (and therefore not in accordance with international law

(66) Adopted in resolution 3281 (XXIX) by the General Assembly by 120 votes to 6, with 10 abstentions. The UK and USA voted against, while Canada, Japan and the Netherlands abstained.

principles necessarily).⁶⁷ While this Charter is not to be taken as part of customary law, and it is not an international convention, it does illustrate how the vast majority of States in the world community see the international legal order in the light of the concept of territorial exclusiveness. The demise of the Westphalian dogma is not therefore imminent. On the contrary in a number of areas it has been fervently adopted by the newly independent States and other countries of the Third World, in a quite specific manner. The global, or inter-territorial approach is, however, of developing importance in certain fields, but not to the extent envisaged by some writers.⁶⁸ The two approaches are not exclusive, it should be noted, but may exist side by side as dual tendencies in international life.⁶⁹ But it is submitted that the territorial pattern of international law remains the dominant one even if its predominance has been modified.

II - Territorial Sovereignty

The concept of territorial sovereignty is concerned with the nature of the authority exercised by the State over its territory. The ideas of territory and sovereignty are closely linked in international law, since the concept of territory itself is concerned with those geographical

(67) See also Articles 4, 5, 10, 12, 13 and 27, and the Declaration on the Establishment of a New International Economic Order.

(68) See eg. Dembinski loc.cit. and Gottmann op.cit.

(69) As for example: economic development law, note the growing importance of UN Conferences on Trade and Development and the work of the UN Commission on International Trade Law.

areas over which sovereignty or sovereign rights may be exercised. Territorial sovereignty is, therefore, centred upon the rights and powers coincident upon territory in the geographical sense. As such it has provided the basis for modern international law.⁷⁰ Territorial sovereignty is essential before one can talk of a State. Huber noted in the Island of Palmas case, the leading case on the subject, that "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State".⁷¹ Jennings referred to the "mission and purpose of traditional international law" as being the delimitation of the exercise of sovereign power on a territorial basis,⁷² while Judge Huber regarded the principle of the exclusive competence of the State in regard to its own territory as the point of departure in settling most questions that concern international relations.⁷³ What then is the nature of sovereignty⁷⁴ over territory? Brierly emphasises that it refers not to a relation of

(70) Maine wrote that "if sovereignty had not been associated with the proprietorship of a limited portion of the earth, had not, in other words, become territorial, three parts of the Grotian theory would have been incapable of application", Ancient Law, 1861, p.66.

(71) 2 RIAA (1928) pp.829, 838. See The Report of the Commission of Jurists in the Aaland Islands case, LNOJ Suppl. no.3, p.6.

(72) Op.cit. p.2.

(73) 2 RIAA (1928) pp.829, 838.

(74) "That much abused word" according to Brierly, The Law of Nations, 6th ed. 1963, p.162.

persons to persons, nor to the independence of the State itself, but to the characteristics of rights over territory and is a convenient way of contrasting "the fullest rights over territory known to the law" with certain minor territorial rights, for example, leases and servitudes.⁷⁵ Territorial sovereignty has a positive and a negative aspect. The former relates to the exclusive competence of the State with respect to its own territory, and in Huber's words "sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".⁷⁶ The negative aspect of the notion relates to the obligation to protect within the territory the rights of other States, for instance, regarding their right to integrity and inviolability.⁷⁷ Thus territorial sovereignty in fact marks a link between a particular people and a particular territory, so that within that area that people may exercise through the medium of the State its jurisdiction while being distinguished from other peoples exercising jurisdiction over other areas. It consists of a coherent body of rights and duties imposed upon States in relation to specific pieces of territory.⁷⁸

(75) Ibid.

(76) 2 RIAA (1928) pp.829, 838.

(77) Ibid p.839.

(78) See the separate opinion of Judge Alvarez in the Corfu Channel case, ICJ Reports, 1949, pp.4, 43. Bastid notes that "sur son territoire, l'Etat est en droit d'exclure l'action des autres Etats. Mais, par contre, la souveraineté territoriale est source d'obligations internationales" see "Les Problèmes Territoriaux dans la Jurisprudence de la Cour Internationale de Justice" 107 H.R. (1962 III) pp.360, 367.

It is important to distinguish the two notions of sovereignty and property here. They may be related to the distinction made in Roman law between imperium and dominium,⁷⁹ which appear to have been subsequently confused with the rise of feudalism.⁸⁰ O'Connell believes that as a result of the foundation of common law theories of land in feudal law "sovereignty and property are indistinguishable conceptions to the Anglo-American lawyer" and held this capable of having repercussions with regard, for example, to the developing law of the sea-bed.⁸¹ International law, however, built upon the Roman law distinction of imperium and dominium. Vattel noted that there existed two elements relating to the connection between a nation and the territory it inhabits. The first was ownership, by virtue of which the nation could use the territory for its needs, benefit from it and dispose of it, and the second was sovereignty or "the right of supreme jurisdiction by which the nation regulates and controls at will whatever goes on in the territory".⁸² The entire space over which a nation extended its sovereignty and which formed the sphere of its jurisdiction was termed its domain.⁸³ The distinction between sovereignty and property, or ownership, is an important one and may be related to a variety of needs in international law. As defined, it could help one appreciate the nature of mandated and trusteeship situations, as well as other cases where absolute

(79) See Schoenborn loc.cit. p.96.

(80) Westlake, International Law Part I, 1904, p.86. See also Cavaglieri, "Regles Generales du Droit de la Paix" 26 H.R. (1929 I) pp.315, 385.

(81) Op.cit. pp.403-4.

(82) Op.cit. p.84. See also Grotius, De Jure Belli ac Pacis, 1625, vol.II, chapter III, s.4.2.

sovereignty is not in the hands of one State alone. Whether it could be used to solve problems relating to the use of res communis, such as the sea-bed, is more doubtful.

The Western Sahara case clearly demonstrates that the concept of territorial sovereignty involved far more than personal ties of allegiance between a people and a ruler and certain rights relating to the land in question. While the court accepted that there did exist at the relevant time (the period of Spanish colonisation) "legal ties of allegiance" between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara and "some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the court, and the territory of Western Sahara", no ties of territorial sovereignty were involved.⁸⁴ The differentiating factor in Morocco's case appeared to be the absence of the exercise of effective internal sovereignty over Western Sahara,⁸⁵ and in Mauritania's case the fact that the "Mauritanian entity" did not have the "character of a personality or corporate entity distinct from the several emirates and tribes which composed it".⁸⁶ Judge Ammoun, however, regarded such personal ties as equivalent to State ties and therefore transmuted, as it were, into ties of territorial sovereignty merely by virtue of the existence of a particular territory relative to the accepted personal ties.⁸⁷ This cannot be

(83) Ibid.

(84) ICJ Reports, 1975, pp.12, 48, 64 and 68.

(85) Ibid p.47.

(86) Ibid p.63.

(87) Ibid pp.93-4.

accepted, for the notion of territory in the context of territorial sovereignty denotes more than the existence of a defined geographical space. It refers additionally to a particular kind of relationship between people and space, as characterised by the existence of an effective governmental authority. As the Commission of Jurists noted in the Aaland Islands case, "if the essential basis of ...

territorial sovereignty is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established."⁸⁸

Thus, the link between territorial sovereignty and Statehood becomes manifest. Judge de Castro, on the other hand, took the view that such personal ties as were involved in the Saharan situation as regards both the Sultan of Morocco and the "Mauritanian entity" could not be regarded as binding ties.⁸⁹ Whether such ties could be regarded as legal or not, and it is a complex and difficult issue, they could not affect the decolonisation process or the principle of self-determination. This was the court's view, correctly expressed it is suggested.⁹⁰ Such ties, however, could have an influence upon the various procedures concerned in the decolonisation process,⁹¹ although what this might amount to was not explored by the court. Presumably, it might affect the nature of any questions that might be asked in a plebiscite seeking the views of the population of the

(88) LNOJ Suppl. no.3, 1920, p.6

(89) ICJ Reports, 1975, pp.12, 164

(90) Ibid p.68

(91) Ibid p.64

territory on the future political status of the territory in question. As such, these personal ties etc. cannot be regarded as being of significant importance within the general context of territorial sovereignty.

A number of theories have been elaborated to explain the nature of the relationship between State and territory. The patrimonial theory appears to be the oldest of such theories. According to this approach, territory is regarded as a piece of property pertaining to the ruler. Based upon feudal ideas of land tenure, it confused the concepts of sovereignty and property, or imperium and dominium. In this form, the theory lasted for a number of centuries,⁹² and evolved into the so-called object theory (or property theory or Eigentumstheorie). This continued the notion of territorial sovereignty as concerning a real right, within the context of property. In other words, the State was regarded as exercising its power over its territory much as in private law an owner would treat his possessions.⁹³ While this theory explains the juridical fact that States may dispose of parts of their territory, it faces problems in dealing with the notion of Federal States⁹⁴ and it does not appear to answer the question of why a State disappears upon the disposal of all of its territory. In spite of

(92) See Schoenborn loc.cit. pp.100-2

(93) Cavaglieri noted that "le droit de l'Etat sur son territoire est un droit de nature réelle, un dominium, dont la nature et les effets appartiennent au droit public". Loc.cit. p.385. See also Donati, Stato E Territorio, 1924

(94) Schoenborn loc.cit. p.112, and see as regards servitudes ibid pp.108-12

this, the theory is of significance in Anglo-American jurisprudence.⁹⁵ The approach that such an abstract distinction exists between State and territory can be compared with the subjectivist doctrine⁹⁶ or space or quality theory (or eigenschaftstheorie or taumstheorie),⁹⁷ according to which the territory of a State is regarded not as something separate but as an integral part of the personality of the State itself. An attack on the territory of a State is seen therefore not as affecting the property or possession of the State but as a violation of the personality of the victim State. The emphasis is thus upon imperium rather than dominium. However, there are a number of drawbacks with regard to this view. It appears to suggest that any change in territorial extent, whether by cession or by acquisition, seriously affects the personality of the State itself. It is difficult to assimilate with regard to federal States and condominiums, and there are problems in explaining the existence of leases. By way of contrast, the objectivist⁹⁸ or competence theory (kompetenztheorie),⁹⁹ linked with the Austrian "pure theory of law" school,¹⁰⁰ sees the territory of a State as the area of State jurisdiction or the space in which the State exercises its competence. Kelsen wrote that "the unity of the State territory, and therefore the territorial unity of the State, is a juristic and

(95) See Hall, A Treatise on International Law, 8th ed., 1924, p.125 et seq.; Lawrence The Principles of International Law, 7th ed., 1929, p.136 et seq., and O'Connell, State Succession in Municipal Law and International Law, vol.I, 1967, p.22.

(96) See Delbez loc.cit. p.711.

(97) See Schoenborn loc.cit. p.114 and O'Connell op.cit. footnote 95 pp.22-3.

(98) See Delbez loc.cit. p.712.

(99) Schoenborn loc.cit. p.117, and O'Connell op.cit. footnote 95, p.23.

(100) See Kelsen, General Theory of Law and State, 1949.

not a geographical unity, for the territory of a State is legally nothing but the territorial space of validity of the national legal order called a State".¹⁰¹ In other words, the notion of territory is minimised and seen merely as a limiting factor as regards the exercise of the power of the State. Thus, Kelsen defines State territory as "that space within which a State is authorised by general international law to perform all acts provided for by its national law or the space within which according to general international law the organs determined by a national legal order are authorised to execute this order".¹⁰² This theory has attracted support.¹⁰³ Oppenheim declares that "the importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority".¹⁰⁴ Lauterpacht has attempted to combine this approach, which is sophisticated and can readily account for situations of split sovereignty, with the advantages of the objects theory. He has written that if one accepts a State as the totality of individuals organised in a State, rather than as an absolute and mystical entity, there is then no objection or artificiality in regarding the State as the owner of territory. Indeed the objects theory is the most attractive theory to account for the cession of territory. However, territory is also the basis on which and the area in which a State exercises jurisdiction in conformity with international and municipal law.

(101) Principles of International Law, 2nd ed., 1966, p.307

(102) Ibid p.308

(103) See eg. Delbez loc.cit. p.712; Schoenborn loc.cit. p.124 and Verzijl, International Law in Historical Perspective, vol.III, 1970, pp.12-13, who notes that territorial sovereignty may be adequately defined as "the plenitude of exclusive competencies (sic) appertaining to a State under public international law within the boundaries of a definite portion of the globe".

(104) Op.cit. p.452

Thus, "territory is both the object of the State's right and the space within which its sovereignty and jurisdiction are exercised".¹⁰⁵ In addition, territorial sovereignty is not an absolute element, it may be divided,¹⁰⁶ and property "is a bundle of rights capable of modification, division and adjustment".¹⁰⁷ This composite approach appears the most acceptable one, not only because most proponents in fact have sought to synthesise the various elements involved rather than adhere strictly to one or other of the three major doctrines,¹⁰⁸ but because a highly flexible view of the concept of territorial sovereignty appears the most satisfactory. Territorial sovereignty should be examined on the basis of its provision of opportunities for cooperation and development rather than in a rigid straightjacket.

If territorial sovereignty is to be seen in terms of a particular relationship between State, people and territory and the concomitant possession by the State of a collection of powers, rights, duties, etc. as regards the territory in question, the problem arises as to the source of such powers, etc. There are two possibilities, either they emerge as a consequence or an attribute of sovereignty itself, or they are granted to the State by the rules of international law. The sovereignty¹⁰⁹ argument leans against the latter view since it "has against it the

(105) International Law, vol.I, 1970, pp.367-9.

(106) Eg. Lighthouses in Crete and Samos case, PCIJ Series A/B no.71, p.103 (1937), and O'Connell op.cit. Chapter 10. Instances of divided sovereignty include mandated and trust territories, condominiums, servitudes, etc.

(107) International Law vol.I, 1970, p.377.

(108) See O'Connell op.cit. footnote 95 p.27.

(109) See on sovereignty, Schwarzenberger, International Law and Order, 1971, Chapter 5; Larson, Sovereignty Within the Law, 1965, and Stankiewicz (ed.) In Defence of Sovereignty, 1969.

conviction of States to which nothing is more distasteful than the idea that the power they yield is granted them by the international order".¹¹⁰ The sovereignty approach, in De Visscher's view, is derived from the psychological ties that exist between a nation and its territory and is founded upon the notion of power as delineating that territory.¹¹¹ Yet the sovereignty approach in the true sense is valid only if one posits the supremacy of municipal law. It is believed that the better view is to accept the primacy of international law, at least as far as the relative distribution of competences. It was stated in the Lotus case that "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; without these limits its title to exercise jurisdiction rests in its sovereignty".¹¹² This same minimal approach is adopted by Waldock, who wrote that international law limits the competence of States but beyond that is the domain of free action, i.e. domestic jurisdiction, "the reserved domain begins where international law ends".¹¹³ But it is clear that the delineation of the area of domestic jurisdiction is within the competence of international law.¹¹⁴ As Kelsen wrote, "the international legal order determines how the validity of the national

- (110) Anzilotti, Cours de Droit International, 3rd ed., 1929 (trans. by Gidel), p.51, cited in De Visscher op.cit. p.205.
- (111) De Visscher op.cit. p.206. The international argument is seen as minimising the full human and national significance of territory, *ibid.* Judge Alvarez in the Corfu Channel case declared that sovereignty "has its foundation in national sentiment and in the psychology of the peoples", ICJ Reports, 1949, pp.4, 43.
- (112) PCIJ, Series A, no.10 (1927) p.18.
- (113) "The Plea of Domestic Jurisdiction before International Legal Tribunals" 31 BYIL 1954, pp.96, 142.
- (114) See eg. Nationality Decrees Issued in Tunis and Morocco, PCIJ Series B no.4, p.24. Cf. Free Zones of Upper Savoy and the District of Gex, PCIJ Series A/B no.46, p.167, and Judge Read dissenting in the Anglo-Iranian Oil Co. case, ICJ Reports, 1952, p.143.

legal order is restricted to a certain space and what are the boundaries of this space".¹¹⁵ Both the reason for and the sphere of the validity of national law are determined by the principle of efficacy, which is a notion of international law.¹¹⁶ It would therefore follow that States' rights would flow from the norms of international law rather than from the fact of Statehood itself.¹¹⁷ Thus the collection of competences associated with the concept of territorial sovereignty may be seen as derived ultimately from the norms of the international legal order itself. But this should not be understood so as to detract from the important social and psychological role played by the State in the life of a community. Sovereignty in international law reflects the need for security and stability, but it also constitutes, in Alvarez's words, "an institution, an international social function of a psychological character".¹¹⁸ Territorial sovereignty is the answer provided by international law as regards the needs for security, stability and identity felt by a particular group within a certain area. It also constitutes the method by which a community may enter upon the international scene and by virtue of sovereign equality of States play a particular role in the development of the international system. It is submitted that as regards these two functions, the concept of territory and the sovereignty of States associated with it has been enthusiastically adopted by Third World States, although without foregoing the advantages of the global approach.

(115) Op.cit. p.308.

(116) Kelsen, "Sovereignty and International Law" in Stankiewicz (ed.) op.cit. p.120.

(117) But cf. Wheaton who notes that "every State has certain sovereign rights, to which it is entitled as an independent moral being; in other words because it is a State", Elements of International Law, 6th ed. vol.I, 1929, p.150.

(118) Corfu Channel case, ICJ Reports, 1949, pp.4, 43.

III - Title to Territory

The concept of title involves in essence a description of those legal and factual elements which by virtue of the norms of international law must be present before territorial sovereignty may be validly acquired or maintained. It also expresses the fullest extent of competences that may be exercised by a State over its territory, and in this sense reflects a theoretical rather than an actual position since States continually consent to the limitation of their competences by agreements with other subjects of international law. Jennings regards the primary meaning of title as "the vestitive facts which the law recognises as creating a right".¹¹⁹ Title may be relative,¹²⁰ although it will operate erga omnes, and it is closely linked with the notion of effective control,¹²¹ although not inevitably so.¹²²

IV - The Acquisition of Territorial Sovereignty

In classical international law, five modes of acquisition exist, viz. occupation of terra nullius, prescription, cession, accretion and subjugation (or conquest),¹²³ and these are further divided into

(119) Op.cit. p.4. See also Salmond on Jurisprudence, 12th ed., 1966, p.331, where it is noted that "the title is the de facto antecedent, of which the right is the de jure consequent". The Dictionnaire de la Terminologie du Droit International, 1960, sub.voc. defines "title" as "terme qui, pris dans le sens de titre juridique, designe tout fait, acte ou situation qui est la cause et le fondement d'un droit". See also Brownlie op.cit. pp.126-7.

(120) See eg. the Eastern Greenland case, PCIJ Series A/B no.53 p.46.

(121) See eg. the Island of Palmas case, 2 RIAA, p.829.

(122) Eg. in the case of belligerent occupation.

(123) To this some would add adjudication, see eg. Starke, Introduction to International Law, 8th ed. 1977, p.184, but cf. Akehurst, A Modern Introduction to International Law, 3rd ed. 1977, p.144.

original or derivative modes.¹²⁴ There are, however, a number of problems associated with the traditional method of classification, based as it is on Roman law principles.¹²⁵ The neat doctrinal categories are often extremely difficult to apply in practice. A set of facts may have applicability to more than one of the modes of acquisition. This is particularly so with regard to the modes of occupation and prescription. Theoretically, the distinction is marked. Occupation relates to the acquisition of terra nullius by a State in an effective manner, while prescription (or more accurately acquisitive prescription) refers to the acquisition of territory not terra nullius by effective control. However, in many cases the status of the territory at the relevant time may be unsure. International tribunals have often not applied the classic criteria,¹²⁶ thus leading to the suspicion that such classifications are not of great significance although their underlying principles will be. In addition, the status of acquisitive prescription is itself controversial.¹²⁷ As far as the other modes are concerned, accretion (or accession)¹²⁸ and cession, being the transfer of sovereignty over territory from one State to another,¹²⁹ are relatively straightforward, but the status of conquest as a mode of

(124) See Oppenheim op.cit. p.546; Brownlie op.cit. pp.134-5 and Jennings op.cit. p.6 et seq. A number of writers have stated that such a distinction is of little importance, see eg. De Louter, Le Droit International Public Positif, vol.I, 1920, p.340; Verzijl op.cit. p.347 and Johnson, "Consolidation as a Root of Title in International Law" CLJ, 1955, pp.215, 217.

(125) See O'Connell op.cit. p.405.

(126) See eg. the Island of Palmas case, 2 RIAA p.829, The Eastern Greenland case, PCIJ Series A/B no.53, and the Minquiers and Ecrehos case, ICJ Reports, 1953, p.47.

(127) See Oppenheim op.cit. p.575; Blum Historic Titles in International Law, 1965, Chapter 2, and Brownlie op.cit. pp.156-163.

(128) "The increase of land through new formations", Oppenheim op.cit. p.563.

(129) Ibid p.547.

acquisition is now highly questionable. It is submitted that the acquisition of territory by force is now accepted as illegal in international law,¹³⁰ while a treaty providing for the transfer of territory may be void for duress.¹³¹ It is thus clear that a new framework for the elucidation of the relevant rules is required.¹³² Another serious defect of the classic modes that should be noted, relates to the acquisition of title by newly emerged States. This situation cannot be satisfactorily analysed in terms of the traditional modes.¹³³ The absence of any reference to the principle of self-determination merely compounds the problems.

It is believed that in such a situation recourse must be made to the fundamental rules underlying the international order and the interests that are manifest therein. Such interests revolve around the need for stability and territorial stability in particular in international relations, the desire to prevent illegal acts and situations from generating rights and thus consciously subverting international justice and equity and the need to accept the realities of State sovereignty. In addition, the positive seeking of just ends, such as the preservation and establishment of human rights and the right to self-determination, must also be brought into account. These interests may be expressed through the media of a number of legal doctrines,¹³⁴ which are of broader scope than the exposition

(130) See *infra* Chapter 7, p.525.

(131) See Article 52 of the Vienna Convention on the Law of Treaties, 1969. See also Yearbook of the ILC, 1963, vol.II, p.197 and *ibid* 1966, vol.II, pp.246-7.

(132) See Johnson *loc.cit.* p.215

(133) See *infra* Chapter 6, p.368.

(134) See especially the important article by Schwarzenberger, "Title to Territory: Response to a Challenge" in International Law in the Twentieth Century (ed. Gross), 1969, p.287.

of the classic modes and thus eliminate unnecessary distinctions at certain levels.

The doctrine of sovereignty in international law relates to the collection of rights, powers and duties adhering to each particular State. By virtue of this doctrine, a State may limit its powers and dispose of parts of its territory.¹³⁵ Thus, the cession of regions may be seen as a logical consequence of the possession of sovereignty under international law. Title passes by virtue of an act of sovereignty,¹³⁶ so that the cessionary State can only receive those rights etc. ceded by the former sovereign.¹³⁷ Similarly, territory acquired by accretion, such as additions of land to the seashore by operation of nature, is really acquired as a direct consequence of the sovereignty of the State over the appurtenant land. As Schwarzenberger has noted, "the title to newly created land rests primarily on the unilateral assumption of jurisdiction in situations in which, for all practical purposes, the territorial sovereign has a monopoly of changes".¹³⁸ In a sense, this relatively minor mode of acquisition reflects geographical reality and is attendant upon sovereignty. Coupled with this concept is that of effectiveness, but this principle is of far wider application and permeates the whole of

(135) But see *infra* p.355.

(136) Cavaglieri notes the doctrine which declares that sovereignty is not transmissible between States. The cessionary State will exercise its power and sovereignty over the region rendered terra nullius by the withdrawal of the ceding State's sovereign power, *loc.cit.* p.403.

(137) See Reparation Commission v German Government, AD, 1923-4, no.199. Huber stated in the Island of Palmas case that "it is evident that Spain could not transfer more rights than she herself possessed". 2 RIAA pp.829.

(138) *Op.cit.* p.292. Huber declared that the new land accrued to a "portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity". 2 RIAA, pp.829, 839.

the law of territory. Its importance is a consequence of the structure of international law, with its fundamentally horizontal nature and emphasis upon the State as both the creator and subject and object of international law. In many ways, the principle of effectiveness underlies much of international law, for it stands as a test for the existence of particular facts which may have particular legal consequences. All legal systems possess mechanisms for the determination of those facts and situations to which it is provided legal consequences will attach. International law, however, because of its decentralised and horizontal structure, attaches more importance to the criterion of effectiveness as a creator of legal results.¹³⁹ In no sphere of international law is this more apparent than with regard to the law relating to the acquisition of territorial sovereignty. To such an extent is this so, that one may regard the principle of effectiveness as the basic applicable doctrine regarding the acquisition of territory, although in particular cases it will operate in conjunction with other relevant rules, such as sovereignty and recognition. Within the category of effective control, delineated as it is by the international community, one may find those situations previously classified as those of occupation or prescription. Apart from the fact that occupation in the traditional exposition of the acquisition of territory relates only to terra nullius, of which there is virtually none today, the test for both it and prescription revolve around the notion of effective control. It would seem, therefore, unnecessary to so distinguish the modes since the guiding principle

(139) See in particular Kelsen *op.cit.* 420-32, and De Visscher *op.cit.* pp.318-32.

is identical.¹⁴⁰ The fact that international tribunals have in general not analysed territorial acquisitions in terms of these two categories reinforces this conclusion. De Visscher's discussion of the concept of consolidation by historic title stresses that "proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide in concreto on the existence or non-existence of a consolidation by historic titles".¹⁴¹ Thus, the crucial test is that of effective control, rather than passage of time, and it matters not what the status of the territory was prior to the start of the control.¹⁴² As Johnson has written, De Visscher has simplified the problem considerably for one can now include under one heading "straightforward possession" and "adverse possession".¹⁴³ As Jennings notes, this analysis "is a penetrating and illuminating observation of the way courts actually

(140) It should, however, be noted that acquisition by prescription may be harder than acquisition by occupation, since there is a presumption against loss of title by the former sovereign, and since acquiescence by the former sovereign is required.

(141) Op.cit. p.209. See also the Anglo-Norwegian Fisheries case, ICJ Reports, 1951, pp.116, 138.

(142) Ibid. Prescription depends upon the possession by one State of the territory of another and relies upon the passage of time and the acquiescence of the displaced sovereign, see Johnson, "Acquisitive Prescription in International Law" 27 BYIL (1950) pp.332, 349 and 353. See also Becket, "Les Questions d'Intérêt Général au point de vue juridique dans la Jurisprudence de la Cour Permanente de Justice Internationale" 50 HR (1934 IV) pp.189, 218-55. Occupation does not apply to maritime areas, see De Visscher op.cit. p.209.

(143) Op.cit. footnote 124 p.223.

tackle questions of title to territorial sovereignty".¹⁴⁴ But one should mention that the passage in the Anglo-Norwegian Fisheries case relied on by De Visscher¹⁴⁵ was really concerned with general acquiescence with regard to a maritime area,¹⁴⁶ while the criticism has been made that De Visscher has over-emphasised the aspect of the "complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State".¹⁴⁷ These defects may be remedied, it is suggested, by reliance upon effectiveness rather than consolidation as the appropriate term. The fact that the original possession was contrary to law rather than in pursuance of it is certainly relevant within the context of effective control, but it is not felt that this in itself displaces the contention submitted.¹⁴⁸ Both occupation and prescription are primarily based upon the acquiring of title by virtue of effective possession and control. Although the time element has been seen as important for prescription, as distinct from occupation, it really is concerned with the effectivity of such possession.

The principle of effective control applies in different ways to different situations, but the essence is that "the continuous and peaceful display of territorial sovereignty ... is as good as title".¹⁴⁹ Such control has to be exercised by the State with the intention of

(144) Op.cit. p.26.

(145) ICJ Reports, 1951, pp.116, 138-9, and see also *ibid* p.130.

(146) See MacGibbon, "The Scope of Acquiescence in International Law" 31 BYIL (1954) pp.143, 160.

(147) Jennings op.cit. pp.25-6. Emphasis added.

(148) See O'Connell op.cit. p.407. Note also Jennings' criticism that the notion of consolidation is based upon "the merest hint in the case reports" op.cit. p.27.

(149) Island of Palmas case, 2 RIAA, pp.829, 839.

seeking control, although the latter aspect may only be evident after a certain lapse of time. What amounts to effective control will vary with regard to the circumstances of the case, for example the geographical nature of the region and the existence or not of competing claims. This was expressed by Huber in the Island of Palmas case,¹⁵⁰ and reiterated in the Eastern Greenland,¹⁵¹ Clipperton Island¹⁵² and Minquiers and Ecrehos¹⁵³ cases. Nor is it necessary for the control to be effective equally throughout the region.¹⁵⁴ The doctrine of effectiveness has displaced the earlier doctrines of discovery and symbolic annexation as in themselves sufficient to generate title,¹⁵⁵ as well as the validity of geographical contiguity alone as the basis of title,¹⁵⁶ while the so-called hinterland theory as regards territory in Africa in the nineteenth century never became established as a viable doctrine.¹⁵⁷ It should also be noted that Article 35 of the General Act of the Congress of Berlin, 1885, laid down that the signatories recognised the obligation to "insure the establishment of authority in the regions occupied by them on the coast of the African continent".¹⁵⁸

(150) 2 RIAA, pp.829, 840.

(151) PCIJ, Series A/B no.53.

(152) 2 RIAA, p.1105.

(153) ICJ Reports, 1953, p.47.

(154) See the Island of Palmas case, 2 RIAA, pp.829, 840. See also Von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law", 29 AJIL (1935) pp.448, 462-3.

(155) Ibid p.846. See also Von der Heydte op.cit. p.448 et seq.

(156) Ibid p.869. See also the Beagle Channel award HMSO (1977) and Jennings op.cit. pp.74-6.

(157) Hill, Claims to Territory in International Law and Relations, 1945, p.152. See also infra Chapter 5, and Westlake op.cit. pp.114-5.

(158) See Corbett, Law and Society in the Relations of States, 1951, pp.95-6.

Effectiveness may also, depending on the circumstances of the particular case, have a temporal as well as a spatial dimension. This was most forcefully expressed by Judge Huber with regard to the doctrine of inter-temporal law. He noted that "the growing insistence with which international law ... has demanded that the occupation shall be effective would be inconceivable if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right",¹⁵⁹ although it was conceded that this stringent test would not be posed regarding territories with an "established order of things".¹⁶⁰ Nevertheless, the requirement that the existence of a right as distinct from its creation has to be justified in terms of the evolving rules of international law is highly controversial.¹⁶¹ The better view would be to see this as only one element in the bundle of factors relevant to the determination of effective control. Its value would clearly be greatly minimised in the absence of a serious competitor to title.¹⁶² It is also suggested that further relevant factors with regard to the ascertainment of effective control are the public or open nature of the control alleged (a clandestine occupation could not really be considered to be effective with regard to the international community)¹⁶³ and any consent or acquiescence on the part of a party directly concerned.¹⁶⁴

(159) The Island of Palmas case, 2 RIAA, pp.829, 839.

(160) *Ibid*, presumably a State.

(161) See eg. Jennings *op.cit.* pp.28-31 and Jessup, 22 AJIL (1928) pp.735, 739-40. See also Minquiers and Ecrehos case ICJ Reports, 1953, pp.47, 56.

(162) Note also the strong tendency not to change a "state of things" which actually exists and has existed for a long time", the Grisbadarna case, 1 Scott, Hague Court Reports, pp.121, 130.

(163) See Island of Palmas case, 2 RIAA, pp.829, 868 and 870.

(164) We are not referring here to consent or acquiescence as regards the creation of rules of international law.

The latter element, a requirement of prescription, would appear rather to be of evidential value concerning effective control (if of crucial value) than a substantive requirement for title. Thus, the dominant principle regarding the acquisition of territory would seem to be that of effectiveness for reasons relating to stability and the nature of the international system. This principle comprises a series of elements, and clearly the more such elements are satisfied the stronger and more certain will the title be. But this principle, which relies upon acts performed or assimilated by a State authority,¹⁶⁵ must be seen in conjunction with the important principle of recognition.

With regard to this principle, one must distinguish between international recognition and bilateral recognition. In the former case, one is concerned with the acceptance of a particular situation as a valid one despite any ambiguous or illegal origin by the international community as a whole, while in the latter case one or more States recognise a particular situation and may therefore be estopped from denying the validity of the same in the future, that is the situation is opposable to such States but not necessarily to others. The two may shade into one another, but it is believed that a fundamental distinction lies between the two. Bilateral recognition is important as regards evidence of effective control and should therefore be treated as an element within that principle.¹⁶⁶ International recognition involves not only the development of rules

(165) Not all such acts would operate within the context of title creation; see the Frontier Lands case, ICJ Reports, 1959, pp.209, 229, and the Western Sahara case, ICJ Reports, 1975, p.12.

(166) See the Eastern Greenland case, PCIJ Series A/B no.53, pp.51-2. See also Jennings op.cit. pp.38-45; Schwarzenberger op.cit. pp.295-6 and Blum op.cit. pp.49-52.

of international law,¹⁶⁷ but may validate situations of dubious origin. A series of recognitions may validate an unlawful acquisition of territory,¹⁶⁸ for example, while the principle may be regarded as an exception to the proposition, *nemo dat quod non habet*. A further instance of what might be termed international recognition acting in a constitutive fashion is the doctrine of uti possidetis, for this creates a legally obligatory situation with regard to all or a defined section of the international community. Similarly, the doctrine may prevent effective control from founding title, as for example in the Namibia situation,¹⁶⁹ and may form an exception to the general rule that a State is free to dispose of its own territory.¹⁷⁰ The impact of a series of UN General Assembly resolutions, and this will particularly be relevant with regard to self-determination issues, cannot be regarded as of no value in the field of title to territory.¹⁷¹ The use of the right of self-determination can be important as regards title. As a manifestation through international recognition of a legal rule it is important as a constituent of Statehood. As such it may deny title in situations of effective control,¹⁷² it imposes a duty

(167) Blum states that recognition "is one of the main means of expressing consent in international relations" *op.cit.* p.49. Schwarzenberger refers to its "wide actual, and a still greater potential, scope", "Fundamental Principles of International Law" 87 HR (1955 II) pp.195, 228.

(168) See Akehurst *op.cit.*, p.147, but cf. Brownlie *op.cit.* p.173.

(169) See further *infra* Chapter 4, p.191.

(170) Eg. the Bantustans situation, see *infra*, Chapter 6, p.355.

(171) See Jennings *op.cit.* p.85 and Brownlie *op.cit.* p.164. Brownlie notes that the "strength of institutionalised and general recognition is obvious" *ibid.*

(172) Eg. in the Rhodesian and Bantustan situations, *infra* pp.355 and 352. Note that non-recognition does not invalidate a valid title. It withholds validation from a title which is invalid for some other reason.

to transfer territorial sovereignty and may be the means whereby title may be held pending Statehood.¹⁷³ It has also been suggested that the consent of the people of an area to be ceded is required to be shown by a plebiscite,¹⁷⁴ but State practice does not really support this argument. Also of relevance in this area are the rules relating to the use of force and the acquisition of territory.¹⁷⁵

V - Africa and Territory

Pre-colonial Africa did not consist of a series of European-style States existing within fixed borders. On the other hand, identifiable empires and States were evident in certain areas of the Continent.¹⁷⁶ The notion of the boundary line, however, was not known in Africa, while the use of frontier zones was widespread. Reasons for this include the lack of demographic constraint and the existence of a large number of natural separation zones, such as deserts and forests. Anene has identified three types of frontier in existence in the nineteenth century. The frontiers of contact involved situations where political and cultural groups lived and worked together, for example, as occurred in the West African States of the Yorubas and Dahomey and in the East African State of Buganda and its neighbours. Frontiers of separation consisted of geographical buffer zones physically dividing communities and not claimed by any authority, as for instance in the central Sudanic belt around States such as Bornu and the Fulani empire. The third type of frontier is to be explained rather in terms of enclaves or

(173) See *infra* Chapter 6, p.368.

(174) See Oppenheim *op.cit.* p.551.

(175) See further *infra* Chapter 7, p.525.

(176) See generally Oliver and Fage, A Short History of Africa, 3rd ed. 1970; Mair, Primitive Government, 1962; *ibid* African Kingdoms, 1977, and Fortes and Evans-Pritchard (eds.), African Political Systems, 1940.

considerable overlapping of various groups than as conventional borders, and the examples cited are the migrating tribes of the Tuareg and the Masai.¹⁷⁷ Thus, frontiers possessed at this time a highly dynamic and fluid character.¹⁷⁸ In such a situation, the nation-State with a stable territorial base was very much the exception even in pre-colonial Africa.¹⁷⁹ This is not to say that the notion of a State or territorially-based centralised political entity did not exist in Africa. Around the turn of the first millenium, for instance, a series of States existed in the Sudanic belt stretching across north-central Africa from the Red Sea to the mouth of the Senegal river. And other examples may be seen at other times and places in Africa.^{179(a)} Not all African communities formed States, of course. Fortes and Evans-Pritchard note that in addition to societies with some form of centralised authority, administrative machinery and judicial institutions, in which cleavages of wealth, privilege and status correspond to the distribution of power and authority, societies existed without such governmental machinery and with no sharp divisions of rank, status

-
- (177) The arbitrator in the Barotse award of 1905 referred to the "notorious instability of the tribes and their frequent intermingling" making a precise boundary delimitation between the UK and Portugal on the basis of the territorial extent of the Barotse kingdom impossible, see Hertslet, Map of Africa by Treaty, 3rd ed. 1909 vol.III, p.1076.
- (178) The International Boundaries of Nigeria, 1970, pp.5-6. See also Yakemtchouk, L'Afrique en Droit International, 1971, pp.67-9.
- (179) Colson has written that "political and ethnic boundaries rarely coincided in pre-colonial Africa", "African Society at the Time of the Scramble" in Gann and Duignan (eds.), Colonialism in Africa, 1870-1960, vol.I, 1969, p.31. Anene has referred to the endemic warfare between neighbouring groups at this time, op.cit. p.7. The nature of African societies and their political structure and history are beyond the scope of this work.
- (179a) See generally Oliver and Fage, op.cit. and Davidson, Africa in History, 1974.

or wealth.^{179(b)} Accordingly, the territorial aspect regarding the respective political organisations differed. In the former case, the administrative unit was a territorial unit and political right and obligations were territorially delimited, while in the latter case the unit was not a territorial one defined by an administrative system but was instead a local community defined in terms of lineage ties.^{179(c)}

However, it does appear as if the concept of territory was viewed rather differently than in Europe. Bozeman writes with regard to ancient African and later Moslem communities that "territorial consolidation was nowhere a major concern".^{179(d)}

Additionally, land was traditionally seen as "the spatial expression of social relations rather than of strategic, material or ideological functions", and migrations were continually taking place.^{179(e)}

The great African societies were neither territorial States nor nation-States in the western sense of the terms and the personality of the King or paramount chief was the crucial factor in such organisations. Such African States were marked "by the absence either of regionally shared conceptions about the territorial and national configuration of political entities or of traditionally fixed or reliable rules for the conduct of Statecraft and intertribal relations".^{179(f)}

(179b) Op.cit. p.5.

(179c) Ibid pp.10-11. Maine writes that the political tie of kinship marks the start of the history of political ideas and the change to an alternative basis of common political action, such as "local contiguity", amounts to a startling and complete revolution, op.cit. p.76.

(179d) Conflict in Africa, 1976, p.122.

(179e) Ibid.

(179f) Ibid pp.131-2. Examples are given of the Ghana, Mali and Gao empires in West Africa, Bantu States in Southern Africa and Congolese Kingdoms in Central Africa, ibid pp.132-3. Anene notes that between most African traditional communities "boundaries, as lines separating States, did not exist", op.cit. p.5.

The Islamic conception of territory differed also from the modern European paradigm. Flory has pointed out how territory in Islamic law was not connected with the State, but rather with the socio-religious concept of the Umma, or community founded upon the Moslem religion, which, unlike Christianity, did not develop a dichotomy between spiritual and temporal spheres of existence.¹⁸⁰ Territory was defined, therefore, not with regard to political power wielded within a delimited space as in Europe, but in terms of religious manifestations. The Dar el Islam was the dynamic framework within which the community of believers lived and worked and was not to be identified with State territorial sovereignty developed in European thought.¹⁸¹ The Dar el Islam extended as far as the Moslem community and was thus not a static structure but a very flexible one, developing as the community developed.¹⁸²

To some extent this was recognised by the International Court in the Western Sahara case.¹⁸³ Morocco asked the court to take account of the special structure of the Sherifian State, founded as it was upon the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan of Morocco through their caids or sheikhs rather than on the notion of territory.¹⁸⁴ The court accepted this and noted that international law did not specify the type of structure a State had to adopt, but at the same time the allegiance offered to the authority of the State,

(180) "La Notion de Territoire Arabe et son Application au Probleme du Sahara" AFDI, 1957, pp.73,76.

(181) Ibid.

(182) Ibid pp.78-81.

(183) ICJ Reports, 1975, p.12.

(184) Ibid pp.43-4.

if it was to be referable to the sovereignty of the ruler, "must clearly be real and manifested in acts evidencing acceptance of his political authority, otherwise there will be no genuine display or exercise of State authority".¹⁸⁵ Although authority was in pre-colonial Africa often defined in personal rather than territorial terms, communities were accepted as having rights over the land they inhabited and utilised and the role of territory was indispensable in the existence of such communities.¹⁸⁶ In the colonial period, the territories as colonially defined acquired a personality and integrity of their own,¹⁸⁷ and upon independence formed the framework of the new nations for the purpose of identity and sovereignty.

The fundamental principle relating to decolonisation as seen by the African States is that of self-determination. By virtue of this principle, they attained independence within a specified territorial space, and proclaimed the right for the peoples of the non-self-governing territories, ruled by minority White regimes. This principle also operates after independence as a guarantee of political independence and territorial integrity, and it is also utilised to express State sovereignty as regards the natural wealth and resources of States. It therefore ensures the demise of the non-self-governing territory and thereafter acts to reinforce the doctrine of State sovereignty.

(185) Ibid p.44. The "Mauritanian Entity" was not a legal entity since it was not an entity capable of availing itself of obligations incumbent upon its constituent elements, although they did possess certain rights, including rights over the lands through which they migrated, ibid pp.63-5. But cf. Judge Ammoun ibid p.102.

(186) See Allott, "Boundaries and the Law in Africa" in African Boundary Problems, (ed. Widstrand) 1969, p.10.

(187) See Coleman, "Tradition and Nationalism in Tropical Africa" in New States in the Modern World (ed. Kilson), 1975, pp.12-15.

African attitudes to territory are thus firmly based upon the traditional European concepts as expressed through the fundamental principles of international law, with the added emphasis of relying to a large extent upon the manifold principles associated with self-determination. There has been relatively little concern with the classic modes of acquisition of territorial sovereignty as such, but much analysis of the related principles dealing with secession, Statehood, the use of force and the settlement of boundary disputes. Although State sovereignty and territorial sovereignty rank as crucial starting positions, African States have paradoxically invested much effort in collective activities through the UN and the OAU. Stress upon the sovereignty of States has not discouraged an approach to international relations which leans heavily upon international institutions. Economic instability and political insecurity have bred both nationalism and internationalism.

CHAPTER 2 - THE COLONISATION OF AFRICA

Until the latter half of the nineteenth century, the impact of Europe upon Africa in general terms was relatively slight. Except for certain areas, African communities retained considerable freedom for independent development.¹ In fact, the late eighteenth and nineteenth centuries marked in Africa a significant stage in the development of indigenous States as well as witnessing population movements in southern Africa and the rise of commercialism in West Africa.² As far as European trade with Africa was concerned, prior to 1880, it constituted only a small part of the total foreign commerce of Europe. Hargreaves notes that the share of trade with West Africa in Europe's overseas trade was under one per cent.³ By the late 1870s, however, the increasing activity in Africa by explorers, merchants, missionaries, engineers and soldiers led both to a greater impact upon indigenous societies and to a growing awareness in Europe's political capitals of the advantages to be derived from a more forward policy with respect to the African continent. No longer were the European States primarily interested in trading advantages and coastal forts, the radically new phase inaugurated in the late 1870s demonstrated a concern with territorial acquisition and the extension of the national sovereignties of an expanding Europe. The reasons for this change are many and complex and beyond the scope of this work, but in addition to religious, scientific, economic and ideological motivations one may note the role played by territorial acquisition in

(1) Hargreaves, West Africa Partitioned, vol.I, The Loaded Pause, 1885-1889, 1974, p.5.

(2) Ibid. Note also the increasing influence in this period of Islam, see Oliver and Fage, A Short History of Africa, 3rd ed. 1970, p.180.

(3) Ibid p.1.

Africa in the process of maintaining the uneasy balance of power in Europe.⁴ To some extent because of this, the whole episode of the "scramble for Africa" was cloaked with the aura of legality and the care taken in preserving legal form and conforming with the principles of international law was very marked. This was not in the first instance out of a sense of duty either generally or towards the African populations, but rather to protect the title claimed from challenge by other European powers. In this process of territorial acquisition, the European powers observed most of the rules and formalities of international negotiation and treaty-making.⁵ However, where such alleged titles went without contradiction by other European States, various mistakes and inadequacies went unnoticed,⁶ but where the claim was disputed a close examination of the "title deeds" was to be expected and any weaknesses discovered caused acute embarrassment and occasionally led to an abandonment of the claim.⁷

The modes of acquisition of territory used by the European States with regard to African lands ranged from treaties of cession to conquest and the gradual transformation of the colonial protectorates, while the notion of spheres of influence proved of some relevance in the process.

-
- (4) See generally Robinson and Gallagher, Africa and the Victorians, 1961, and Hargreaves, Prelude to the Partition of West Africa, 1963.
 - (5) Alexandrowicz, "The Role of Treaties in the European-African Confrontation in the Nineteenth Century" in African International Legal History (ed. Mensah-Brown), 1975, pp.27, 28.
 - (6) For example, the British claim to "Mount Mfumbiro" as falling within the British sphere of influence by virtue of the 1890 Anglo-German agreement was based on alleged treaties concluded by Stanley. In the event the claim was not contested and it was not until much later that it was discovered that no mountain of that name existed, but rather that Mfumbiro was the name of a plain near the imaginary mountain. See Hertslet, The Map of Africa by Treaty, 3rd ed. 1909, vol.3, p.124, and Jentgen, Les Frontieres du Ruanda-Urundi et le Regime International de Tutelle, 1957, pp.22-3.
 - (7) For example, the ultimately successful challenge to a British treaty made by Lugard with Nikki on the present Nigeria-Dahomey (Benin) border on the grounds inter alia that the African signing the treaty had no power whatsoever to sign, see Touval, "Treaties, Borders and the Partition of Africa" 7 Journal of African History, 1966, pp.279, 281-2.

An analysis of the methods then in operation and the way in which territory was acquired is of more than purely historical interest, since the vast majority of African borders today were in the first instance delimited by treaties between the European powers. Had the new African States decided upon independence to embark upon a general re-arrangement of territorial borders, as at one time seemed not improbable, the question of the nature of the colonial acquisitions would be of little actual value. However, the colonially defined frontiers were reaffirmed and upheld. Therefore, the process of colonial delimitation and title remains relevant, particularly with respect to the large number of boundary disputes existing in modern Africa. The parties to such conflicts invariably base their claims upon European treaties and the validity and extent of such treaties can have important repercussions today.⁸

The charge that the colonial partition of Africa divided tribes and united antagonists in uneasy relationship is easily sustained, but it is important to note that the nation-State in the European sense did not really develop in Africa. Fluid frontiers characterised the continent and where identifiable States arose they invariably contained a variety of tribal groups. On the other hand, defined communities such as the Ibos of West Africa or the Kikuyu of East Africa did not create an administratively centralised structure, but lived politically disorganised but culturally united.⁹ The disruptive effect, thus, of European colonisation, though certainly a significant factor in African history, should not be treated in isolation and exaggerated.

(8) See eg. the Gabon-Equatorial Guinea dispute, *infra* Chapter 8 and the Ethiopian-Sudan dispute, *infra* Chapter 8.

(9) Anene, The International Boundaries of Nigeria, 1970, pp.5-12. See also Lloyd, Yoruba Land Law, 1962, p.62, as regards the definite boundaries possessed by the Yoruba ethnic group.

I - The Modes of Acquisition of Territory in Africa in Colonial Times

The methods of acquiring title adopted by the European powers in nineteenth century Africa demonstrate not only the way in which the international law modes of territorial acquisition were interpreted in a large-scale operation, but also the views of the European powers as to the status in international law of the Heads of the African communities encountered and, of course, of those communities themselves.

(1) Effective Occupation and The Concept of Terra Nullius

The concept of terra nullius has developed in the light of the acquisition of territory by occupation, ie. the peaceable acquisition of sovereignty over territory otherwise than by cession or succession.¹⁰ In order for this to occur, the territory had to be terra nullius or a *territoire sans maitre* in the French phrase. Thus, a determination of what entity could constitute a *maitre* was called for. Salomon noted that virtually all international controversies dealing with the notion of the occupation of territory have been based upon the different ways in which the *res nullius* has been defined.¹¹

While it is clear that certain types of territory are without doubt terra nullius, for example uninhabited areas, abandoned territories (*res derelicta*)¹² and areas inhabited by relatively few persons totally lacking in any kind of social or political organisation, there has been considerable ambiguity concerning the situation where the territory is inhabited by recognisable entities. In such cases, a number of different

(10) See Western Sahara case, ICJ Reports, 1975, pp.12, 39. See also Brownlie, Principles of Public International Law, 2nd ed. 1973, p.180, and the Island of Palmas arbitration, 2 RIAA p.829.

(11) De L'Occupation des Territoires sans Maitres, 1889, p.200.

(12) Abandonment involves the relinquishment of actual possession by the former sovereign and the intention not to resume possession, see Oppenheim, International Law, vol.1, 8th ed. 1955, pp.579-80.

theses have been presented.¹³ The view that peoples possessed sovereign rights thus precluding the acquisition of their territory by means of occupation under international law was put forward by a number of the founding fathers of the law of nations. These included, Vitoria, Soto, Las Casas, Ayala, Gentilis, Selden and Grotius.¹⁴ The essence of this attitude was that the acquisition of sovereignty over the lands of such peoples depended upon the concept of conquest not occupation, and accordingly discussion centred around the notion of just war and the legality of hostilities against non-Christians. The second theory concerning the relationship between a people and its land under international law recognised that such peoples could exercise sovereign rights in certain circumstances only. Vattel, for example, declared that where the occupying State was in need of more land, it could acquire by occupation that part of the territory of indigenous wandering tribes, which could be deemed to be in excess of the latter's requirements. This followed from the obligation to cultivate the earth which meant that tribes could not take for themselves more land than they had need of.¹⁵

The third approach that can be identified is the one that appeared to dominate throughout the later nineteenth century when Africa was being divided amongst the competing European powers. This thesis propounded the

(13) See Lindley, The Acquisition and Government of Backward Territory in International Law, 1926, pp.11-20; Fauchille, Traité de Droit International Public, vol.1, 1925, pp.697 et seq. and Jèze, Etude Theorique et Pratique sur l'occupation comme Mode d'Acquerir les Territoires en Droit International, 1896.

(14) Lindley op.cit. pp.12-14. But cf. Westlake's view that Vitoria, Soto, and other theorists were not so much impugning the titles of Spain and Portugal as trying to influence their conduct, Collected Papers on Public International Law, 1914, p.139. Blackstone declared that only deserts and uncultivated lands could be obtained by means of occupation, cultivated lands being acquired by means of conquest or cession, Commentaries on the Laws of England, vol.1, 1765, pp.106-7.

(15) Lindley op.cit. p.17. See also Vattel, The Law of Nations or the Principles of Natural Law, 1916 ed. pp.37-8 and 85-6.

view that the organised tribes or peoples of non-European lands had no sovereign rights over their territories and thus no sovereign title which could be used to bar acquisition of title by means of effective occupation. The inhabitants, therefore, were merely factually and not legally in occupation of the territory, which could be treated as terra nullius and acquired by any State in accordance with the requirements of international law. Foremost among such theorists was Westlake, who took the view that Government was the international test of civilisation¹⁶ and that those communities unable to furnish a government readily recognisable as such to western eyes could not hold territorial title.^{16a} This marked the high point of the exclusivity concept of the State in international law as fostered by nineteenth century positivism.¹⁷ Oppenheim noted that "only such territory can be the object of occupation as belongs to no State, whether it is entirely uninhabited, for instance an island, or inhabited by natives whose community is not to be considered a State".¹⁸ Jennings has written that occupation was accepted as "the appropriation by a State

(16) Op.cit. pp.143-5. See also Lawrence, The Principles of International Law, 7th ed. 1929.

(16a) Westlake perceived such a government partly in terms of the preservation of security, but "when people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry homes", op.cit. p.143. See also Jennings, "The Progress of International Law", 34 BYIL, 1958, p.334.

(17) See Alexandrowicz, The European-African Confrontation, 1973, p.6. Lorimer declared that recognition of State-existence depends on the intent of the receiving party to reciprocate and non-Christian States could not be expected to provide this, The Institutes of the Law of Nations, vol.I, 1883, pp.113-25. He also noted that States' relative value depended on a number of factors, including "moral and intellectual qualities", *ibid*, pp.182-8. Wheaton wrote that "the public law, with slight exceptions has always been, and still is, limited to the civilised and Christian people of Europe or to those of European origin", Elements of International Law, 8th ed. 1866, pp.17-8. See also Kent, Commentary on International Law, 2nd ed. 1878, p.8, and Phillimore, Commentaries upon International Law, 3rd ed. vol.I, 1879, pp.23-4.

(18) Op.cit. p.555. See also Brierly, The Law of Nations, 6th ed. 1963, p.163.

of a territory which is not at the time subject to the sovereignty of any State.... Natives living under a tribal organisation were not regarded as a State for this purpose".¹⁹

The problem of terra nullius was examined in the oral pleadings in the Western Sahara case and in the opinion of the International Court.²⁰ The court had been requested to answer two questions, of which the first stated, "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (terra nullius)?"²¹ In the pleadings, Ambassador Bedjaoui on behalf of the Algerian government particularly carefully analysed the concept of terra nullius. It was emphasised that the concept linked with the acquisition of territory by occupation alone constituted a basis for all the imperialisms and all the phenomena of oppression in the history of civilisation. It was a device which involved the "thingification" of numerous peoples since it divorced them from the process of territorial sovereignty.²² The original function of the concept and its most valuable success concerned the regulation of international relationships with respect to the peaceful extension of State sovereignty to uninhabited areas, such as polar regions, deserts and new islands, but it became perverted by application to inhabited territories. In Roman Antiquity, any territory which was not Roman was terra nullius. In the fifteenth and sixteenth centuries any territory which did not belong to a Christian sovereign was terra nullius, and in the nineteenth century any territory which did not belong to a civilised State was terra nullius.²³ Such a historical survey is used to demonstrate how

(19) The Acquisition of Territory in International Law, 1963, p.20.

(20) ICJ Reports, 1975, p.12.

(21) General Assembly resolution 3293 (XXIX).

(22) Pleadings, CR.75/18, p.29.

(23) Ibid, pp.36-55. See also Pleadings CR.75/19, pp.2-23.

law has followed on meekly from power, while the development of the concept in the nineteenth century saw it primarily as a method of adjusting relationships between the colonising powers themselves, rather than as between the coloniser and the colonised.

It was utilised to emphasise that might was right.²⁴ In the course of time, European rivalries precipitated what Bedjaoui termed the overheating of the concept of terra nullius and led to the development of effective occupation as a method of acquiring territory not under the sovereignty of a civilised State.²⁵ The endogenous function of the concept, that is in its regulation of the distribution of territories between imperial powers, was reflected in the attitudes of the Berlin Conference of 1884-5 convened to regulate the "scramble for Africa". These were characterised by the Algerian agent in the statement that "a territory owned by no one, and thus open to occupation by any European colonising State, was any territory which that same State decided to regard as such, with the agreement of the other States of the European club".²⁶ In accordance with this approach, it was claimed that in the late nineteenth century the distinctions between occupations of terra nullius and conquest, cession and acquisitive prescription of other territories were "ruthlessly set aside by the practice of States and appeared ridiculously unreal".²⁷ The practice of entering into agreements with indigenous groups had the sole purpose of being opposable to the other European States, which could not then claim the particular territory as terra nullius.²⁸

(24) Pleadings, CR.75/18, pp.33-4.

(25) Pleadings, CR.75/19, pp.4-5.

(26) Ibid, p.39.

(27) Ibid, p.36.

(28) Ibid, p.17.

This critique of the use of the concept of terra nullius as the legal spearhead of European colonisation in the last century is a valuable one and is a reminder of the intimate relationship between law, power and territory, as well as demonstrating one aspect of the manner in which European international law began to achieve an almost universal application in practice. However, the degree of its accuracy can be seriously questioned. In fact, a perusal of State practice of the period reveals that Africa was not regarded as terra nullius and that occupation was not therefore available as a mode of acquiring legal title to territory. Territory was acquired on the continent primarily by means of agreements of cession with local leaders.²⁹ It seems that Bedjaoui by concentrating upon the European scramble aspect, or the endogenous aspect, has minimised the exogenous aspect, or the relationship between the European power and the colonised territory to such an extent that the doctrine of occupation of terra nullius under international law has become confused with the political occupation (in the sense of colonisation) of Africa. To this extent, he has apparently misunderstood the scope of the Berlin Conference of 1884-5 which did not establish that the method of acquiring territory in Africa was by way of occupation (in the legal sense) but rather used the term "occupation" as a general expression comprising all modes of acquisition, to be interpreted synonymously with acquisition or appropriation.³⁰

In fact, the International Court made the same point. It declared that although "occupation" was used often in a non-technical sense to mean acquisition of sovereignty, this did not necessarily, or always, signify that sovereignty was actually acquired by way of an occupation of

(29) Lindley op.cit. p.34. See Alexandrowicz op.cit. footnote 5, p.64. See also O'Connell, International Law, 2nd ed. 1970, vol.1, pp.408-9 and sources therein cited.

(30) Ibid. Judge Ammoun was guilty of the same misinterpretation. See ICJ Reports, 1975, pp.12, 86 and ICJ Reports, 1971, pp.16, 86.

a terra nullius in the legal sense of these expressions.³¹

As regards Western Sahara, the Algerian argument could in fact lead only to one result, namely, that under the international law of the period, the territory was indeed terra nullius. This made the conclusion inevitable that "it is enough for Western Sahara to have been colonised for one to be obliged....to infer inevitably that Spain and Europe had considered it to be terra nullius, totally disregarding the owner of the territory".³² Algeria, however, was unhappy at this conclusion, which would appear to have rendered the request to the International Court redundant since it required a positive response to the first question and thus no consideration of the second question.³³ Accordingly, it suggested two alternative lines of proceeding, both of them of significance. On the one hand, it was proposed that colonialist law be disregarded and reference made to the legal system operative in the area at the relevant time, while on the other it was postulated that the application of inter-temporal law with consequent recourse to the principles developed by international law might provide a satisfactory answer to the problems of the situation. Both of these solutions were methods of getting around the problem posed by the view that Western Sahara was terra nullius at the time of Spanish colonisation and bringing to the fore the crucial role to be played by the wishes of the population regarding its political role.³⁴

The other States involved in the Sahara case appear to be unanimous in their conclusion that the territory was not at the relevant time terra nullius,³⁵ but their reasons for this were not identical. Spain had

(31) ICJ Reports, 1975, pp.12, 39.

(32) Pleadings, CR.75/19, p.40.

(33) The request stated that "if the answer to the first question is in the negative, (2) what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"

(34) These solutions will be examined *infra*, p.97 et seq.

(35) Pleadings, CR.75/6, p.23.

declared before the UN General Assembly that it had never regarded the territory as terra nullius.³⁶ In its written statement, it noted that an area was terra nullius if not under the sovereignty of a State authority,³⁷ while the issue was not discussed in the Spanish submissions in the oral pleadings.³⁸ In view of the fact that Spain denied that either Morocco or the Mauritanian entity possessed sovereign rights over the Saharan territory at the time in question, or that the tribes of the area constituted a State, it should logically have accepted that the territory was terra nullius. This it did not do³⁹ and thus its position remained to that extent confused and ambiguous.

Morocco and Mauritania both criticised the Algerian approach as equating terra nullius with colonised territories or territories that were being colonised. Morocco declared that the Algerian argument was "a real piece of intellectual conjuring",⁴⁰ while Mauritania held that the international law of the period should not be represented as worse than it was. A humanistic stand did exist, it was averred, which ensured the consent of populations in the process of territorial acquisition in order to render the cession of sovereignty valid.⁴¹ Despite the Moroccan-Mauritanian view that Algeria had over-extended the concept of terra nullius and dismissed the importance of the numerous agreements made between the colonising powers and the inhabitants of the territories concerned, they appeared to differ slightly as to why Western Sahara was not terra nullius during the period

(36) A/C.4/SR.2130, p.24. See also Judge Dillard, ICJ Reports, 1975, pp.12, 123.

(37) Spanish Written Statement, paras. 264 and 265.

(38) Except for a peripheral reference to the concept in discussing the development of spheres of influence and protectorates, Pleadings CR.75/23, p.58.

(39) A/C.4/Sr.2130, p.24. During this discussion in the 4th Committee, Spain appeared to be suggesting at one point that the territory was not terra nullius since "the Sahara was populated by Saharans", but this view of terra nullius as purely uninhabited areas was dropped *ibid.*

(40) Pleadings, CR.75/26, p.45.

(41) Pleadings, CR.75/29, pp.31-2.

in question. Morocco declared that the territory was not terra nullius since Morocco was at the time a recognised State and its presence in the territory was thus in the nature of State sovereignty, and that this automatically disposed of the problem.⁴² At a later stage, this attitude was carefully modified to take account of Mauritania's claims in the light of the accord reached between the two.⁴³ Mauritania all along maintained that the territory was not terra nullius since international law at the time recognised the legal personality of tribes and therefore did not regard their lands as terra nullius, and the part of Western Sahara linked with the so-called Mauritanian entity clearly fell into this category.⁴⁴ Morocco, therefore, appeared to adopt a slightly ambiguous median position between the Statist approach of Spain on the one hand and the wide approach preferred by Mauritania on the other.

A number of judges of the International Court in the Sahara case were a little unhappy as regards the nature of the question posed on terra nullius. Judge Gros maintained that the question as to whether the territory was terra nullius at the time of Spanish colonisation was not a legal one, but purely academic and served no useful purpose. This was because none of the States interested in the territory's status at the time of colonisation had relied upon the concept of terra nullius.⁴⁵

(42) Moroccan Written Statement, Introduction pp.6 et seq., Part I p.9 and Part II pp.99-100. See also Pleadings CR.75/12, pp.2-4.

(43) Morocco declared that "the court will ascertain that the Sahara was not terra nullius at the time of Spanish colonisation, and that it was, without any geographical void, an aggregation of Moroccan and Mauritanian lands, where Moroccans and Mauritania exercised political authority in different forms and places", Pleadings, CR.75/6, p.8.

(44) Pleadings, CR.75/17, p.17. Mauritania noted that there was no problem of res nullius in the part of the territory linked with Morocco since the latter was an entity recognised as a State at the time, *ibid.*

(45) ICJ Reports, 1975, pp.12, 74. His contention that States at the time spoke only of zones of influence is not strictly accurate, *ibid.*

It was, therefore, a sterile exercise to ask the court to discuss a hypothetical situation.⁴⁶ Judge Petren declared that the question was without object in the context of the Western Sahara case, and it was pointless and inappropriate for the court to answer it.⁴⁷ Judge Dillard emphasised that Spain's original title was not in question nor had any State in fact asserted that Western Sahara was at the relevant time terra nullius.⁴⁸ However, the question was of some legal relevance in the case since it served as an introduction to the second question dealing with the alleged Moroccan and Mauritanian ties with the territory. A determination that the territory was terra nullius would automatically dispose of the Moroccan and Mauritanian claims. To this extent, the first question was of interest. As Judge Dillard pointed out, it "helped clear the decks for question II".⁴⁹ It helped establish the requisite framework for the examination of the Moroccan and Mauritanian contentions. This incidentally, raises the problem as to why two questions, since one question dealing with the legal status of the territory at the date of colonisation would appear to have been adequate.⁵⁰ The answer to this is to be sought in the political processes leading up to the adoption of resolution 3292 (XXIX) and the contending pressures from the various parties, which created the guidelines for the court's advisory opinion. In any case, the opportunity it provided for an analysis of the nature of terra nullius was fortunately grasped.

(46) Ibid, p.75.

(47) Ibid, pp.113 and 114.

(48) Ibid, p.123. See also ibid, p.74.

(49) Ibid, p.124.

(50) See Judges De Castro, ibid p.171, Dillard ibid p.124, Gros ibid p.74 and Ignacio-Pinto ibid p.78.

In its functional examination of the concept of terra nullius, the court ignored any reference to the processes of colonisation and declared that the concept was a legal term of art used in connection with the mode of acquiring sovereignty over territory known as occupation.⁵¹ It was also clearly emphasised that the question had to be understood in the light of the law in force at the time of colonisation.⁵² The court noted the differences of opinion between jurists regarding the concept, which have been briefly noted above, and then proceeded to place full emphasis upon the State practice of the era in question. The court unambiguously asserted that "the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as terra nullius".⁵³ This posthumous rehabilitation of the classic authors of international law and side-stepping of those late nineteenth century theorists denying any form of international legal personality inherent in non-European style State entities, places considerable stress upon the numerous agreements concluded between the European colonising powers and the local communities. It elevated them from the status of mere methods by which European powers demonstrated their occupation of a particular territory as against each other⁵⁴ to documents of a central character in the acquisition of sovereignty over territory.⁵⁵

(51) Ibid, p.37.

(52) Ibid.

(53) Ibid. This, however, does raise a problem not considered by the court and that is the extent of the terra in question. In the case of a sparsely inhabited area, such as parts of Southern Africa and Patagonia in the early nineteenth century, one might be faced with an area which is partly terra nullius and partly occupied in such a fashion as to render classification of the territory as a whole a complicated matter.

(54) See for example Pleadings, CR.75/19, p.17 (Algeria).

(55) ICJ Reports, 1975, pp.12, 39. Cf. Judge Huber in the Island of Palmas case, 2 RIAA, pp.829, 858.

Agreements dismissed as "trinket treaties"⁵⁶ or "glass-bead" treaties⁵⁷ therefore did have legal significance.⁵⁸ The unanimity of the court's opinion reinforces this determination of the situation. As far as Western Sahara was concerned, the court declared that the territory was not terra nullius on the grounds that the inhabitants, although nomadic, were socially and politically organised with chiefs competent to represent them and that Spain recognised this. Spain had all along treated its acquisition of the territory as achieved by virtue of a series of agreements with the independent tribes of the area. In fact, its decree of 26 December 1884, treated by the court as the starting date of the time of colonisation, proclaimed the establishment of a protectorate based upon local agreements and as Judge Dillard noted, one cannot protect a terra nullius.⁵⁹ For this Judge, it was the nature of the Spanish presence as expressed through numerous treaties of protection that constituted a controlling factor. What might have been the case and the court's attitude had Spain not signed such agreements remains open to speculation, and it is not clear from the opinion whether the court felt that the general rule regarding the existence of organised tribes would have sufficed.

In any event, it does seem that the conclusion of treaties of protection constitutes a recognition of personality both of the ruler and of the people concerned and therefore eliminates the possibility of the area in question being considered a terra nullius. The suggestion by Judge Huber in the Island of Palmas case that agreements with rulers of

(56) Pleadings, CR.75/19, p.18 (Algeria).

(57) Pleadings, CR.75/29, p.32 (Mauritania).

(58) For examples of such State practice see Lindley op.cit. pp.34-44, and Alexandrowicz op.cit. footnote 17. See also the succeeding section.

(59) ICJ Reports, 1978, pp.12, 124.

peoples "not recognised as members of the community of nations", while not amounting to titles in international law, "are nonetheless facts of which that law must in certain circumstances take account",⁶⁰ can be seen as too tentative. Indeed, such agreements can be seen as constituting recognition of membership of the community of nations. They most certainly mark acceptance of the contracting party as representing an organised tribe or people by the relevant European power and thus negating the possibility of a terra nullius situation.

Occupation as a method of obtaining title to territory was thus only open as regards uninhabited territories or territories inhabited only by a number of individuals not constituting a social or political aggregation.⁶¹ Where, in Lindley's words, "the inhabitants exhibit collective political activity"⁶² the acquisition could only have been achieved by way of cession or conquest or prescription.

(2) Cession

It thus appears that the prime method of acquiring territory in Africa in the period of colonisation was by way of cession. This raises questions as regards the status of both contracting parties and with respect to the legal quality of the agreement concerned. Since the existence of sovereignty and of political organisation excluded the possibility of treating Africa as terra nullius, the European powers had

(60) 2 RIAA pp.829, 858.

(61) For example, Australia, see Evatt, "The Acquisition of Territory in Australia and New Zealand", Grotian Society Papers, 1968, pp.16, 18.

(62) Op.cit. p.45.

resort to bilateral treaties as a means of acquiring territory from the local sovereign.⁶³

The General Act of the Berlin Conference of 1884-5 itself recognised implicitly the existence of African sovereign entities. Article 1 noted that the principle of freedom of trade and navigation in the "conventional basin of the Congo" would only operate in the territories of an independent sovereign State if approved by such State.⁶⁴ The core of the General Act revolved around the principles enunciated in Articles 34 and 35. The former declared that any power taking possession of land on the coasts of Africa, or establishing a protectorate there, must notify the other signatory powers, while the latter provision stipulated that the signatory powers "recognise the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon".⁶⁵ These provisions were, it should be emphasised, concerned with the relations of the European powers inter se and not with the direct acquisition of territory from the African sovereign. It denoted that in any territory acquired on the African coastline, the European powers agreed amongst themselves that effective occupation was to be the norm. O'Connell has written that this indicated also what was involved in the notion of effective occupation, viz.

(63) Alexandrowicz op.cit. footnote 5, p.64. It should be noted that what was acquired was the title to the land of the entity, or territorial sovereignty, not private law rights over land in that territory. This was expressly proclaimed in a number of treaties, eg. those with the Kafir Bulloms, 1827, and the King of Combo, 1840. See Hertslet op.cit. vol.I, pp.34, 12, 125, 137 et seq. The Judicial Committee of the Privy Council declared that "a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners" Amodu Tijani v Secretary of the Southern Provinces (1921) 2 AC 299. See also Alexandrowicz op.cit. footnote 5, p.52.

(64) See Lindley op.cit. pp.32-3. This proviso was inserted in view of the claims of the Sultan of Zanzibar, *ibid.* A report presented to the Conference by the Commission noted that "with regard to the native Princes, the majority have already alienated their rights of sovereignty and with the others it will be right and possible to arrive at equitable arrangements", *ibid* p.33.

(65) *Ibid*, p.144 and Hertslet op.cit. vol.II p.468.

the display of sufficient authority to protect acquired rights.⁶⁶ While this would be of use in cases of occupation of terra nullius, it cannot be taken to specify the declaration of Africa as terra nullius. The Berlin Conference⁶⁷ can be seen as a turning point in European-African relations.⁶⁸ Although the conference did not itself partition Africa, but rather was intended to "limit the effects of the scrambling on European relationships"⁶⁹ it did involve an institutionalisation of the process of acquiring territory in the African continent. And this process, as Alexandrowicz has correctly stated, "was in the first instance not a race for the occupation of land by original title but a race for obtaining derivative title deeds which the European powers had to acquire according to the rules of international law relating to negotiation and conclusion of treaties".⁷⁰ In the case of the Cameroons territory, for example, Britain had intended to acquire the region but before it had acted Germany signed a treaty with the local chief placing the territory under its protection. The title acquired by Germany, in late 1883, was not disputed by Britain. Had the area been regarded as terra nullius, the mere signing of a document would not have been sufficient and there would therefore have been scope for Britain to recoup the situation.⁷¹ Similar races took place between Britain, France and Germany on the Niger and in each case the aim was to obtain treaties with local chiefs, which

(66) Op.cit. p.417.

(67) See generally Crowe, The Berlin West Africa Conference 1884-5, 1942, and Ward, The Great International Share-out, 1958.

(68) Alexandrowicz op.cit. footnote 17, p.6.

(69) Hargreaves, "Towards a History of the Partition of Africa" 1 *Journal of African History*, 1960, pp.97, 99.

(70) Op.cit. footnote 17, p.7.

(71) Lindley, op.cit. pp.34-5.

would give title. None of this vast area of West-Central Africa was acquired by occupation alone.⁷² Lindley declares that "the territorial rights of the European powers in Africa were in general those which they had obtained by cession from the native chiefs".⁷³

Since in the case of a cession the cessionary State receives such title as is possessed by the ceding party, the nature and status of the latter is of great importance to the former. No serious problem will in general arise where the cessionary party is accepted as a subject of international law or, in Lindley's words, is "an advanced sovereign".⁷⁴ An example of such a transaction affecting colonised territory would be the sale of the Danish West Indies to the United States in 1916.⁷⁵ In addition, in 1907 and 1908 treaties, King Leopold as the "Roi-Souverain du Congo" ceded to Belgium "la souveraineté des territoires composant l'Etat Indépendant du Congo avec tous les droits et obligations qui y sont attachés".⁷⁶ However, where the chiefs or leaders of indigenous communities are involved, issues as to capacity may arise. In a number of treaties, African rulers specifically declared the powers they possessed. For example, in a 1840 treaty with Britain, it was stipulated that "all sovereignty of the before specified territory is now vested in the said King of Combo and has descended to him from his ancestors".⁷⁷ In a treaty of 1861, the ruler of Lagos was deemed to be "King in the usual African signification".⁷⁸ In the general form of treaties used by

(72) Ibid pp.35-6. Further examples provided by Lindley as to the acceptance of the acquisition of title by means of treaties of cession signed with tribal chief include Bechuanaland, South-West Africa, East African territories and the Congo, ibid pp.36-9.

(73) Ibid p.34.

(74) Ibid p.166.

(75) 110 BFSP p.843

(76) Lindley op.cit, p.167.

(77) Hertslet op.cit. vol.I, p.12.

(78) Ibid pp.92-3. See also Alexandrowicz op.cit. footnote 5, pp.38-43.

African companies in dealing with local rulers, cessions were to be "with all sovereign rights".⁷⁹ Problems arose in certain cases because of uncertainty as to the precise status of the ruler with whom the European State (or company) was making the particular agreement. In the Bulama arbitration, Britain claimed that certain territories in West Africa had been ceded to it in 1792, but the arbitrator held that those purporting to cede were in fact under Portuguese sovereignty and that therefore the cession was invalid.⁸⁰ A similar situation occurred in the Delagoa Bay award of 1875, as certain chiefs had purported to cede land on the eastern coast of southern Africa to Britain in 1823. The cession was declared to be invalid, since the chiefs were under Portuguese sovereignty.⁸¹

An attempt to analyse the various types of rulers or chiefs from the point of view of external sovereignty was attempted in the Barotse arbitral award of 1905 concerning the western boundary of the Barotse Kingdom. It was noted that "a Paramount Ruler is he who exercises governmental authority according to (customary law), that is, by appointing the subordinate chiefs or by granting them investiture, by deciding disputes between these chiefs, by deposing them when circumstances call for it and by obliging them to recognise him as their Paramount Ruler".⁸² The arbitrator examined the facts regarding the payment of tribute, the submission of tribal disputes and the exercise of authority in general, but eventually decided to stipulate an arbitrary boundary in view of the constant intermingling of tribes making it impossible to establish a precise delimitation. The question of capacity was also at issue regarding

(79) Ibid, pp.137 et seq.

(80) Hertslet op.cit. vol.III, p.988.

(81) Ibid, p.996.

(82) Ibid, p.1074.

a treaty made by Britain with the ruler of Boussa over territory to be ceded on the Niger. France established that that chief was in fact subordinate to another at Nikki, and a race ensued to gain the superior chief's signature on a treaty of cession.⁸³ Similar situations arose respecting the cession of land at Assab Bay to Italy in 1880-1 and the following year in Madagascar over the cession of land to France.⁸⁴

In a number of treaties, the ceding party expressly stated that he was in no way dependent upon an external power. In a treaty of 1888 between the UK and the Kingdom of Igbessa, it was proclaimed that the latter was "perfectly independent and pays tribute to no other power".⁸⁵ In the same year, the chiefs of Keta stated that their kingdom was also perfectly independent and paid tribute to no other power.⁸⁶ In a treaty of 1880 between France and the country of Kita, the chiefs, notables and inhabitants of Kita expressly declared that they were independent of any foreign power and this was repeated with respect to the chiefs of Benito in 1883.⁸⁷

In order to transfer title in strict accordance with the international rules of cession, the treaty has to be entered into with such persons or institutions as, according to the law of the community, possessed the capacity to make the cession. In the Delagoa Bay case, Portugal objected to one of the treaties relied upon by Britain on the grounds that the chief concerned lacked capacity according to the law and custom of Tembe.⁸⁸

(83) Lindley, op.cit. p.170.

(84) Ibid, pp.170-1.

(85) Hertslet op.cit. vol.I, p.105.

(86) Ibid, p.106. See also similar statements with regard to the Ibu towns, the Kingdom of Ibaro and the Kingdom of Ondo, also in southern Nigeria, ibid, pp.107-8.

(87) See Alexandrowicz op.cit. footnote 17, pp.34-5. Further examples of this kind of statement are also cited, ibid pp.35-6.

(88) See footnote 80. See also Lindley op.cit. p.172.

In certain cases, the agreement itself specified that the necessary constitutional requirements of the community with regard to the cession of land had been complied with.⁸⁹ In legal form at least, the cessionary power had to be able to demonstrate that the person making the cession had the capacity so to act. The greater the rivalry between the European powers in the particular region concerned, the greater this need appeared. One may note that in the Report on the Insurrection in the Sierra Leone Protectorate, it was stated that "in [all] treaties from the foundation of the Colony....to the latest treaty made in 1895, the character of the chiefs as the owners and sovereigns and as independent contracting powers is unequivocally and universally recognised".⁹⁰

Since such agreements were intended to constitute binding obligations on the parties, it was generally necessary to show that the local ruler appreciated the nature of the transaction, otherwise the treaty might be invalid. This was clearly demonstrated in the Lamu arbitration of 1889. The arbitrator rejected a German claim to the territory on the ground that the agreement purporting to cede the island of Lamu was not in writing and was therefore inadequate. He declared that "the adoption of the written form is particularly necessary in dealings with the governments of, but little-civilised, nations, which often only attach binding force to promises made in a solemn form or in writing".⁹¹ This would appear to be going a little too far and it is suggested that Lindley's rider that "any solemn form which is recognised by the laws and traditions of the native society should be equally effective",⁹² is

(89) See the treaty between France and the King of Comendo, 1687; the agreement by the King and Chiefs of Sierra Leone to the cession of land to King George III of Britain in 1788; the treaty between Britain and the King of North Bulloms in 1821 and the treaty between Britain and the King of Brekama in 1827, Alexandrowicz op.cit. footnote 17, pp.39-40.

(90) UK Parliamentary Papers, 1899, vol.60, p.15 (C.9388).

(91) Hertslet op.cit. vol.III, p.894.

(92) Op.cit. p.172.

preferable. That African communities were capable of understanding the binding nature of agreements with other communities is quite clear. Lugard, for example, believed he had found the equivalent of the European concept of a treaty as a binding arrangement in the ceremony of blood brotherhood.⁹³ The more significant question that followed was whether in practice such communities had consented to the particular treaties involving the cession of territory or the creation of a protectorate, or whether indeed such consent was seen as necessary. To take the latter point first, it does seem as if it was established that the contracting African party had clearly to comprehend the nature of the transaction. Lord Salisbury in 1889 discussing the distribution of Portuguese flags to chiefs who appeared in ignorance of the possible interpretation of vassalage involved in the acceptance of such gifts, stated that "Her Majesty's Government cannot recognise any claims which may be hereafter advanced on the part of Portugal to sovereignty over territories in the Nyassa districts, based upon the distribution of flags to the ignorant native chiefs".⁹⁴ The 1893 Convention between the UK and the South African Republic stated that the UK would not recognise any agreement between the latter and the Swazis relating to South African protection unless it could be shown that the Swazi Queen Regent and Council understood the nature, terms and conditions of such an agreement.⁹⁵ In fact, a large number of treaties expressly stipulated that the particular African rulers had understood the terms and effects of the agreement in question. In the treaty between Britain and the Chiefs and headmen of the Congo River of 1854, the latter stated that they understood the agreement and considered it binding.⁹⁶ The many agreements entered into by the Royal Niger Company

(93) The Rise of an East African Empire, 1893, vol.II, pp.33, 579 et seq.

(94) 81 BFSP pp.995-7. Emphasis added.

(95) 85 BFSP p.680.

(96) 47 BFSP p.540.

contained a stipulation, one form of which declared that, "We, the undersigned, are witnesses to the marks of the [Chiefs] and also vouch for their understanding what they have signed.... [and] do hereby declare that the foregoing agreement was duly and correctly explained to [them] and that they fully understood it".⁹⁷ Some of the agreements made by this company also included a declaration that the Chiefs had entered into the particular arrangements "of their own free will and consent".⁹⁸ However, knowledge does not automatically or always indicate free consent, and one interesting indication of the true situation is provided by the declaration of the US delegate to the Berlin Conference of 1884-5 which was sought to be added to the protocol of the final Act. It was stated that "modern international law steadily follows the road which leads to the recognition of the right of native races to dispose freely of themselves and of their hereditary soil. Conformably to this principle, my Government would willingly support the more extended rule one which should apply to the said occupation [of territory] in Africa, a principle looking to the voluntary consent of the natives of whose country possession is taken [by treaty] in all cases where they may not have provoked the act of aggression".⁹⁹ The fact that this view did not receive support at the Conference, and bearing in mind that the US did not ultimately ratify the final Act of the Conference, would seem to point to an ambiguous approach to the question of consent by the various African Chiefs. In a number of cases, it is probable that what appeared to be free consent would, upon examination, turn out to be something rather less. Alexandrowicz, perhaps a little optimistically, concluded that "it must be assumed that the principle of voluntary consent was at least tacitly accepted by the Conference".¹⁰⁰

(97) Hertslet op.cit. vol.I, pp.137 et seq.

(98) Ibid p.142.

(99) Ibid p.VI.

(100) Op.cit. footnote 17, p.47. The practical question of the extent to which consent was actually forthcoming in particular situations is beyond the scope of this work.

While duress would in modern international law vitiate a treaty,¹⁰¹ the issue was less certain with regard to nineteenth century practice regarding the colonisation of Africa. In fact, State practice tends to show that treaties imposed by force upon indigenous communities were still regarded as valid. In 1881, for example, a French army invaded Tunisia and a French general with an armed escort surrounded the palace of the Bey, giving him four hours to sign a treaty placing Tunisia under French protection. The Bey signed under protest and in the presence of French power.¹⁰² Lindley notes that there seemed to be no case in which a treaty made by "a member of the International Family" with "a backward people" was objected to on the ground that its conclusion was obtained by force.¹⁰³

The approach that the treaties of cession with local rulers were purely private arrangements having regard to the status, or rather lack of it, of those rulers under international law, cannot really be maintained in view of the large amount of practice on this point. To emphasise this, one may refer to the situation regarding colonial protectorates. Lindley has pointed out that "it is difficult to see how, having regard to the universality of the practice grounding a colonial protectorate upon an agreement with the local authority, and of the importance attached by the European powers to these agreements in their relations inter se, the requirement for such an agreement can be regarded otherwise than as a rule of law".¹⁰⁴ It can be argued that such instances took place upon a background of greater legal personality, but it is submitted that treaties of cession made with local rulers were the main method whereby the

(101) See Articles 51 and 52 of the Vienna Convention on the Law of Treaties, 1969.

(102) Lindley op.cit. pp.189-90.

(103) Ibid p.175.

(104) Ibid p.176.

European powers acquired territory in Africa.¹⁰⁵ Thus, the question of the status in international law of African communities in the nineteenth century is clearly raised. Nineteenth century views of the universality of international law were distinctly limited.¹⁰⁶ Westlake, for example, stated that the international society which developed international law was composed of all the States of European blood plus, as a late addition, Japan. International law also applied to the three Christian States of Africa, viz. Abyssinia (Ethiopia), Liberia and the Congo State (regarded as Christian since its sovereign was the King of the Belgians), although it could hardly be said that such States contributed to the development of international law. In addition to this, international society could admit States to parts of its law only and examples of this would include Turkey, Morocco, Muscat, Siam, Persia and China.¹⁰⁷ One may draw from this two conclusions. Firstly, that basically only States within the European circle were or could be members of the "International Family" and full subjects of international law, and secondly, that only States were involved in any event.

As for the first contention, the nineteenth century test was that of "civilisation". Smith noted that one important requirement of Statehood was that a State should be "under a system of law which gives strangers and natives a reasonable approach to equality of treatment. The assimilation of European ideas, the growth of humane habits, the frank attempt to break down the barriers of exclusion, all these will insensibly prepare the way".¹⁰⁸ Oppenheim wrote that "the Law of Nations, as a law

(105) O'Connell points out that the cessions made by Indian and South-East Asian protectorates to the British Crown were the bases of title and that it would be profitless to speculate on the degree of civilisation which would qualify a ruler for international personality, op.cit. p.440.

(106) See Jenks, The Common Law of Mankind, 1958, pp.62-89, and Jennings, "The Progress of International Law" 34 BYIL, 1958, pp.334, 350-4.

(107) International Law, part I, Peace, 1904, pp.49-1.

(108) International Law, 5th ed. 1918, p.53. See also Westlake, Collected Papers on Public International Law, 1914, pp.143-5.

between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning intercourse with and treatment of such States as are outside the circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious".¹⁰⁹ Rivier excluded from international law, "a horde or nomadic tribe, the negro tribes of Africa and the native races of Australia, the North American Indians, and chance communities, organised temporarily such as bands of brigands and associations of pirates".¹¹⁰ However, such statements were never an accurate reflection of the evolution of international law. European powers had treaty relations with the Ottoman empire, and with Algiers, Tunis, Tripoli and Morocco for a number of centuries.¹¹¹ Scott noted in 1801 in The Helena that although African States such as Algiers had once been considered as pirates, "they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal States".¹¹² However, in another case, he emphasised that with regard to African (ie. north African) States, the "European law of nations is not to be applied in its full vigour to the transactions of persons....residing in that part of the world".¹¹³

International law was thus the law governing civilised States. The British law officers wrote of it in 1859, "as it has been hitherto recognised and now subsists by the common consent of Christian nations".¹¹⁴ However, this requirement of "civilisation" is perhaps best seen as

(109) Op.cit. p.50.

(110) Principes du Droit des Gens, vol.1, 1896, pp.45-51.

(111) Andrews, "The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century", 94 LQR pp.408, 413. For examples of such pre-nineteenth century relations see Alexandrowicz op.cit. footnote 17, pp.9-28.

(112) 165 ER, p.515.

(113) 165 ER, p.480.

(114) Smith, Great Britain and the Law of Nations, vol.1, 1932, p.12.

referrable to entry into the European Family of Nations, rather than as a condition of Statehood itself. In the Western Sahara case, the International Court emphasised that "no rule of international law.... requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today".¹¹⁵ Thus, Morocco was at the time of the Spanish colonisation of Western Sahara a State, although of a special character as being founded upon the common religious bond of Islam and personal allegiance to the Sultan rather than upon the notion of territory.¹¹⁶

From this, it may be deduced that international law in the nineteenth century and as transformed by positivism and European colonisation operated a dual system of States, those within and those without the European Family of Nations. This also affected the applicability of international law. However, where non-State entities were concerned a further level of the international society was involved. It has been seen that practice demonstrates that the European colonisation of Africa was achieved in law not by virtue of the occupation of terra nullius but by cession from local rulers. This means that such rulers were accepted as being capable in international law not only of holding title to territory, but of transferring it to other parties. Accordingly, one may postulate a three-level structure of international law during this period as it related to the issue of international personality. States within the European defined "Family of Nations" were full and complete subjects of international law, States outside this "Family" had only a limited impact upon the development of the law and not all of it applied to them, while certain non-State entities or communities possessed only a limited personality in international law, although this certainly included the capacity to hold title to territory and territorial sovereignty.

(115) ICJ Reports, 1975, pp.12, 43-4.

(116) Ibid p.44.

(3) Conquest

This involves the taking of possession of enemy territory through military force in time of war.¹¹⁷ Of dubious legality today,¹¹⁸ it was historically important and certainly operative in the nineteenth century as a method of acquiring territory.¹¹⁹ It was noted in the case of In Re Southern Rhodesia¹²⁰ that conquest as a way of obtaining title to territory assumed the absence of any formal transfer on the part of the previous sovereign and required the taking possession of the territory by force, together with the intention and ability to hold the territory as its sovereign.¹²¹ The title by conquest was completed when the intention to annex was signalled and the territory involved was effectively occupied.¹²² It was not necessary apparently for all of the territory and all opposition to be totally subjugated, as the British proclamations of May and September 1900 annexing the Orange Free State and the Transvaal while some Boer forces were still fighting, demonstrates.¹²³ The Italian annexation of Libya in 1911 was clearly premature. Serious if sporadic fighting continued until and during the First World War and it was only in 1923 that Turkey recognised Italy's sovereignty over the Libyan provinces.¹²⁴ It is therefore doubtful whether title by conquest was involved in this case.

(117) Oppenheim op.cit. p.566.

(118) *Infra*, Chapter 7, p.525.

(119) Lindley op.cit. p.160.

(120) (1919) AC 211.

(121) *Ibid* p.221.

(122) Lindley op.cit. p.160.

(123) Westlake op.cit. p.65. But see Oppenheim op.cit. p.571, who regards this as an example of premature annexation.

(124) Lindley op.cit. pp.161-4.

Title by conquest was rare in Africa in the nineteenth century. The Judicial Committee of the Privy Council noted that the territory of Matabeleland and Mashonaland had been acquired by conquest,¹²⁵ while Britain claimed that upon the defeat of the Khalifa's army at Omdurman in 1818, "all the territories which were subject to the Khalifa passed by right of conquest to the British and Egyptian governments".¹²⁶ By a French law of 6 August 1896, Madagascar with the dependent islands was declared to be a French colony, with title being based upon conquest.¹²⁷

Conquest involves, it would seem, an implicit recognition of the international personality of the opposing party. In the case of Southern Rhodesia, the British had concluded a treaty with Lobengula in 1888 and a year later had informed the Portuguese that Lobengula was the independent ruler of Matabeleland and Mashonaland,¹²⁸ while in the case of Madagascar, the other main example of title by conquest in Africa, the conquest was preceded by treaties of protection.¹²⁹ In Africa, however, title by conquest was the exception.¹³⁰

II - Colonial Protectorates

The establishment of protectorates was so widespread during the period of colonisation in Africa that O'Connell has stated that it became in the nineteenth century almost a mode of acquisition.¹³¹ However, the assumption by a comparatively powerful State of the duty of protecting a weaker State was an institution of some antiquity. One example of such a

(125) In Re Southern Rhodesia (1919) AC 211.

(126) Lindley op.cit. p.164.

(127) Ibid pp.190-1.

(128) In Re Southern Rhodesia (1919) AC 211. See also Alexandrowicz op.cit. footnote 17, pp.76-7.

(129) Lindley op.cit. pp.190-1.

(130) It appears that there were no cases of territory being acquired by prescription in Africa during the period of colonisation.

(131) Op.cit. p.342.

relationship was to be found in the protectorate exercised by Britain over the Ionian Islands between 1815 and 1864. This was set up by treaties with Russia, Austria and Prussia, which stipulated that the Islands were to be a free and independent State under the immediate and exclusive protection of the King of Great Britain. In 1864, they were ceded to Greece at the request of the islanders and with the consent of the guaranteeing powers.¹³² In the Tunis and Morocco Nationality Decrees case, the Permanent Court declared that protectorates had "individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development".¹³³ As regards the creation of the French protectorate over Morocco by the Treaty of Fez in 1912, the International Court noted that Morocco remained a sovereign State, and had granted certain sovereign powers to France.¹³⁴ Thus, much depends upon the particular circumstances of the case. In this classic conception of the institution of the protectorate, should the protecting power exceed its authority as derived from the relevant agreement, the protected party could treat this agreement as broken.¹³⁵ In R v Crewe, it was stated that the concept of a protectorate excludes, in contradistinction to the idea of annexation, "that absolute ownership which was signified by the word dominion in Roman Law and which though perhaps not quite satisfactory is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country".¹³⁶ The concept of the protectorate was founded, initially at

(132) See Lindley op.cit. pp.181-2.

(133) PCIJ Series B no.4, p.27.

(134) US Nationals in Morocco, ICJ Reports, 1952, pp.176, 188.

(135) See Vattel, The Law of Nations, 1758, vol.I, para.16. This view was cited by Lord Salisbury with regard to the dispute with the French over the latter's declaration of a protectorate of Madagascar, see Alexandrowicz op.cit. footnote 17, p.62.

(136) [1910] 2 KB 576 at 620.

least, upon a division made between external and internal sovereignty, with the former being delegated to the protecting power. But the concept was developed in the case of the colonial protectorate so that the institution became one more method of acquiring territory rather than the model of the classic approach.

Lindley observed that "an essential feature of the colonial protectorate is that it is recognised by the other members of the international family as giving to the protecting power the right as against themselves to take steps in the direction of annexing the protected territory as its dominions".¹³⁷ The Berlin Conference of 1884-5 appears to have marked the turning point. Prior to that date, a number of treaties of protection were signed consistent with traditional practice, i.e. granting the protecting State powers in the external field and quite often determining that the local ruler was restricted in his external relations by the consent of the protecting power.¹³⁸ After 1885, "State practice.... revealed a tendency to deform the original classic concept of the protectorate and to convert it into an instrument of colonialism".¹³⁹ This can be seen with regard to Bechuanaland, where internal as well as external sovereignty gradually passed to the protecting power. In 1884, a number of treaties were signed with local rulers and the following year a British protectorate was established. Not long afterwards, the southern part of the protectorate was made a Crown Colony and its governor exercised jurisdiction over the protectorate as well. In effect, Britain acquired both internal and external sovereignty over the territory.¹⁴⁰

(137) Op.cit. p.183.

(138) For example the 1827 treaty between Britain and the King of Brekoma, Alexandrowicz op.cit. footnote 5, p.55; the 1837 treaty between France and Adb-el Kader, Hertslet op.cit. vol.I, p.11; and the 1884 treaty between Britain and the ruler of Opobo, 89 BFSP 1089. See also Lindley op.cit. pp.183-4.

(139) Alexandrowicz op.cit. footnote 5, p.55.

(140) See Lindley op.cit. p.187.

Kennedy LJ emphasised in R. v Crewe that in the protectorate "every branch of such government as exists in administrative, executive and judicial, has been created and is maintained by Great Britain".¹⁴¹ Nevertheless, the theoretical distinction was maintained. Vaughan-Williams LJ noted that "the Bechuanaland protectorate is under His Majesty's dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion".¹⁴²

This revisionist approach to the nature of protectorates in essence treated them as hardly distinguishable from colonial possessions.¹⁴³ Other examples of protectorates established in Africa by the European powers included Tunisia in 1881,¹⁴⁴ Madagascar in 1885, Zanzibar in 1890, Uganda in 1895, Egypt in 1889 and Morocco in 1912. Basutoland and Swaziland also became protectorates, but Italian efforts to enforce a protectorate over Ethiopia rapidly collapsed.¹⁴⁵ Under the Act of the Berlin Conference, only Article 34 relating to notification applied to protectorates and not the requirement under Article 35 relating to effective occupation. However, in subsequent interpretations, it was declared that protectorates had also to be effectively occupied by the European State concerned.¹⁴⁶ This meant in effect that little practical

(141) [1910] 2 KB 576, 619.

(142) Ibid, 603-4.

(143) A distinction may be drawn here between the "traditional" protectorates of North Africa i.e. Tunis and Morocco and the "revisionist" protectorates of black Africa, see Okoye, International Law and the New African States, 1972, p.8. The difference lies in the acceptance of the objects of the former protectorates as States (if not within the European Family of Nations) but not in the case of the latter.

(144) Supra

(145) See Lindley op.cit. pp.189-93. Treaties of protection were also signed with rulers in the Gambia, Gold Coast and in Nigeria by the British and in West Africa generally and in the Congo by France, see Hertslet op.cit. vol.I, pp.19-20, 64-120 and 137. See also McNair, International Law Opinions, vol.I, 1956, pp.41-55 and Lewis, The Modern History of Somaliland, 1965, pp.40-62.

(146) See Lindley op.cit. pp.148-9.

distinction was made between ordinary colonies and protectorates and it marked the development of the colonial protectorate with its substantial differences from the traditional protectorate.¹⁴⁷

III - Spheres of Influence and the Hinterland Doctrine

In a large number of cases, before the European powers established colonial protectorates, they agreed among themselves as to the division of areas of the African continent into spheres of influence, or spheres of action.¹⁴⁸ Such agreements merely amounted to an acceptance by the parties that certain territories would be subject to the attentions of one of their number and that the others were to abstain.¹⁴⁹ Westlake sees the reason for their development in the haste for the provisional appropriation of territories in advance of anything resembling occupation that characterised the latter part of the nineteenth century. This "more shadowy form of earmarking" was especially needed since colonial protectorates differed so little in practice from annexations.¹⁵⁰ A sphere of influence could arise as a result of a unilateral declaration of one power, which would become a reality if uncontested, or, more usually, from an agreement between two or more powers not to interfere in the "spheres" of the other. By distinguishing between exercising "influence" and exercising "sovereign rights" in Articles 6 and 9, the Final Act of the Berlin Conference formally inaugurated the prolific era

-
- (147) Westlake defined a colonial protectorate as "a region in which there is no state of international law to be protected, but which the power that has assumed it does not yet claim to be internationally its territory, although that power claims to exclude all other States from any action within it". *Op.cit.* pp.123-4. Note that Oppenheim declared that the protectorates over African tribes acquired through treaty possessed no international status whatsoever, *op.cit.* p.196. This would emphasise the distinction between protectorates over States and over other entities, see footnote 143.
- (148) The term "sphere of interest" was also used, but was of less significance than the other expressions, see Curzon, Frontiers, 1907, p.42.
- (149) Holdich declared that it was a way of setting up a "warning to trespassers", Political Frontiers and Boundary Making, 1916, pp.96-7.
- (150) *Op.cit.* p.128.

of spheres of influence in the partition of Africa.¹⁵¹ The first such arrangement was the Anglo-German agreement of May 1885, which defined the spheres of interest of the parties and provided for non-interference by each party in the sphere of interest of the other.¹⁵² Other such agreements followed rapidly between France and Germany, Britain and Germany, France and Portugal and Germany and Portugal.¹⁵³ In effect, these agreements, binding upon the parties, marked a transitional stage on the road to colonial acquisition. Agreements with the local chiefs invariably followed to be succeeded by the establishment of protectorates. Thus, while the spheres of interest agreements were of no legal effect as regards the African populations,¹⁵⁴ they tended to inaugurate the acquisition of title to the territories concerned. In any event the process re-emphasises the predominant inter-European aspect of the partition of Africa.

The principles established by the General Act of the Berlin Conference relating to the creation of European colonies and protectorates in Africa were solely related to territories on the African coasts and were not applicable in the interior of the continent. This was due not only to the fact that such interiors had not by then been seriously explored by Europeans to any great extent, but also to the difficulty of establishing effective occupation in such areas. Accordingly, various doctrines were utilised aiming at the acquisition of title and its

(151) See Uzoigwe, "Spheres of Influence and the Doctrine of the Hinterland in the Partition of Africa", 3 *Journal of African Studies*, 1976, pp.183, 186.

(152) 76 BFSP 772.

(153) See Lindley op.cit. p.210 and Uzoigwe op.cit. pp.186-7.

(154) When the Sultan of Zanzibar protested that territory recognised as belonging to him was allotted under a German-Portuguese treaty of 1886 to the latter State, Germany pointed out that the treaty did not affect the Sultan's rights but merely provided that Germany would not interfere with any arrangements that Portugal might wish to make regarding the territory whether with the Sultan or with others, 78 BFSP 1254-5.

recognition by all the European powers in a way which would obviate the need to establish effective occupation. Prominent among these were the notions of contiguity and hinterland.

Such expansive geographical doctrines, originally formulated it seems with regard to the occupation of the American continent,¹⁵⁵ were transferred to Africa, with the idea that possession of a coastal strip in some way placed the occupier in a privileged position (at least) with regard to the interior of the country bounded by that coastal strip. France used the argument with regard to Senegal and the British with regard to Nigeria.¹⁵⁶ Britain, however, objected to Portuguese claims to a belt running across Africa from Angola to Mozambique on the grounds that no doctrine of constructive acquisition existed in the absence of bona fide occupation and de facto jurisdiction.¹⁵⁷ The hinterland doctrine, according to the arbitrator in the Walfisch Bay award, required for its application "the existence or assertion of political influence over certain territory or a treaty in which is concretely formulated".¹⁵⁸ However, the doctrine, replete with geographical uncertainty, ambiguity and possibilities for confusion, was never really accepted. Britain, for example, abandoned its claim of 1883 to large areas of land outside its acquired territory of Walfisch (or Walvis) Bay in south-west Africa on the grounds of contiguity or hinterland, once Germany had made territorial acquisitions in that region.¹⁵⁹ Lord Salisbury declared in 1896 that "the modern doctrine of hinterland with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or

(155) Uzoigwe op.cit. pp.194-5. See also Westlake op.cit. pp.114-6.

(156) Ibid, pp.195.

(157) McEwan, International Boundaries of East Africa, 1971, p.172.

(158) Cmd. 5857 (1911), p.32 cited in Lindley op.cit, p.235.

(159) Lindley op.cit. pp.229-30.

control",¹⁶⁰ while the US Secretary of State declared in the same year that "spheres of influence and the theory or practice of the 'hinterland' idea are things unknown to international law and do not as yet rest upon any recognised principles of either international or municipal law".¹⁶¹ These notions were political expressions of the colonising spirit, not legal concepts. They soon gave way to cessions and effective occupation as the guiding juridical principles.

IV - Consideration of Geographical and Ethnic Factors during Colonisation

In the process of the European colonisation of Africa, ethnic considerations were, in general, ignored and the colonies and protectorates included within their borders, with few exceptions, large numbers of different, often antagonistic tribes, while dividing others between different jurisdictions.¹⁶² However, this should not be taken to mean that no account was taken of local conditions in the delimitation of colonial frontiers in Africa. While some 30 per cent of the total length of African borders follow geometrical lines and thus would appear to have been established irrespective of local conditions, the majority of the borders were delimited, partly at least, in the light of some indigenous factors.¹⁶³

Geographical factors were sometimes relevant, as in the delimitation of Gabon's frontiers,¹⁶⁴ while on a number of occasions ethnic considerations were taken into account as well as the structure of African

(160) Ibid p.235.

(161) Ibid p.212.

(162) Yakemtchouk, L'Afrique en Droit International, 1971, pp.70-3.

(163) Touval, op.cit. p.291. See also Boggs, International Boundaries, 1940, pp.156-8.

(164) Mangongo-Nzambie, "La Délimitation des Frontières du Gabon (1885-1911)", 9 Cahiers d'Etudes Africaines, 1969, p.5.

political entities. By the mandate agreements of 1922, the former German East Africa was divided into Belgian and British mandated territories. Soon after the mandates came into force, the Permanent Mandates Commission was petitioned to rectify the border delimitation, since the district of Kissaka had been separated from Ruanda and placed in Tanganyika.¹⁶⁵ The Commission deplored the territorial transfer and referred to the protests of the local population, and after Belgian-British talks, the boundary was altered and the district returned to Ruanda.¹⁶⁶ On similar grounds, the Council of the League of Nations suggested in 1924 that certain readjustments be made to the frontier between the French and British mandated areas in the Cameroons.¹⁶⁷

In a series of treaties, provisions were incorporated stipulating that account be taken of tribal groupings and African entities in the drawing of boundaries. In the Anglo-French treaty of 1890, for example, article 2 declared that the northern border of what was later to become Nigeria should be drawn "in such a manner as to comprise in the sphere of action of the Niger Company all that fairly belongs to the Kingdom of Sokoto".¹⁶⁸ The frontier between Nigeria and Dahomey as delimited by the Anglo-French agreement of 1898 contained alterations to take account of treaties made by Britain with local rulers,¹⁶⁹ while a treaty between Britain and Portugal in 1891 provided that part of the border between their central African territories would follow the western boundary of the Barotse Kingdom.¹⁷⁰ A comprehensive agreement regarding colonial

-
- (165) Apparently in order to ease the construction of British railway communications, Permanent Mandates Commission, Minutes of the 2nd Session, 9 August 1922, p.72.
- (166) Cmd. 1974. See also McEwan op.cit. pp.154-5 and Touval, The Boundary Politics of Independent Africa, 1972, p.10.
- (167) Lindley op.cit. p.282. See also Murty, "Evidence on Traditional Boundaries and some Problems in its Interpretation", 8 IJIL, 1968, pp.487-8, footnote 14.
- (168) Hertslet op.cit. vol.II, p.229. See also Anene op.cit. p.13.
- (169) Touval op.cit. footnote 7, p.289.
- (170) Ibid.

delimitations was made between the UK and France in 1904 and this provided that the line separating Niger from Nigeria (as they are now) should be changed to place three particular sultanates with whom France had made treaties within the French sphere and that in determining the frontier regard should be had to the political divisions of the territories.¹⁷¹

The treaties between France and Liberia in 1907, and Italy and Ethiopia in 1908 also provided that close regard was to be had to existing tribal divisions so as to avoid splitting tribes.¹⁷² In a number of instances, treaties provided for the problem of tribes divided by borders, not by amending the borders, but by some other form of recognition of the situation. For example, the Anglo-French treaty of 1904 provided for the transfer of the Iles de Los and a part of Gambia to France and stipulated that the populations of the areas concerned could opt for British citizenship if they wished.¹⁷³ The Anglo-Belgian treaty of 1915 regarding the Uganda-Congo border and the Anglo-Italian agreement of 1927 regarding the Kenyan-Italian Somaliland border also included similar provisions.¹⁷⁴

However, such considerations must be seen against the background of European power politics, which had much to do with the siting of borders and the influence of administrative convenience. In 1910, for instance, an area known as the Lado enclave was transferred from the Congo to Sudan and for ease of administration its southern part became a part of Uganda,¹⁷⁵ while the inclusion within German south-west Africa of the

(171) Ibid.

(172) Lindley op.cit. pp.282-3, and Murty op.cit. pp.487-8, footnote 18.

(173) Ibid pp.289-90. See also Touval op.cit. footnote 166, p.10.

(174) Ibid p.290. See also Jones, Boundary Making, 1945, p.42.

(175) McEwan op.cit. p.129.

Caprivi Strip was due to poor geographical knowledge, since the intention had been to secure access to the Zambezi for the German colony, in the belief that an important communications route was involved.¹⁷⁶ As an example of the vagaries of colonial boundary making, one may cite the instance of a part of French West Africa. In 1890, the Soudan was created as an administrative entity, but nine years later was dismembered and distributed amongst its neighbours. In 1902, the territory of Senegambia and Niger was established. Two years later, the western part was renamed the French Soudan. In 1935, Upper Volta was abolished and parts of it were incorporated into the French Soudan, but fifteen years later it was reconstituted, while in 1944 parts of the Soudan were given to Mauritania.¹⁷⁷

V - Legal Ties

The second question put to the International Court in the Western Sahara case, asked "what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"¹⁷⁸ and in the discussion of this point, a number of interesting matters were raised, that highlighted the relationship between people, territory and sovereignty so crucial in the law of territory.

Morocco argued that it possessed sovereignty over Western Sahara by virtue of immemorial possession founded upon "the public display of sovereignty, uninterrupted and uncontested for centuries"¹⁷⁹ as "evidenced by the general acquiescence of the international community which it was accorded for several hundred years".¹⁸⁰ These internal and international

(176) Hertslet op.cit. vol.III, pp.899-906.

(177) Touval op.cit. footnote 166, p.14.

(178) ICJ Reports, 1975, pp.12, 14.

(179) Pleadings, CR.75/12, p.29.

(180) Ibid, p.6.

aspects had to be understood, however, in the light of the special nature of the Moroccan State based upon personal allegiance to and the religious significance of the Sultan.¹⁸¹ Moroccan sovereignty extended also, it was claimed, to the Bled Siba, the area not in fact submissive under the complete power of the Sultan, since it acknowledged the spiritual authority of the Sultan.¹⁸² Morocco pleaded that a number of religious and tax documents demonstrated political allegiance, to which could be added various military activities,¹⁸³ while a series of international agreements were invoked which purportedly constituted international recognition of its title to Western Sahara.¹⁸⁴

Mauritania was in a different position, since it clearly had not existed as a State during the colonisation period. It therefore emphasised that the problem centred around the re-unification of its people.¹⁸⁵ In order to substantiate this, reference was made to the "Mauritanian entity", or Bilad Shinguitti. This was a distinct, cultural entity inhabiting a certain area.¹⁸⁶ This entity, with its own language and social structure, was not a State, nor even a federation or confederation. The concept of a league as it had existed in ancient Greece was the nearest analogy presented to the court,¹⁸⁷ and this entity, consisting of a number of different, even warring, tribes was reinforced

(181) Pleadings, CR.75/11, pp.18-19.

(182) Ibid, p.6. The court, in fact, accepted this analysis, ICJ Reports, 1975, pp.12, 44-5.

(183) Pleadings, CR.75/12, pp.36-7.

(184) Ibid, pp.6-29.

(185) Ibid, p.38. See also A/C.4/SR.2004.

(186) Allegedly from the river Senegal to the Wadi Sakiet El Hamra, with the proviso that to the south of the latter there was a zone of overlap with the Tekna nomads of the Moroccan Bled Siba, Pleadings, CR.75/17, p.24.

(187) Ibid, p.28.

by a unified Saharan law.¹⁸⁸ Although it was acknowledged that the constituent parts of the entity were sovereign and independent,¹⁸⁹ the entity lived as a distinct unit in complete independence from neighbouring States.¹⁹⁰ The concept of nomadism was used to express this method of linking people and territory in a legal relationship.¹⁹¹ The nature of the relationship between the individual parts and the entity was described as co-sovereignty. This meant that despite its political diversity, the entity could be regarded as an independent nation, in which all the people jointly exercised sovereignty over the Mauritanian entity.¹⁹² Included in this entity were the inhabitants of Western Sahara, who therefore partook of the co-sovereignty.

Both Moroccan and Mauritanian contentions were rejected by Spain, who emphasised that Morocco had never exercised State functions over Western Sahara¹⁹³ while the Mauritanian entity was simply a sociological phenomenon with no legal implications whatsoever.¹⁹⁴ On the contrary, the population of the Western Sahara itself constituted a distinct people with its own characteristics.¹⁹⁵

(188) Dealing inter alia with agricultural and water issues, rules relating to area and methods for the peaceful settlement of disputes, *ibid* p.29.

(189) *Ibid* p.28.

(190) *Ibid* p.25.

(191) *Ibid* pp.32, 33 and 37.

(192) *Ibid* p.41. See also Pleadings, CR.75/30, pp.38-40.

(193) See Pleadings, CR.75/22, pp.12-25 and 42-51, and Pleadings CR.75/23, pp.2-33 and 44.

(194) Pleadings, CR.75/24, pp.9-43. The term "Mauritanian entity" was first used during the General Assembly debates of 1974, ICJ Reports, 1975, pp.12, 57.

(195) *Ibid* pp.44-9. Spain emphasised that this approach was adopted by the Saharan political movements including Polisario, *ibid* pp.49-51. The Algerian approach to the issue of legal ties as of the date of colonisation was to assert the primacy of the principle of self-determination and the will of the people, Pleadings, CR.75/31, p.121.

In its analysis of the Moroccan claim, the International Court laid emphasis upon the actual manifestation of sovereignty by Morocco with regard to Western Sahara during the time of Spanish colonisation. What was of decisive importance was not indirect inferences drawn from history, but "evidence directly relating to effective display of authority in Western Sahara".¹⁹⁶ The court firmly resisted the temptation to accord historical and geographical factors other than peripheral value.¹⁹⁷ This meant that Morocco's claim was to be analysed in the light both of "the intention and will to act as sovereign, and some actual exercise or display of such authority".¹⁹⁸ While the court accepted that the Moroccan State of this period was based on personal and religious bonds rather than territorial ones, such allegiance had to be manifested clearly in acts evidencing acceptance of the ruler's political authority.¹⁹⁹ The court, thus, was not willing to project the internal characteristics of Morocco on to the international scene so as to obviate the need to comply with recognised rules of international law.²⁰⁰ The court concluded that the material submitted²⁰¹ did not show that Morocco had displayed "effective and exclusive State activity in Western Sahara" and that, therefore, there was no tie of territorial sovereignty between the two.²⁰²

(196) ICJ Reports, 1975, pp.12, 43.

(197) The court regarded the historical material presented to it as ambiguous, while the factor of geographical contiguity (even if it could be considered, which was doubtful) only emphasised the paucity of evidence of unambiguous display of Moroccan authority regarding Western Sahara, *ibid*, pp.42-4.

(198) PCIJ Series A/B no.53, p.45.

(199) ICJ Reports, 1975, pp.12, 43-4.

(200) But see Judges Ammoun and Forster who declared that the court had erred in not recognising that in the circumstances ties of allegiance amounted to ties of sovereignty, *ibid*, pp.102 and 103. But cf. Judge De Castro *ibid*, p.136.

(201) In essence the court adopted the Spanish interpretation of the facts regarding the internal aspects of Morocco's claim to immemorial possession, *ibid*, pp.47-8 and *supra* footnote 193.

(202) *Ibid*, p.49.

The court, however, went further to state that legal ties of allegiance had existed between the Sultan of Morocco and some of the monadic tribes of the territory.²⁰³ However, there is a qualitative difference between personal influence exercised by the Sultan over tribes inhabiting areas adjacent to the frontiers of his State and legal ties of allegiance between the two parties. Quite why the court recognised legal ties of allegiance here is difficult to appreciate. It may be that the special local conditions required such an unusual conclusion, but it must be regarded as misguided, especially since, unlike ties of sovereignty which might influence the process of decolonisation of the territory, legal ties of allegiance with part of the population did not. It is also doubtful whether the material available could support the existence of such ties of allegiance and it is hard to avoid the conclusion that the court was trying to present Morocco with a consolation prize.²⁰⁴ In the event, Morocco later misinterpreted and misused this part of the court's opinion.²⁰⁵

In discussing the nature of the Mauritanian entity, the court took into account that subjects of law varied in their nature and the exercise of their rights, and gave full weight to the special characteristics of the

(203) Evidence was adduced showing a certain influence upon the Tekna tribes by the Sultan, *ibid*, pp.48 and 56.

(204) The court also appeared to give a broader interpretation to the question of legal ties than was justified in the case. The question was centred on legal ties between the territory of Sahara and the claimants, it did not go further and call for a discussion of ties with sections of the population of the territory. The court's opinion, therefore, fell between the Moroccan position that personal ties of allegiance amounted to ties of sovereignty over the territory and the terms of resolution 3292(XXIX) which clearly concerned only territorial ties in Morocco's case. As far as the various international acts invoked by Morocco were concerned, the court felt that although they did not show that the international community did recognise Moroccan territorial sovereignty in Sahara at the relevant time, they did provide indications of the Sultan's authority or influence over some nomads in the territory, *ibid*, p.56.

(205) Morocco declared that the court's opinion meant that Western Sahara was part of Moroccan territory and that "Moroccan claims have been recognised by the legal advisory organ of the United Nations", S/PV.1849 p.11 (16 October 1975).

Sahara region, but the essential test of legal personality was that such an entity be in "such a position that it possesses in regard to its members, rights which it is entitled to ask them to respect" and be "an entity capable of availing itself of obligations incumbent upon its members".²⁰⁶ As a matter of fact, the Mauritanian entity did not constitute such an entity and could therefore have exercised no sovereignty in Western Sahara.²⁰⁷ However, certain legal ties could still have existed, based on the facts of nomadism. Such rights included those relating to the lands comprised on the nomadic routes. This appears correct, for nomadic tribes should be regarded as possessing legal rights respecting the land over which they have customarily migrated. The special nature of Saharan life at the time demanded a more flexible view of the manifestation and creation of legal ties.²⁰⁸ However, the court went beyond the assertion of legal rights between the nomadic peoples concerned and the lands which they traversed, to declare that such rights "constituted legal ties between the territory of Western Sahara and the 'Mauritanian entity'".²⁰⁹ It is felt that this conclusion is far too generalised. What the correct analysis would have led to was that there were some legal ties between some of the tribes of the alleged entity relating to some of the territory of the Sahara. To transmute nomadic rights over part of a territory to rights possessed by the "Mauritanian entity" over the whole of the territory in question must be seen as mistaken.^{209a}

(206) ICJ Reports, 1975, pp.12, 43 and 63. See also the Reparations case, ICJ Reports, 1949, pp.174, 178.

(207) Ibid, p.63. Thus, no ties of sovereignty or allegiance existed, *ibid*, p.64. See also Judges Petren, *ibid* p.115; De Castro, *ibid*, p.165 and Ruda, *ibid*, p.175.

(208) Ibid, pp.64-5. See also the analysis by Judge Dillard, *ibid*, pp.155-6.

(209) Ibid, p.64. Cf. Judge de Castro, *ibid*, p.165.

(209a) Note, however, that the court accepted that there existed a certain overlapping of Moroccan and Mauritanian ties, *ibid*, pp.65-7.

The court's acceptance of such non-territorial legal ties provides a legal loophole through which States with irredentist claims may seek recognition of pre-colonial legal ties and then declare that such ties should be accepted as having an influence upon the decolonisation process and after. The question is then raised of the effects of the legal ties discussed in the Sahara case. As far as ties of territorial sovereignty are concerned, it seems clear that their existence would have been of relevance not in superseding the principle of self-determination,²¹⁰ but in providing guidelines for its application,²¹¹ such as with regard to the framing of questions for a plebiscite in the territory.²¹² As regards the other legal ties recognised by the court, they could not affect the application of resolution 1514(XV) and the principle of self-determination to the inhabitants of the territory, but some uncertainty now exists as to their function in other such situations.

It may be concluded, therefore, that while international law will take into account any special characteristics there may be in attempting to identify legal personality, particularly Statehood, with regard to non-European entities, the ultimate test of sovereignty is the classic one of objectively determined exercise of authority coupled with the intention to act as sovereign. As far as non-sovereign legal ties are concerned, these may be demonstrated in the light of the special characteristics of the region and people in question and may be founded on religious or tribal practices. While such ties will not be relevant in the field of sovereignty, it seems, they may be of relevance to the various procedures involved in the decolonisation process, although in what form and to what extent is open to question.

(210) See *infra*, Chapters 3 and 4.

(211) Legal ties were defined in terms of their impact upon the decolonisation of the territory, ICJ Reports, 1974, pp.12, 68.

(212) See *ibid*, pp.36 and 37. Cf. Judge Petren *ibid*, p.112.

IV - The Problem of Legal Particularism

The circumstances of the Sahara case, which required an analysis of the legal situation in that area during the 1880's, raised the issue of particularism and the validity of competing international legal orders. A number of different approaches were propounded during the case.

Algeria declared that one of the ways in which one could get around the conclusion that European international law regarded colonies as terra nullius, was to reject colonialist law and recognise that there existed an Arab-Islamic civilisation at that time and place, with a developed public law dimension. Thus, it could be argued that Western Sahara was not terra nullius since it belonged to the Dar El Islam, or Moslem civitas.²¹³ Mauritania claimed on rather similar lines that the entity or Bilad Shinguitti had since the seventeenth century an extremely precise meaning throughout the Moslem world and was within the Arab-Islamic community a clearly individualised entity. It was argued that there had been nothing in the nineteenth century to prevent international law co-existing with various special legal orders such as Latin American law, or the internal relations of the British Commonwealth or indeed the law of the Dar El Islam.²¹⁴ Spain adopted a different approach and stressed instead the unity of international law. To accept that different legal frameworks were to apply on the one hand to the establishment of Moroccan sovereignty and on the other to the establishment of Spanish sovereignty, would mean the annihilation of international law. In addition, the parties concerned had not supplied proof of the existence and applicability of such rules.²¹⁵ Spain stressed that departure from the

(213) Pleadings, CR.75/19, pp.43-5. Algeria actually rejected such an approach since it was argued that one had to presume the pre-dominance of European international law in the circumstances of the nineteenth century, *ibid.* Cf. Pleadings, CR.75/26, p.50 (Morocco).

(214) Pleadings, CR.75/30, pp.38-9.

(215) Pleadings, CR.75/25, p.13.

idea that there is only one legal order, a general international law governing relationships between independent States would have grave consequences, the most serious of which being that legal reasoning would be incapable of producing a minimum of agreement since different basic categories would be used.²¹⁶

Morocco adopted a median position. It pleaded the special character of its State structure in the nineteenth century, while declaring that its ties of territorial sovereignty with Western Sahara were valid under general international law. In the nineteenth century, Morocco could only be understood as an Islamic State with its mixture of temporal and spiritual elements.²¹⁷ To judge the nature of its ties with Sahara, "it was essential to abandon the constitutional pattern of the European State of the nineteenth century".²¹⁸ But Morocco claimed that international law did recognise such a diversity of State systems and that, therefore, its approach was within the framework of general international law.²¹⁹

Faced with such contentions, the court was prepared to move some way towards the acceptance of legal particularism, but not with regard to the question of terra nullius, which was treated purely in the light of the (European) State practice of the period. This sidestepped the possibility raised by Algeria of Sahara not being terra nullius because it was part of the Dar El-Islam. The court declared that "the legal regime of Western Sahara, including its legal relations with neighbouring territories, cannot properly be appreciated without reference to (the territory's) special characteristics",²²⁰ viz. the desert nature of the land and the nomadism

(216) Pleadings, CR.75/22, p.16. See also Pleadings CR.75/23, p.57.

(217) Pleadings, CR.75/11, pp.15 and 18.

(218) Ibid, p.11.

(219) Pleadings, CR.75/27, pp.9-11. See also Pleadings CR.75/26, p.52.

(220) ICJ Reports, 1975, pp.12, 41.

of its population. The question of legal ties had to be examined "in the context of such a territory and such a social and political organisation of the population".²²¹ In discussing the nature of the Moroccan State and the Mauritanian entity at the relevant time, the court was prepared to reach its conclusion in the light of the local particularism. However, the general framework was firmly established as that of the general international law of the period. The court recognised the special nature of the Moroccan State and noted that "the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty".²²² Nevertheless, the key factor was whether Morocco had effectively exercised sovereignty in Sahara at the relevant time. Religious ties had existed in other parts of the world and did not necessarily amount to legal ties of sovereignty, while ties of allegiance had to be "real and manifested in acts evidencing acceptance of....political authority"²²³ for one to talk of the display of State sovereignty. The real analysis had to be concerned with proof of effective sovereignty".²²⁴ As far as Mauritania was concerned, the court noted that it had given full weight to the "special characteristics of the Saharan region and peoples".²²⁵ However, whether the entity did enjoy sovereignty in the area was to be determined in the light of the general international law test revolving around the existence of an identity separate from its constituent parts and involving the sense of obligation.²²⁶

(221) Ibid, p.42.

(222) Ibid, p.44. See also Judges Ammoun ibid, p.83, and Forster ibid, p.103.

(223) Ibid.

(224) Ibid, p.49.

(225) Ibid, p.63.

(226) Ibid. See also the Reparations case, ICJ Reports, 1949, pp.174, 178.

The court, however, accepted the existence of legal ties of allegiance between the Sultan of Morocco and some of the people of Sahara, based on the exercise of the former's influence over certain tribes and, therefore, upon the specific nature of the Sherifian State. In the case of Mauritania, the court recognised that the nomadism of the people of the area at the time of colonisation "gave rise to certain ties of a legal character....(and)....those ties neither had nor could have any other source than the usages of the tribes themselves or Koranic law".²²⁷ In other words, the court emphasised the existence of valid rights under international law at the time of colonisation founded upon the particularism of the region, even though these had no effect upon the decolonisation process. However, the fact that the court concluded that certain rights over nomadic routes amounted to legal ties between Western Sahara and the tribes of the entity in question can only raise questions as to the parameters of particular juridical systems within international law. The court's overall treatment of the function of particularism and the problems of coinciding legal orders, therefore, does leave something to be desired.

Morocco also raised the attendant problem of the validity of the pre-colonial legal system. Since that had been replaced by the colonial order consistent with intertemporal law,²²⁸ could it be revived upon the demise of colonisation by virtue of intertemporal law? It was declared that "logic would require that the new law which reopens the question of the title acquired by Spain at the time of colonisation should also reopen

(227) Ibid, p.64.

228) See Island of Palmas case, 2 RIAA, pp.829, 845, and ICJ Pleadings, Minquiers and Ecrehos case, vol.II, p.375. See also Jennings op.cit. pp.28-31.

the question of Morocco's loss of title at the same period".²²⁹ This was, however, based upon a two-fold misconception. The new law did not reopen the question of the title acquired at the date of colonisation, but rather demanded its cessation. Secondly, the new law patently did not operate on the basis of re-examining old titles, but based itself on the right of the inhabitants of the colonially defined territory to self-determination. As Bedjaoui noted on behalf of Algeria, the function of intertemporal law was not "to confer fresh legal life on a title prior to the title which today has become obsolete or is obsolescent".²³⁰ The court did not discuss this problem, but its attitude may be appreciated in view of its support of the right of self-determination as the vital operative principle.²³¹ Judge de Castro noted that colonisation had created rights and ties, just as General Assembly resolutions calling for decolonisation had created new facts so that by the date of resolution 3293 (XXIX), it could be stated that the law then in force was based upon self-determination.²³² The continuation or re-emergence of historic rights, thus, had to be judged in the light of the right to self-determination, which posited the supremacy of the will of the inhabitants of the colonially defined territory. It was unfortunate that the court itself did not discuss such issues. The question as to which legal ties of the 1880's may be relevant to decolonisation in the 1970's raises all sorts of problems that were only peripherally considered.

(229) Pleadings, CR.75/26, p.54. The terra nullius question was to be interpreted, the court held, by reference to the law in force at the time of Spanish colonisation of the territory, ICJ Reports, 1975, pp.12, 38-9, but the legal ties question had to be interpreted in the light of the decolonisation process, *ibid*, pp.40-1. This posed some awkward problems as to time.

(230) Pleadings, CR.75/31, p.15.

(231) For example, see ICJ Reports, 1975, pp.12, 36 and 68.

(232) ICJ Reports, 1975, pp.12, 167-71.

CHAPTER 3 - THE ESTABLISHMENT OF THE LEGAL RIGHT TO SELF-DETERMINATION¹

1 - Historical Introduction

Verzijl has remarked that "seldom has there been advanced as a legal right a claim so obviously of a political nature and of such a slogan-like quality as the so-called 'right of self-determination' ".² Despite this phraseology self-determination has clearly proved to be a principle of the utmost importance in international relations since 1945.

The history of the principle can be traced to the French revolution at the close of the 18th century with its twin proclamations of human rights and popular sovereignty. Its peculiar blend of nationalism and democracy profoundly influenced the political development of Europe³ and ultimately produced the concept of self-determination. This was interpreted as the capacity of the nation to decide for itself its own political structure, for nationalism appeared as a framework for the operation of the new theory of sovereignty called democracy.⁴ Although this "principle of nationalities", as it was sometimes known, was not

(1) See in general, Umozurike, Self-determination in International Law, 1972; Rigo Sureda, The Evolution of the Right of Self-determination, 1973; Shukri, The Concept of Self-determination in the United Nations, 1965; Calogeropoulos-Stratis, Le Droit des Peuples à Disposer d'Eux-mêmes, 1973; Cobban, The Nation-State and National Self-determination, 1969; Johnson, Self-determination Within the Community of Nations, 1967.

(2) International Law in Historical Perspective, 1968, vol.1, p.321.

(3) Cobban op.cit. pp.33-6. The word self-determination is derived from the German Selbstbestimmungsrecht, used by the radical philosophers of the mid-nineteenth century, see Umozurike op.cit. p.3.

(4) See Emerson, From Empire to Nation, 1960, p.297.

recognised as an integral part of European law,⁵ it had a profound effect particularly upon the nations of central and eastern Europe.

However, the three constituent elements of this concept, ie. people, the nation and the State, did not always coalesce in the same fashion and the role of the democratic factor often fluctuated. In many instances in central Europe it re-emerged as a form of national determinism, whereby the fact of birth alone determined the issue and the idea of subjectivity was rejected as irrelevant. The individual could not operate in a manner inconsistent with the mystical concept of the nation.⁶ On the other hand western European liberal thought emphasised the subjective element and the element of choice over the pull of the nation.⁷ But self-determination was in no sense thought of as legally binding.⁸

-
- (5) Tunkin, Droit International Public, 1965, p.43. Note that although self-determination and the principle of nationalities were often used synonymously, there is a theoretical difference in that the unit of self-determination may well make a decision which runs counter to the attraction of the nation and leads not to greater unity but greater fragmentation of the nation, see Redslob, "Le Principe des Nationalités", 37 HR 1931, p.5. See also Carr, The Conditions of Peace, 1942, p.60.
- (6) Cobban declared that "the individual did not determine his nation, rather the nation determined the individual" op.cit. p.115. See also McCartney, National States and National Minorities, 1934, p.100. It is suggested that the idea should be phrased in terms of the individual not being able to choose his State, that function being performed by the nation. Judge Dillard commented that the "cardinal restraint which the legal right of self-determination imposes" is that it is "for the people to determine the destiny of the territory, and not the territory the destiny of the people" ICJ Reports, 1975, pp.12, 122.
- (7) Zimmern wrote that "English people when they invoke the principle of nationality mean the principle of democracy". Nationality and Government, 1918, p.50, quoted in Cobban op.cit. p.114. See also De Visscher, Theory and Reality in Public International Law, 3rd ed. trans. 1968, pp.33-7.
- (8) The nationalist school of international lawyers following Mazzini did indeed propose that national self-determination was a legal right, but their position was an extreme one in the period, see Wright, Mandates under the League of Nations, 1930, p.11.

It was the events and views precipitated by the outbreak of the First World War⁹ that thrust the principle on to the centre of the stage. President Wilson of the United States declared before Congress in 1916 that "every people has a right to choose the sovereignty under which they shall live",¹⁰ and this idea was developed in the following years. In 1918 he promised that "all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old demands of discord and antagonism".¹¹

In spite of such protestations, it was clear that the 1919 Peace Conference did not treat national self-determination as an overwhelmingly important principle. It did not appear in the final draft of the Covenant of the League of Nations,¹² and it was treated "as a purely political factor and not as a legal principle applicable to all peoples whose fate has to be determined".¹³

-
- (9) Self-determination was included in a resolution in the London International Socialist Congress in 1869, see Lenin, The Right of Nations to Self-determination, 1951, p.42.
- (10) US Congressional Record, L.III part 9, 8854, June 27 1916. This principle was his "favourite panacea" according to Minogue, Nationalism, 1967, p.137.
- (11) The last of the four points put to Congress. US Congressional Record, L.VI part 2, 1952, February 11 1918. The 1919 border adjustments were to follow "clearly recognised lines of nationality", Secretary Lansing proclaimed "what misery it will cause" The Peace Negotiations: A Personal Narrative, 1921, pp.97-8, Wambaugh, Plebiscites Since the World War, vol.1 1933, p.4. Temperly wrote that Wilson's ideas "in themselves were few and simple but their consequences when developed by the war were such as to produce the most far-reaching results", A History of the Peace Conference of Paris, 1920-4, vol.I, p.173. See also Pomerance, "The United States and Self-determination: Perspectives on the Wilsonian Conception" 70 AJIL 1976, p.1.
- (12) Wilson put forward a suggestion in the first and second drafts of the Covenant that territorial adjustments between States should be pursuant to the principle of self-determination, but this was not accepted, Miller, The Drafting of the Covenant, vol.II 1928, pp.12-3.
- (13) Dupuis, "Règles Générales du Droit de la Paix", 32 HR 1931, p.37. Cobban noted that the more the work of the peace conference was studied, the less it seemed to have been under the control of this principle, op.cit. p.32. Schuman wrote that self-determination was appealed to when there was a possibility of reducing the territory and power of the defeated States, International Politics, 5th ed. 1953, p.492. See also Wambaugh, op.cit. p.42, and Calogeropoulos-Stratis op.cit. pp.49-52.

Nevertheless, its impact upon the legal constitution of the world community can be detected in the various provisions for minority protection,¹⁴ which can be regarded as a restricted application of self-determination in its creation of protective norms for certain cultural and language groups. It was even conceivable that minority rights could give rise to secession but this was considered an "altogether exceptional situation, a last resort where the State lacks the will or the power to enact and apply just and effective guarantees".¹⁵

Self-determination also made its mark in the institution of the mandate system¹⁶ which replaced the annexation of territories belonging to the defeated States outside Europe and was founded on the proposition that "the well-being and development of such non-independent peoples form a sacred trust of civilisation".¹⁷

-
- (14) See eg. De Azcarate, The League of Nations and National Minorities: An Experiment, 1945; Claude, National Minorities - An International Problem, 1955; Lador-Lederer, International Group Protection, 1968. Kunz writes that the international law for the protection of minorities was a substitute in cases where the principle of self-determination could not be applied and can be regarded as a "strict and logical corollary of the principle of self-determination of nations", "The Present Status of International Law for the Protection of Minorities", 48 AJIL 1954, p.282. See also Robinson, "From Protection of Minorities to Promotion of Human Rights", *Jewish Yearbook of International Law*, 1949, p.115.
- (15) The Aaland Islands Dispute, Council Doc. B7/21/68/106.
- (16) Hall, Mandates, Dependencies and Trusteeship, 1948; Wright op.cit.; Haas, "The Reconciliation of Conflicting Colonial Policy Aims: The Acceptance of the League of Nations Mandate System" 6 *International Organisation* 1952, p.521.
- (17) Art.22 of the Covenant of the League. The International Court emphasised that the mandate was created in the interests of the territory's inhabitants and of humanity in general as an international institution with an international object, ie. the sacred trust of civilisation, ICJ Reports, 1950, p.132. ICJ noted that there was "little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned", ICJ Reports, 1971, p.31.

In the inter-war years there was relatively little practice dealing with the application of self-determination.¹⁸ In the leading discussion of its juridical character that did take place it was emphasised that "the recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations" and stated that international law "does not recognise the right of national groups as such to separate themselves from the State of which they form part by the simple expression of a wish".¹⁹

Verzijl regarded the decision in the Aaland Islands question as based upon the acceptance by the Commission of Jurists that positive international law did not know of the asserted 'right' of self-determination.²⁰ Although the idea of self-determination probably helped encourage the growing nationalist movements in the Arab and Asian worlds, Brownlie points out that this had "no immediate counterpart on the legal plane".²¹

(18) It was however proclaimed by the USSR in her peace treaties with the Baltic States in 1920. See Martens, Recueil Général de Traités, 3rd Series, XI pp.864, 877 and 888, Cobban op.cit. pp.187-218. The Treaty of Brest-Litovsk in 1917 imposed on Russia by Germany was declared to be founded on the cardinal principles of the renunciation of war and self-determination, see Shapiro ed. Soviet Treaty Series, 1950, vol.1, p.1. The Communist theory subordinated self-determination to the interests of the working class, see Lenin, Marx, Engels, Marxism, 1934, p.147. Stalin emphasised that the border territories of Russia and the nations therein "like all other nations have an inalienable right to secede from Russia but the interest of the popular masses tells us that the demand of secession is deeply counter-revolutionary at the present stage of the Revolution". See Whiteman, Digest of International Law, vol.IV, 1965, p.56.

(19) The Aaland Islands Question, LNOJ Sp. Suppl. no.3, Report of the Commission of Jurists, 1920, pp.5-6. See also Barros, The Aaland Islands Question: Its Settlement by the League of Nations, 1968, and Verzijl op.cit. pp.328-32, and Modeen, "The International Protection of the National Identity of the Aaland Islands" Scandinavian Studies in Law, 1973, p.177.

(20) Op.cit. p.329.

(21) "History of the Principle of Self-Determination", Grotian Society Papers, 1968, p.96.

The Second World War stimulated further consideration of this concept. The Atlantic Charter, 1941, declared "the right of all peoples to choose the form of government under which they will live" and the desire to see no "territorial changes that do not accord with the freely expressed wishes of the people concerned".²²

Self-determination was not mentioned in the Dumbarton Oaks proposals of 1944, but it came into prominence at the San Francisco Conference at the instigation of the Soviet Union²³ and was incorporated into Article 1(2) of the Charter of the United Nations. This noted that one of the purposes of the Organisation was the development of friendly relations among nations "based on respect for the principle of human rights and self-determination of peoples" and was echoed in Article 55.

Although widely accepted before 1945 as a political or moral principle entailing no legal obligation,²⁴ its inclusion in the UN Charter

- (22) Decade of American Foreign Policy, Docs. 1941-9, 1950, p.1. These and other principles were reaffirmed in the Declaration by the United Nations in January 1942 *ibid* pp.2-3, and in the Declaration on Liberated Europe in February 1945 *ibid* pp.27, 29. Churchill later noted that the Atlantic Charter was only intended to apply to conquered Europe, see Huber, "National Self-determination", *Social Research* X 1943, p.1.
- (23) Docs. of the UN Conference on International Organisation, III 1945, p.622.
- (24) Lachs, however, regarded self-determination as a pre-existing legal norm "Law In and Of the UN" *IJIL* 1960, p.432; Brown, "Self-determination in Central Europe" 14 *AJIL* 1920, p.235; Stamshenko, "Principle of National Self-determination" in Soviet Foreign Policy, 1963, p.162, and Rousseau, Droit International Public, 1953, p.82 *cf.* Briggs, The Law of Nations, 1953, p.65.

raised questions as to its juridical character.²⁵ However, the Charter only refers to self-determination as a 'principle' and not a 'right' and this induced the Australian delegate to the Commission on Human Rights to point out that "where the Charter laid down a principle, it did not necessarily signify a right, and it must be left to the authority responsible for the administration of a given dependent territory to determine the extent to which the principle of self-determination could be applied to it".²⁶

This view is reinforced by a consideration of the context in which the principle is proclaimed, that is, as a basis for friendly relations among States. Article 1(2) comes within the section dealing with the purposes of the UN and not the more important section concerned with the principles of the Organisation and appears merely as a guidance framework for UN activities rather than prescribing legal norms.²⁷

A further factor is the absence of definition or clarification of the concept in the Charter and this leaves one to question its legal validity as proclaimed in the Charter.²⁸ This is reinforced by the coupling of

-
- (25) Article 73 of the Charter proclaimed the paramountcy of the interests of the inhabitants of non-self-governing territories and noted that the administering powers were pledged to develop self-government. Article 76 emphasised the promotion of progressive development towards self-government or independence having regard to the wishes of the people concerned as one of the basic objectives of the trusteeship system.
 - (26) E/CN.4/SR.505 p.5. See also the views of the British delegate that self-determination was purely a political principle, E/CN.4/SR.503, p.7. See also O'Connell, International Law, 2nd ed. 1970, vol.I, p.312.
 - (27) Bentwich and Martin, Commentary on the Charter of the UN, 1950, p.7. See also Giraud, "Le Droit International Public et la Politique", 110 HR 1966, p.744, cf. Nincic, The Problem of Sovereignty in the Charter and in the Practice of States, 1970, p.221, and Wright, "Recognition and Self-determination" PASIL 1954 pp.23-7 and *ibid* HR 1959 III p.182.
 - (28) However, Bokor-Szego regards this not as detracting from its legality but as constituting it as a *lex imperfecta* which has been perfected by later regulation and application, New States and International Law, 1970, pp.16-27, but see Schwarzenberger, Dynamics of International Law, 1976, p.10.

self-determination of peoples with equal rights. Not every expression of a political concept in the Charter can be taken as creating legal obligations, notwithstanding the character of the Charter as a multi-lateral treaty, since the Charter is not only the constitution of the UN but a document of political faith.

The majority of writers have taken the view that the combined effect of Articles 1(2) and 55 is not such as to create binding legal obligations upon States to grant self-determination to non-independent peoples. Bentwich and Martin regard Article 1(2) merely as "a declaration of goodwill towards peoples who have not yet achieved self-determination",²⁹ while Fawcett considers self-determination as formulated in the Charter as a "directive principle" similar in essence to part IV, Article 37 of the Indian Constitution which lays down principles fundamental to the government of the country but nevertheless unenforcible by the courts.³⁰ In other words the Charter provisions could not provide the legal basis for claims to self-determination by non-independent peoples.³¹⁻⁴¹

Kelsen adopted a different approach and took self-determination as expressed in the Charter as simply emphasising the concept of the sovereignty of States. Since "self-determination of the people usually designated a principle of internal policy, the principle of democratic government" and Article 1(2) referred to relations among States, and since "the term 'peoples' too in connection with 'equal rights' means

(29) Op.cit. p.7.

(30) "The Role of the United Nations in Relation to Human Rights - Is it Misconceived?", Nobel Symposium 7, 1968, pp.95-101.

(31-41) See the Views of Ethiopia, Liberia and Egypt, African Original Members of the UN, that the Charter provisions regarding self-determination have given rise to international legal rights and obligations, GAOR 6th Session, 3rd Committee, 361st, 363rd, 366th, 371st meetings E/CN.4/SR. 252-9; GAOR 7th Session, 3rd Committee, 286th, 400-47th, 465th and 438th meetings, ibid 9th Session, 3rd Committee 562-73rd, 575th and 580-2nd meetings.

probably States since only States have 'equal rights' according to general international law then the self-determination of peoples in Article 1(2) can mean only sovereignty of the States".⁴²

This conservative interpretation, strongly influenced by traditional positivist philosophy, can no longer be accepted today in view of the wealth of State practice relating to the development of rights under international law for persons other than States. The view that the combination of equal rights and self-determination amounted only to a reinforcement of the sovereign equality of States can only be regarded as a misunderstanding of the basic trends in international law, while the idea that self-determination refers only to internal political situations has been contradicted by the evolution of the principle. However, there is a strong current of irony involved here, since Kelsen's conclusion that self-determination reinforces State sovereignty is not far off the mark in the light of the subsequent interpretation of the principle, although his reasoning is flawed. If one takes self-determination to be the right of non-independent peoples to sovereignty within accepted territorial limits (usually those defined by the administering power) and that alone, then the sanctity of the territorial sovereign is enhanced, the principle of territorial integrity underlined and the right of minorities to secede from independent States eliminated.

Quincy Wright, however, has argued that the Charter did introduce binding duties for member States with respect to self-determination. He bases this opinion upon the proviso in Article 56 whereby all members "pledge themselves to take...action for the purposes set forth in Article 55".

(42) Law of the United Nations, 1950, pp.51-3. See also pp.29-32. See generally Schwelb "the International Court of Justice and the Human Rights Clauses of the Charter" 66 AJIL, 1972, p.337. In his report to Commission I, the Rapporteur noted that it was understood that the "principle of equal rights of peoples and that of self-determination are two component elements of one norm". Summary Reports of Committee I/1, Doc.1/1/1 of 16 May 1945, 6 UNCIO p.296.

By ratifying the Charter, States have, according to Wright, undertaken such legal obligations.⁴³ But the point has to be made that the purposes in Article 55 are many and various, and it is by no means sure that the principle of the self-determination of peoples could be included as such a purpose.

In addition it is not certain that the expression "pledge" alone can convert the humanitarian aims set out into binding legal obligations. For example it would be difficult to say that the aim of "full employment" is a legal duty on the State or indeed that it could be merely by virtue of this provision in the UN Charter.

Although the discussion as to the legal status of the principle in the Charter has revolved around Articles 1(2) and 55, Bowett has noted that it is permissible "to regard the entirety of Chapters XI and XII of the Charter as reflections of the basic idea of self-determination".⁴⁴

(43) "Recognition and Self-determination" PASIL, 1954, pp.23-37 and *ibid* "National Courts and Human Rights - the Fujii Case" 45 AJIL, 1951, p.73. Lauterpacht stated that "there is a distinct element of legal duty in the undertaking expressed in Article 56 ... any construction of the Charter according to which members of the United Nations are in law entitled to disregard - and violate - human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter as a whole". International Law and Human Rights, 1950, pp.147-9. Sloan noted that the provisions on human rights, Articles 55 and 56, embodied a definite and positive legal obligation, "Human Rights, the United Nations and International Law". 20 Nordisk Tidsskrift for International Ret, Acta Scandinavica Juris Gentium, 1950, pp.30-1. See Judge Tanaka, ICJ Reports 1966, pp.288-9. Cf. Hudson's view that the human rights provisions in the Charter are purely a programme of action and no more - "A frame for a picture must not be mistaken for the picture itself" - "Integrity of ILC, 1949, p.178. See also Akehurst, A Modern Introduction to International Law, 3rd ed. 1977, p.77.

(44) "Problems of Self-determination and Political Rights in Developing Countries" PASIL, 1966, p.134.

Chapter XI deals with non-self-governing territories, while Chapter XII deals with the trusteeship system. In neither is the concept expressly referred to, but those administering non-self-governing territories have by Article 73(b) to "develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions", and among the basic objectives of the trusteeship system in Article 76 is "progressive development towards self-government or independence". The freely expressed wishes of the people concerned have to be taken into account in fulfilling these objectives.

Van Asbeck has written that Chapter XI being in the form of a declaration imposes international duties,⁴⁵ but this was decidedly a minority viewpoint.⁴⁶

The question as to the establishment of a legal right to self-determination has to be answered rather in the light of developments subsequent to the UN Charter. Practice since 1945 reveals certain trends towards regarding self-determination as a rule of international law. Declarations and resolutions adopted by the UN relating to the concept both in general theoretical terms and in specific cases have been numerous and have manifested a definite approach to the problem. But the issue as to whether such expressions have been sufficient to establish self-determination as a legal right lies at the heart of the matter and must be disentangled from the political aspects of the question.

It is generally accepted that its inclusion in the Charter did not per se transform it into a binding obligation as distinct from a

(45) Transactions of the Grotius Society, 1953, pp.5, 23.

(46) See eg. Kaeckenbeek, "La Charte de San Francisco Dans Ses Rapports Avec le Droit International", 70 HR, 1947, pp.113, 266.

non-legal guideline,⁴⁷ but the relevant provisions possessed considerable potential for development.⁴⁸

The point should also be made that the fact that a particular purpose of the UN is not deemed to constitute a legally binding rule does not mean that it is devoid of effect within the sphere of law. It will be relevant as regards the interpretation of the Charter of the UN and may contribute towards the development of customary law.

There are basically two methods by which self-determination may have subsequently attained the status of law.⁴⁹

The first derives from the character of the Charter as a multi-lateral treaty and the consequent capacity of the parties thereto to interpret its provisions. Could it be stated that subsequent practice has revealed the interpretation of the relevant Charter provisions in terms of self-determination as a legal right? The second manner in which State conduct could construe self-determination as a binding rule is by virtue of its development as a rule of customary law. Both methods utilise to some extent the same material, namely, UN declarations and resolutions, but comprehend their role slightly differently.⁵⁰

-
- (47) Schwarzenberger notes that "when the Charter of the United Nations came into existence, neither the principle of national self-determination nor that of the self-determination of peoples was a principle of customary international law, a general principle of law recognised by civilised nations or in the framework of the Charter of the United Nations more than a constituent element of Purpose Two of the United Nations". International Constitutional Law, 1976, p.153.
- (48) See Robinson, Human Rights and Fundamental Freedoms in the Charter of the United Nations - A Commentary, 1946, p.105.
- (49) Schwarzenberger op.cit. pp.158-67.
- (50) Judge Tanaka noted that "the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc. concerning the interpretation of the Charter by the component organs of the international community can be characterised as evidence of the international custom referred to in Article 38(1)b". ICJ Reports, 1966, p.292. Emphasis added. Judge Nervo declared that "included among the international rules which are binding on the administration of the international territory of Namibia are declarations formally adopted by the principal organs of the United Nations which represent generally accepted interpretations and applications of the provisions in the United Nations Charter" ICJ Reports, 1971, p.119.

II - Charter Interpretation

(a) General

The development of international legal rules through the medium of the United Nations has been one of the most striking and controversial aspects of post 1945 norm creation. The problem has already been considered at length,⁵¹ but what we need to note here is a difficulty that has arisen as regards the relevance and application of the traditional sources of law to this phenomenon. The international community has recognised as law-creating mechanisms conventions, custom and general principles of law recognised by civilised nations,⁵² but it is clear that many of the activities connected with the UN organisation may be implicitly or explicitly creative of law in a manner which straddles the traditional classifications, and this is particularly so with regard to the political organs of the United Nations.⁵³ This has led Higgins to refer to the blurring in the UN of the historically separate sources of law and to emphasise the twilight zone between custom and treaty in the development of international law in the Charter and in

(51) See eg. Kelsen, op.cit; Schwarzenberger op.cit; Higgins, The Development of International Law Through the Political Organs of the UN, 1963; Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, 1966; Castaneda, The Legal Effects of United Nations Resolutions, 1969, and other works cited.

(52) Article 38(1) of the Statute of the ICJ.

(53) Kelsen emphasised that the act of choice by the political bodies of the UN has a law-creating character which may result in replacing a legal norm by another norm of totally different content, op.cit. p.xv. Schachter has noted that when an organ applies a principle or rule of law to a particular set of facts, it is asserting a new rule of a more specific character and "this is a law-creating act" so that "once a decision is rendered by an authoritative body it has entered into the stream of decisions that will normally be looked to as a source of law". - "The Quasi-Judicial Role of the Security Council and General Assembly" 58 AJIL, 1964, p.964.

the organisation as a whole.⁵⁴

This arises primarily because of the tremendous amount of State practice generated through the UN organisation and produced by virtually all the independent States of the international community in an ever-increasing variety of situations ranging from debates on colonialism in plenary session to discussions in committees such as the Commission of Human Rights and the International Law Commission. This vast array of State behaviour pattern has inevitably led to an increased awareness and emphasis upon such practice as norm-creative in given circumstances. One result of this has been the faster emergence of rules of customary law while another has been the enhanced potentialities of Charter interpretation by State practice.

However, since the Charter as a multilateral treaty may be amended or interpreted by treaty action (ie. by following the prescribed methods of amendment stipulated in Chapter XVIII), by custom and (it is suggested) by State practice not amounting to custom, it is hardly surprising that the precise boundaries between the different processes are frequently difficult to clarify. Similarly, it is often hard to pinpoint the exact legal manner in which a rule has emerged in the United Nations, since it could conceivably arise by virtue of Charter interpretations or amendment or customary international law or even as a general principle of law. In addition an emerging proposition may be a legal norm or a principle by reference to which existing rules are to be interpreted.

(54) "The Development of International Law by the Political Organs of the UN", PASIL, 1965, pp.116-8. Schwelb notes that after the 1960 Colonial Declaration "there are international documents which, although not concluded or ratified as treaties, are not 'non-binding'. One can say that they comprise a third category". "Neue Etappen der Fortentwicklung des Völkerrechts durch die Vereinten Nationen" Archiv des Völkerrechts XIII, 1966, pp.25-6. He declared that the difference between treaties and resolutions of international organisations is disappearing, *ibid* p.44.

This apparent flexibility in the methods of international law creation in the framework of the international organisation has contributed to the relative decline of the consent theory of law and the rise of the consensus approach,⁵⁵ and this has some bearing upon the issue of the emergence of self-determination as a legal right through the process of General Assembly resolutions and declarations. The blurring of the division between the sources of law has led to great confusion as to whether or not a particular proposition is or is not law and to greater difficulties in identifying the criteria of norm-creation. It has also meant the comparative neglect of Charter interpretation as a separate category distinct from customary law. A number of writers, in fact, have discussed the role of UN resolutions as interpretations of the Charter in terms of the development of customary law,⁵⁶ and this has led to insufficient attention being paid to this process in the development of legal rules.

The parties to a treaty may subsequently interpret its provisions and could possibly be legally bound by such interpretations.⁵⁷ This proposition is illustrative of the principles of consent and good faith and reflects

(55) See D'Amato "On Consensus" 8 Canadian YBIL 1970, p.104; *ibid* The Concept of Custom in International Law, 1971, pp.33-41, 187-99. Cf. Thirlway, International Customary Law and Codification, 1972, pp.76-9.

(56) Eg. Elias, Africa and the Development of International Law, 1972, p.82. See also Judge Tanaka, ICJ Reports, 1966, pp.292, 294. Hevener writes, regarding the discussions of the ICJ in the South-West Africa case, 1966, and Namibia case, 1971, on the subject of human rights and international law that "the general obligation is based on convention; its interpreted definition has developed as custom. The custom aspect of the court's opinion derives from a combination of custom reflected in the Charter and subsequent United Nations resolutions and action which interprets the Charter and gives evidence of the practice of States and their recognition of the present binding nature of rules protective of human rights". "The 1971 South-West Africa Opinion. A New International Juridical Philosophy" 24 ICLQ, 1975, pp.794-5. Emphasis in original.

(57) See Kelsen op.cit. p.xiii et seq., Oppenheim, International Law, 7th ed. vol.I, p.857.

an old-established concept of international law. Article 31 of the Vienna Convention on the Law of Treaties, 1969, notes that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes", while "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account (Article 31(3)b).

It is this concept of subsequent practice interpreting the treaty which marks as it were the frontier between treaty and custom in the emergence of new international legal norms. It may be valid as a straightforward act of treaty interpretation or it may constitute State practice evidencing or leading to a new customary rule.

By Article 5, the Vienna Convention is deemed applicable to any treaty which is the constituent instrument of an international organisation.⁵⁸ Such multilateral treaties are clearly in a special category since they create international entities with defined powers and purposes and go beyond the bounds of ordinary treaties. They invariably operate on a higher level of complexity as they specify not only the rights and duties of the signatories but also the functions and aspirations of the newly created organisation, and the intended pattern of its relationships with the member States. Nevertheless, in form

(58) This is "without prejudice to any relevant rules of the organisation". This may provide a way around the literal interpretation approach of Article 31 of the Vienna Convention, since it could be argued that rules permitting a more teleological and practice oriented approach to Charter interpretation have been adopted. Such rules may be derived from practice as well as from the constituent documents of the organisation concerned, see UN Conference on the Law of Treaties, Official Records, First Session, p.147, para.15. But cf. Judge De Castro's view that the Charter would not appear to fall within the framework of the Vienna Convention, ICJ Reports, 1971, pp.16, 184.

such instruments are treaties and as such are subject mutatis mutandis to the law of treaties.⁵⁹

Such treaty-Charters incorporate a dynamic element which increases the likelihood of interpretation by subsequent practice since the operations of the organisations of which they constitute the constitutional instruments invariably provide evidence and examples of the understanding of their Charters by the member States.⁶⁰ Invariably the activities of international organisations emphasise the role and importance of interpretation by subsequent practice even if this is not always expressly recognised.

Higgins has pointed out that the notion of subsequent practice is ambiguous since it may refer either to treaty interpretation or developing custom, but she appears to adopt the prevalent attitude by stressing that "it seems to me that the repeated practice here of the organ interpreting the treaty establishes a practice and ultimately custom".⁶¹⁻⁶²

The Charter of the United Nations is a multilateral treaty and has been subjected to over 30 years of discussion, interpretation and judicial opinion. It is unique in its universality of membership and function, and the wide range of subsequent practice relating to its role and powers places it in a category of its own. The question of the interpretation of

(59) Tunkin refers to the Charters of international institutions as treaties *sui generis*, Theory of International Law, 1974, p.325. Rosenne notes that by origin such Charters are international treaties but by operation they are of a different genus and are in practice governed by fundamentally different principles, "Is the Constitution of an International Organisation an International Treaty?" *Comunicazioni e Studi XII*, 1966, pp.21, 86, 66. See also ICJ Reports, 1962, p.157.

(60) See El Erian, "The Legal Organisation of International Society" in Manual of Public International Law (ed. Sørensen), 1968, p.92.

(61-62) Op.cit. footnote 54, p.119.

the UN Charter, therefore, must be prefaced with a few words illustrating the general approach adopted.

It appears clear that in the light of the special nature of treaty-Chararters, the ordinary rules of interpretation of treaties may not suffice. This is primarily because of the powers and purposes ascribed to the organisation which have the effect of altering the emphasis of interpretation from the intention of the original parties to the intention of member States on the contemporary temporal plane as manifested by practice and in the light of a collective appreciation of the purposes of the organisation. This point was clearly put by Judge De Visscher who noted that "one must bear in mind that in the interpretation of a great international constitutional instrument like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties do not suffice".⁶³

Thus, a shift in the time frame of reference from the past, ie. the date of the treaty, to the present coupled with an added emphasis upon a consensus perception of the purposes of the organisation constitute the main differentiating factors regarding the interpretation of treaty-Chararters as distinct from ordinary treaties.⁶⁴

The intentions of the original contracting parties remain important⁶⁵ but as the amount of subsequent practice increases and the membership grows,

(63) International Status of South-West Africa case, ICJ Reports, 1950, p.189.

(64) But see Judge Gros' dissenting opinion in the Namibia case, ICJ Reports, 1971, pp.16, 341.

(65) See eg. The Advisory Opinions on Admission to the United Nations, ICJ Reports, 1948, p.63, and Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports, 1949, pp.178-9. See also the United Nations, ICJ Reports, 1950, p.8. Fitzmaurice notes that general approach to treaty interpretation based primarily on an elucidation of the text, "The Law and Procedure of the International Court of Justice, 1951-4", 33 BYIL 1957, p.209.

the need for a wider base for interpreting the Charter becomes more apparent.⁶⁶ This process inevitably emphasises the teleological approach to treaty interpretation, by which the treaty is comprehended in the light of its aims and objects⁶⁷ as against the textual and 'founding fathers' methods.⁶⁸ This approach has found favour with most of the representatives in UN debates,⁶⁹ and been propounded by a number of Judges of the International Court.⁷⁰⁻⁷⁵ Such an approach means that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".⁷⁶⁻⁷⁸ This phrase together with the statement that the concepts embodied in Article 22

- (66) See the joint dissenting opinion of Judges Basdevant, Winiarski, McNair and Reed, ICJ Reports, 1948, p.92.
- (67) See Fitzmaurice, "The Law and Procedure of the International Court of Justice" 28 BYIL 1951, pp.1-2.
- (68) Ibid. They of course will be of greater importance regarding the interpretation of ordinary treaties. See The Opinion of the Court in the Interpretation of Peace Treaties case (2nd Phase) to the effect that "the Principle of Interpretation expressed in the maxim: ut res magis valeat quam pereat often referred to as the rule of effectiveness cannot justify the court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning ... contrary to their letter and spirit" ICJ Reports, 1950, p.221. See also The Iranian Oil case, ICJ Reports, 1952, p.105, and the Rights of US Nationals in Morocco case, ICJ Reports, 1952, p.196.
- (69) See eg. the delegates of Afganistan GAOR, 17th Session, 6th Committee, 142-4-A/C.6/SR.762, Algeria ibid 138-9 A/C.6/SR.761, Argentina ibid 119-20, A/C.6/SR.758, Ceylon ibid 149-50-A/C.6/SR.762, Hungary ibid 112-A/C.6/SR.756, Syria ibid 156-A/C.6/SR.764, UAR ibid 18th Session, 6th Committee, 164-A/C.6/SR.811. See also McDougal, "International Law, Power and Policy" 82 HR, 1953, pp.143-57.
- (70-75) See Judge Azevedo, ICJ Reports 1950, pp.23-4. See also Judge Alvarez who noted that "an instrument ... must develop not in accordance with the views of those who created it, but in accordance with the requirements of international life". ICJ Reports, 1948, p.68. See also Schwarzenberger, op.cit. p.137.
- (76-78) ICJ Reports 1971, pp.16, 31. Judge Alvarez went further than this in his dissenting opinion in the Competence case when he declared that "a treaty or a text ... acquires a life of its own. Consequently in interpreting it one must have regard to the exigencies of contemporary life rather than to the intentions of those who framed it". ICJ Reports, 1950, p.18.

of the Covenant of the League of Nations were "by definition evolutionary"⁷⁹ appeared to mark the demise of the school emphasising the predominant role to be played by the intentions of the original parties in treaty-Charter interpretations.⁸⁰

Judge De Castro declared that "the teaching of the court is, in fact, that for the interpretation of the Charter, account must be taken of its fundamental purposes and it must be recognised that it has the powers which are necessary to achieve them 'by necessary implication'."⁸¹ This must be accepted as correct and the teleological approach to Charter interpretation as the most important by far of the various schools and the one most productive of viable development. As De Castro pointed out, "it should not be forgotten that the General Assembly and the Security Council have the responsibility for promoting the purposes laid down in the Charter. They cannot remain bound by the possible intentions of the draftsmen, not only because it is difficult to know what those intentions were ... but also because interpretation necessarily undergoes a process of development and as in municipal law must adapt itself to the circumstances of the time

(79) Ibid

(80) See Higgins who noted that "in interpreting the constitutions of dynamic international organisations the primary canon should not be the intention of the original parties but rather the evidence which can be adduced of the obligations which the present members feel are incumbent upon them". - "The Development of International Law by the Political Organs of the United Nations" PASIL 1965, p.119. This approach is characterised by Fitzmaurice as the theory of 'emergent purpose', whereby the teleological school is extended so that the objects become liable to change through time. He notes that "whatever the attractions of this idea, it is clear that the process in question is a legislative rather than an interpretative one and must involve the assumption of a quasi-legislative function". - "The Law and Procedure of the International Court of Justice 1951-4" 33 BYIL 1957, p.208.

(81) ICJ Reports, 1971, pp.16, 185. References were made here to ICJ Reports, 1949, p.182 and ICJ Reports, 1962, pp.208-15. See also the court's view that "when the Organisation takes action which ... is appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation". ICJ Reports, 1962, p.168. Judge Spender noted that "the meaning of the text will be illuminated by the stated purposes to achieve which the terms of the Charter were drafted" ibid p.187. This last proposition is quoted by Judge De Castro as "an authoritative criterion", ICJ Reports, 1971, pp.16, 185.

and to the requirements so far as they are foreseeable of the future.

The text breaks away from its authors and lives a life of its own".⁸²

The nature of the United Nations as an active political structure has reinforced these tendencies, particularly since the balance of membership has moved drastically since 1945.⁸³ International organisations are competent to interpret their own constitutions, but this is not an unrestricted capacity. They must have regard to the terms of the instrument and the aims and powers of the organisation. As far as the United Nations is concerned, the *prima facie* scope for interpretation by subsequent practice is extensive in view of the essential characteristics and purposes of the organisation. Committee IV/2 of the San Francisco Conference reported that "in the course of operations of the various organs of the organisation, it is inevitable that each organ will interpret such

(82) ICJ Reports, 1971, p.184. See also Judge Alvarez, ICJ Reports, 1950, p.18 and *ibid*, and ICJ Reports, 1951, p.53. Judge Spender noted that "the Charter must accordingly be interpreted, whilst in no way deforming or dislocating its language, so that the authority conferred upon the Organisation and its various organs may attach itself to new and unanticipated situations and events", ICJ Reports, 1962, p.187. The court had already declared that "the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice", ICJ Reports, 1949, p.180. See also Fitzmaurice *loc.cit.* p.211, Gros, "The International Court of Justice and the United Nations", 120 HR, 1967, pp.370, 385, and Lauterpacht, The Development of International Law by the International Court, p.280. See for other examples of a teleological approach by the court, the International Status of South-West Africa, ICJ Reports, 1950, pp.136-7; South-West Africa Voting Procedure, ICJ Reports, 1955, pp.99, 104-5; The Admissibility of Hearings of Petitioners by the Committee on South-West Africa, ICJ Reports, 1956, p.22 and South-West Africa Preliminary Objections, ICJ Reports, 1962, pp.329 and 326.

(83) Higgins has made the point that the treatment of treaties by the political organs of the UN has involved the prevalence of the teleological rather than the literal approach. She notes that "given the fact that the advent of the general multi-lateral convention with its large participation and provisions for subsequent accession makes it hard to ascertain precisely the intention of the parties, it is understandable that the mushrooming of such instruments under United Nations auspices should encourage the view of interpretation which rests on the presumed objects of the treaty". The Development of International Law Through the Political Organs of the UN, 1963, pp.308-9. This is of course a manifestation of the general approach adopted with regard to the interpretation of the UN Charter itself.

parts of the Charter as are applicable to its particular functions.... Accordingly it is not necessary to include in the Charter a provision authorising or approving the normal operation of this principle".⁸⁴⁻⁹⁷

One question which is of particular concern is whether any special Procedure is necessary to bring about a binding interpretation. Vallat, for example, takes the view that authoritative interpretations can only be by way of amendment,⁹⁸ while others consider that General Assembly resolutions on their own are quite sufficient.⁹⁹ Yet other jurists declare that where resolutions purporting to be interpretations are rejected by some member States amendments would then be required.¹⁰⁰

In any event, it appears to be accepted by most writers that at the very least, as noted by Judge Nervo, "the General Assembly has competence in respect of the interpretation of the Charter".¹⁰¹

(84-97) UNCIO Docs. vol.13, pp.709-10. See also Higgins op.cit. p.304, and Brugiero, Les Pouvoirs de L'Assemblée Générale des Nations Unies en Matière Politique et de Sécurité, 1955, p.25. As regards the doctrine of implied powers, see the view of the International Court, ICJ Reports, 1949, pp.179 and 198. See Judge Fitzmaurice ICJ Reports, 1971, pp.281-2, and Judge Gros ibid, p.339. See also Bowett, The Law of International Institutions, 3rd ed. 1975, p.301; Seyersted, "International Personality of Intergovernmental Organisations" 4 IJIL, 1964, p.55, and Tunkin, Theory of International Law, 1974, pp.334-5.

(98) "The General Assembly and the Security Council of the United Nations" 29 BYIL 1952, pp.66-7. See also El Erian op.cit. p.92.

(99) See eg. Lachs, "Law In and Of the United Nations" 1 IJIL, 1960-1, pp.429, 439.

(100) See Schachter, "The Relation of Law, Politics and Action in the United Nations" 109 HR, 1963, pp.169, 187.

(101) ICJ Reports, 1971, pp.16, 111. See also Judge Ammoun, ICJ Reports 1970, pp.302-4. However, Virally notes that the absence of an organ of final competence weakens the argument that Assembly resolutions and declarations can be regarded as authoritative interpretation of the Charter, "Droit International et Décolonisation" AFDI 1963, p.563.

The teleological approach has permitted a certain amount of flexibility within the basic structure of the UN Organisation and its constitution and has been supported by judicial opinion. In the Expenses case, the International Court discussed the meaning of the word "action" as it appeared in Article 11(2) of the Charter,¹⁰² and came to the conclusion that it referred not to any kind of action, which would effectively reduce the General Assembly's function to simple recommendation but to coercive or enforcement action alone.¹⁰³ In other words "action" meant only "such action as is solely within the province of the Security Council"¹⁰⁴ and in deciding whether the actual expenses authorised were within the meaning of Article 17(2),¹⁰⁵ one had to test them by their relationship to the purposes of the United Nations. Such purposes, though broad, are not unlimited, "but when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action was not ultra vires the Organisation".¹⁰⁶ Thus the General

(102) "Any such question relating to the maintenance of international peace and security on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion".

(103) ICJ Reports, 1962, pp.151, 164.

(104) Ibid, p.165.

(105) "The expenses of the Organisation shall be borne by the members as apportioned by the General Assembly".

(106) ICJ Reports, 1962, p.168. This case contrasts with the Competence case, ICJ Reports, 1950, p.4, where the court stressed that the Assembly could not decide upon an application for admission in the absence of a Security Council recommendation and that "it is in the nature of things that the recommendation should come before the decision". *ibid* p.7. The court rejected the argument that no recommendation was equivalent to an unfavourable recommendation on which the Assembly could then decide positively, *ibid* p.9. Greig differentiates the cases on the basis of the more generally framed provisions in the former which permitted a more dynamic approach by the court, International Law, 2nd ed. 1976, p.486. In addition one must point out that the purposes of the Organisation include the maintenance of international peace and security and that according to Article 24 the Council possesses only the primary responsibility for this, whereas universality of membership is not a stated purpose of the Organisation, though highly desirable.

Assembly was able to establish peace-keeping forces.¹⁰⁷

The recognition by the ICJ of the competence of the General Assembly to make determinations as to the meaning and scope of Charter provisions, albeit not unlimited with regard to the stated purposes of the Organisation, is valuable, but a few guidelines are proposed. The issue basically relates to the political structure and inter-relationships of the United Nations and as the court pointed out "in the legal system of States there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted therefore each organ must, in the first place at least, determine its own jurisdiction."¹⁰⁸

Accordingly, therefore, one must examine the practice of the organ in question in order to see how it has tackled the problem of interpreting the various provisions of the Charter.

The problem is also raised that it is the UN's organs themselves that will usually constitute the fora for the determination of the

(107) A similar process of interpretation and application has taken place with respect to Article 2(7) which declares that nothing in the Charter is to authorise the UN to intervene in matters essentially within the domestic jurisdiction of States. Matters concerning colonial affairs have in practice been excluded from this provision. Higgins notes that a narrow interpretation of the Article has taken place in UN practice, and that "the actions of the Organisation have been in conformity with the principle that an area covered by international law changes and develops - not in an arbitrary manner, but in accordance with interpretations made in good faith and in the hope of making the Charter effective". *Op.cit.* p.130. El Erian stresses that "wherever possible a flexible interpretation has been maintained by the concept of domestic jurisdiction, the main criterion being the attainment of the aims and purposes of the Organisation". *Loc.cit.* p.95. See for examples of cases, UN Repertory of Practice 1955, vol.1, pp.55-156. See also Judge Ammoun *ICJ Reports*, 1970, pp.313-4.

(108) *ICJ Reports*, 1962, p.168. See also *ICJ Reports*, 1971, p.45.

constitutionality of their own acts.¹⁰⁹ As the court itself remarked in the statement quoted above, attempts to make the ICJ a final authority regarding the interpretation of the Charter were rejected. Recourse to the court will depend upon a positive decision by the particular organ, and the opinions of the International Court are only advisory in this field, though in practice usually adopted by resolution.¹¹⁰

This means that in practice a very high proportion of questions relating to the constitutionality of, for example, General Assembly resolutions will be considered only by the Assembly itself, and this has had a blurring effect on the subject of Charter interpretation and its limits.¹¹¹ There are indeed dangers inherent in the situation where organs are deemed to be the final authority as regards the constitutionality of their own acts since majority voting could validate as it were provisions manifestly contrary to the stipulations enshrined in the Charter. Some safeguards therefore are necessary to prevent the process from degenerating into license. These will take the form of determining the requirement of authoritativeness surrounding Charter interpretations in such a way as to

-
- (109) The competence of the political organs of the UN may to a large extent depend upon commonly accepted practices. For example, the right of the Assembly to determine which territories fell within the scope of Article 73 of the Charter has now been recognised. See Higgins *op.cit.* pp.110-3. Resolution 1747(XVI), for example, affirmed that Southern Rhodesia was a non-self-governing territory within the meaning of Chapter XI of the Charter. Note also the statement of the Philippines delegate that if there was a lacuna in Chapter XI, it "could be remedied by a reasonable interpretation in keeping with the principle that any restrictive construction of an international agreement which would nullify or circumvent its manifest purpose should be rejected". GAOR 1st Session, part 2, 4th Committee, part 3, pp.34-55.
- (110) Eg. Security Council resolution 301 (1971) accepting the Namibia opinion of the ICJ.
- (111) The court has however noted that "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement". ICJ Reports, 1948, p.64, cf. Judge Morelli, ICJ Reports, 1962, pp.960-1. See also Judges Fitzmaurice, *ibid* p.200, and Winiarski, *ibid* p.230.

protect the interests of the minority as well as to preserve some elements of continuity and stability in evolution of international legal principles.¹¹²

There have been varying views expressed as to the way in which the Charter may be amended, altered and interpreted, and such views range widely. At this point we shall take a brief look at some of them in order to clarify the role and potentialities of Charter interpretation particularly with regard to self-determination.

Chapter XVIII of the Charter prescribes two ways in which the Charter may be changed. The first (Article 108) is by way of amendments, which are to come into force for all UN members when adopted by a vote of two thirds of the members of the General Assembly and ratified by at least two thirds of UN members including all the permanent members of the Security Council. The second (Article 109) is by way of alteration, which is to follow upon a general conference for the review of the Charter and a recommendation by a two thirds vote of the conference ratified by two thirds of the members of the UN including all the permanent members of the Security Council. These methods are the declared constitutional procedures enshrined in the constituent document of the UN Organisation and there is a minority view to the effect that they are the sole means available for the modification of the Charter.¹¹³

(112) Asamoah, however, writes that the danger of arbitrariness has been overestimated and this is because when "protests of irregularity have been raised and overruled expressly or impliedly, and practice proceeds on the assumption that the interpretation is valid, the interpretation will become unimpeachable and the practice built upon it will attain the status of law". Op.cit. p.39. It is suggested nevertheless that one does not follow from the other.

(113) Verdross notes that "any authentic interpretation of a legal norm may proceed only from the authority which created it, or from a superior authority, or perhaps as a result of a procedure which has been determined by these authorities. We find such a procedure for the present case in Articles 108 and 109 of the United Nations Charter". Kann Die Generalversammlung der Vereinten Nationen das Völkerrecht Weiterbilden, p.695 quoted in Tunkin op.cit. p.171: see generally Kelsen op.cit. p.816 et seq, Goodrich, Hambro and Simons, The Charter of the United Nations, Commentary and Documents, 3rd ed. 1969, p.641 et seq.

However, despite this view it is possible to achieve some measure of change in the Charter. An instrument may be amended by the subsequent practice of the States parties to it. It is clear that custom may modify a previous treaty norm just as a treaty may alter a previous customary rule,¹¹⁴ but practice not amounting to custom may accomplish the same objective. As Fitzmaurice has written, "the way in which the parties have actually conducted themselves in relation to the treaty affords legitimate evidence as to its correct interpretation"¹¹⁵ and the International Court has on a number of occasions had recourse to subsequent practice in order to aid in the process of treaty interpretation.¹¹⁶ However, subsequent practice may not only clear up doubts and ambiguities in the text of the treaty, that is, act as an extraneous means of elucidation in the absence of clarity in the ordinary meaning of the words, but may also result in actual revision of the treaty itself.¹¹⁷ This, as we have already noted,

-
- (114) See Rousseau, Droit International Public, 1970, vol.I, para.283, and the Air Transport Services Agreement Arbitration, 38 ILR, pp.182, 249 et seq.
- (115) "The Law and Procedure of the International Court of Justice, 1951-4" 33 BYIL 1957, pp.211, 223. See also *ibid* 28 BYIL 1951 pp.20-1.
- (116) See the Competence of the ILO with Respect to Agricultural Labour, PCIJ Series B no.2, The Rights of US Nationals in Morocco, ICJ Reports, 1952, p.185, The Anglo-Iranian Oil case, ICJ Reports, 1952, p.92. In the latter case the court in interpreting an Iranian unilateral declaration accepting its compulsory jurisdiction referred to an Iranian law passed after the date of the signature of the declaration, and before its ratification, and noted with respect to a particular clause in the law that "this clause...is in the opinion of the court a decisive confirmation of the intention of the government of Iran at the time when it accepted the compulsory jurisdiction of the court" *ibid* p.107. See also Waldock's 3rd Report to the ILC, Yearbook of the ILC, 1964, vol.II, p.198.
- (117) Article 38 of the International Law Commission's Draft Articles on the Law of Treaties provided that "a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions", see Yearbook of the ILC, 1966, vol.II, p.236. This provision was deleted at the Vienna Conference by 53 votes to 15, with 26 abstentions, UN Conference on the Law of Treaties, Official Records, first Session, pp.207-15. After a consideration of the views expressed by States voting in favour of the proposal to delete, Akehurst concludes that "it is thus difficult to interpret the deletion of Article 38 as a clear rejection of the view that existing law allowed a treaty to be amended by subsequent practice", "The Hierarchy of the Sources of International Law" 47 BYIL, 1974-5, pp.273, 277.

is particularly evident in the case of the international organisations where changing conditions and a wealth of day to day practice cannot but result in some modification of the original constituent documents.¹¹⁸

The question then arises as to the conditions under which this procedure might operate. It is generally accepted that the conduct involved will have to encompass a large number of the parties to the treaty¹¹⁹ though conduct by one party might be relevant as regards the doctrines of acquiescence and estoppel. One cannot go so far, however, as to insist upon universal compliance since this could result in one State out of about 150 frustrating an agreement reached by all the others.¹²⁰

Tunkin emphasises that a further element must be that the practice in question is evidence of an agreement by the relevant parties to the intended modification.¹²¹ This follows from his well-known views of custom as a form of tacit agreement and his emphasis upon the importance of the concordance of States' wills in the formation of rules of international law.¹²² To the extent that the subsequent practice must clearly relate to a particular provision or set of provisions in the relevant treaty and that the States involved in the practice clearly wish to amend the treaty, Tunkin's opinion is valid. However, it is felt that the requirement that the practice evidences the existence among the parties

(118) Akehurst notes that "subsequent practice often modifies the constituent treaties of international organisations", *ibid.*

(119) Fitzmaurice emphasises that "it is, of course, axiomatic that the conduct in question must have been....in the case of general multi-lateral conventions, of the great majority of the parties" *loc.cit.* p.223. Rajan writes that a majority is sufficient, United Nations and Domestic Jurisdiction, 2nd ed. 1961, p.405.

(120) But cf. Tunkin, *op.cit.* p.339. See also Judge Spender, ICJ Reports, 1962, pp.151, 191. There is much to commend Akehurst's view that one ought to apply by analogy any amendment clause that exists in the constituent treaty so that, in the case of the UN, the Charter may be amended by a practice supported by two-thirds of the member States, including the permanent members of the Security Council, *loc.cit.* p.278.

(121) *Ibid* p.339.

(122) *Ibid* pp.124, 146.

of an agreement respecting the attempted amendments is going too far and fails to recognise the point that the conduct need not amount to a custom before achieving a modification in the terms of the treaty.¹²³ Of course, a customary norm may alter a previous treaty provision if the necessary conditions apply, but conduct not amounting to custom may operate to alter treaty norms so long as it is clearly aimed at modifying such norms.¹²⁴

General Assembly resolutions are in this instance particularly suited in form for this purpose. They constitute State practice and they are inherently linked to the UN Organisation and its Charter. This does not mean that other practice is irrelevant but by the very nature of things Charter modification, by way of amendment or interpretation, may be more readily accomplished by General Assembly resolutions than by other methods.¹²⁵

Judge Spender declared that although members of international organisations have the right to interpret the constituent instruments in good faith, "their right to interpret....gives them no power to alter".¹²⁶

-
- (123) Ibid pp.171-2, 339. See Schachter op.cit. p.186. See also ibid "Interpretation of the Charter in the Political Organs of the United Nations" in Law, State and International Order, Essays in Honour of Hans Kelsen, 1964, p.269.
- (124) Fitzmaurice notes that "it is difficult to deny that the meaning of a treaty, or some part of it (particularly in the case of certain kinds of treaties and conventions) may undergo a process of change or development in the course of time. Where this occurs it is the practice of the parties in relation to the treaty that effects and indeed is that change or development", loc.cit. p.225.
- (125) Judge Spender has argued that one cannot equate a principle of subsequent practice of parties to a treaty with the practice of international organisations themselves, ICJ Reports, 1962, pp.192, 195. However, the subsequent conduct of international organisations is based upon the practice of States, for example, voting and statements and the actions of the former are predicated upon the practice of the latter. See also Tunkin op.cit. p.339.
- (126) ICJ Reports, 1962, pp.196-7. Judge Spender notes that changes in treaty-charters may be accomplished only in accordance with the revision clauses in such instruments; they "cannot be altered at the will of the majority of the member States no matter how often that will is expressed...and no matter how large be the majority of member States which asserts its will in this matter", ibid. See also Vallat, "The Competence of the United Nations General Assembly" 97 HR, 1959, p.211, and Bokor-Szego op.cit. pp.29-30.

This strict positivist viewpoint is predicated upon the need to preserve the consensual aspect of international law creation and lays excessive emphasis upon the actual wording of the text of the particular instruments. It ignores the fact that to interpret is to create and that the line to be drawn between interpretation *stricto sensu* and actual alteration is hazy and incapable of precise definition.¹²⁷

Fitzmaurice appears to be moving towards this, and tentatively suggests that where subsequent practice has brought about a change or development in the meaning of a treaty through a revision of its terms by conduct, "it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms".¹²⁸ Although this may seem confusing in introducing a concept of agreed revision and treating interpretation as equivalent (it would appear to amendment, it is a recognition that subsequent conduct may re-interpret a treaty, particularly the UN Charter within certain limits. But the problem still remains, that is, where to draw the line between interpretation and alteration (or, in Fitzmaurice's phrase, agreed revision) if indeed a line has to be drawn.

Tunkin takes the view that custom may amend treaties but not change the basic provisions of the treaty¹²⁹ and he gives as an example the modification of Article 27 of the UN Charter¹³⁰ but he criticises the

(127) See generally Cross, Statutory Interpretation, 1976, and Dias, Jurisprudence, 4th ed. 1976, Chapter 7.

(128) *Loc.cit.* p.212.

(129) *Op.cit.* p.339. He notes that to allow custom to modify any treaty provisions would be inadvisable and dangerous for the stability of international treaties, *ibid.* p.146. Lachs suggests that there may be no need to amend the Charter where the interpretation confirms a general principle defined in the Charter, "Law In and Of the United Nations", 1 *IJIL*, 1960-1, pp.429, 440.

(130) See ICJ Reports, 1971, p.22, and pp.117 (Judge Nervo) and 186 (Judge De Castro).

Uniting for Peace resolution of 1950 as a violation of the Charter since it purported to amend basic provisions of the Charter.¹³¹ In practice this distinction could prove elusive since perceptions as to such basic provisions may well alter with the passage of time and lead to complex problems of determination, while in theory it creates difficulties since it is arguable that even rules of jus cogens may be changed by virtue of the tacit consent of the vast majority of the members of a universal organisation.¹³²

However, one distinction does remain and that is between amendments by subsequent practice and interpretations. It is a distinction that is in practice extremely difficult to define precisely, since the mechanics of change will be the same and States will rarely specify whether they feel that by a series of, for example, resolutions, they are amending or interpreting the Charter. Nevertheless, it is possible for a Charter provision to be interpreted by a majority of UN members in circumstances that might not amount to an amendment, for example, with respect to the numbers voting for it. In such cases, the persuasiveness of the interpretation would depend upon the number and identity of the States voting for it. Schachter, however, regards virtual unanimity as the true test of interpretation,¹³³ and this demonstrates again the process of merging

(131) Ibid pp.339-43. Cf. Goodrich who treats resolution 377(V) as a "liberal interpretation" of the UN Charter, The United Nations, 1959, p.168.

(132) See Tunkin op.cit. p.160, and Akehurst loc.cit. pp.277-8, note 7.

(133) Op.cit. pp.186-7. See also Lachs loc.cit. p.439 and Judge Winiarski, ICJ Reports, 1962, pp.227-34. Asamoah adopts this approach as well, op.cit. p.35. Schachter also appears to suggest that only recommendations associated with the assertion of legal rights and obligations may constitute authoritative precepts derived from the Charter, "Interpretation of the Charter in the Political Organs of the UN", Law, State and International Order, Essays in Honour of Hans Kelsen, 1964, pp.269, 271.

amendment and interpretation in Charter modification.¹³⁴ This raises the question of the authoritativeness of such interpretations. Whereas an amendment by subsequent practice will be binding, whether a particular interpretation of a Charter provision contained in one or more resolutions of the General Assembly possesses a persuasive quality and to what extent will be determined on the basis of the number and identity of States voting for the proposed interpretation. Thus, Charter interpretation in this narrow sense constitutes one element of Charter modification by practice and is subsumed under the generally recognised heading of Charter Interpretation. The advantage of this latter process is that it enables the majority of States to modify the Charter to accord with contemporary conditions, while imposing certain limitations as to the quantity of States proposing the change, and thus providing some protection to minorities. It is also necessary for the proposed modification to be directly referrable to a particular provision of the Charter.

Such changes may be, and generally will be, accomplished by Assembly resolutions, which may be either related to a specific situation or be more generally framed. Thus, Charter interpretations may occur other than as responses to particular disputes. Not all such resolutions will be of the same persuasive nature and a series of resolutions over a period of time will usually be required.

(134) Schachter makes the point that such an authoritative interpretation can just as easily be contained in actions and statements made within or outside the UN as in General Assembly Resolutions, "The Relation of Law, Politics and Action in the United Nations", 109 HR, 1963, pp. 169, 186. Schwarzenberger writes that UN practice in the field of colonialism has departed from the text of the Charter and indeed "amounts to a de facto revision of the Charter which on the basis of acquiescence or ineffective opposition on the part of a diminishing number of colonial powers tends to harden into a de jure revision of the constitution of the United Nations," A Manual of International Law, 6th ed. 1976, pp. 226-7.

(b) Self-Determination

(1) General Approach

At this point we shall turn to examine the question of whether the right of self-determination can be regarded as established through the medium of Charter interpretation as a result of practice subsequent to the creation of the UN Organisation. As an introduction, one should note the Universal Declaration of Human Rights. This was adopted on December 10, 1948, in the form of an Assembly resolution by 48 votes to 0 with 8 abstentions. It built upon Charter provisions regarding human rights (for example, Articles 1, 55, 56, 62 and 76) and enumerated a list of human rights and fundamental freedoms "as a common standard of achievement for all peoples and all nations".¹³⁵ Although the principle of self-determination was not referred to in this Declaration, which concentrated upon the elucidation of individual rights, its path forward was cleared in the same way in that democratic rights seemed to lead inevitably in international society to consideration of the rights of peoples to define their own cultural and national status.¹³⁶

The Declaration was not legally binding as such in view of the terms in which it is expressed and the circumstances surrounding its adoption,¹³⁷ but has come to have a significant effect within the international community. Some of its provisions might be taken as reflecting general principles of law, others as relatively new international stipulations.

(135) A/811, resolution 217(III).

(136) Note here, that resolution 637(XVII) in 1952 declared that the right to self-determination was a pre-requisite to the enjoyment of other human rights, and the inclusion of the right to self-determination in the international Covenants on Human Rights.

(137) See Lauterpacht, International Law and Human Rights, 1950, pp.397-408, and Ganji, International Protection of Human Rights, 1962, p.161.

However, it can be regarded in essence as an influential interpretation by the General Assembly of the relevant Charter provisions upon human rights and fundamental freedoms, and as such of legal value as part of the law of the UN.¹³⁸

There have been a number of resolutions dealing with self-determination both generally and with regard to particular situations, and it is possible to point here to what appears to be a significant distinction. Resolutions and declarations that posit principles of law may be regarded as valid interpretations of the Charter if the necessary requirements of unanimity (or near unanimity) and referral have been met. However, resolutions and other UN and State practice referable to the specific situations are often limited by two factors. Firstly, such practice in concentrating upon a particular situation is of restrictive value since it deals only with one aspect of the principle under discussion which may be modified or even distorted by virtue of other principles deemed relevant in that particular situation,¹³⁹ and secondly by the greater likelihood of

(138) This view is taken by Brownlie, Principles of Public International Law, 2nd ed. 1973, p.554 and ibid Basic Documents in International Law, 2nd ed. 1972, p.144 and Judge Tanaka, ICJ Reports 1966, p.293. See Waldock, 106 HR, 1962, pp.198-9 but cf. Oppenheim *op.cit.* p.745. See also 9 Journal of the International Commission of Jurists, 1968, pp.94-5. The International Conference on Human Rights at Teheran in 1968 declared that the Universal Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community". A/CONF.32/41. The Teheran Declaration was proclaimed by the General Assembly to be an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights", see res.2442 XXIII. See also with regard to the Teheran approach, the Annual Report of the Secretary-General on the Work of the Organisation, Sept.1968, A/7201/ Add.1 at 13, see Sohn and Buergenthal, International Protection of Human Rights, 1973, p.519. In a confusing phrase, Asamoah writes that the Universal Declaration is "of quasi-legal significance as distinct from being the fons et origo of legal rights and duties" *op.cit.* p.190. Waldock noted that "the Declaration has acquired a status inside and outside the United Nations which gives it high authority as the accepted formulation of the common standard of human rights", Human Rights in Contemporary International Law and the Significance of the European Convention, 1963, p.15.

(139) Eg. the need to maintain peace and security as in Palestine in 1947-8 and Ruanda-Urundi in 1961.

opposing votes and behaviour that will rob the practice of its claim to universality.¹⁴⁰ However, it is possible for such defects to be remedied by a consideration of the temporal element. In other words a series of resolutions, for example, calling for self-determination in different colonial territories, may be regarded as subsequent practice relevant to the interpretation of the particular Charter provisions in question. Examples of such practice will be noted in the following section,¹⁴¹ but it will be useful in this context to recall the views of the ICJ regarding Article 27 of the Charter. The court declared that "the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the position taken by members of the Council.... have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions.... This procedure followed by the Security Council.... has been generally accepted by members of the United Nations and evidences a general practice of that Organisation".¹⁴²

A similar process can be seen with regard to Article 2(7) of the Charter concerning domestic jurisdiction which has over the years been increasingly restrictively interpreted¹⁴³ while the General Assembly has progressively widened the scope of its jurisdiction under Chapter XI of the Charter by asserting its competence both to request political information on non-self-governing territories under Article 73(e) and to

(140) Eg. the Tunisian and Algerian cases before the General Assembly, see Higgins op.cit. pp.94-7.

(141) *Infra*, p.152 et seq.

(142) ICJ Reports 1971, p.22, the case here also reinforces the view that a practice to constitute interpretation does not necessarily have to amount to a custom. The court referred to a practice "consistently and uniformly" followed, thus recalling the discussion in the Asylum case, ICJ Reports, 1950, p.266, but omitting any mention of *opinio juris*. Nevertheless the practice became a general practice of the Organisation and thus an authoritative interpretation of the relevant Charter provisions.

(143) See Judge Ammoun, ICJ Reports, 1970, pp.313-4 and Higgins op.cit. pp.58-130.

decide which territories may be regarded as non-self-governing.¹⁴⁴ The Assembly has also proclaimed its authority to decide between competing aspirations of the right to self-determination and to declare whether territories have exercised or should exercise the right to self-determination.¹⁴⁵

In all of these instances State practice over a period of time has been consolidated into Charter interpretation. Whether such practice can be treated as a valid interpretation will depend on all the circumstances of the case, but the presumption would be that the larger the number of resolutions, for instance, applying the principle of self-determination to different territories and the longer the period during which such practice has been operating the greater would be the likelihood that a persuasive or even binding view of the Charter term has been expressed.

Resolution 421(v) of December 4, 1950, embodied the request of the General Assembly for a study of the ways and means "which would ensure the right of peoples and nations to self-determination", and this was taken further by resolution 545(VI) which stated that the proposed article on self-determination in the International Covenants on Human Rights should be expressed in the terms that all peoples have the right to self-determination. It also noted that the article should stipulate that all States should promote the realisation of the right in conformity with the principles and purposes of the United Nations. Resolution 637(VII) proclaimed that self-

(144) Higgins op.cit. pp.113-6 and Schwarzenberger op.cit. p.167.

(145) See Rigo Sureda, The Evolution of the Right of Self-Determination, 1973, pp.48-53 and ICJ Reports, 1975, pp.12, 36.

determination was a fundamental human right.¹⁴⁶ This resolution also declared that UN member States "shall recognise and promote the realisation of the right" with regard to the peoples of trust and non-self-governing territories under their administration "according to the principles and spirit of the Charter of the United Nations".¹⁴⁷ The Commission on Human Rights considered the concept of self-determination over a number of sessions¹⁴⁸ and submitted recommendations to the UN Economic and Social Council, including a suggestion for the establishment of a Special Commission to examine situations resulting from alleged denials or inadequate realisation of the right to self-determination in certain circumstances.¹⁴⁹ This was, however, opposed and the matter was referred back to the Commission on Human Rights for reconsideration.¹⁵⁰ During the reconsideration a number of representatives pointed out that self-determination was only a principle and not a right. It was declared that the Charter had not granted the General Assembly competence to implement self-determination, although by way of contrast, implementation of Article 1(1) was provided for by Article 11 and that of Article 1(3) by Article 13.

(146) The voting on the part of the resolution concerning self-determination as a human right was 38 to 13 with 9 abstentions (with France, UK and USA opposing) see A/C.3/SR.642. See also Calogeropoulos-Stratis op.cit. p.139. The proclamation of self-determination as a human right tended to confuse the issue since it was really only intended to stress decolonisation as a fundamental norm in international relations. The conclusion that self-determination as a human right was therefore applicable beyond the colonial situation and with reference to minority situations in particular was strongly rejected, see eg. A/C.3/SR.671, A/C.3/SR.888 and A/C.3/SR.642. The right to self-determination was also stressed in resolution 742(VIII) which set out a list of factors to be considered regarding the readiness of a people for self-government. See also resolution 648(VII).

(147) See the preceding discussions in the 8th session of the Commission on Human Rights, ECOSOC OR, 14th session, suppl.4, paras.75-91, E/2256 and E/2256 annex 1. See also ECOSOC resolution 472(XV).

(148) See eg. E/1371, E/1681, E/1992, E/2256, E/2447. See in general on the Commission on Human Rights, A/CONF.36/6 at pp.33-47.

(149) E/2573.

(150) ECOSOC resolution 545 G(XVIII).

Such objections were overridden as was the view that the realisation of self-determination fell essentially within the domestic jurisdiction of States, and the Commission reaffirmed its previous recommendations which was sent to the General Assembly.¹⁵¹ The General Assembly at its eighth session asked the Commission to give priority to recommendations regarding international respect for the right of self-determination,¹⁵² and by the next session the Assembly already had before it the draft International Covenants on Human Rights prepared by the Commission and transmitted by the Economic and Social Council.¹⁵³

The Commission suggested that both International Covenants should have an identical first article¹⁵⁴ and this article, according to the draft of the Third Committee of the Assembly, read as follows:

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

... 3. All States parties to the Covenant including those having responsibilities for the administration of non-self-governing and trust territories shall promote the realisation of the right of self-determination and shall respect that right in conformity with the provisions of the UN Charter." ¹⁵⁵

(151) By ECOSOC resolution 586 D(XX). See for the text of the recommendation E/2731 and Corr.1. See also for the discussion, E/CN.4/SR.500 p.15, E/CN.4/SR.503 p.8 and E/CN.4/SR.505 p.5.

(152) Resolution 738(VIII).

(153) ECOSOC OR 18th session suppl.7, annexes I, II, III, and ECOSOC resolution 545 B(XVIII). By resolution 833(IX), the Assembly recommended that the 3rd Committee should give priority to an article by article consideration of the draft Covenants.

(154) Commission on Human Rights, report of 10th session, ECOSOC OR 18th session, suppl.7, pp.62, 65, 66.

(155) A/3077. Para.2 referred to the right to dispose freely of natural wealth and resources. Certain members of the third committee felt that the inclusion of an article on the right to self-determination would be incompatible with article 2(7) of the Charter, A/2910/Add.2. The text which was to appear in both International Covenants was adopted by 33 votes to 12 with 13 abstentions.

At the twelfth session, the Assembly declared in resolution 1188 (XII) that member States were to give due respect to the right of self-determination. From this point, the proposed Covenants became enmeshed in UN discussions from which they were only to emerge nine years later.

At this point we shall turn to two General Assembly declarations that might be treated as binding interpretations of the Charter.¹⁵⁶

The Declaration on the Granting of Independence to Colonial Countries and Peoples (the Colonial Declaration) was adopted by the General Assembly of December 14, 1960, in resolution 1514 (XV) by 89 votes to 0 with nine abstentions. This has had a profound impact upon international affairs and has been treated with particular reverence by the States of the third world. It has been regarded by many as the "second Charter" of the UN drawn up for the subjugated peoples of Africa and Asia.¹⁵⁷ Indeed, Parry has written that the Declaration by itself has had the effect of modifying that part of international law that deals with territorial sovereignty.¹⁵⁸

The Declaration emerged after a debate in the Assembly initiated by the Soviet premier¹⁵⁹ and was drafted by 43 States.¹⁶⁰ The preamble noted that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory"

(156) The fact that a resolution is adopted as a declaration rather than a recommendation is not significant as far as straight legal principle is concerned, although it is more formal and the level of expectation regarding its implementation is higher. See the reply of the UN Secretariat, E/CN.4/L.610 quoted in Asamoah op.cit. p.24, and Sohn and Buergenthal op.cit. pp.519-20.

(157) GAOR 18th Session, 1169th meeting para.5 (Nov.1962). Rosenstock described it as "a document only slightly less sacred than the Charter" for the Afro-Asian States, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 AJIL, 1971, pp.713, 730.

(158) The Sources and Evidences of International Law, 1965, p.22.

(159) A/4501, A/BUR/SR.130, A/L.312/Rev.1 and GAOR 15th Session, 902nd, 903rd, 925-39th, 944-7th meetings. See UN Repertory of Practice, 1972, vol.III Suppl. no.3, pp.44-52.

(160) See UN Yearbook 1960 pp.44-50.

and proclaimed the necessity of "bringing to a speedy and unconditional end colonialism in all its forms and manifestations". The Declaration laid down seven principles, stressing that "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". Inadequacy of political, economic, social or educational preparedness was not to serve as a pretext for delaying independence. Immediate steps were to be taken to transfer power to the peoples of non-independent countries, but attempts aimed at the partial or total disruption of the national unity and territorial integrity of a country were deemed incompatible with the purposes and principles of the UN Charter.

The Declaration has been treated by a number of countries as constituting a binding interpretation of the Charter, or a restatement of principles enshrined in the Charter¹⁶¹ and it has been similarly regarded by some writers.¹⁶² However, there are others who dispute this. One view already discussed is that any action by the General Assembly could only be recommendatory in such circumstances and that therefore the Declaration could be nothing more than a general statement of objectives.¹⁶³

But the most significant criticism of the Declaration as an authoritative interpretation of the Charter is concerned with the inconsistencies that are noticeable between the two instruments.

(161) Eg. Liberia, GAOR 15th Session 931st meeting, Madagascar *ibid* 944th meeting, Peru *ibid* 930th meeting, Tunisia *ibid* 929th meeting, Yugoslavia *ibid* 928th meeting and UAR *ibid* 18th Session, 6th Committee 164.

(162) Eg. Brownlie *op.cit.* p.576- Lachs *op.cit.* p.439; Asamoah *op.cit.* pp.177-85; cf. Arangio-Ruiz "The Normative Role of the General Assembly of the United Nations and the Declaration on Principles of Friendly Relations" 137 HR, 1972, p.517.

(163) Eg. the Swedish delegate GAOR 15th Session 946th meeting. See also the Australian delegate *ibid* 18th Session, 6th Committee 205, A/C.6/SR.817.

Paragraph 1 of the Declaration proclaimed that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights (and) is contrary to the Charter of the United Nations". However, this is not too clear in the Charter itself, for Chapter XI and XII legitimise certain relationships of dependence regarding non-self-governing and trust territories,¹⁶⁴ subject to defined conditions.

The Declaration in paragraph 3 notes that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence", while Article 73(b) declares that States administering non-self-governing territories must "assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement" and Article 76(b) underlines that among the basic objectives of the trusteeship system is the "progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples".

Paragraph 5 of the Declaration emphasises that "immediate steps" should be taken in all non-independent territories to transfer power to the people and this seems inconsistent with Articles 73 and 76. However, the call by the USSR, in particular, for immediate independence or the proclamation of a date at the end of 1961 for this to be achieved was not accepted¹⁶⁵ and this provision should perhaps be regarded rather as a

(164) It has also been possible for the mandate relationship to continue unconverted to the trusteeship system. Article 77(1) of the Charter noted this, see also International Status of South-West Africa, ICJ Reports, 1950, p.128.

(165) A/4502 and Corr.1, GAOR 15th Session, 947th meeting. See also UN Yearbook 1960 pp.44-50.

change of pace rather than as a change of essence. The Declaration also blurs the distinction between trust and non-self-governing territories by positing the same provisions for all territories that have not yet attained independence. In addition, the Declaration in paragraph 5 appears to regard independence as the only legitimate goal of the whole process. This latter provision runs counter to a number of UN resolutions, for example, recognising the exercise of self-determination involved in the relationship of dependence between the USA and the Commonwealth of Puerto Rico,¹⁶⁶⁻⁷ and between New Zealand and the Cook Islands¹⁶⁸ and Niue¹⁶⁹ after elections had been held in the respective dependent territories. In fact, the UN Secretary-General noted in 1963 that "the emergence of dependent territories by a process of self-determination to the status of self-government either as independent sovereign States or as autonomous components of larger units, has always been one of the purposes of the Charter and one of the objectives of the United Nations".¹⁷⁰

(166-7) Resolution 748 (VIII). The changed status of the island was later declared to be "a new political formula which respected the right of peoples to self-determination", A/C.4/SR.1007 p.32.

(168) Resolution 2064 (XX).

(169) Resolution 3155 (XXVIII), resolution 3285 (XXIX). See UNMC Oct. 1974 pp.50-1 and *ibid* Jan. 1975 pp.56-7. See also resolution 849 (IX) regarding Greenland's association with Denmark, resolution 945 (X) regarding Netherlands and Antilles and Surinam, and resolution 1469 (XIV) regarding the integration of Alaska and Hawaii with the USA. However, by resolution 742 (VII) a non-self-governing territory choosing self-government only must be free to change its status in the future if so desired. See Rigo Sureda *op.cit.* p.63, Whiteman's Digest *op.cit.* vol.V pp.61-6, vol.VI pp.392 et seq. In the case of Puerto Rico an attempt in the Special Committee on Decolonisation to re-open the question of its status in 1967 was adjourned sine die, UN Yearbook 1967 pp.622-3. However, in 1972, a resolution was adopted by the Special Committee recognising the "inalienable right of the people of Puerto Rico to self-determination and independence". See "The Applicability of the Principle of Self-determination to Unintegrated Territories of the United States - The Cases of Puerto Rico and the Trust Territory of the Pacific Islands" PASIL 1973, p.1. In 1974 and 1975 the question was adjourned, but in Oct.1976 the Special Committee reaffirmed the right of the people of Puerto Rico to self-determination and independence, and agreed to resume consideration of the question at its next session in Sept.1977, UNMC Oct.1976, p.17.

(170) Report of the UN Secretary-General, UN Special Release SPL/84. See generally resolution 742(VII) and 2625(XXV) which accept statuses other than independence as legitimate exercises of self-determination.

Such inconsistencies have led Bokor-Szego¹⁷¹ and Martine¹⁷² for example, to deny that the Colonial Declaration is an authoritative interpretation since it appears actually to amend the Charter, the argument turning on where the line between interpretation and amendment should be drawn. Fifteen years of State practice in the process of decolonisation formed the background to the Colonial Declaration and enabled it to bring up to date the relevant Charter provisions in a way marking contemporary consensus views as to, for example, the effect of inadequacy of political, social, economic or educational preparedness. All interpretations refine and develop the concept under consideration, in a manner acceptable to those concerned, and may be no less influential or binding because of that.¹⁷³

However, it does not follow that everything contained in the Declaration (or in similar resolutions for that matter) constitutes a binding obligation. Some elements would remain upon a purely hortatory level, for example, the solemn proclamation in the preamble to the

(171) *Op.cit.* pp.29-30.

(172) "Le Comité de Décolonisation et le Droit International" *Revue Générale de Droit International Public* 1970, p.402. See also Virally, "Droit International et Décolonisation" *AFDI* 1963, p.536.

(173) Castaneda refers to the Declaration as the "modern interpretation of the principle of self-determination rendered by the most representative organ of the international community, on the basis of political trends and events since the Charter was signed", *op.cit.* p.175. He stresses that the Declaration "not only reflects the change that has been wrought; it also symbolises and concretises a new politico-juridical conception: the definite repudiation and end of colonialism", *ibid.* Lachs stresses that the Declaration bridges the gap regarding self-determination between the state of affairs at the time of the adoption of the Charter, and the situation at the time of the Declaration, quoted in Bokor-Szego *op.cit.* p.29. Tunkin notes that the principle of self-determination in the Charter found "authoritative confirmation and concretisation... in the Declaration of the General Assembly on the Granting of Independence to Colonial Countries and Peoples" *op.cit.* p.65.

Declaration stressing "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations". On the other hand, there may be statements which are inconsistent with instruments interpreting the Charter - for instance, the apparent acceptance in the Declaration of independence as the sole object of self-determination. This contrasts with UN practice, as noted above, recognising other relationships and with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Resolution 2625(XXV)) which noted that "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people".¹⁷⁴

It would therefore seem that where one is faced by conflicting interpretations of equal standing, resort must be had to the intentions of the members of the UN, as revealed in their practice and upon this basis it would seem the stipulation in the 1960 Declaration restricting self-determination to the attainment of independence must be regarded as only a suggestion and not an authoritative interpretation of the Charter. Nevertheless the core of the Declaration does constitute an interpretation of the Charter and one that has underpinned the end of colonialism.¹⁷⁵

-
- (174) See also resolution 1541(XV). The ICJ referred to self-determination as "the need to pay regard to the freely expressed will of peoples" ICJ Reports, 1975, pp.12, 32, 33. See also Judge Dillard, *ibid*, p.123.
- (175) The International Court has stressed that the Declaration "provided the basis for the process of decolonisation" without explaining whether this is to be understood as a legal or political basis, ICJ Reports 1975, pp.19, 32. See also ICJ Reports 1971, pp.16, 31. Sukovic regarded the Declaration as "an intermediate between the Charter which is an international treaty....and....resolutions of the General Assembly which have no binding force". "The Colonial Question in the Charter and in the Practice of the UN", *International Problems of the Institute of Political Economy*, 1966, p.73. The Declaration was cited by no fewer than 95 subsequent resolutions in the 6 sessions following its passage, Anand, New States and International Law, 1972, p.82.

Higgins has noted that it "must be taken to represent the wishes and beliefs of the full membership of the United Nations".¹⁷⁶ As to the juridical character of the Declaration, Higgins stresses that in it the right of self-determination is regarded "as a legal right enforceable here and now".¹⁷⁷

This approach is underlined by the action taken by the UN to implement the Declaration. On November 27, 1961, the General Assembly created a subsidiary organ entitled the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence,¹⁷⁸ which was enlarged from 17 to 24 member States the following year.¹⁷⁹ It has gradually widened its sphere of activity so that apart from the Trusteeship Council (which is only concerned now with the trust territory of the Pacific Islands), it is the only organ responsible for issues dealing with dependent territories. The Committee has been very active and has done much to pressure the colonial powers and the administering powers.¹⁸⁰ It has also stressed the position that the United Nations intended the Colonial Declaration to act as a juridical signpost to complete decolonisation and not merely as a solely hortatory pronouncement.

(176) Op.cit. p.101.

(177) Ibid p.100. See also Feinberg, The Arab-Israel Conflict in International Law, 1970, p.47.

(178) Assembly resolution 1654(XVI) adopted by 97 votes to none with 4 abstentions. States administering trust and non-self-governing territories were called upon to "take action without further delay with a view to the faithful application and implementation of the Declaration". Higgins wrote that in the light of the lack of opposition to the Declaration and resolution 1654(XVI) "it seems academic to argue that as Assembly resolutions are not binding nothing has changed and that 'self-determination' remains a mere 'principle' " op.cit. p.101.

(179) Resolution 1890(XVII). See also resolutions 1810(XVII) and 2105 (XX).

(180) See eg. Contemporary Practice of the UK (ed. Lauterpacht), 1962, II, pp.280-2, and Martine op.cit. p.357, and Mittelman, "Collective Decolonisation and the UN Committee of 24" 14 JMAS 1976, pp.41-64.

Virtually all UN resolutions proclaiming the right to self-determination of particular peoples expressly refer to the 1960 Declaration.¹⁸¹ Judge De Castro particularly noted in the Western Sahara case how the African group at the UN that prepared a draft resolution on the Sahara problems for discussion in the fourth Committee was at pains to refer four times to resolution 1514(XV) in reaffirming the right of the people of Western Sahara to self-determination.¹⁸² The International Court has specifically referred to the Colonial Declaration as an "important stage" in the development of international law regarding non-self-governing territories,¹⁸³ and as "the basis for the process of decolonisation".¹⁸⁴

On December 16, 1966, the General Assembly adopted the International Covenants on Human Rights, which consisted of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the latter. Both Covenants have an identical first Article which declares inter alia that "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" and that "the States parties to the present Convention including those having responsibility for the administration of non-self-governing and trust territories shall promote the realisation of the right of self-determination and shall respect that right in conformity with the provisions of the Charter of the United Nations".

(181) For example, resolutions 1064(XI), 1568(XV), 1579(XV), 1596(XV), 1065/XV, 1626(XVI), 1650(XVI), 1724(XVI), 1742(XVI), 1746(XVI), 1747(XVI), 1807(XVII), 1819(XVII), 1897(XVIII), 1913(XVIII), 1949(XVIII), 1954(XVIII), 2063(XX), 2107(XX), 2184(XX), 2183(XXI), 2185(XXI), 2226(XXI), 2354(XXII), 2379(XXIII), 2383(XXIII), 2428(XXIII), 2983(XXVII), 3162(XXVIII) and 3292(XXIX).

(182) ICJ Reports, 1975, pp.12, 136, footnote

(183) ICJ Reports, 1971, pp.16, 31.

(184) ICJ Reports, 1975, pp.12, 32.

The inclusion of the right to self-determination in the International Covenants occurred because the General Assembly in resolution 545(VII) recommended that the proposed Covenants should incorporate such a provision and in resolution 637(VII) declared that the right to self-determination was a "fundamental human right". It is to be noted that the preambles to both the Covenants refer to the "obligation of States under the Charter of the United Nations to promote universal respect for and observance of human rights and freedom".¹⁸⁵

The International Covenants came into force in 1976¹⁸⁶ and are thus binding as between the parties, but it would seem that they are of legal value over and above that, not only as practice leading to or reflecting a customary rule, but also as a persuasive interpretation of the notion of human rights as embodied in the Charter.¹⁸⁷

This appears so in view of the drafting history of the Covenants through the various organs of the UN, culminating in the adoption of resolution 2200(XXI), and the emphasis in the many discussions and resolutions and in the Covenants themselves upon the actual provisions

-
- (185) The International Covenants had been under consideration since the 6th session of the UN, and a draft prepared by the Commission on Human Rights was transmitted to the General Assembly by the Economic and Social Council on July 29, 1954, by resolution 545 B (XVIII). See Ganji op.cit. pp.167-227, British Practice ed. Lauterpacht, 1963, II, p.223, Sohn and Buergenthal op.cit. pp.535-9. The movement to include self-determination in human rights was led by the USSR and the Afro-Asian States, see eg. A/C.3/SR.671.
- (186) See UNMC April 1976, pp.50-2.
- (187) Rao declared that once the Covenants came into force, self-determination would become "a legal right beyond doubt, but its contours can only become clear through the medium of State practice". "Right of Self-Determination: Its Status and Role in International Law" *Internationales Recht und Diplomatie*, 1968, p.28, cf. Nincic's view that the Covenants "reaffirm the legally binding nature of self-determination as a norm of international law for all States, whilst at the same time defining the concept and the contents of self-determination with considerable precision", Problem of Sovereignty in the Charter and in the Practice of States, 1970, p.221.

of the Charter.¹⁸⁸ The preambles to the Covenants specifically recall various Charter provisions (particularly Articles 1, 55 and 56) and the Universal Declaration of Human Rights.

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was unanimously adopted without a vote on October 24, 1970, and is contained in the annex to General Assembly Resolution 2625 (XXV). It proclaims seven principles including the principle of equal rights and self-determination of peoples. And the question that is raised at this stage is whether this Declaration may be regarded as a binding interpretation of the Charter. The Declaration was specifically stated to deal with certain international legal principles "in accordance with the Charter of the United Nations" and the preamble includes the phrase "considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles". This suggests not only that such resolutions are relevant in a Declaration of principles "in accordance with the Charter", thus impliedly reinforcing the importance of the interpretative role of such resolutions, but also that the Declaration itself constitutes an

(188) See eg. A/7326 (1968) p.58 for a general view of the value of the Covenants. Mustafa has referred to the apparent anomaly of inserting an identical article on self-determination into two differing Covenants, since the Covenant on Civil and Political Rights recognises certain rights as already in existence, while the Covenant on Social, Economic and Cultural Rights may be defined as a promotional instrument binding its signatories to take steps to achieve progressively the specified rights. This incompatibility, argues Mustafa, makes self-determination ambiguous, especially since the parties are called upon to "promote and respect" self-determination only, while they must "respect and ensure" other civil and political rights: "The Principle of Self-determination in International Law" 5 International Lawyer 1971, p.482. Schwelb argues that the implementation rules of the Covenants are not applicable to self-determination: "Some Aspects of the International Covenants on Human Rights of December 1966", International Protection of Human Rights, Proceedings of the 7th Nobel Symposium, 1967, p.111.

interpretation of the Charter provisions. The reason for the interpretation is emphasised in the preamble which notes that "the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter of the United Nations give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on". The Declaration stresses that "nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration."¹⁸⁹

The Declaration states that "by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine....their political status and to pursue their economic, social and cultural development" while "every State has the duty to respect this right in accordance with the provisions of the Charter". Arangio-Ruiz strongly asserts the non-legal status of the Declaration since it was effected at the merely organic or institutional level rather than on a formal, legally binding inter-State level¹⁹⁰ and concludes that "there can hardly be any doubt....that the Declaration embodied in Resolution 2625(XXV).... is to be considered from a legal point of view as an instrument of a purely hortatory value".¹⁹¹ This approach, however, cannot be supported.

(189) Emphasis added. See also Judge Nervo, ICJ Reports, 1971, p.117, and ICJ Reports, 1975, p.33.

(190) Loc.cit. p.522.

(191) Ibid p.523. Arangio-Ruiz stresses later that the Declaration per se is neither part of customary international law nor an authoritative determination or interpretation of custom or treaty: ibid p.525.

The Declaration was intended to act as an elucidation of certain important Charter provisions, although not as an actual amendment of the Charter, and was adopted by member States on that basis.¹⁹²

State practice within and outside the UN also supports the view that the right to self-determination exists in international law. State practice, other than resolutions and declarations purporting to express principles of law, can be important in the process of Charter interpretation provided it is linked to particular Charter stipulations and provided over a period of time sufficient practice has accumulated for it to be treated as a valid and general interpretation rather than as strictly limited conduct specifically related to a particular situation.

It is realised that this formulation may fail to provide an adequate guide as to whether a proposition can be accepted as an authoritative Charter interpretation in a number of instances, but it is clearly impossible to lay down firm conditions as to the time that should be encompassed or the number of relevant resolutions that must be adopted. In each case much will depend upon acceptance and acquiescence by an increasing number of States regarding the propositions involved in particular situations constituting general principles interpreting the Charter.

One must be careful not to deny the members of an organisation the capacity to harmonise its constitution with contemporary needs by means of their subsequent practice. After all, the aim of interpretation is to enable the overwhelming majority to determine the nature and extent of the

(192) See UN Juridical Yearbook 1966 pp.124-5, *ibid* 1967 pp.198-201, *ibid* 1968 pp.123-6 and *ibid* 1969 pp.96-8. See also the various reports of the 6th Committee eg. A/6547, A/6955, A/7429, A/7809 discussing the reports of the Special Committee on Principles of International Law - A/6230, A/6799, A/7326, A/7619. See also Wittens, "The Friendly Relations Declaration", 12 *Harvard International Law Journal*, 1971, pp.517-9, and Judge Nervo *ICJ Reports*, 1971, pp.16, 111, 115.

obligations and rights they have agreed to in circumstances minimising adverse effects upon dissentient members.¹⁹³

State practice that does not fall within the categories mentioned may nevertheless be relevant in the process of Charter interpretation as evidence of recognised interpretations, and thus may be of value in emphasising the form and content of a particular interpretation. It may also play a vital role in pointing out which interpretations are to be regarded as valid binding ones, much as State practice may also constitute evidence of particular rules of customary law. State practice, of course, may also lead to a new customary law. One should note that those member States that abstain with regard to such interpreting resolutions as the 1960 and 1970 Declarations discussed above may well still be bound by them.¹⁹⁴

(2) Specific Approach

State practice, particularly as manifested in the United Nations, concerning the status and application of self-determination in specific situations exceeds the abstract, general expression of self-determination as a right, in terms of both frequency and diversity and accordingly must be considered as a significant factor.

General Assembly resolutions proclaiming that specific territories should be entitled to the exercise of the right of self-determination are ultimately founded upon the established competence of the Assembly to

(193) Judge Nervo has said that "among the international rules which are binding on the administration of the international territory of Namibia are declarations and resolutions formally adopted by the principal organs of the United Nations which represent generally accepted interpretations and applications of the provisions of the United Nations Charter and which either are of general application or are stated to have specific reference to the situation of Namibia". ICJ Reports, 1971, pp.16, 119.

(194) See Akehurst, "Custom as a Source of International Law", 47 BYIL, pp.1, 7 and Schwarzenberger op.cit. pp.28-9, 156, 299.

determine which territories are non-self-governing. This is partly because self-determination has been deemed non-applicable to independent territories and partly to sidestep the doctrine of domestic jurisdiction.

Article 2(7) of the Charter declares that "nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State" and the history of the first decade and a half of the UN Organisation largely centres around attempts to establish a balance between this provision and the perceived need to end colonialism. This latter aim was achieved at least as far as the UN was concerned through establishing a clear division between the administering State and its administered territories, contrary to the wishes of a number of colonial powers particularly France with regard to Algeria and Portugal with regard to its African possessions. Having instituted this division and provided an exception to Article 2(7), the Assembly proceeded to make recommendations regarding the future of these non-self-governing territories.¹⁹⁵ Based upon its recognised competence to decide which territories were non-self-governing territories, the General Assembly successfully asserted its competence to determine whether or not a non-self-governing territory had attained a full measure of self-government as referred to in Chapter XI of the Charter, and to this end a series of resolutions were adopted expressing the Assembly's views as regards specific cases.¹⁹⁶ Despite the objections of the colonial powers, the

(195) See Rigo Sureda *op.cit.* pp.54-67; Higgins *op.cit.* pp.110-6; Rajan, United Nations and Domestic Jurisdiction, 1961. An analysis of how the Assembly's competence was established is beyond the scope of this work, but see in particular the letter of the Secretary-General inviting the views of member States on the definition of non-self-governing territories, A/74 under resolution 9(I) "Non-self-governing territories: Summaries of Information transmitted to the Secretary-General during 1946", 1947, pp.132-7, and resolutions 66(I), 222(III), 334(IV), 567(VI), 648(VII), 742(VIII), 1467(XIV), 1541(XV), 1542(XV), 1747(XVI). See also Higgins *op.cit.* pp.113-6.

(196) See eg. resolutions 748(VIII), 849(IX), 945(X), 1469(XIV), 1747(XVI).

doctrine of domestic jurisdiction as declared in Article 2(7) has been interpreted by the subsequent practice of the UN Organisation and its members so that the affairs of non-self-governing territories may be discussed within the Organisation and rendered subject to UN resolutions and declarations as to their political status.

The competence of the Assembly was initially founded upon Chapter XI of the Charter, but later resolutions disregarded this Chapter and concentrated instead on the concept of self-determination as the basic relevant principle.

The large number of Assembly resolutions calling for self-determination in specific cases represents international practice regarding the existence and scope of a rule of self-determination in customary law. They also constitute subsequent practice relevant to the interpretation of particular Charter provisions. For example, resolutions proclaiming that an obligation exists under Article 73(e) of the Charter to transmit information in a particular case may be regarded as a binding interpretation of the Charter provision in that specific instance since the competence of the General Assembly to determine such matters has been clearly recognised.¹⁹⁷ The change from Chapter XI to self-determination with the Colonial Declaration as the juridical basis for the process marks the stronger line taken by the Assembly as a whole but the effect remains broadly similar - that is, the determination by the General Assembly of a factual situation within which the declared norm will be deemed to operate. By such method, of course, the outlines of the norm itself will be elucidated and to that extent factual determinations by the Assembly will be juridically relevant.

(197) Similarly with regard to the determination of a territory as a non-self-governing territory. *Supra*, p.137, and see Wright *op.cit.* pp.32-3, 69; Schachter *op.cit.* pp.187-8 and ICJ Reports 1962 p.163.

However, unlike Assembly resolutions of a general nature, they cannot themselves authoritatively interpret a principle as a legally binding norm, their function in this sphere rests rather upon delimitation,¹⁹⁸ though such determinations may also provide for the application of non-legal principles to a particular situation.

The Algerian problem¹⁹⁹ was first included on the agenda of the Assembly in 1955, and it was claimed that France had broken the provisions of the Charter on self-determination.²⁰⁰ The Assembly, however, decided not to pursue the matter²⁰¹ and the Security Council did not place it upon its agenda.²⁰² In succeeding sessions, resolutions proclaiming the right of the Algerian people to self-determination failed to be adopted although support for the proposition was growing.²⁰³ In fact, it was only in 1960 that a resolution was adopted which referred to the right of the Algerian people to self-determination.²⁰⁴ Despite this hesitant start, and in view of the changed climate of opinion in France itself, the

(198) Cf. Castaneda op.cit. pp.127-8, and Sloan op.cit. p.29.

(199) Earlier draft resolutions proclaiming the right of the Moroccan and Tunisian peoples to self-determination narrowly failed to obtain the necessary two-thirds majority, see A/2526 and A/2530.

(200) A/2924 and Add. 1.

(201) GA resolution 909(X).

(202) S/3609.

(203) See the resolution before the 1st Committee in the 11th Session, A/C.1/L.167, and the two moderate resolutions which went before the Assembly, A/C.1/L.166 and A/C.1/L.167. Resolution 1012(XI), which was adopted after the two resolutions were defeated, merely called for a peaceful, democratic and just solution to the problem. In the 12th Session there was no agreement in the 1st Committee as to a resolution to be presented to the Assembly, A/C.1/L.194. Resolution 1184(XII) merely stresses the need for a solution to the problem. In 1958, a draft resolution was adopted by the 1st Committee calling for the right of the Algerian people to independence, but it failed by one vote to be adopted by the Assembly, A/C.1/L.232. In 1959 a similar resolution was similarly defeated, A/C.1/L.276. Higgins remarks that despite such failures support for the concept of a legal right to self-determination in such situations was growing, op.cit. p.96.

(204) Resolution 1573(XV).

Assembly passed without opposition in the following session resolution 1724(XVI) which called for the implementation of "the right of the Algerian people to self-determination and independence respecting the unity and territorial integrity of Algeria".

This resolution, which significantly referred to the Colonial Declaration of 1960, also asserted that the UN had a part to play in the fulfillment of this right.

A large role has been performed in this process by the Special Committee established after the adoption of the Colonial Declaration.²⁰⁵ For example, the Special Committee was requested to study the situation in Southern Rhodesia by General Assembly resolution 1745(XVI) and its report formed the basis of an Assembly resolution criticising the failure of the United Kingdom to carry out the Colonial Declaration, and affirming that Southern Rhodesia was a non-self-governing territory.²⁰⁶ The Assembly adopted resolution 1755(XVII) proclaiming the right of the people of Southern Rhodesia to self-determination, and the problem has been discussed at the UN at great length.²⁰⁷ The claim of the UK that the problem was an internal matter and therefore the UN could not consider it, was clearly rejected, and resolution 1747(XVI) affirmed that "the territory of Southern Rhodesia is a non-self-governing territory within the meaning of Chapter XI of the Charter of the United Nations."²⁰⁸ This situation was altered, at least as far as the United Kingdom was concerned, by the

(205) Supra, p.

(206) See A/AC.109/L.9, A/5124 and GA resolution 1747(XVI) (opposed only by South Africa). The Special Committee had established a sub-committee on Southern Rhodesia, comprising India, Mali, Syria, Tanganyika, Tunisia, and Venezuela.

(207) See Higgins op.cit. pp.102-3 and Higgins "International Law, Rhodesia and the UN" *The World Today*, March 1967, pp.94-106; McDougal and Reisman, "Rhodesia and the UN: The Lawfulness of International Concern" 62 *AJIL*, 1968, p.1 and Fawcett "Security Council Resolutions on Rhodesia" 41 *BYIL*, 1965-6, p.103.

(208) See also A/5127 and Add.1 and 2, A/5124 and SCOR 18th year, 1066th meeting, para.51 and *ibid*, 20th year 1202nd meeting, para.90.

unilateral declaration of independence by the government of Southern Rhodesia, but the General Assembly vigorously attacked "any agreement reached between the administering power and the illegal racist minority regime which will not recognise the inalienable rights of the people of Zimbabwe to self-determination and independence in accordance with General Assembly resolution 1514(XV)".²⁰⁹

In its first six years, the Special Committee considered some 70 territories²¹⁰ and in 1974, for example, it discussed 39 territories, the majority being Pacific or Atlantic islands.²¹¹ In virtually all cases the Special Committee has recommended that the territory become independent in the light of its right to self-determination, although in some instances association with another State was accepted, for example, Niue and the Cook Islands.

Throughout the years of the existence of the UN Organisation a great number of resolutions have been adopted calling for self-determination in particular situations and these constitute State practice and international practice of overwhelming importance. The majority of such resolutions have referred specifically to the 1960 Colonial Declaration, thus strengthening its claim to be the fount of legality as far as the right to self-determination is concerned. It has been noted that "if this right (of self-determination) is still not recognised as a juridical norm in the practice of a few rare States or the writings of certain even rarer theoreticians, the attitude of the former is explained by their concern for their traditional interests, and that of the latter by a kind of extreme respect for certain long-entrenched postulates of classical international law".²¹²

(209) Resolution 2138(XXI). See also resolutions 2151(XXI), 2379(XXIII) and 2383 (XXIII).

(210) Kay op.cit. p.54.

(211) Mittelman op.cit. pp.41-2.

(212) Per Judge Ammoun, ICJ Reports, 1971, pp.16, 75.

It is submitted in conclusion that the right to self-determination has been accepted by the United Nations by virtue of the process of Charter interpretation as a basic principle in the law of the United Nations, and that from this proposition certain legal effects flow with regard to, for example, the definition of the determining unit, the capacity of the people of the territory in question to decide its political, economic and social status, the role of force in the process and the locus standi of the colonial power.²¹³ Some of these notions will be examined in later chapters.²¹⁴

III - Customary International Law

The practice supporting the right of self-determination as emanating from Charter interpretation may also be of relevance in establishing the existence of a right to self-determination as a rule of customary law. Custom differs from treaty interpretation in a number of vital ways. It is founded on State practice, whereas treaty interpretation relates to practice construed with reference to a treaty provision, and it is dependent upon the *opinio juris*, the belief or expression of an accepted legal obligation. This, as we have seen, is not necessarily the case with respect to the interpretation of treaty-Charters, for practice not amounting to custom may have the effect of interpreting a particular stipulation.

(213) Schwarzenberger has listed a number of ways in which the purposes of the UN may be enlarged or transformed into legal duties of member States. Of these, three may be attained under the Charter itself, viz. treaty, practice accepted as law by the preponderant number of UN members and general principles of law recognised by civilised nations *op.cit.* pp.156-7. These rules are based upon Article 38 of the ICJ Statute and it is suggested that this categorisation is unduly restricting in requiring a practice to be accepted as law before it can operate within the framework of binding Charter interpretation.

(214) One should note also Skubiszewski's view that "law made by international organisations" is to be placed alongside treaty, custom and general principles as sources of law, "Enactment of Law by International Organisations", 41 BYIL 1965-6, p.198. See also Friedmann "General Course in Public International Law" 127 HR 1969, pp.142-6.

The International Court of Justice is directed by Article 38(1) of its statute to apply "international custom as evidence of a general practice accepted as law" and Brierly emphasised this in terms of a "usage felt by those who follow it to be an obligatory one".²¹⁵ Oppenheim notes that "whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law".²¹⁶

Precisely how one is to interpret and balance the two factors of State practice and *opinio juris* is subject to conflicting analyses,²¹⁷ but it is commonly recognised that both elements are required. Usage is needed as the source material delineating the content and scope of the proposed rule, while the *opinio juris* is essential in differentiating norms of customary international law from State behaviour embarked upon for reasons of courtesy, morality or expediency alone, since the latter forms of conduct are clearly intended to have no legal effect at all.

(216) Op.cit. p.27. See also ICJ Reports 1950, pp.276, 277.

(217) Gény regarded usage as the "material and detectable element" in custom and *opinio juris* as the "immaterial and psychological element", Méthode d'Interprétation et Sources en Droit Privé Positif, 1899, para.118. Different schools have arisen emphasising one or other of these elements, eg. Strupp, "Les Règles Générales du Droit de la Paix" 47 HR 1934, pp.263, 304; Tunkin "Remarks on the Juridical Nature of Customary Norms of International Law", 49 California Law Review, 1961, pp.419, 420-21, and op.cit. pp.113-33; Bin Cheng "UN Resolutions on Outer Space: 'Instant' International Customary Law?" 5 IJIL, 1965, pp.23, 35, 36, tend to stress the need for *opinio juris* while Kelsen, "Théorie du Droit International Coutumier", Revue Internationale de la Théorie du Droit (new series) 1939, pp.253, 264-6, and Guggenheim, Traité de Droit International Public, 1953, pp.46-8, appear to dispute this. See also D'Amato, The Concept of Custom in International Law, 1971, Thirlway, International Customary Law and Codification, 1972, and Akehurst, "Custom as a Source of International Law", 47 BYIL, 1974-5, p.1.

As far as self-determination is concerned, practice is extensive both within and outside the UN. Tied to the issue of colonialism as it has been virtually since the adoption of the Charter, it has constituted one of the major concerns of the organisation as any analysis of debates, resolutions and declarations will attest. Kay notes that between 1960 and 1967 the number of speeches by representatives of the new nations devoted to decolonisation outweighed those relating to any other topic in plenary and main committee meetings, with the exception of the Assembly's 20th session when the issue of economic aid received marginally more attention.²¹⁸

If one includes the topic of South Africa which has been treated by many nations as an aspect of the general problem of decolonisation the emphasis becomes even more evident. It is clear that the interest of the third world nations of Africa and Asia has focused primarily upon the decolonisation issue, with the problems of economic aid and development coming more to the fore as the number of countries still under colonial rule rapidly declines. This issue has been broadly defined and extended so that it has assumed the status of a general category incorporating a number of specific questions. The Ghanaian representative to the 16th session of the General Assembly declared that "in our view, colonialism is the greatest evil of the modern world, the source of all the troubles which presently afflict mankind. It is the root-cause of the arms race and the problem of disarmament. Colonialism and neo-colonialism are a perpetual threat to the peace and sovereignty of the world. Colonialism is the cause of war and conflict among nations and is, therefore, the

(218) The New Nations in the United Nations, 1970, p.45. Kay notes that there were 511 speeches devoted to decolonisation (in plenary and main committee meeting) in the 15th session, 928 in the 16th session, 661 in the 17th session, 554 in the 18th session, 153 in the 19th session, 624 in the 20th session and 896 in the 21st session, *ibid* pp.46-8.

greatest danger to world peace".²¹⁹⁻²²⁰

The number of resolutions directly concerned with self-determination is high and forms a vital part of the UN attitude to the decolonisation process. Of necessity, therefore, one must consider whether such resolutions can be regarded as constituting State practice for the purposes of customary law formation.

Resolutions may be relevant in the context of norm creation or determination in a number of differing ways. They may constitute binding or persuasive interpretations of the UN Charter. They may evidence and reflect recognised rules of international law whether created through the medium of treaty, custom or as general principles of law recognised by civilised nations.²²¹ In this case, resolutions merely underline the accepted position and have no norm-creating functions to fulfil. More crucial is the role played by resolutions within the process of customary law formation. This may take the form either of a stimulus to State practice²²² or of actual State practice or indeed of manifesting the *opinio juris*.

-
- (219-220) GOAR 16th session, 1015th meeting, para.54. Henkin has written that "the struggle to end colonialism also swallowed up the original purpose of cooperation for promotion of human rights" "The United Nations and Human Rights" 19 International Organisation 1965, p.512. Self-determination, he declared, was "added to the roster of human rights as an additional weapon against colonialism". *ibid* p.513.
- (221) Resolutions could constitute statements of general principles of law recognised by civilised nations. Precisely what amounts to such general principles of law is a matter of controversy, see Asamoah *op.cit.* pp.61-2. O'Connell notes that there are three approaches to this problem: one, that it incorporates natural law into positive international law- two, that the general principles are only sources of positive international law and must be embodied in treaty or custom before they become legally operative and three, that the court may utilise general principles embodied in the municipal laws of States, *op.cit.* p.9. As far as self-determination is concerned, it is clear that points two and three are not relevant while if point one is to be of use it has to be shown that the right is part of natural law and that would be difficult.
- (222) See Thirlway *op.cit.* pp.63-4.

In the first case, that of a resolution encouraging the growth of usage, what is involved is clearly an extra-legal factor and one which does not need to be considered further, since many activities may perform such an encouraging role ranging from resolutions of private bodies to opinions of legal writers. But the second and third possibilities must be considered briefly. Whether a usage is solely a practice or also incorporates within itself the expression of *opinio juris* is often difficult to decide. A State which makes a claim asserted as a legal right is not only exhibiting a practice but is also evidencing the *opinio juris*, thus the border line between the material and psychological requirements of customary law created is blurred. This is particularly true with respect to Assembly resolutions, since they are often assertions of rights under international law. An example of this would be the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted unanimously on 13 December, 1963.²²³ It was regarded as a declaration of existing law by many States, including the most important in the field,²²⁴ as well as by a number of writers.²²⁵

The expression of State support for a particular declaration or resolution, however, whether by statement or voting, constitutes State

-
- (223) General Assembly resolution 1962(XVIII). Resolution 1721(XVI), also unanimously adopted by the Assembly, proclaimed certain principles of law relating to outer space. The US representative in the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space noted that "when a General Assembly resolution proclaimed principles of international law - as resolution 1721 (XVI) had done - and was adopted unanimously, it represents the law as generally accepted in the international community". A/AC.105/C.2/SR.20, pp.10-11. See also A/AC.105/C.2/SR.20, p.7.
- (224) Eg. by the US and USSR, the only space powers at that time, A/C.1/PV.1342 at pages 6-27 and *ibid* pp.27-46. These statements are reproduced in 58 AJIL 1964 pp.720-1.
- (225) Eg. Schwelb, "The Nuclear Test Ban Treaty and International Law" 58 AJIL, 1964, pp.645-6, Jenks wrote that the Declaration, while somewhat less than a treaty, must be regarded as rather more than a statement of custom, Space Law, 1965, p.185. But cf. Thirlway *op.cit.* pp.70-71, Darwin, "The Outer Space Treaty" 42 BYIL 1967 p.280, and Cheng, *loc.cit.*

practice,²²⁶ while the assertion of the legality of the principles outlined therein is clear evidence of the *opinio juris*.²²⁷ Thirlway has emphasised the need to maintain a clear distinction between usage and *opinio juris* in order to prevent alleged rules lacking both components from becoming part of customary law,²²⁸ but the fact remains that the two are closely intertwined particularly with regard to United Nations practice. The difficulty of unravelling the two with respect to Assembly resolutions is one more aspect of the changes brought about by the institution and operations of the UN within the sphere of international law.²²⁹⁻²⁶⁰ Self-determination was clearly not a rule of customary law prior to the Charter²⁶¹ and the overwhelming bulk of practice regarding the concept has clearly occurred in connection with the United Nations.²⁶² Thus one must focus on this aspect.

-
- (226) Akehurst proposes that one should accept as State practice, "any act or statement by a State from which views about customary law can be inferred" *op.cit.* p.53. This would include physical acts, claims, declaration in abstracto (eg. General Assembly resolutions) national laws and judgements, and omissions, *ibid.* But cf. D'Amato *op.cit.* p.88 and Thirlway *op.cit.* pp.58-9.
- (227) The necessity for *opinio juris* is accepted by virtually all writers in one form or another and by the International Court, see eg. North Sea Continental Shelf cases, ICJ Reports, 1969, pp.3, 44, the Asylum case, ICJ Reports, 1950, pp.266, 277, and Akehurst *op.cit.* pp.31-42.
- (228) *Op.cit.* p.68. He notes that it is doubtful to regard the 1963 Declaration as an expression of existing law because it appears to lack sufficient State practice, *ibid.* p.71.
- (229-260) The acceptance of UN resolutions as reflecting and strengthening customary rules is widespread, see eg. Anglo-Iranian Oil Co.Ltd. v. Supor, 22 ILR, 1955, pp.23, 40-41 and Assembly resolutions 96(I) on genocide. Akehurst argues that to constitute authority for the content of customary law, such resolutions must actually claim to be declaratory of existing law, "Custom as a Source of International Law", 47 BYIL, 1974-5, pp.1, 6. Judge Ammoun has suggested that a number of similar Assembly resolutions might per se constitute a custom, ICJ Reports, 1975, pp.12, 99.
- (261) See Briggs, The Law of Nations, p.65, and Nussbaum, Concise History of International Law, 1954, p.186.
- (262) Higgins writes "The practice of the United Nations in this complex area of international affairs is very revealing and its importance can hardly be exaggerated". *Op.cit.* p.91.

The concern of the United Nations with regard to self-determination has been two-pronged. On the one hand the Organisation has affirmed the right to self-determination of all peoples in general terms and consistently since 1952. This has been included not only in a number of Assembly resolutions and declarations but also in the International Covenants on Human Rights adopted in 1966. On the other hand, the right has been declared in a number of specific situations and disputes. This has tended to increase the plausibility of the entry of self-determination into the panoply of international customary rules, since the greater the practice relating to a particular proposition, the greater the likelihood that it has been accepted as a custom. This also applies to the length of time during which the principle has been affirmed as a right. The longer the process has taken the greater the chances that it has hardened into a rule. In any event, it is clear that more practice affords more opportunity from which to extrapolate the *opinio juris*. It is interesting to note that Judge Dillard has stated that "even if a particular resolution of the General Assembly is not binding, the accumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time, may give rise to a general *opinio juris* and thus constitute a norm of customary international law".²⁶³

IV - Conclusions

It is thus concluded that the right to self-determination is a legal right as a result of Charter interpretation and that the possibility, additionally, is raised of the right constituting also a customary right, although UN practice appears to have strongly favoured the former approach.

Recent judicial pronouncements on self-determination are surprisingly rare and centre around the Namibia case of 1971 and the Western Sahara

(263) ICJ Reports, 1975, pp.12, 121.

case of 1975.²⁶⁴ The court, in the former case, noted that "the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them"²⁶⁵ without really specifying how this has occurred or what possibly is involved,²⁶⁶ and proceeded to refer to the Colonial Declaration as "a further important stage in this development"²⁶⁷ without further clarification. In interpreting the mandate, therefore, the court had to consider "the changes which have occurred in the supervening half-century....by the subsequent development of law, through the Charter of the UN and by way of customary law".²⁶⁸ However, the court failed to confirm whether or not self-determination was a binding legal principle in its own right.

The court's observations of self-determination in the Namibia case were quoted extensively in the Western Sahara case, where the court similarly refrained from a clear declaration. The Colonial Declaration was referred to as "the basis for the process of decolonisation",²⁶⁹ and

(264) See also the Aaland Islands question, *supra*, p.106. In the Rights of Passage case, India referred to the principle of self-determination as regards the population of the Portuguese enclaves. Portugal replied by asking the court to dismiss this line of argument, but the court held that it was no part of its judicial function to declare in the operative part of its judgement that such arguments were or were not well-founded, ICJ Reports 1960, pp.16-9, 32. Judge Nervo rhetorically declared that concepts of equality and freedom "will inspire the vision and conduct of peoples the world over until the goal of self-determination and independence is reached". ICJ Reports 1966, p.457.

(265) ICJ Reports 1971, pp.16, 31.

(266) Judge Ammoun picked this up by declaring that "although the Opinion does not lack persuasive force, it would be more persuasive if it traced the path by which this right of peoples has made its entry into positive international law", *ibid* p.74.

(267) *Ibid*, p.31.

(268) *Ibid*. The court stressed that "these developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned". *Ibid*.

(269) ICJ Reports 1975, pp.12, 32.

the essence of self-determination was discussed in relation to resolution 1541(XV) and the 1970 Declaration on Principles of International Law.²⁷⁰ Such instruments constituted the "basic principles governing the decolonisation policy of the General Assembly".²⁷¹ Judge Dillard regarded the opinion as forthright in proclaiming the existence of the rights as far as the proceedings were concerned, but he went further and declared that "the pronouncements of the Organisation thus indicate....that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations".²⁷² Although he does not expressly bring out the process by which this has occurred, Judge Dillard draws attention to the long list of resolutions dealing with self-determination following in the wake of the Colonial Declaration.²⁷³ The result, therefore, appears to be that the opinion recognises that self-determination is a legal right²⁷⁴ but is unclear as to how that has arisen exactly.^{274a}

A norm created as a result of Charter interpretation, it should be noted, will bind all members of the UN, while a customary rule will bind all States save those objecting ab initio. Thus, the former method would appear the more advantageous particularly as regards, for example, South Africa. Indeed, the fact that self-determination applies virtually

(270) Ibid p.33.

(271) Ibid p.34. Judge Petren emphasised that the law of decolonisation does not yet constitute a complete body of doctrine and practice although its guiding principles have emerged inspired by a series of General Assembly resolutions and in particular the Colonial Declaration, *ibid* p.110.

(272) Ibid p.121. He makes it clear that the court is thereby stating the law not creating it, *ibid* p.122.

(273) Ibid p.121. See further on this case, *infra*, Chapter 4, p.174 et seq.

(274) But cf. Verzijl *op.cit.* pp.557-8; Kaur, "Self-determination in International Law" *IJIL* 1970, p.479; Gross "The Right of Self-Determination in International Law" in *New States in the Modern World* (ed. Kitson), quoted by Emerson, "Self-determination" 65 *AJIL* 1971, p.461; Jennings *op.cit.* p.78; Emerson "Self-determination Revisited in the Era of Decolonisation" 1964, pp.63-4.

(274a) However, the discussions by the court, as distinct from individual judges, would appear to suggest that the binding quality of the rule lies in its character as an interpretation of the Charter.

exclusively within the colonial sphere (although with some potential for development) is a further argument favouring the Charter interpretation approach, since the distinction between colonies and metropolitan territories is one made by the Charter.

One further point remains and that is the possibility that self-determination constitutes a rule of jus cogens, and thus a peremptory norm of international law from which no derogation is permitted. The question of the existence and nature of jus cogens is one that has received much attention in recent years, being partly stimulated by discussions and debates leading up to the Vienna Convention on the Law of Treaties in 1969.²⁷⁵ The basis of such rules, which cannot be changed save by contradictory rules of the same status, has been variously ascribed to natural law,²⁷⁶ and to international public policy.²⁷⁷⁻⁸

However, despite differences as to the origin of jus cogens, its essence is generally accepted.²⁷⁹ The International Law Commission

(275) See eg. Suy, The Concept of Jus Cogens in International Law, 1967, pp.17-77; Riesenfeld, "Jus Dispositivum and Jus Cogens in International Law: In the light of a Recent Decision of the German Supreme Constitutional Court", 60 AJIL 1966, p.511; Schwarzenberger, "International Jus Cogens" 43 Texas Law Review 1965, p.455.

(276) See Verdross, "Jus Dispositivum and Jus Cogens in International Law" 60 AJIL 1966, pp.55, 56; Bokor-Szego op.cit. p.66; Tunkin op.cit. p.147.

(277-8) Quadri, "Cours General de Droit International Public" 113 HR 1964 p.335, Lauterpacht, Yearbook of ILC 1953 vol.II, p.155, cf. Rousseau, Principes Généraux de Droit International Public, vol.I pp.340-1. Note, the International Court has distinguished between obligations of a State vis-a-vis another State and obligations towards "the international community as a whole", ICJ Reports 1970, p.32. Tunkin speaks of the growing internationalisation of aspects of the life of society as the reason for jus cogens, op.cit. p.157. See also Thirlway op.cit. p.29.

(279) See GAOR 20th session 6th Committee p.40. Suy writes that "the most surprising feature of the Commission's (ie. ILC) debates is the unanimity with which members of the Commission approved the idea of jus cogens" op.cit. p.50. Schwarzenberger writes that since jus cogens presupposes the existence of an effective de jure order, with legislative, judicial and enforcement machinery, no such rules exist in customary law, op.cit. p.24, although they do exist in relation to the Charter and organisation of the UN, *ibid* p.206.

discussed the concept²⁸⁰ and incorporated it into the final draft on the law of treaties in 1966.²⁸¹ Article 53 of the Vienna Convention specifies that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

O'Connell has written that "the inclusion of the concept of jus cogens in the Vienna Convention constitutes an important recognition of the fact that contemporary society is bound together by the acceptance of fundamental principles constituting the rule of law".²⁸²

If the concept of jus cogens is generally accepted, no such agreement is manifested with regard to the creation of rules of jus cogens or their scope or, indeed, which rules can be included as rules of jus cogens. However, there is a body of juristic opinion which declares that the rules of jus cogens are formed in the same way as other norms of international law, that is primarily by way of custom and treaty, and can be modified by such means,²⁸³ thereby placing the concept firmly within the ambit of positive law and away from any variant of natural law thinking.²⁸⁴

(280) Yearbook of ILC, 1963, vol.II, p.187, at pp.198, 211, 216.

(281) Ibid 1966, vol.II, pp.247-9, as Article 50.

(282) Op.cit. p.244.

(283) See Tunkin op.cit. pp.158-9. See also Bokor-Szego op.cit. pp.69-70; Verzijl, International Law in Historical Perspective, vol.I, 1968, p.85, and Akehurst, "The Hierarchy of the Sources of International Law" 47 BYIL, 1974-5, pp.273, 282-5 and the sources therein cited.

(284) See Tunkin op.cit. p.158. He denies the automatic binding force of jus cogens upon new States, ibid p.159, footnote, cf. Bokor-Szego op.cit. p.70. See also Akehurst, loc.cit. p.283.

The problem of the emergence of a new rule of jus cogens is centred upon the conduct of States as a whole and a new principle might arise by way of inference from State practice.²⁸⁵ How one might decide whether a new rule appertains to jus dispositivum or to jus cogens is open to question and would depend to a large extent upon the intentions of the international community and the universality of the rule involved.

One may illustrate this point by noting some examples of jus cogens.²⁸⁶ The most recognisable relate to the proscription of aggression²⁸⁷ and the prohibition of crimes against humanity and peace,²⁸⁸ while other possibilities include the banning of slavery, piracy and genocide.²⁸⁹ Some jurists regard the rule against racial discrimination as an aspect of jus cogens.²⁹⁰

(285) The ILC left the full content of jus cogens "to be worked out in State Practice and in the jurisprudence of international tribunals" Report of the ILC A/6309/Rev.1, pp.76-7. D'Amato falls between the two stools of the existence or not of jus cogens by noting that it could be argued that a rule of jus cogens meant simply "a very strong rule of customary international law" that might be changed by a number of treaties with contrary provisions, but is unlikely to be changed, op.cit. p.132. Emphasis in original. It is submitted that this is a poor compromise since it combines the disadvantages of the concept without the advantages.

(286) The ILC refrained from providing such examples in its work since the inclusion of some examples might lead to misunderstanding as to the position of other cases not specifically mentioned and since any attempt to draw up examples of jus cogens would involve it in a prolonged study of matters falling outside the scope of the draft articles, *ibid*, but see for the views of some members, Yearbook of ILC, 1963, vol.II, p.199.

(287) See McNair, Law of Treaties, 1961, pp.214-5.

(288) Brownlie op.cit. p.500, and Tunkin op.cit. p.160. Note that resolution 2074(XX) condemned apartheid and racial discrimination as crimes against humanity. This was reaffirmed in resolution 2145(XXI) and Security Council resolution 276 (1970).

(289) Brownlie op.cit. p.500.

(290) See ICJ Reports 1970, p.32, and Judge Ammoun *ibid* p.304. See also Judge Tanaka, ICJ Reports 1966, p.298, and Judge Ammoun ICJ Reports 1971, pp.78-81.

It is arguable that the principle of self-determination also falls within the category of jus cogens²⁹¹ and a number of members of the International Law Commission appeared to be of this opinion.²⁹² It would indeed be difficult to conceive of a treaty providing for the continuation of a colonial relationship against the wishes of the inhabitants of the territory being upheld as valid. Self-determination is a basic principle of international law of universal application, while the weight of international opinion appears to suggest that the right may be part of jus cogens.

(291) See Judge Ammoun ICJ Reports 1970, p.304, and Brownlie *op.cit.* pp.500-1.

(292) See Yearbook of ILC 1963, vol.II, p.199.

CHAPTER 4 - SELF-DETERMINATION, DECOLONISATION AND TERRITORY

One of the major factors in any consideration of international relations since 1945 has been the advent of decolonisation, whereby scores of entities administered by European powers have emerged upon the world scene as sovereign and independent nations. This process has been of tremendous significance within international law. However, although decolonisation has been extensively discussed in the United Nations, it has only really been considered by the judicial organs of the international community in the Namibia¹ and Western Sahara² cases, and then not in any great detail. Until these cases, and to some extent after them, the status in law of the principles relating to decolonisation has been the subject of much debate. In particular, the definition of the entity seeking independence and the precise extent of its territorial and temporal delimitation remain open to conflicting interpretations. Clearly much hinges upon an appreciation of the principle of self-determination and the definition of the "self", but that notion as comprehended in moral or political terms is more extensive than is apparently the case with the legal concept, since it would permit any set of persons linked together by a sense of group-consciousness to determine its political status.³ To permit such a wide proposition within the framework of international legal

(1) ICJ Reports, 1971, pp.16, 31 and 73-5.

(2) ICJ Reports, 1975, pp.12, 29-36.

(3) See Deutsch, Nationalism and Social Communication, 1952, p.78; Scelle, Précis de Droit des Gens, Principes et Systematique, pt.2, Chapter 1, p.259 cited by the Egyptian delegate to the Commission on Human Rights, A/C3/SR443 para.34 and Cobban, The Nation State and National Self-Determination, 1969, p.107. See also the Greco-Bulgarian Communities case, PCIJ, Series B, no.17, p.21.

regulations, with consequent obligations, would be hazardous to the dominant State system in international relations. It would threaten the territorial basis of international law as it has developed, and it would pose particular dangers to the precarious stability of third world States, the vast majority of which are not nation-States in the nineteenth century European sense, but State-nations⁴ in that diverse ethnic, religious, linguistic and cultural groupings have to be reconciled within the framework of one State. In other words, the State precedes the development of the territorial nation, but is faced with powerful loyalties generated by sub-State community ties. This creates a crisis of legitimacy, since the State is founded not upon a genuine sense of community, but upon the vagaries and power ranking of nineteenth century European colonial empires. Thus, the emphasis upon the necessity of maintaining colonial frontiers clearly demonstrated by the overwhelming majority of Afro-Asian and South American States⁵ can be understood in terms of the necessity of establishing stable legitimacy factors. But this has meant a general freezing of territorial entities as at the eve of decolonisation and a consequent disregard for ethnic and historical ties, which cross the old colonial border, or at the least a minimisation of their importance in territorial terms. Accordingly, the principle of self-determination has operated in practice to safeguard the colonial delimitations and overrule purely ethnic definitions of the "self", so that the "self" must be determined

(4) Rejai and Enloe, "Nation-States and State-Nations", 13 International Studies Quarterly, 1969, p.143. Hoffman refers to "governments still in search of their nation", in "International Systems and International Law" 14 World Politics, 1961, p.230.

(5) See further *infra*, Chapter 5, p.268.

within the colonial territorial context. Despite some controversy, it is clear that the concept of self-determination has played a crucial role in the replacement of the colonial African (and Asian) empires by individual, sovereign States. The reference of the Western Sahara problem to the International Court of Justice was particularly advantageous, in that an opportunity was thus presented for clear judicial pronouncements on the relevance and hierarchy of the various principles involved.

I Self-Determination and Decolonisation: The Western Sahara Analysis

The principle of self-determination has been defined in very wide terms in international agreements. It has been propounded as the right of all peoples to determine their political status and pursue their own economic, social and cultural development.⁶ This broad approach incorporates a series of propositions. Firstly, that all "peoples", however defined, have the right to establish their own sovereign, independent State. Secondly, that every people has the right freely to choose its own political system internally.⁷ Thirdly, that upon the achievement of independence via self-determination as formulated in the first proposition, the people (in the sense of the State) attains sovereignty free from the claims of other peoples (in the sense of resident minorities).⁸ Fourthly, the right of the people

-
- (6) Article 1 of the International Covenant on Human Rights, 1966. See also the 1970 Declaration on Principles of International Law.
- (7) See Luard, "The Origins of International Concern Over Human Rights" in The International Protection of Human Rights, (ed. Luard), 1967, p.10. See also Thomas and Thomas, Nonintervention, 1956, p.369 and Umozurike, Self-determination in International Law, 1972, p.192. Note also A/C.3/SR.447, paras. 4-10.
- (8) Calogeropoulos-Stratis called this the principle of total sovereignty. Espoused particularly by third world States, it treats self-determination as protecting the independence and integrity of the newly independent State, Le Droit des Peuples à Disposer d'eux-mêmes, 1973, pp.162-4.

(i.e. the State and maybe its inhabitants) to develop its own patterns of social, economic and cultural behaviour and fifthly, the right of peoples and nations to permanent sovereignty over their natural wealth and resources.⁹ The second, fourth and fifth propositions are beyond the scope of this work, but are mentioned to illustrate the range of this principle.

The nature of self-determination and its relationship with the process of decolonisation was extensively discussed during the course of the Western Sahara case.¹⁰ The questions posed by Assembly resolution 3292 (XXIX)¹¹ were firmly placed within the context of self-determination and decolonisation. The resolution reaffirmed the right of the people of the territory to self-determination in accordance with resolution 1514 (XV), noted that the request to the court was made without prejudice to the principles embodied in that resolution and specified that the court's opinion would be of value in the process of decolonisation of Western Sahara. The court recognised that the principles of decolonisation were an essential part of the framework of the questions contained in the request¹² and that the right of the people of the territory to self-determination constituted a basic assumption of the questions.¹³ In the case of Western Sahara, both Morocco and Mauritania,

-
- (9) See General Assembly resolutions 523 (VI), 626 (VII), 1514 (XV) and 1803 (XVII). See also the Declaration on the Establishment of a New International Economic Order, UNMC May 1974, pp.66-84 and the Charter of Economic Rights and Duties of States, 1974, (resolution 3881 (XXIX)).
- (10) In the Namibia case, the court declared that "the subsequent development of international law in regard to non-self-governing territories ... made the principle of self-determination applicable to all of them" pp.16, 31.
- (11) See supra Chapter 2, p.57 and infra, p.227.
- (12) ICJ Reports, 1975, pp.12, 30. The court declared that its opinion would provide the UN General Assembly with legal factors relevant to the decolonisation of the territory, *ibid* p.37.
- (13) *Ibid*, p.36.

the claimant States, had voted in favour of Assembly resolutions proclaiming the right of self-determination for the population of the territory,¹⁴ as had Spain¹⁵ and Algeria.¹⁶ These States had also supported the right in express terms.¹⁷ The problem was that the parties had different views both of the role of self-determination within the context of decolonisation and the framework of international law in general, and of the actual content of the principle.

Morocco declared that the fundamental relevant rule was that of decolonisation, characterised as a rule of *jus cogens* and an "end-norm", towards the attainment of which a variety of techniques and principles were available as "means-norms".¹⁸ As examples of such principles, one could cite self-determination and territorial integrity. Therefore, a wide range of possibilities lay before the Assembly in its task of decolonising territories, in the light of the UN Charter and various resolutions, such as resolutions 1514 (XV), 1541 (XV) and 2625 (XXV). The right of self-determination was certainly relevant, but it had to co-exist with other principles, such as that of territorial

-
- (14) Morocco had voted in favour of all such resolutions except resolution 2983 (XXVII), while Mauritania had voted in favour of all of them, see resolutions 2229 (XXI), 2354 (XXII), 2591 (XXIV), 2711 (XXV), 2983 (XXVII), 3162 (XXVIII) and 3292 (XXIX).
 - (15) Spain had voted for resolution 2354 (XXII), against resolutions 2072 (XX) and 2229 (XXI), and abstained in the rest.
 - (16) Algeria had voted in favour of all such resolutions.
 - (17) See A/10023/Add.5, Annex, paras. 269 (Spain), 305 (Morocco), 348 (Algeria) and 104 (Mauritania). See also the Agadir meeting of July 1973 at which the latter three reaffirmed the right as regards Sahara, A/9623/Add.4, pt.11 at p.23 and A/10023/Add.5, Annex. Appendix III D.
 - (18) Pleadings, CR.75/26, p.60.

integrity and in certain cases, it was deemed subordinate to the latter concept. The Moroccan representative, Professor Dupuy, put forward a typology by which to reconcile the various factors in the light of State practice. It was accepted that the right of self-determination existed with regard to non-self-governing territories in areas where no State had been recognised by the international community in the nineteenth century. It was agreed that the right did not exist respecting independent States so as to destroy the unity of such countries. However, in the case of States which had enjoyed international recognition prior to colonisation and had then been dismembered, such as Morocco, it was suggested that self-determination gave way to re-unification and the re-establishment of the former State's territorial integrity. Thus, the pre-colonial State came back into existence with all of its dismembered parts recovered.¹⁹

Mauritania characterised the issue as "quite simply that of our territorial integrity, the unity of our people."²⁰ Although the principle of self-determination was accepted, it was emphasised that the Sahara was an integral part of Mauritania and that the latter had a right of re-unification.²¹ The principle of self-determination was connected with the principle of national unity and territorial integrity referred to inter alia in resolutions 1514 (XV) and 2625 (XXV), and in practice the General Assembly often gave priority to the latter principle,

(19) Pleadings, CR.75/8, pp.11-16.

(20) Pleadings, CR.75/12, p.38.

(21) Ibid p.44. See also Pleadings CR.75/17, p.27.

it was claimed, particularly where colonialism had taken lands from an existing State and artificially created a new territory.²²

The attitude taken by Algeria and Spain was completely different. Algeria recognised the right of self-determination as "one of the great principles of contemporary international law and decolonisation ... only one of its manifestations."²³ It was an essential and primary legal principle from which the other principles governing the international community flowed, and therefore was a rule of jus cogens. It operated as a direct opposite to the concept of terra nullius²⁴ in reaffirming the rule of peoples and was a higher principle than those underlying territorial claims.²⁵ The territorial integrity of a non-self-governing territory was guaranteed under international law and its incorporation into a neighbouring State could only be justified by the wishes of the former's population, and not upon the basis of any alleged territorial integrity of the latter. Moroccan reliance upon paragraph 6 of resolution 1514 (XV)²⁶ was based upon a misinterpretation, since it did not aim at giving territorial claims priority over self-determination. The paragraph referred only to future attempts

(22) Pleadings CR.75/13, pp.9-13. The return of French and Portuguese territories to India was referred to, as was the Gibraltar situation, *ibid.* See also resolution 2429 (XXII).

(23) Pleadings CR.75/31, p.34. It was declared that decolonisation was clearly only a species of a larger genus, viz. self-determination, which was the right of peoples to independence, to set up their own political and economic system and non-interference in the internal affairs of States, *ibid.*

(24) See *supra* Chapter 2, p.54.

(25) Pleadings, CR.75/20, pp.10-12 and 26.

(26) This stated that any attempt to disrupt the "national unity and the territorial integrity of a country is incompatible with the ... principles of the Charter."

and not to disputes of the past.²⁷ Therefore, Algeria supported the right of the population of Western Sahara to self-determination as the fundamental principle to which all other factors were subordinate. A division of the territory would only be acceptable, if the people freely expressed itself in favour of that solution.²⁸ The point was also made that the General Assembly had recognised the right of the people of Sahara to self-determination as had resolutions of the Organisation of African Unity and conferences of non-aligned countries and various meetings of Morocco, Mauritania and Algeria.²⁹

Spain took a similar line in emphasising self-determination as the fundamental relevant principle. But whereas Algeria wished for a re-statement by the court of the supremacy of that principle, Spain declared that the request to the court was without object since the General Assembly had already decided that the right of self-determination should apply and that a plebiscite should be held. Just as the title of the administering power has to cease on decolonisation so the claims of third parties become legally without effect, for otherwise the rights of the Saharan people as recognised by the Assembly would be disregarded and imperilled.³⁰

Since the court emphasised that the request lay within the framework of the consideration by the Assembly of the decolonisation of Western Sahara, it decided to review the basic principles governing the decolonisation policy of the Assembly. Article 1 (2) of the UN Charter,

(27) Pleadings, CR.75/31, pp.36-38.

(28) A/10023/Add. 5. Annex, para. 351.

(29) Pleadings CR.75/20, pp.18-23.

(30) Pleadings CR.75/21, pp.14-19. Spain also regarded the right of self-determination as a rule of jus cogens, Spanish Written Statement, para. 344.

reinforced by Articles 55 and 56, referred to the development of friendly relations among States based upon respect for the principle of equal rights and self-determination. The principle was discussed in resolution 1514 (XV), which the court regarded as "the basis for the process of decolonisation"³¹ without specifying whether a legal or political basis was meant. This called for immediate steps to be taken in non-independent territories for the transfer of power in the light of the principle that all peoples had the right to self-determination. Resolution 1541 (XV) noted that self-determination could take the form of independence, free association with an independent State or integration with an independent State.³² In each case the essential feature was the free choice of the people.³³ Resolution 2625 (XXV), the Declaration on Principles of International Law, was noted, as was the court's view in the Namibia case that the principle of self-determination applied to all non-self-governing territories.³⁴ The court also pointed out that the General Assembly had reaffirmed the right of the inhabitants of Western Sahara to self-determination.³⁵

The court emphasised that the right of the Saharan population to self-determination constituted "a basic assumption of the questions put to the court".³⁶ Judge Dillard declared that the opinion of the court

(31) ICJ Reports, 1975, pp.12, 32. See also ICJ Reports, 1971, pp.16, 31.

(32) See also Pleadings CR.75/8 p.17 et seq. (Morocco); Pleadings CR.75/13 pp.7-9 (Mauritania) and Pleadings CR.75/20, pp.38-9 (Algeria).

(33) ICJ Reports, 1975, pp.12, 32-3. See also resolution 2625 (XXV), the 1970 Declaration on Principles of International Law.

(34) ICJ Reports, 1971, pp.16, 31.

(35) ICJ Reports, 1975, pp.12, 34-36.

(36) Ibid p.36.

had been forthright in proclaiming the existence of the right in the instant proceedings and presented his view that the pronouncement of the court indicated "that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations."³⁷ The court did not enter directly into the Moroccan-Algerian debate as to decolonisation and self-determination. However, its attitude appeared to be to regard decolonisation as the basic framework and self-determination as the most important relevant principle. In that sense, it sought implicitly to reconcile the competing assertions. Judge Petren made the point that "although its guiding principles have emerged, the law of decolonisation does not yet constitute a complete body of doctrine and practice."³⁸ The court, unfortunately, did not take this opportunity of further analysing the subject, but certain factors may be discerned.

The court concluded that no ties of territorial sovereignty could be established, thus "the court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination."³⁹ In other words, the implication is that only ties of territorial sovereignty could affect the application of the relevant decolonisation principles. But if self-determination is one of the guiding principles of the decolonisation of non-self-governing territories, may this be overridden by ties of sovereignty in the past and if so, on which basis? The court here declared that the validity of

(37) Ibid, p.121.

(38) Ibid, p.110.

(39) Ibid, p.68.

the principle of self-determination had not been affected by the failure in certain cases to consult the population of a territory, since these were based either on the grounds that such a population "did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances."⁴⁰ Therefore, two avenues are open in the event of the recognition of past ties of sovereignty, it appears. Either the people involved are not a "people" for the General Assembly, or special circumstances are involved. Precisely what "special circumstances" might amount to for this purpose was not made clear. The ambiguity inherent in the conclusion of the court in this respect could well open the door to other claims of pre-colonial sovereignty rendering the application of self-determination redundant.⁴¹ A far better approach would have been to state, as did Judge Boni,⁴² that even a finding of ties of sovereignty would have entailed the obligatory consultation of the inhabitants of the territory, thus affirming the right of self-determination as the primary principle involved. The uncertainty in the court's opinion in this respect is to be regretted. In the light of the Sahara case and State practice,⁴³ the centrality and legal character of the principle of self-determination can hardly be denied, but one vital question which was raised by Morocco concerned the role of the principle of territorial integrity. Could this principle be employed to bring back into being the pre-colonial frontiers of a State recognised

(40) Ibid, p.37.

(41) One should note in this context the claims of Spain to Gibraltar, Argentina to the Falkland Islands and Guatemala to Belize.

(42) Ibid, p.174.

(43) Infra, p.191. See also Chapter 5, p.268.

at that time? Morocco argued that it could, but was strenuously opposed by Algeria.⁴⁴ The court, however, did not discuss the issue at all, since by declaring that no ties of territorial sovereignty had existed, it avoided the necessity.⁴⁵ On the other hand, the tenor of the court's opinion appeared to favour the supremacy of self-determination and therefore the rejection of the Moroccan thesis concerning territorial integrity.⁴⁶

The principle of self-determination itself was defined by the court as "the need to pay regard to the freely expressed will of peoples"⁴⁷ and this was clearly accepted as the crucial point, although consultation could be dispensed with in limited instances.⁴⁸ Judge Negendra Singh regarded consultation on the decolonisation process as "an inescapable imperative",⁴⁹ while Judge Dillard referred to the "cardinal restraint which the legal right of self-determination imposes ... it is for the people to determine the destiny of the territory and not the territory the destiny of the people."⁵⁰

(44) See Pleadings, CR.75/31, pp.25-32 and 36-39.

(45) See Judge Dillard, ICJ Reports, 1975, pp.12, 120.

(46) Judge Nagendra Singh declared that "even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people - the very sine qua non of all decolonisation", *ibid*, p.81. See also Judge Boni, *ibid*, pp.173-4. Note in particular, the court's approach, *ibid*, pp.34-7. See further *infra*, p.285.

(47) *Ibid*, p.33. See also *ibid*, p.68.

(48) But cf. Judge Ammoun *ibid*, pp.99-100.

(49) *Ibid*, p.81.

(50) *Ibid*, p.122. The same phrase was in fact used by Ambassador Bedjaoui, Pleadings, CR.75/31, p.15. However, since the people of a non-self-governing territory must make the determination as to its future political status within the confines of the territory as colonially defined, there is an argument for saying that in a sense it is the territory which determines the destiny of the people.

II The Nature of the "Self" and Territory

The relevant instruments of the UN have consistently referred to the application of self-determination to "all peoples". Accordingly, some discussion of a "people" is merited. Sociological discussions of the nature of a people centre around certain common characteristics, which are reinforced by an awareness of a distinct consciousness. Deutsch writes that by "peoples" one means groups of individuals bound together by certain complementary habits and characteristics, including language, customs and history.⁵¹ Scelle noted that the term indicated that legal rights "may be exercised collectively by any group of nationals of a State without further prerequisites as regards such group than that of the common wish of the individuals of which it is composed",⁵² while Cobban held that "any territorial community, the members of which are conscious of themselves as members of a community and wish to maintain the identity of their community, is a nation."⁵³ Although this may be acceptable as a guideline in socio-political theory, it does not necessarily follow that the same concepts should govern the legal definition of a people, since the additional perspective of an international community founded upon the basis of a finite number of territorially based entities called States is involved. This extra factor argues for certainty and stability in the process of State formation as in the protection of the integrity of existing States.

(51) Op.cit. p.78. See also Wright, A Study of War, 1942, pp.998-9.

(52) Op.cit. p.259.

(53) Op.cit. p.107. Emphasis in original. Claude writes that "nationality is in essence a subjective phenomenon ... a group of people constitute a nation where they feel that they do ... there is no uniform or necessary pattern of objective factors whence national feeling is derived or in which it manifests itself", National Minorities: An International Problem, 1953, p.2. See also Greco-Bulgarian Communities case, PCIJ, Series B, no.17, p.21.

Part of the problem lies in the confusion of terminology apparent in Article 1 (2) of the UN Charter. This called for "friendly relations among nations based on ... self-determination of peoples", and the question arose as to whether these terms were interchangeable. Certain delegates to the Commission on Human Rights replied in the affirmative,⁵⁴ but others emphasised that "peoples" was wider than "nations" since it could comprise all or part of the population of a State or indeed the inhabitants of several States.⁵⁵ However, by referring to "nations" in Article 1 (2), the Charter in essence concerned with States, since this would provide the only likely explanation of Article 1 (4), whereby the UN was to be "a centre for harmonising the actions of nations in the attainment of ... common ends.

A trend emerged in later discussions in favour of restricting the notion of "peoples" to the inhabitants of a particular State or colony, that is to clearly defined political units.⁵⁶ Johnson regarded the use of the term as signifying the desire to ensure that a narrow application of "nations" would not prevent the extension of the principle of self-determination to peoples who might not yet qualify as nations.⁵⁷ However, such discussions failed to reach a clear conclusion and one must turn to State practice to determine the juridical definition of a people.

(54) See eg. the Haiti delegate, A/C.3/SR.444 para.40.

(55) Eg. the UK delegate, *ibid*, paras. 24 and 25.

(56) See A/7326, p.61.

(57) Self-determination Within the Community of Nations, 1967, p.55. The Indian delegate to the Commission on Human Rights declared that if an ethnic group claiming to be a minority was actually a people, it would succeed in obtaining its independence whether or not its right to do so was recognised, A/C.3/SR.651, para.4. Emerson noted that all too frequently the determination as to whether a people was involved was made after the fact, From Empire to Nation, 1960, p.90.

In Europe, the principle of self-determination centred around recognised nations such as the Magyars, Germans, Poles and Italians, the aim being to create a sophisticated political structure upon the basis of the nation and thus to ensure the emergence of the nation-State and the demise of the multi-national empires. As Cobban noted, "the history of self-determination is a history of the making of nations and the breaking of States".⁵⁸ In actual fact, very few of the colonial borders in Africa coincided with ethnic lines. Each territory tended to contain a multitude of different tribal groupings and each border to split tribes amongst different administrative authorities. For example, the frontiers of Ghana cut through the areas of seventeen major tribes.⁵⁹ The Bakongo Kingdom was partitioned between the Belgian Congo, the French Congo and Portuguese Angola, while the Ewes were to be found in the British Gold Coast, British Togoland and French Togoland. On the other hand, Kenya included over 200 tribes and Nigeria comprised hundreds of separate groups.⁶⁰ All this has meant that in Africa, with few exceptions, one could not establish a newly independent State emerging from within colonially drawn frontiers upon the basis of a unified ethnic self.

Mazrui has attempted to get around this problem by stressing the notion of "pigmentational self-determination" as the basis for sovereignty in Africa. He has written that "the right to sovereignty was not merely

(58) Op.cit. pp.42-3.

(59) Zartman, International Relations in the New Africa, 1966, p.108.

(60) Yakemtchouk, L'Afrique en Droit International, 1971, pp.70-72.

for nation-States recognisable as such in a Western sense, but for 'peoples' recognisable as such in a racial sense, particularly where differences of colour were manifest."⁶¹ This approach leads to the notion of "racial sovereignty" rather than national sovereignty in discussions of self-determination problems in the States of Africa and Asia. However, it confuses more than it elucidates, for it appears to ignore questions of domination by one people over another of the same race and the dilemma of secession. It has also been contradicted in State practice, in cases of the alleged denial of self-determination to a minority racial group within an independent State, as for example in Southern Sudan.⁶² Mazrui thesis can also lead to severe definitional problems with respect to "pigment" and "race". In any event, it is far too simplistic as a legal tool for analysing the nature of self-determination in Africa.

Umozurike defines the concept of "people" for the purposes of self-determination in very wide terms indeed. He notes that "the legitimate 'self' ... is a collection of individuals having a legitimate interest which is primarily political, but may also be economic, cultural or of any other kind"⁶³ and continues by stating that "individuals, as peoples, are entitled to exercise rights and enjoy a commensurate share in determining their political, cultural and economic future".⁶⁴ To reconcile this broad approach with reality, he is impelled on the one

(61) Towards a Pax Africana: A Study of Ideology and Ambition, 1967, pp.14, 33-4 and "Consent, Colonialism and Sovereignty" 11 Political Studies, 1963, p.48. Cf. Kamanu, "Secession and the Right of Self-Determination: An OAU Dilemma" 12 JMAS, 1974, p.355.

(62) See *infra*, Chapter 5, p.322.

(63) Self-determination in International Law, 1972, p.195.

(64) *Ibid.*

hand to extend the concept of self-determination to include self-government, local autonomy, merger, association and other forms of participation in government⁶⁵ and on the other to declare that the mere assertion of a right to self-determination does not ipso facto make the claim a question of self-determination in international law.⁶⁶ It is a matter of degree depending upon all the circumstances of the case particularly the seriousness of the "abuse of sovereign power, to the detriment of a section of the population".⁶⁷ In other words, whether the claim is one of international law appears to be dependent upon a prior contravention of the principle by the government complained of, ie. the legal right of self-determination arises upon the abuse of the political principle of self-determination. It is clear that this approach confuses the political and legal principles and appears also to misunderstand the nature of self-determination as developed through international practice. Part of the problem may have occurred because of the linking of self-determination of peoples with individual human rights in the world community, something which tended to downgrade the importance of human rights by the focus upon self-determination as a fundamental human right.

In determining the nature of the "self" in self-determination, it must be realised that the relevant definition of "peoples" is not the sociological one but the legal one. There is a difference and upon that difference the legal concept of self-determination is predicated. The

(65) Ibid, pp.3, 192.

(66) Ibid, p.196.

(67) Ibid. The quotation is from the Aaland Islands case, LNOJ Suppl. no.3, 1920, p.5.

International Court has pointed to this by noting that the fact that the General Assembly has not consulted the inhabitants of a particular territory in relation to self-determination may be due to the consideration that "a certain population did not constitute a 'people' entitled to self-determination".⁶⁸ International instruments have consistently maintained that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the UN Charter⁶⁹ and this would appear to rule out the right of secession from an independent State. In addition, practice reveals that not every "people" is deemed to have the right in law of self-determination. The legal concept of self-determination is founded upon a particular definition of the "self" that has emerged in doctrine and in practice and this definition is centred upon the non-self-governing territories (and the mandated and trust territories as well). Whether or not the political concept has been infringed may be relevant in a broad political sense, but it has no bearing upon the legal issue. The concept of self-determination has been the legal instrument in the process of ending colonialism.⁷⁰

An early attempt to extend the doctrine of self-determination in international law to all countries occurred in the so-called "Belgian thesis". This was a move spearheaded by the Belgians to widen the obligations under Chapter XI of the Charter to include "colonial situations" within independent States. As was noted, many States oppress groups within

(68) ICJ Reports, 1975, pp.12, 33. See also Judge Dillard, *ibid*, p.121.

(69) See eg. para.6 of resolution 1514 XV; the 1970 Declaration on Principles (res. 2625 (XXV)) and Article III (3) of the OAU Charter.

(70) Judge Quintana characterised the mood of the present period as "the age of national independence", ICJ Reports, 1960, p.95.

their own frontiers by a variety of discriminatory measures and there seemed to be no reason, it was argued, why such groups could not count as "peoples [who] have not yet attained a full measure of self-government."⁷¹ However, this proposition was strongly rejected by the non-colonial powers, who argued that the term "non-self-governing territories" clearly referred to entities distinct from the metropolitan State.⁷²

The terms in which UN resolutions have been expressed have also manifested the rejection of the Belgian thesis. Resolution 1514 (XV), the Colonial Declaration, emphasised the necessity to end colonialism and called for immediate steps to be taken in non-independent territories to transfer power to the people, while resolution 1541 (XV) noted that "the authors of the Charter ... had in mind that Chapter XI should be applicable to territories which were then known to be of colonial type" and declared that "prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." To make the point even clearer, the 1970 Declaration on Principles of International Law (resolution 2625 (XXV)) stipulated that "the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of

(71) UN Charter, Article 73. See The Sacred Mission of Civilisation: The Belgian Thesis, 1953; Toussaint, "The Colonial Controversy in the United Nations" 10 YBWA, 1956, pp.177-9; Kunz, "Chapter XI of the United Nations Charter in Action" 48 AJIL, 1954, p.109 and Nawaz, "Colonies, Self-government and the United Nations" 1 Indian Yearbook of World Affairs, 1962, p.3. See also A/AC.58/1 pp.3-14 and A/AC.67/2 pp.3-31.

(72) See eg. GAOR, 7th Session, 4th Committee, 254th meeting, paras. 5, 7 and 8; *ibid*, 258th meeting paras. 24, 40 and 41; *ibid*, 255th meeting paras. 31, 39 and 40; *ibid*, 257th meeting, paras. 5 and 58; *ibid* plenary, 402nd meeting, para. 134 and *ibid* 8th session, 4th committee, 327th meeting, para. 2. Note that Article 74 of the Charter distinguishes between "the territories to which this Charter applies" and "their metropolitan areas". See also Yearbook of ILC, 1949, p.73.

the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter."⁷³ In practice, the call for self-determination and independence has been limited to the colonial situation, encompassing mandate, trust and non-self-governing, territories.⁷⁴ Accordingly, the problem of defining a "people" which so engrossed UN delegates in 1950's in particular⁷⁵ resolved itself for legal purposes in a territorial sense.⁷⁶ A people in a sociological sense would only be accepted as a people in legal terms for the purposes of self-determination if it inhabited a particular type of territory.⁷⁷ The distinction between trust and non-self-governing territories was fundamental in the UN Charter, with differing provisions for each and emphasis upon the former, but it has been of decreasing importance in practice. The call for self-determination has been made regarding both types of territory and the right has been accepted as being equally applicable to both.⁷⁸ State practice reveals that the clarification of the "self" has

(73) The USA argued unsuccessfully in 1961 for the Colonial Declaration to be used in non-colonial situations, see GAOR, 16th Session, 4th Committee, 1175th meeting, para. 35.

(74) But see eg. resolutions 2535B (XXIV) and 2627C (XXV) as regards Palestine and infra p.257 with respect to South Africa.

(75) See eg. GAOR, 6th Session, 3rd Committee, 364th, 366th and 371st meetings and ibid 447th, 449th, 451st and 452nd meetings; and ibid, 7th Session, 3rd Committee, 444th, 445th and 446th meetings.

(76) See the Indonesian delegate, GAOR, 7th Session, 3rd Committee, 451st meeting, para. 11.

(77) Whether or not a territory was non-self-governing depended in the last resort upon the UN. In the cases of Algeria and Oman, the General Assembly upheld the right of self-determination even though these territories were not officially non-self-governing.

(78) See ICJ Reports, 1971, pp.16, 31.

been made in clear territorial terms and within a particular temporal framework, ie. in terms of pre-independent territories. The former proposition will be examined in the light of practice relating to Africa in the following section, and the latter in the following Chapter.

III The Spatial Factor - State Practice

The determination of the self in terms of a defined territorial framework raises the question also as to the inviolability of the territorial unit as colonially determined prior to independence, since the date at which the territorial "self" crystallises is of crucial importance.

(a) Namibia (South-West Africa)⁷⁹ - South-West Africa was awarded to the Union of South Africa as a mandated territory after the First World War under the League of Nations system.⁸⁰ In 1946, the League adopted a resolution recommending the termination of its functions as regards mandated territories and noting that Chapters XI, XII and XIII of the United Nations Charter corresponded to Article 22 of the Covenant of the League, which had dealt with the creation of the mandate system.⁸¹ Following this recommendation and the dissolution of the League, the UN

(79) See in particular Dugard, The South-West Africa/Namibia Dispute, 1973; Slonim, South-West Africa and the UN; An International Mandate in Dispute, 1973, and Wellington, South-West Africa and Its Human Issues, 1967.

(80) For details of the mandate agreement see Dugard op.cit. pp.72-4. See also Alexandrowicz, "The Juridical Expression of the Sacred Trust of Civilisation" 65 AJIL, 1971, p.149. South Africa tried to incorporate South-West Africa as the fifth province of the Union with the support of the all-white South-West Africa Assembly, see League of Nations Doc. C.489M.214 (1934) 50, but this was declared contrary to the principles of the mandate and rejected by the Permanent Mandates Commission, see PMC Minutes 1925, pp.59, 60 and 61.

(81) 21st Ordinary Session, Report of the 1st Committee, pp.5-6. See also Umozurike, "International Law and Self-Determination in Namibia" 8 JMAS, 1970, pp.585-603.

requested that South-West Africa be placed under the trusteeship system⁸² and rejected South African proposals to incorporate the territory into the Union of South Africa.⁸³ The issue was eventually referred to the International Court⁸⁴ which held that South Africa alone was not competent to modify the international status of the territory. That competence rested with South Africa acting with the consent of the UN.⁸⁵ Liberia and Ethiopia as the two black African member-States of the League sought a declaration from the court that South Africa had broken the terms of the mandate and was thus in breach of international law.⁸⁶ The court decided in 1962 that it had jurisdiction to decide the case on its merits,⁸⁷ but in 1966 it held that individual League members had no locus standi to sue the mandatory power in respect of its treatment of the inhabitants of the mandated territory and dismissed the case.⁸⁸ The problem then reverted to the political organs of the United Nations.

One of the primary objectives of the UN in this situation has been to preserve the territorial integrity of South-West Africa and prevent

(82) Resolution 61 (I). See also resolutions 141 (II), 227 (III) and 449B (V).

(83) Resolution 65 (I).

(84) Resolution 338 (IV).

(85) ICJ Reports, 1950, p.128.

(86) See resolutions 1143A (XII) and 1361 (XIV) in which the General Assembly pointed out the legal action provided for in a joint reading of Article 7 of the mandate agreement and Article 37 of the ICJ Statute. The action to take legal proceedings was commended in resolution 1565 (XV). See Falk, "The South-West Africa cases: An Appraisal" 21 International Organisation, 1967, p.7; Higgins, "The International Court of Justice and South-West Africa", 42 International Affairs, 1966, p.573 and Green "The United Nations, South-West Africa and the World Court" 7 IJIL, 1967, p.491.

(87) ICJ Reports, 1962, p.318.

(88) ICJ Reports, 1966, p.6.

South Africa annexing or partitioning it. Assembly resolution 65 (I) firmly rejected any attempt at annexation and this was reinforced by the stand of the International Court in 1950, when the principle of non-annexation was declared to be of paramount importance. However, over the years, South Africa has sought to divide the territory on racial and tribal grounds on a number of occasions. In 1958, the Good Offices Committee, established by the Assembly the previous year,⁸⁹ issued its report in which it suggested that some form of partition of the territory involving annexation of part by South Africa and the establishment of a trusteeship over the remainder might provide the basis for an agreement with South Africa.⁹⁰

This was quickly rejected by the General Assembly,⁹¹ which called for full discussion for an agreement "which would continue to accord to the mandated territory of South-West Africa as a whole an international status."⁹² In 1961, the Assembly proclaimed "the inalienable right of the people of South-West Africa to independence and national sovereignty" and established a UN Special Committee for South-West Africa.⁹³ However, the government of South Africa proceeded with preparations to divide the territory. The report of the Odendaal Commission was tabled early in 1964 and advocated a series of ten separate homelands for the Africans,

(89) Resolution 1143 (XII).

(90) A/3900.

(91) Resolution 1243 (XIII).

(92) Ibid, para.2. Emphasis added. Since South Africa was not prepared to consider UN supervision of the territory nor the UN to accept partition, there was no basis for an agreement, see Report of the Good Offices Committee, 1959, A/4224, para.16.

(93) Resolution 1702 (XVI). See also resolution 1596 (XV).

three coloured townships and a white area.⁹⁴ However, the bulk of the industrial and mineral wealth would be situated within the European areas.⁹⁵ In discussions before the UN Special Committee against Apartheid, it was reported that the objective of the plan "was seen to be to divide the territory on tribal lines, create bantustans with small populations and integrate the territory more closely with the Republic (of South Africa)."⁹⁶ The South Africa government in a White Paper of April 1964 accepted the report and endorsed the view that "it should be the aim as far as practicable to develop for each population group its own homeland in which it can attain self-determination and self-realisation."⁹⁷

This view was not accepted by the UN, which strove to emphasise the territorial integrity of South-West Africa. The Odendaal report was criticised by the Special Committee on Decolonisation as a device to prolong the control of the South African authorities⁹⁸ and condemned by the General Assembly in 1965.⁹⁹ In 1966, following the decision of

(94) Report of the Commission of Enquiry into South-West African Affairs, 1962-3, 1964, Pretoria. See D'Amato, "The Bantustan Proposals for South-West Africa" 4 JMAS, 1966, p.177. See also A/AC.109/L.108.

(95) The allocations were as follows:- 312,433 sq. kilometres for 424,047 Black Africans, 14,785 sq. kilometres for 23,965 coloureds and 495,927 sq. kilometres for 73,464 whites (including government lands). 1960 population figures. See Odendaal Report, tables A, B and C, pp.109, 111, tables XI, XVIII and XIX at pp.29, 39 and 41. See also D'Amato loc.cit. p.181 and Africa Research Bulletin, February, 1964, p.27.

(96) Africa Research Bulletin, March 1964, p.42.

(97) See Kahn, Annual Survey of South African Law, 1964, pp.41-3.

(98) UNMC June, 1964, pp.33 et.seq.

(99) Resolution 2074 (XX).

the International Court, the Assembly adopted a resolution reaffirming the inalienable right of the people of South-West Africa to self-determination, freedom and independence and proclaiming that the territory had an international status which it would retain until independence.¹⁰⁰ The resolution reaffirmed the applicability of resolution 1514 (XV) and terminated the mandate. The intention was that thenceforth South-West Africa would come under the direct responsibility of the UN, and to this end an ad hoc Committee for South-West Africa was established.¹⁰¹

In resolution 2248 (XXII), the Assembly re-emphasised the "territorial integrity of South-West Africa" and the right of its people to freedom and independence in accordance with the UN Charter, resolution 1514 (XV) and all other resolutions concerning the territory. A UN Council for South-West Africa of 11 members was established to exercise various powers and functions.¹⁰² The Assembly declared in resolution 2325 (XXII) that South Africa's continued presence in the territory was a "flagrant violation of its territorial integrity and international status as determined by General Assembly resolution 2145 (XXI)."¹⁰³ However, in 1968, the South African parliament adopted the Development of Self-Government for Native Nations in South-West Africa Act, which was intended to implement the Odendaal report¹⁰⁴ and accordingly the Act established

-
- (100) Resolution 2145 (XXI). Adopted by 114 votes to 2 (South Africa and Portugal), with 3 abstentions (France, Malawi and UK).
- (101) See as to the legality of the resolution and the question of the Assembly's competence eg. Crawford, "South-West Africa: Mandate Termination in Historical Perspective" 6 Columbia Journal of Transnational Law, 1967, p.91; Higgins, "The International Court and South-West Africa: The Implications of the Judgement" 8 Journal of the International Commission of Jurists, 1967, p.3 and Dugard, "The Revocation of the Mandate for South-West Africa" 62 AJIL, 1968, p.78.
- (102) UNMC July 1967, p.87; *ibid*, August-September 1967, pp.39-40 and *ibid* November 1967 pp.28-30. See A/6640. See also Herman, "The Legal Status of Namibia and of the United Nations Council for Namibia" 13 Canadian Yearbook of International Law, 1975, p.306.
- (103) UNMC January 1968, pp.62-7.
- (104) See Dugard *op.cit.* pp.431-3.

certain areas for the different nations and provided for various administrative machinery in each homeland. In pursuance of this policy, legislative and executive councils were created between 1968 and 1972 for the Ovambos, Kavangos and the inhabitants of the Eastern Caprivi.¹⁰⁵ In April 1968, the Assembly resolved to change the name of the territory to Namibia and condemned the Pretoria government for consolidating its illegal control and destroying the unity of the people and the territorial integrity of the country.¹⁰⁶ Following the Development of Self-Government Act, the Assembly adopted a resolution attacking South Africa for destroying the territorial integrity of Namibia.¹⁰⁷ At this point, the Security Council by resolution 264 (1969) recognised the termination of the mandate by the General Assembly and declared that the actions of the South African government "designed to destroy the national unity and territorial integrity of Namibia through the establishment of bantustans are contrary to the provisions of the United Nations Charter." By resolution 269 (1969), the Council declared that the continued occupation of Namibia by South African authorities constituted an "aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia." It also called upon South Africa to withdraw its administration from the territory immediately.¹⁰⁸

(105) Ovamboland Legislative Council Proclamation no. R291, GGE no. 2177 (Reg. Gaz. no. 1025); Kavango Legislative Council Proclamation R196, GG 2770 (Reg. Gaz. no. 1313) and Eastern Caprivi Legislative Council Proclamation R6 GG 3373 (Reg. Gaz. no. 1566). See Dugard op.cit. pp.434-5. See also the Caprivi Constitution Proclamation, Africa Research Bulletin March 1976, p.3975.

(106) Resolution 2372 (XXII).

(107) Resolution 2403 (XXIII).

(108) See also resolution 276 (1970).

By resolution 284 (1970), the Council requested an advisory opinion from the International Court on the legal consequences for States of the continued presence of South Africa in Namibia. In its opinion,¹⁰⁹ the court emphasised that the principle of self-determination was applicable to all non-self-governing territories¹¹⁰ by virtue of the "subsequent development of international law", in particular resolution 1514 (XV) and the subsequent independence of all but two of the trust territories.¹¹¹ The opinion of the court was that the continued presence of South Africa in the territory was illegal and should be terminated. UN members were obliged to recognise this illegality and refrain from actions and declarations implying recognition or lending support to such presence and administration.¹¹² The opinion was approved by the Security Council in resolution 301 (1971), which also reaffirmed the national unity and territorial integrity of Namibia and condemned all measures by the government of South Africa to destroy that unity and integrity, including the establishment of bantustans.

South Africa, however, continued to maintain its policy of separate development with the proposed partition of the territory into separate black and white States.¹¹³ In 1973, the South African Foreign Minister

-
- (109) ICJ Reports, 1971, p.16.
- (110) Ibid p.31. See also ICJ Reports, 1975, pp.12, 31-3.
- (111) ICJ Reports, 1971, pp.16, 31. Papua-New Guinea became independent in 1976.
- (112) Ibid p.58. The court declared that the decisions of the Security Council declaring South Africa's presence in Namibia illegal (ie. resolutions 264 (1969), 269 (1969) and 276 (1970)) were in accordance with Articles 24 and 25 of the Charter and "consequently binding on all States members of the United Nations." *ibid*, p.53. See Higgins, "The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?" 21 ICLQ, 1972, p.27.
- (113) See the proposals of the Commissioner-General for Indigenous Peoples of South-West Africa, *Africa Research Bulletin*, October 1974, p.3406. The possibility was also suggested of the Ovambos of Angola and Namibia uniting to form a State, *ibid*. See also *Africa Research Bulletin* January 1975, p.3511.

appeared to suggest that Namibia might become independent in about ten years,¹¹⁴ while the UN continued to adopt resolutions proclaiming the right of the people of the territory to self-determination and independence and reaffirming the national unity and territorial integrity of Namibia, as well as criticising the bantustan proposals.¹¹⁵

In 1975, a Constitutional Conference opened in Windhoek in Namibia with delegates from 11 ethnic groups, but without the participation of SWAPO, the UN-recognised national liberation movement.¹¹⁶ The aim was to establish a multi-racial government to run the territory until independence, which was intended to be the end of 1978, according to a committee of the conference.¹¹⁷ The conference ended in the spring of 1977, with proposals for a draft constitution with a three-tier system based on ethnicity, not on separate bantustans. The principle of the territorial integrity of Namibia was thus accepted by the South African supported conference.¹¹⁸ However, the ethnically based proposals were rejected by the UN Council for Namibia, which reiterated its support for the struggle of the people under SWAPO's leadership to achieve self-determination and independence and called upon

(114) See UNMC May 1973, pp.39-40 and 59-60.

(115) See eg. Security Council resolutions 323 (1972) and 385 (1976) and Assembly resolutions 3031 (XXVII) and 3111 (XXVIII).

(116) Africa Research Bulletin, September 1975, p.3769. See also *ibid*, March 1976, pp.3973-4.

(117) *Ibid*, August 1976, p.4136. This was rejected by the UN Council for Namibia and by SWAPO, *ibid*, pp.4136-7.

(118) *Ibid*, January 1977, p.4301 and *ibid* March 1977, pp.4370-1. Of the 60 seat proposed Assembly, 12 would go to Ovambos, 6 to whites and 4 or 5 proportionately to 9 other groups, *ibid*, February 1977, p.4336. See also S/12180.

the Security Council to take action.¹¹⁹ In resolution 31/146, the General Assembly criticised the convening of the conference as an attempt by South Africa to "perpetuate its colonial exploitation of the people" and impose upon the people a "bogus constitutional structure aimed at subverting the territorial integrity and unity of Namibia." This resolution also expressed support for the armed struggle of the people, led by SWAPO, to achieve self-determination, freedom and independence in a united Namibia. The International Conference in Support of the Peoples of Zimbabwe and Namibia held in Maputo, Mozambique, in May 1977 rejected all attempts by South Africa to dismember the territory of Namibia.¹²⁰ The plan for an interim administration on multi-ethnic lines as envisaged by the Windhoek conference was, however, abandoned by South Africa and Judge Steyn appointed instead as Administrator-General for Namibia during the transition period.¹²¹ Assembly resolution 32/9D reaffirmed the terms of resolution 31/146, in particular as regards the need for maintaining the territorial integrity of Namibia.¹²²

In the spring of 1978, South Africa announced its acceptance of western proposals¹²³ for a settlement in Namibia involving a UN peace-

-
- (119) UNMC August-September 1976, pp.26-7. See also S/12185. The EEC stated that these Turnhalle talks held at Windhoek were not representative without the participation of SWAPO, Africa Research Bulletin, February 1977, pp.4336-7. SWAPO was effectively barred by the ban on non-white political parties, UNMC August-September 1976, p.27.
- (120) Ibid June 1977, pp.41-8. See also Africa Research Bulletin, May 1977, pp.4418-21.
- (121) Ibid June 1977, pp.4471-2 and ibid July 1977, p.4516.
- (122) See also resolution 32/42, and the Declaration of Lusaka by the UN Council for Namibia, A/S-9/2-S/12631.
- (123) The western proposals may be seen in ILM, May 1978, pp.762-9. They involved a reduction in the number of South African troops in the territory, the entry of SWAPO personnel and a UN supervised election for a constituent assembly.

keeping force.¹²⁴ However, concern for the territorial integrity of Namibia was evident in the Ninth special session of the General Assembly,¹²⁵ and in resolution S-9/2 containing the Declaration on Namibia and a Programme of Action, South Africa was urged to respect the integrity of the territory. Namibia was declared to be the direct responsibility of the UN until genuine self-determination and independence and the mandate given to the Council for Namibia as the legal Administering Authority until independence was reaffirmed. In September 1978, however, South Africa rejected key parts of the Western proposals regarding the number of UN troops to be stationed in Namibia and stated its intention to conduct its own elections in the territory.¹²⁶

It was ultimately accepted by all parties that the territorial integrity of Namibia prior to independence was to be maintained and that the appropriate "self" for the exercise of self-determination was to be defined in terms of a united territory of Namibia. It could be argued that Namibia as a mandated territory was a special case in this respect, but practice seems to show that the same principle operates with respect to other non-self-governing territories.¹²⁷

(b) Pre-Independent Kenya and Somali Claims for Self-Determination¹²⁸ -
Any examination of the Kenya colony and protectorate in relation to its

-
- (124) Africa Research Bulletin, April 1978, p.4829. SWAPO accepted the proposals on July 12th, *ibid* July 1978, p.4935.
- (125) See the report of the debates in UNMC June 1978, pp.49-106.
- (126) Africa Research Bulletin, September 1978, pp.4999-5002.
- (127) The question of Walvis Bay, although linked to the issue of the territorial integrity of Namibia by UN resolutions, is a special one and will be examined *infra*, p.250.
- (128) See generally, McEwan, International Boundaries of East Africa, 1971; Drysdale, The Somali Dispute, 1964; Touval, Somali Nationalism, 1963; Castagno, "The Somali-Kenyan Controversy" 2 JMAS, 1964, p.165 and Lewis, "The Problem of the Northern Frontier District of Kenya" 5 Race, 1963, p.48.

minority Somali population must centre on the strong desire to maintain the territorial integrity of the colony that was clearly manifested both by the British administration and by the colony's emerging African rulers.¹²⁹

The Northern Frontier District (NFD) of Kenya consisted in 1962 of some 102,000 sq. miles in six administrative areas and a population of 388,000, including approximately 240,000 Somalis.¹³⁰ These people had gradually migrated southwards over the years and displaced the majority of the Galla tribes, themselves representatives of an earlier Hamitic invasion.¹³¹ In the years preceding 1939 there were many disputes between those of Somali origin and the non-Moslem Gallas which necessitated much stricter military control than was exercised in southern Kenya. After the Second World War, there were increasing signs of Somali nationalism and with the creation of the Somali republic in July 1960, the Somalis of the NFD began demanding the right to secede from the Kenyan colony and join their brethren.¹³² The British Prime Minister, however, declared in April 1960 that "Her Majesty's Government does not and will not encourage or support any claim affecting the territorial integrity of French Somaliland, Kenya or Ethiopia. This is a matter which could only be considered if that were the will

(129) This was mitigated to some extent by the cession of the Jubaland province to Italy from Kenya by the Anglo-Italian Treaty of 1924 as a reward for Italian participation in the First World War in accordance with the 1912 Treaty of London, see McEwan, *op.cit.*, pp.117-9. However, it is argued that the critical period is the period prior to independence, thus excluding territorial changes made decades before independence from our thesis.

(130) See the Report of the NFD Commission, cmnd. 1900. 1962, Appendix D.

(131) See Lewis, "The Somali Conquest of the Horn of Africa" 1 *Journal of African History*, 1960, p.213.

(132) Castagno, *loc.cit.*, pp.173-6.

of the Governments and peoples concerned."¹³³ This clearly appeared to define such "governments and peoples" in terms of the whole of the territories involved and not parts of them.

Nevertheless, a delegation from the NFD consisting of pro-secessionist members was invited to the Kenyan Constitutional Conference in London in 1962. They requested autonomous status for the area so that upon Kenya's independence it could join the Somali Republic.¹³⁴ A United Nations plebiscite in the area was suggested, but the idea was rejected. However, a commission was appointed to discover the views of the area's population to various constitutional proposals.¹³⁵ This Commission reported that the majority of the population supported the secessionist approach.¹³⁶ But at the same time, the Regional Boundaries Commission visited the area and a new system of regions was proposed for Kenya, which would split the NFD into three regions; the north-eastern region and parts of the eastern and coast regions. The Commission declared that they would have preferred to see a separate Somali district, but had been precluded from suggesting this. This

(133) 621 House of Commons Debates 55, Written Answers, cols. 104-5.

(134) Report of the Kenyan Constitutional Conference, cmd. 1700 p.11. It was claimed that as well as being historically, ethnically and culturally distinct, the NFD had always been governed as a separate entity, with its own laws and courts and with special passes needed to enter the rest of Kenya, see The Issue of the NDF, White Paper issued by the Government of Somalia, 1963, pp.15-16.

(135) Castagno, loc.cit., p.176.

(136) Report of the NFD Commission, cmd. 1900. The split was basically on Moslem/non-Moslem lines. The Commission consisted of a Nigerian lawyer and a Canadian major.

impelled Somalia to break off diplomatic relations with the UK in March 1963,¹³⁷ and ultimately to pledge non-co-operation by Somali leaders in the NFD with Kenyan authorities.¹³⁸ It was also disclosed that the British Prime Minister's statement of April 1960 had been interpreted by the British authorities as "precluding any cession of Kenyan territories so long as Her Majesty's Government are responsible for Kenya."¹³⁹ This approach appeared to allow for secession upon independence, but that, of course, depended on the attitude of the Kenyan leaders who were strongly opposed to any re-adjustment of its frontiers. In a memorandum on the Somali question submitted by the Kenyan delegation to the Addis Ababa summit conference of 1963 (prior to Kenyan independence), it was emphasised that "the principle of self-determination has relevance where foreign domination is the issue. It has no relevance where the issue is territorial disintegration by dissident citizens."¹⁴⁰

This case demonstrates the supremacy of the principle of the unity of the colonially defined territories, even when faced with an accepted majority preference by a distinct group in a defined area for secession as the logical expression of self-determination. Ethnic identity was

(137) Drysdale op.cit. p.145.

(138) Ibid pp.157-8 and Castagno loc.cit. p.180.

(139) In a Somali press communique of August 29, 1963, after the abortive Rome conference with Britain, quoted in Drysdale op.cit. p.133.

(140) Pan-African Unity and the NFD Question in Kenya, May 1963, quoted in Emerson, Self-Determination Revisited In the Era of Decolonisation, 1964, pp.35-6. Note also the Report of the Commission on the Problem of the Kenya Coastal Strip, which recommended integration with Kenya because inter alia it would provide no precedent for the disintegration of Kenya and would avoid the creation of boundary problems, Keesings Contemporary Archives, pp.19403 and 19741.

not to disturb the integrity of the colonially established territory. Kenya became independent on 12 December 1963 and in October 1964, it abolished the regions and became a unitary State.¹⁴¹

(c) British Togoland¹⁴² - The situation in this case revolved around the division of the Ewe people amongst the British administered Gold Coast and the British Togoland and French Togoland trust territories.¹⁴³ By the early 1950's, the Ewe problem had become linked with the proposed unification of the two Togolands. The General Assembly unequivocally recognised this as an ethnic issue and declared that, "the unification of the two Togolands is the manifest aspiration of the majority of the population of both trust territories."¹⁴⁴ The complicating factor was that British Togoland was administered together with the Gold Coast and this impelled the British authorities to regard an all-Ewe solution with some disfavour. The General Assembly sent a Special Mission¹⁴⁵ to British Togoland which recommended¹⁴⁶ the division of the area into four units for the purpose of a plebiscite. The UK

- (141) Note that prior to the independence of Kenya and Tanganyika, a delegation from the Masai tribe split between the two territories requested the UK to remain in Masailand after Kenyan independence. The petitioners were also seeking the unification and independence of the Masai lands, see McEwan op.cit. p.149.
- (142) See Coleman, Togoland, International Conciliation, 1956, no.509 and Rigo Sureda, The Evolution of the Right of Self-Determination, 1973, pp.151-63.
- (143) By resolution 441 (V), the General Assembly stressed the importance of the problem and requested a solution by the administering authorities in accordance with the wishes of the people concerned. The All-Ewe Conference had petitioned the UN Trusteeship Council in 1947 over the division of the Ewe people, see Rigo Sureda, op.cit., p.15.
- (144) Resolution 652 (VII).
- (145) Resolution 860 (IX).
- (146) T/1218, p.16, essentially dividing the territory into Ewe and non-Ewe areas.

opposed this as failing to accord with democratic practice which had to be manifested in terms of majority opinion throughout the country as a whole,¹⁴⁷ and declared that if this were to be followed elsewhere the result could be "none other than the break-up of viable political and economic units and the frustration of true constitutional progress."¹⁴⁸ The argument was put that in view of the diversity of the people in the territory the only fair assessment would be by plebiscites by area¹⁴⁹ but this was overwhelmingly rejected.¹⁵⁰

The Assembly decided in favour of treating British Togoland as a unit and by resolution 944 (X) called for a UN sponsored plebiscite to ascertain the wishes of the majority of the population. The results of the plebiscite held in May 1956 showed a majority in favour of union with the Gold Coast, although over half the votes in the southern part of the territory were against such a union. The result was endorsed by the Assembly, which subsequently approved of the union of British Togoland with the Gold Coast.¹⁵¹ Subsequent elections held in July 1956 in the Gold Coast and Togoland revealed a large majority in favour of integration and this was clearly of importance as regards the correctness of the plebiscite decision. The UN Plebiscite Commissioner declared that "the fate of the plebiscite was bound up with the results of the general election"¹⁵² and stressed the point in his report.¹⁵³ The

(147) Ibid p.62.

(148) Ibid. See also Rigo Sureda op.cit., p.157.

(149) GAOR 10th Session, 4th Committee, 539th meeting, para.71 (Venezuela) and ibid 544th meeting, para.46 (Togoland Congress).

(150) Ibid 536th meeting, para.39; ibid 537th meeting para.18; ibid 538th meeting para.16; ibid 537th meeting paras.49 and 82 and ibid 540th meeting para.54.

(151) Resolution 1044 (XI). See also Yearbook of the UN, 1956, pp.368-70.

(152) GAOR 9th Session, 4th Committee, 562nd meeting, para.1.

(153) A/3173.

importance of these elections was underlined by the fact that when the General Assembly discussed the outcome of the plebiscite, the results of the elections were already known. The Gold Coast and British Togoland became independent in 1957 as the State of Ghana.¹⁵⁴ Thus the concept of pre-independent territorial integrity was emphasised and the relevant determination made by the majority of the inhabitants of the territory as a whole.

(d) British Cameroons¹⁵⁵ - This trust territory was administered by the UK in two parts, the northern part together with the northern region of Nigeria¹⁵⁶ and the southern part as a separate unit. This de facto partition was upheld as valid by a Trusteeship Council Visiting Mission,¹⁵⁷ which noted that the inhabitants of the northern sector were closer to their northern Nigerian neighbours than to the population of the southern part of British Cameroons who resembled the inhabitants of the French Cameroons.¹⁵⁸ Accordingly, separate determinations of the wishes of the population were recommended.¹⁵⁹ The General Assembly accepted this and requested separate plebiscites.¹⁶⁰ There was also a

- (154) Zartman, International Relations in the New Africa, 1966, p.14.
- (155) See generally Ardener, "The Nature of the Reunification of Cameroon", African Integration and Disintegration, (ed. Hazlewood), 1967, p.285. Note that Cameroun is the correct spelling of the independent French speaking republic of 1960-1, while the Cameroons applies to the pre-independent divisions of the territory, and either Cameroun or Cameroon to the unified, independent State, *ibid*.
- (156) T/1440, para.10.
- (157) Asked to visit the territory by Trusteeship Council resolution 1907 (XXII).
- (158) Report of the Visiting Mission, 1958, T/1446 and Add.1, para.16.
- (159) *Ibid* para.170. The problem had arisen because of the British announcement that Nigeria was to become independent on October 1, 1960, see GAOR 12th Session, 4th Committee, 803rd meeting.
- (160) Resolution 1350 (XIII). However, some countries had argued, unsuccessfully, that the differences between north and south Cameroons were no greater than those existing in Nigeria, Togoland and the Gold Coast and that therefore one plebiscite unit was sufficient. See GAOR 13th Session, 4th Committee, 860th meeting, para.31 and *ibid* 862nd meeting, paras.13-15. See also *ibid* 865th meeting, para.2 and *ibid* 878th meeting, para.5.

different choice to be made in each case. The north was to choose between joining Nigeria or deciding its political future at a later date,¹⁶¹ while the south was to choose between joining Nigeria or the independent republic of Cameroun.¹⁶²

The result of the plebiscite in the north revealed a majority in favour of postponing the decision,¹⁶³ an outcome which was attributed by the UN Plebiscite Commissioner to protests against inadequate local administration policies.¹⁶⁴ In the south a large majority voted for joining the republic of Cameroun.¹⁶⁵ The General Assembly decided to hold a second plebiscite in the north, the choice being restricted to joining Nigeria or Cameroun¹⁶⁶ and the result this time favoured joining Nigeria.¹⁶⁷

However, taking British Cameroons as a single unit, a majority had voted in favour of joining Cameroun¹⁶⁸ and this emphasises the importance

(161) Resolution 1350 (XIII).

(162) Resolution 1352 (XIV). See also Keesings Contemporary Archives, p.16821. The French Cameroons was proclaimed independent on January 1, 1960, *ibid*, p.17226.

(163) The actual votes were 70,546 favouring a later decision, 42,788 in favour of joining Nigeria and 526 rejected votes. Voting was by universal male suffrage, see Umozurike, Self-Determination in International Law, 1972, p.106 and Rigo-Sureda, *op.cit.*, pp.166-7.

(164) A/4314 and Add.1. See also GAOR, 14th Session, 4th Committee, 989th meeting, para.13.

(165) By 233,571 votes to 97,751, see Umozurike, *op.cit.*, p.106 and Rigo-Sureda *op.cit.* pp.166-7.

(166) Resolution 1473 (XIV).

(167) By 146,296 votes to 97,659, see Umozurike, *op.cit.*, p.106 and Rigo-Sureda *op.cit.* pp.106-7. See also Keesings Contemporary Archives, pp.17179 and 17484.

(168) Cameroun was dissatisfied with the preparations and conduct of the plebiscite in the northern part of British Cameroons and instituted proceedings before the International Court, which, however, dismissed the case, ICJ Reports, 1963, p.15.

of ascertaining the necessary "self" for the exercise of self-determination, as well as the importance of the questions asked in any plebiscite. The only valid factor differentiating the Cameroons from Togoland would appear to be the Visiting Mission's ethnic observations, coupled with the influence of the views of the administering power.¹⁶⁹ It is also to be noted that the British Cameroons was administered as two separate units. But in any event, this case does mark an exception to the general rule.

(e) Ruanda-Urundi - In 1959, the General Assembly asked the Belgian authorities of this trust territory to put forward a timetable for its independence.¹⁷⁰ This followed a series of disturbances between the rival Tutsi and Hutu tribes.¹⁷¹ Within a couple of months, a UN Visiting Mission had arrived in the territory.¹⁷² The question of independence for Ruanda-Urundi was discussed at the twenty-sixth session of the Trusteeship Council, which recommended, in view of the essential community of interest and the facts of history and geography, the evolution of a single, united and composite State.¹⁷³ This approach was endorsed by the General Assembly, which established a UN Commission for Ruanda-Urundi consisting of delegates from Haiti, Togo and Iran and proposed the introduction of such arrangements regarding internal autonomy for Ruanda and Urundi as would be agreed by the representatives of the area.¹⁷⁴

(169) But see Rigo Sureda op.cit. pp.167-8.

(170) Resolution 1413 (XIV).

(171) See generally Lemarchand, Rwanda and Burundi, 1970. See also Lemarchand and Martin, Selective Genocide in Burundi, Minority Rights Group, 1974, p.3.

(172) T/1551 and T/1538.

(173) T/L.985 and Add.1, and T/L.1004 and T/L.1005.

(174) Resolution 1579 (XV).

In early 1960, there was an upheaval in Ruanda which resulted in the establishment of a republic, but this did not affect the view of the General Assembly.¹⁷⁵ A further resolution was adopted, which emphasised the conviction of the Assembly that "the best future for Ruanda-Urundi lies in the accession of that territory to independence as a single, united and composite State."¹⁷⁶ More disturbances occurred in the area and in December 1961, Belgium signed Protocols separately with Rwanda and Burundi granting them a large measure of self-government.¹⁷⁷ The issue was discussed in the UN Fourth Committee and the delegates were overwhelmingly in favour of the creation of a single State.¹⁷⁸ Belgium was severely criticised for fomenting distrust in the area.¹⁷⁹ As recommended by the Fourth Committee,¹⁸⁰ the General Assembly reaffirmed the single State idea.¹⁸¹ A five-member Commission for Ruanda Urundi was established to reconcile the rival factions, and the return of refugees, help in the guarantee of human rights in the territory and generally assist in the maintenance of law and order. In addition, the Commission was to convene a conference at Addis Ababa to find an acceptable formula for the closest

(175) See the Report of the UN Commission for Ruanda-Urundi, A/4706 and Add.1.

(176) Resolution 1605 (XV).

(177) A/C.4/518.

(178) GAOR 15th Session 4th Committee, eg. 1080th meeting para.10 (Ghana), *ibid.* 1086th meeting para.12 (Ivory Coast) and *ibid.* 1091st meeting paras.4 (Somalia) and 53 (Pakistan).

(179) *Ibid* 1093rd meeting para.19 (Guinea).

(180) A/4929 and Add.1.

(181) Resolution 1743 (XVI).

possible political, economic and administrative union between the two areas. However, the conference was not a success and the commission was forced to admit "the regrettable fact that the territory was divided."¹⁸² Its report referred to the "psychosis of mutual distrust which has prevented the two sides from taking a clearer view of their long term prospects." This report convinced the delegates of the UN Fourth Committee of the need to partition the territory.¹⁸³

Accordingly, the Assembly adopted a resolution noting that the efforts to maintain the unity of Ruanda-Urundi had not succeeded and taking account of the desires of Rwanda and Burundi to become separate, independent States on July 1, 1962.¹⁸⁴ This decision by the UN reflected acceptance of the fact that the interests of peace and security were paramount and that this overrode the desirability of retaining the pre-independence territorial structure.¹⁸⁵ The wishes of the two units must also be accepted as an important element here. It is also to be presumed that the UN was concerned with the possibility of a repetition of events that had occurred in the neighbouring Belgian Congo and that this influenced the ultimate decision.

(182) A/5126 and Add.1.

(183) See GAOR, 16th Session, 4th Committee, 1305th meeting, para.14 and *ibid* 1307th-27th meetings. Note also that the units had been separate kingdoms and continued this way under both German and Belgian rule.

(184) Resolution 1746 (XV).

(185) Note also Assembly resolution 181 (II) on Palestine, which emphasised that "the present situation ... is likely to impair the general welfare and friendly relations among nations." Two other points need to be noted with regard to the Palestine issue. Firstly, that the Mandate for Palestine incorporated the Balfour Declaration with regard to the establishment of a Jewish national home in Palestine and there is nothing similar in any other mandate and secondly that the principle of self-determination was not a legal right as of 1947-8. See generally, The Arab-Israel Conflict (ed. Moore), 1974, 3 vols.

(f) Cabinda¹⁸⁶ - This enclave formed part of Portuguese Angola, although physically separated from it by the Zaire river and some forty miles of Zaire territory. The General Assembly in resolution 1542 (XV), which listed nine Portuguese territories deemed to fall within Chapter XI of the UN Charter, recognised its status as an enclave and as part of Angola.¹⁸⁷ In 1975, members of the Front for the Liberation of the Enclave of Cabinda (FLEC) declared the area independent¹⁸⁸ and attempted to invade it from their bases in Zaire and take control from the Angolan MPLA organisation. They did not succeed, although the movement was recognised by Gabon and the Congo Republic.¹⁸⁹ No State, however, recognised the independence of Cabinda. Indeed, one of the few factors on which the three rival Angolan movements (MPLA, FNLA and Unita) did agree was the territorial integrity of Angola including Cabinda.¹⁹⁰ Cabinda was the only instance of a former Portuguese territory where the threat of a break-up of the colonially defined unit was acute.¹⁹¹

(186) See "Notes sur Cabinda, Partie Intégrante de l'Angola" an anonymous text sent by anti-separatist Cabindese to African States and published in 121 *Revue Française d'Etudes Politiques Africaines*, 1976, pp.58-69.

(187) Article 1 (e) of the resolution referred to "Angola, including the enclave of Cabinda".

(188) *Africa Research Bulletin*, July 1975, p.3706.

(189) *Ibid.* The Congolese Foreign Minister declared that "Cabinda exists as a reality and is historically and geographically different from Angola." *Ibid.* But cf. "Notes sur Cabinda" *op.cit.* pp.59-63. Zaire called for a referendum in the enclave, *Africa Research Bulletin*, May 1975, p.3632.

(190) See the terms of the Mombasa agreement of January 1975, in Legum and Hodges, *After Angola*, 1976, p.67.

(191) The UN adopted a number of resolutions calling for the independence and self-determination of such territories, as well as reaffirming their territorial integrity, see eg. resolutions 1542 (XV), 1807 (XVII), 1819 (XVII), 1913 (XVIII), 2107 (XX), 2184 (XXI), 2395 (XXIII) and 2918 (XXVII). By resolution 3294 (XXIX), the Assembly welcomed Portugal's acceptance of self-determination and stressed the need for preserving the territorial integrity and national unity of the territories.

Despite the MPLA victory in the Angolan civil war,¹⁹² unrest continued in Cabinda.¹⁹³

(g) Equatorial Guinea - This territory was created by Spain in 1963 by merging the island of Fernando Po with mainland Rio Muni. The General Assembly noted the merger¹⁹⁴ in 1965 and the following year requested Spain to ensure that "the territory accedes to independence as a single political and territorial unit and that no step is taken which would jeopardise the territorial integrity of Equatorial Guinea."¹⁹⁵ The territory became independent in 1968 despite the fact that in a referendum in August of that year a majority in Fernando Po voted against independence.¹⁹⁶ Accordingly, the integrity of the colonial unit as it existed just before independence was maintained at the express request of the United Nations.

(h) Comoros - The attitude of the international community in general and of African States in particular to the independence of the four Comoro islands ruled until 1975 by France clearly reveals the acceptance of the territory as a whole as the relevant unit for self-determination. The General Assembly in January 1974 reaffirmed the right of the people

(192) See *infra*, Chapter 7, p.515.

(193) See Africa Research Bulletin, October 1977, p.4601 (regarding also a split in the separatist forces) and *ibid.* April 1978, p.4820. The separatist argument included not only geographic and ethnic factors, but also a claim based on the treaty of Simulambuco, 1895, between Portugal and the Cabinda princes, *ibid.*

(194) Resolution 2067 (XX).

(195) Resolutions 2230 (XXI) and 2355 (XXII). See Africa Research Bulletin, December 1966, p.686.

(196) See Rigo Sureda, The Evolution of the Right of Self-Determination, 1973, p.200.

of the archipelago to self-determination in accordance with resolution 1514 (XV) and stressed the unity and territorial integrity of the territory.¹⁹⁷ In December 1974 a referendum held by the French authorities on the islands revealed a 95 per cent vote for independence, but on Mayotte island a majority voted against independence and for continued ties with France.¹⁹⁸ The consequence of this result was that the French Parliament passed a bill in June the following year which provided for Mayotte to remain linked with France after the independence of the Comoros.¹⁹⁹ This disturbed the representatives of the three other islands and on July 6, the Comoros parliament unilaterally declared independence notwithstanding the absence of the Mayotte deputies.²⁰⁰ In response to a plea for help from the latter, France, while recognising the independence of the Comoros, reserved its position regarding Mayotte.²⁰¹ Within a short time, eleven African States had recognised the independence of the four islands of the Comoros, including Mayotte.²⁰² The African group at the United Nations issued a statement supporting the Comoros' membership of the organisation and calling on France to refrain from any action likely to compromise the independence and territorial integrity of the new State.²⁰³ The French, however, claimed that the principle of

(197) Resolution 3161 (XXVIII). See also UNMC January 1974, p.51.

(198) Africa Research Bulletin, December 1974, p.3466.

(199) Ibid, June 1975, p.3666.

(200) Ibid, July 1975, p.3707.

(201) Ibid, p.3708.

(202) Ibid.

(203) Ibid, October 1975, p.3802.

self-determination was superior to the need to respect the territorial integrity of the colonial territory, but this implied a version of the "self" of self-determination not consistent with international practice.²⁰⁴ According to a bill later adopted by the French Council of Ministers in May 1975, Mayotte was to become the 102nd French department,²⁰⁵ but in December the National Assembly adopted a bill, later confirmed by the Senate, declaring Mayotte to be a "territorial collectivity" in the French Republic.²⁰⁶ This was attacked by the Organisation of African Unity, which reaffirmed the view that Mayotte was part of the Comoros.²⁰⁷ In resolution 31/4, the Assembly, by 102 votes to 1 (France), with 28 abstentions, condemned the French referenda and declared them void. The French occupation of Mayotte was a flagrant encroachment on the national unity of the Comoros and a violation of resolution 1514 (XV).²⁰⁸ In resolution 32/7, the General Assembly called on the Comoros and France to settle the problem of Mayotte, respecting the political unity and territorial integrity of the Comoros, while the OAU Summit Conference of July 1978 at Khartoum condemned France's illegitimate occupation of Mayotte, which constituted a threat to the national unity and territorial

(204) See UNMC March 1976, p.6. The Comoros joined the UN on November 12, 1975, see Africa Research Bulletin, November 1975, p.3833. See also resolutions 3291 (XXIX) and 3385 (XXX), reaffirming the need to respect the unity and territorial integrity of the new State, composed of the four islands including Mayotte.

(205) Africa Research Bulletin May 1976, p.4019.

(206) Ibid, December 1976, pp.4252-3.

(207) Ibid. At the OAU Summit Conference in July 1976, a resolution was adopted rejecting all French laws intended to legalise the French presence on Mayotte, *ibid*, July 1976, p.4080. See also *ibid*, September 1977, p.4554.

(208) A Security Council resolution calling on France not to jeopardise the independence, unity and territorial integrity of the Comoros was vetoed by France, see S/11967 and UNMC March 1976, p.5. See also Assembly resolution 31/34.

integrity of the Comoros as well as an act of aggression.²⁰⁹ Thus, following the Equatorial Guinea example, the claims of a territorially distinct part of the colonial unit were denied by the international community in the interests of the territory as a whole.²¹⁰

(1) Eritrea, 1941-1952²¹¹ - The history of the colony of Eritrea from the defeat of the Italian occupation forces in 1941 until its eventual incorporation within the Ethiopian empire in 1952 affords an interesting example of the way in which the decolonisation of the territory failed to lead to independence, while the integrity of the territory was maintained. The case emphasised the relevance of a series of factors ranging from the wishes of the population to the requirements of peace and security and the nature of the claims of other States. It is particularly instructive in that the decision was left in the hands of the UN.

Prior to the Italian conquest of Eritrea in the late nineteenth century, the territory had existed on the fringes of the Ethiopian empire, but not as any kind of distinct entity either in fact or in name.²¹² The people in the colony were divided by race and religion. Eritrea was captured by British forces in 1941 and there were basically two interlinked objections to an ultimate grant of independence to the territory as a unit. The first was the claim maintained by neighbouring

(209) Africa Research Bulletin, July 1978, p.4914.

(210) See also the cases of Aden, Anguilla and the British Indian Ocean Territory, Rigo Sureda, op.cit. pp.199-202.

(211) See generally Trevaskis, Eritrea, A Colony in Transition: 1941-52, 1960; Henderson, The Making of the Modern Sudan, 1953; Longrigg, A Short History of Eritrea, 1945; Cumming, "The Disposal of Eritrea" 7 Middle East Journal, 1953, p.18, and Abuetan, "Eritrea: United Nations Problem and Solution", 2 Middle Eastern Affairs, 1951, p.35.

(212) Trevaskis, op.cit., p.4.

Ethiopia founded upon historical, ethnic and economic grounds and the second was the attitude adopted by the Eritrean Christians. The population of the territory of just over one million was virtually equally divided between Christians and Moslems,²¹³ with the former wishing to maintain ties with Ethiopia²¹⁴ and the latter objecting to annexation by Ethiopia. This rivalry resulted in intermittent violence in the 1940's. Ethiopia's claims were partly historical, although its sovereignty over the area prior to the Italian conquest had been tenuous, and partly ethnic and cultural in relation to the Eritrean Christians. There were also economic and strategic factors operating.

Impelled by these claims and by the communal friction, British opinion in the 1940's tended to support partition with the Moslem tribes of the west being incorporated with Sudan and the Christians being merged into Ethiopia.²¹⁵ Such a solution was also proposed at meetings of the Big Four between 1945 and 1947.²¹⁶ In February 1947, the UK, France, USA and USSR agreed on an Italian Peace Treaty, which provided inter alia that the future of the former Italian possessions in Africa (Libya, Somalia and Eritrea) was to be decided by the Big Four in accordance with the wishes and welfare of the local populations and in the interests of peace and security. The opinions of other interested States were also to be taken into account. However, if the Big Four

(213) The Christians were concentrated around Asmara on the plateau bordering Ethiopia and the Moslems on the coastal strip and in the western province, *ibid*, pp.132-3.

(214) Primarily through the medium of the Coptic Church, encouraged by Ethiopia, *ibid*, pp.59-60.

(215) See Henderson *op.cit.*, p.335 and Longrigg *op.cit.*, p.174-5.

(216) Trevaskis *op.cit.*, p.84.

were unable to reach a decision within a year of the treaty entering into force, the problem was to be sent to the General Assembly for a recommendation, which the powers agreed to accept and implement. Thus the Assembly was to be given the power to make a binding decision by virtue of the express agreement of the parties.²¹⁷ The four powers sent a Commission of Enquiry to Eritrea, which confirmed that while the Christians were in favour of immediate union with Ethiopia, the Moslems favoured eventual independence after a period as a UN trust territory.²¹⁸ Both parties appeared to reject partition.²¹⁹ In the event, the four powers failed to agree and the matter was referred to the General Assembly in September 1948.

In the First Committee, the UK proposed a partition of the territory between Ethiopia and Sudan, and this was accepted.²²⁰ However, following anti-Italian riots in Tripolitania, the General Assembly rejected the draft resolution dealing with the disposal of Italy's former possessions,²²¹ and the issue was postponed until the following session.²²² During that session, a commission was established to ascertain the wishes of the inhabitants. The Commission (comprising

(217) See Castaneda, Legal Effects of United Nations Resolutions, 1969, pp.141-2.

(218) Report of the Four Power Commission of Investigation, vol. 1, Eritrea, pp.88-9.

(219) Ibid, p.96.

(220) In May, 1949. See GAOR 3rd Session, 1st Committee, annexes, A/C.1/466.

(221) By 14 to 37 against, with 7 abstentions, even though the part dealing with Eritrea had in fact been approved by 37 votes to 11, with 10 abstentions, see Trevaskis op.cit., p.93. See also Rivlin, "The Italian Colonies at the General Assembly" 3 International Organisation, 1949, p.469.

(222) Resolution 287 (III).

representatives of Norway, Guatemala, South Africa, Pakistan and Burma) was to take account of "(a) the wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government; (b) the interests of peace and security in East Africa; (c) the rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea."²²³

This enquiry was less thorough than that of the four powers and two separate reports and three sets of proposals emerged. The Norwegian representative called for the territory's union with Ethiopia, except for the western province, which was to continue under British administration and be allowed to choose at a later date between union with Ethiopia or Sudan. The South African and Burmese representatives suggested that Eritrea should become a self-governing unit federated with Ethiopia under the sovereignty of the Ethiopian crown, while the Pakistani and Guatemalan representatives called for a ten year trusteeship followed by independence. Both reports and all the representatives, apart from the Norwegian, emphasised the necessity of maintaining the unity of the territory.²²⁴ The General Assembly also took this line and on 2 December 1950 recommended that Eritrea was to become an "autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian

(223) Resolution 289 C (IV).

(224) Report of the UN Commission for Eritrea, GAOR 5th Session, Suppl. No. 8, A/1285. In its subsequent comments, the UK supported the partition of the territory between Ethiopia and Sudan, *ibid.*

crown".²²⁵ The territory was to have its own legislative, executive and judicial powers in domestic affairs, while the federal government was to have control over defence, foreign affairs, finance and interstate and international commerce and communications. An Imperial Federal Council with equal representation was to be set up and a single nationality established throughout the federation.²²⁶ This solution was deemed by the UN Commissioner to constitute a middle of the road answer to the conflicting aspirations of the inhabitants of the territory.²²⁷ In reaching its decision, the UN General Assembly considered the three points specified in resolution 289 C (IV) and called for the fullest respect for the institutions and traditions of the Eritrean territory.²²⁸

The importance of the choice of the unit for self-determination is underlined in this case, since a separate consideration of the Christian and Moslem areas would have led to the partitioning of the territory. Both parties called for the unity of the territory and this was a factor of some significance, no matter what the ultimate intentions of the parties were.²²⁹ In the event, the UN, given a determinative role by the Big Four Powers, decided to maintain the territorial integrity of the unit, partly because of the views of the parties involved and

(225) Resolution 390 A (V).

(226) Final Report of the UN Commissioner for Eritrea, appointed to draft the constitution, A/2188.

(227) A/1959.

(228) Resolution 390 (V).

(229) See A/2188, para.44.

partly since the territory was administered as one unit. The ultimate solution of a self-governing federation with Ethiopia was deemed to comprise sufficient safeguards for the preservation of the Moslem traditions of half the inhabitants. It is also possible that the Assembly was influenced by its experiences over Libya, where proposals to divide the territory had been rejected.²³⁰

(j) The French Territory of the Afars and Issas²³¹ - This territory of some 23,000 sq. kilometres has a population of around 200,000 roughly equally split between Afars and Issas.²³² The territory was at one time coveted both by Somalia on the grounds of the reunification of the Somali people and by Ethiopia for historic, economic and ethnic reasons.²³³ France transmitted information on the territory to the UN in accordance with Chapter XI of the Charter from 1946 until 1957. As from that year, France declared French Somaliland had become a self-governing territory.²³⁴ In 1967, the French authorities held a referendum to ascertain the views of the inhabitants as regards the future of the territory and a substantial majority voted in favour of continued French rule. However, there were objections that this had been achieved by deporting large numbers of sympathisers with the Somali cause and

(230) See Yearbook of the UN, 1948-9, p.257.

(231) Formerly known as French Somaliland. The change in terminology was made in a law of 3 July 1967 and recognised by the UN on 15 April 1968, see Yearbook of the UN, 1970, pp.717-8.

(232) See Africa Research Bulletin June 1974, p.3272. An OAU fact-finding mission estimated the population of the territory in 1976 at 220,000, 120-150,000 inside the barbed-wire enclosed area around the port of Djibouti and the rest nomads. The number of French troops was put at 6,000, *ibid*, May 1976, p.4031. The Afars are related to the Ethiopians, while the Issas are akin to the Somalis.

(233) Djibouti handled some 75% of Ethiopia's foreign trade, *ibid*.

(234) GAOR 14th Session, annexes, agenda item 36, p.2.

imprisoning thousands of others, as well as by altering electoral constituencies.²³⁵ The French view was that the population had expressed its wishes to remain French and that this was to be respected.²³⁶

Neither Somalia nor Ethiopia has openly called for the annexation of the territory. They declared instead that France had to respect the principle of self-determination and proclaim the territory independent.²³⁷ In 1966, the General Assembly affirmed the right of the people of the territory to self-determination and independence in accordance with resolution 1514 (XV).²³⁸ Somalia proposed that France should grant immediate independence to the territory and that the UN should administer it for two years to enable the deportees to return and to permit the inhabitants to decide for themselves whether they favoured an independent status or some other solution to the problem.²³⁹ The UN limited itself to a declaration of the right of the people to self-determination and independence. In resolution 2356 (XXII), the Assembly called on France to create the necessary political conditions for accelerating the implementation of the right, including the return of all refugees. Ethiopia's position seemed to be at one stage an acceptance of the status quo, but if the French were to leave its claim to the

(235) Lewis, "The Referendum in French Somaliland; Aftermath and Prospects in the Somali Dispute", *The World Today*, July 1967, p.308.

(236) See eg. the statements of the French Minister of State for Overseas Territories and Departments, *Africa Research Bulletin* February 1972, p.2385 and by the French President, *ibid*, November 1974, p.3437.

(237) A/6300/Rev.1, pp.637-42 and 647.

(238) Resolution 2228 (XXI).

(239) A/AC.109/121, paras.37-40. Somalia appeared to be hoping for a merger of the territory with the Somali republic.

territory might be revived.²⁴⁰ In August 1975, however, the Ethiopian Head of State appeared to renounce Ethiopia's historic claim to the territory in favour of allowing a free choice to the population.²⁴¹ Somalia at the same time demanded the unconditional independence of the territory and the return of all expellees.²⁴² In January 1976, the General Assembly adopted resolution 3480 (XXX) calling on all States to refrain from any action that might alter the independence and territorial integrity of the territory, which should be granted immediate independence, and urged all States to renounce claims to the territory.²⁴³ Round-table discussions on the territory opened in Paris in February 1977 and the following month a conference was held in Accra by the OAU.²⁴⁴ A referendum took place in May of that year and 77.2 per cent of the votes were cast for independence²⁴⁵ and at midnight of the June 26-27, the territory became independent. Military and other agreements were signed with France and the new State of Djibouti was welcomed inter alia by Somalia, Ethiopia and Sudan.²⁴⁶

(240) Africa Research Bulletin January 1973, p.2726. See also Yearbook of the UN, 1966, pp.58 et.seq. and A/6300/Rev.1.

(241) Africa Research Bulletin August 1975, p.3720. Ethiopia had been backing the Djibouti Liberation Movement (MLD), while Somalia was supporting the Somali Coast Liberation Front (FLCS), *ibid*.

(242) These views were reaffirmed before a UN Special Mission on Djibouti that held talks with Somali officials in Mogodishu, *ibid*, April 1976, pp.4000-1.

(243) In a French-Somali communique in January 1977, the Somalis agreed to respect the independence and territorial integrity of the territory, *ibid*, January 1977, p.4294.

(244) *Ibid*, March 1977, pp.4367-8.

(245) *Ibid*, May 1977, pp.4436-7.

(246) *Ibid*, June 1977, pp.4458-60.

(k) Mauritania - The issue of Mauritania was officially taken up by the Moroccan government in early 1958 and the territory claimed as part of Morocco.²⁴⁷ The problem came before the General Assembly at its fifteenth session following a request from Morocco. This request was accompanied by a memorandum in which it was argued that the territory of Mauritania had always formed part of Morocco and that the dismemberment of the latter's territory could not be accepted.²⁴⁸ The General Committee recommended that the item be included on the agenda of the General Assembly,²⁴⁹ and this was accepted by the Assembly,²⁵⁰ which allocated it to the First Committee.²⁵¹

Morocco declared that prior to the French occupation, Mauritania had never constituted a distinct entity while "the frontiers of Morocco had at all times been the Mediterranean to the north, the Atlantic Ocean to the west and the Senegal river to the south."²⁵² In other words, until the French takeover the territory of Mauritania had been an integral part of Morocco. It was argued that until 1912, the currency of Mauritania was Moroccan and that the Moroccan central authority was responsible for public order and national defence.²⁵³ The

(247) Ashford, "The Irredentist Appeal in Morocco and Mauritania" 15 Western Political Quarterly, 1962, p.641. See also Gallagher, Morocco and Its Neighbours, Part III Morocco and Mauritania, 1967.

(248) GAOR 15th Session, 1st Committee, 1109th meeting, para.3, A/4445 and Add.1.

(249) Ibid, General Committee, 128th meeting, para.16.

(250) Ibid, Plenary, 898th meeting, para.134.

(251) Ibid, 904th meeting, para.96.

(252) Ibid, 1st Committee, 1109th meeting, paras. 1, 3 and 4.

(253) Ibid, para.6. Morocco noted that the "attributes of sovereignty were exercised in accordance with the conditions of the time, but the whole population had recognised the authority of the Sultan of Morocco unreservedly until 1912". Ibid.

Moroccan government emphasised that France had pledged in the General Act of the Algeciras Conference, 1906, to respect the sovereignty of the Sultan and the integrity of his domains, but that this promise had been broken by the occupation of increasingly large areas in the region by France.²⁵⁴ In addition, a French decree of 1904 was null and void since it wrongly defined what was termed the "civil territory of Mauritania" in the light of the actual occupation by France of under ten per cent of the area.²⁵⁵ French actions were also inconsistent with an exchange of notes between France and Germany in November 1911, wherein both parties argued that Morocco comprised all of North Africa between Algeria, French West Africa and the Spanish territory of Rio de Oro. It was not until 1920 that Mauritania was declared a colony and partly merged with French West Africa.²⁵⁶ This led Morocco to the view that Mauritania had formed part of Morocco at least until 1906 and that France since its assumption of a protectorate over Morocco in 1912 had broken its obligations to respect Moroccan territorial rights.²⁵⁷

Morocco received some support from the 1958 Tangier Conference for the Unity of the Arab Maghreb, where the three North African delegations acknowledged Moroccan interest in Mauritania within the framework of Morocco's "historic and ethnic unity",²⁵⁸ while at Conakry in 1960

(254) Ibid, para.7.

(255) Ibid. See also 97 BFSP, 1903-4, p.967.

(256) Ibid, para.8. See also 104 BFSP, 1911, pp.953 and 955.

(257) It was stated that France was seeking to "shatter a geographic, political, ethnic, linguistic and religious entity" ibid, para.16.

(258) Ibid. See also Ashford, loc.cit., p.647.

representatives of African and Asian peoples condemned the existence of Mauritania.²⁵⁹ However, Morocco lost support on this issue and it resulted in Morocco's absence from the important Addis Ababa Conference in 1963.²⁶⁰

France denied that Mauritania had constituted a single entity with Morocco and emphasised that "no Moroccan suzerainty or authority had existed either in fact or in law."²⁶¹ Any suggestion of historical rights by Morocco was totally devoid of substance,²⁶² while ethnic, linguistic and religious claims were unconvincing.²⁶³ The Sultan's authority over Mauritania until the French occupation was of a "fragmentary, uncertain and intermittent nature" only,²⁶⁴ while arguments regarding international agreements were incorrect and ignored treaties signed by Morocco, after it had become a protectorate, which showed that Mauritania was not part of its territory.²⁶⁵ It was also noted that in the referendum of September 1958, 94 per cent of the electorate in Mauritania had voted in favour of the French Community and thus impliedly against Morocco.²⁶⁶

The Moroccan argument centred on the significance of pre-colonial historical and religious ties and their continuing validity in terms of the definition of the subject of self-determination. It also involved minimising the relevance of the colonial territorial unit in the

(259) Ibid.

(260) See also Zartman, International Relations in the New Africa, 1966, pp.27 and 34.

(261) GAOR 15th Session, 1st Committee, 1109th meeting, para.21-3.

(262) Ibid, para.23.

(263) Ibid, para.24.

(264) Ibid, para.25.

(265) Ibid.

(266) Ibid.

decolonisation process. The Moroccan view was criticised by many States, particularly African ones, both in the First Committee and later in the Security Council. Senegal declared that "the independence of the African countries had rightly been established on the basis of the existing frontiers; if old political entities had to be reconstituted, independence would not have been achieved in the conditions of peace and harmony."²⁶⁷ The right of self-determination was the relevant principle and it was for the people of Mauritania to decide alone.²⁶⁸ Gabon referred to the "foolish course of revising frontiers" and emphasised the wisdom of retaining the status quo,²⁶⁹ while Niger declared that the frontiers of Africa should be left undisturbed.²⁷⁰ Ultimately no vote was taken in the First Committee.

Upon achieving independence in November 1960, Mauritania applied for United Nations membership. Its case received majority support, with only the USSR supporting Morocco's claims in the Security Council. Following the Soviet Union's veto in the Council, the issue came before the General Assembly and resolution 1602 (XV) was adopted. This noted that no recommendation had been made regarding membership because of the opposition of a permanent member and declared that "in its view the Islamic

(267) Ibid, 1111th meeting, para.2. See also Thiam, La Politique Etrangère des Etats Africains, 1963, pp.101-2.

(268) GAOR 15th Session, 1st Committee, 1111th meeting, para.3.

(269) Ibid, para.17.

(270) Ibid, 1113rd meeting, para.22. See also Central African Republic, *ibid*, para.12; Upper Volta, *ibid*, 1114th meeting, para.2 and Nigeria *ibid*, plenary, 893rd meeting, para.196. Note also Senegal, SCOR, 16th Year, 971st meeting, para.163 and Ivory Coast, *ibid*, para.183.

Republic of Mauritania is a peace-loving State within the meaning of Article 4 of the Charter, that it is able and willing to carry out the obligations of the Charter and that it should in consequence be admitted to membership in the United Nations."²⁷¹

This case clearly demonstrated the supremacy of the territorial model of self-determination in the face of closely argued historical, cultural and religious affiliations with a neighbouring State. Ultimately, in June 1970, Morocco and Mauritania signed a treaty of co-operation and both agreed to respect each other's territorial integrity.²⁷²

(1) Spanish Sahara²⁷³ - The question of Spanish Sahara first came before the UN at the end of 1963, while in 1963, the Special Committee on Decolonisation called on Spain to implement resolution 1514 (XV) and liberate Spanish Sahara (and the enclave of Ifni) from colonial rule.²⁷⁴ This was reaffirmed in Assembly resolution 2072 (XX), while in resolution 2229 (XXI), Spain was called on to determine at the earliest possible date the procedures for holding a referendum under UN auspices to enable the indigenous population to exercise freely its right to self-determination.

(271) Mauritania was in fact admitted to the UN at the following session.

(272) Africa Research Bulletin, June 1970, p.1776.

(273) See generally, Rezette, The Western Sahara and the Frontiers of Morocco, 1975; Gretton, Western Sahara: The Fight for Self-Determination, 1976, and Mercer, "Confrontation in the Western Sahara" The World Today, June 1976, p.230.

(274) GAOR 19th Session, annexes no.8, pt.1., Chapter XI para.112. Spain maintained for a number of years that its African territories were Spanish provinces, but in November 1960 agreed to transmit information regarding them to the UN Secretary-General under Chapter XI of the Charter, GAOR 15th Session, 4th Committee, 1048th meeting. This was noted with satisfaction in Assembly resolution 1542 (XV).

This call was repeated annually (save for 1971) until 1974.²⁷⁵

Moroccan claims to the territory²⁷⁶ were pursued consistently since independence in 1956. In 1958, King Mohammed V declared that Morocco would do everything possible to recover the Sahara.²⁷⁷ Moroccan claims were based on a number of factors. Historically, the continuity of the authority of the sovereigns of the dynasties which had ruled over Morocco was noted.²⁷⁸ Morocco talked in terms of "a permanent and peaceful Moroccan presence, an immemorial possession" extending over more than three centuries,²⁷⁹ which was based on two elements, internal display of Moroccan authority²⁸⁰ and "certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of the territory."²⁸¹ The religious ties binding Western Sahara to Morocco, which Morocco contended also demonstrated political allegiance, were evidenced by documents dealing with the appointment of caids (or sheikhs), the allegiance of such caids renewed upon the accession of every Sultan and the imposition of Koranic taxes and levies.²⁸² To these could be added what were termed

(275) See, for example, resolution 2354 (XXII), 2428 (XXIII), 2591 (XXIV), 2711 (XXV), 2983 (XXVII), 3162 (XXVIII) and 3292 (XXIX).

(276) The Sahara has an area of some 266,000 sq. kilometres, with a population of about 95,000 according to a Spanish Census of 1974, see Report of the UN Visiting Mission to Spanish Sahara, 1975, A/10023/Add.5, annex, pp.26-7. See also Gretton, op.cit., pp.9-14.

(277) A/10023/Add.5, annex, paras.89-90 and 93-100.

(278) Ibid, para.91.

(279) Western Sahara case, Pleadings, CR.75/9, p.26. See also Pleadings CR.75/12, p.2.

(280) Ibid, pp.29-31 and ICJ Reports, 1975, pp.12,45.

(281) Ibid. See also Pleadings CR.75/12, pp.6-29.

(282) A/10023/Add.5, annex, para.91.

"military decisions" or the dispatch of armed forces to drive out foreigners landing on the Sahara coasts and the sending of arms to various groups resisting foreign penetration, in particular Ma ul-'Aineen in the south.²⁸³ Morocco thus claimed sovereignty over Western Sahara by virtue of immemorial possession founded upon "the public display of sovereignty, uninterrupted and uncontested for centuries"²⁸⁴ as "evidenced by the general acquiescence of the international community which it was accorded for several hundred years."²⁸⁵ This will to act as sovereign could additionally be determined, it was suggested, by the series of travels undertaken by Sultans in the territory, the commercial policy of the Sultans aimed at evicting foreign companies from the coasts and the diplomatic protests addressed to the representatives of the European powers against attempts to occupy territory in Western Sahara.²⁸⁶ Morocco laid great emphasis upon the geographical, historical, ethnological and cultural ties²⁸⁷ linking it with the territory, "because international law attaches decisive importance to these factors."²⁸⁸ These arguments had also to be understood in the light of the special nature of the Moroccan State at the time of the colonisation of the Sahara, based upon personal allegiance and the religious

(283) Pleadings, CR.75/12, pp.36-7.

(284) Ibid, p.29.

(285) Ibid, pp.34-5. It was also claimed that Sheikh Ma ul-'Aineen who in the 1890's controlled Sakiet-El Hanra and neighbouring areas, was an agent of the Sultan, Pleadings CR.75/11, pp.58-68.

(287) See also Pleadings, CR.75/9, pp.5-12 and 26-54.

(288) Pleadings CR.75/12, p.31. See also as regards the importance of contiguity, ibid, p.32.

significance of the Sultan. Accordingly, the territorial sovereignty of the Sultan extended as far as his religious authority reached.²⁸⁹ Morocco also asserted that it was not possible for international law to condone the dismemberment of an independent State by colonial powers in the nineteenth century and thus the territorial integrity of Western Sahara was not a necessary prerequisite of self-determination.²⁹⁰ The principle of the intangibility of frontiers in Africa could not affect changes made before independence.²⁹¹

Mauritania was in a different position to Morocco since it clearly had not existed as a State during the time of colonisation of Western Sahara and therefore it had to base its claim on something other than a modified form of recognised European State requirements for the acquisition of title to territory. Its claims to Western Sahara were based on ethnic, cultural, linguistic and economic ties,²⁹² and the need to "reunify" its people.²⁹³ This involved the description of "the Mauritanian entity" as a distinct unit,²⁹⁴ with a unified Saharan law dealing inter alia with the use of water holes, grazing areas and agricultural lands, rules relating to war and methods for the peaceful settlement of disputes.²⁹⁵ All the people, organised separately in tribes, confederations of tribes and emirates, jointly exercised

(289) At the time, Morocco was divided into the Bled Makhzen, the area fully under the control of the Sultan, and the Bled Siba, the area where the inhabitants possessed a great deal of power, but nevertheless acknowledged the spiritual authority of the Sultan, see Pleadings, CR.75/11, p.6 and ICJ Reports, 1975, pp.12, 44-5.

(290) Pleadings, CR.75/8, pp.3-4.

(291) Pleadings, CR.75/13, pp.47-9.

(292) A/10023/Add.5, annex, paras.378-9.

(293) Pleadings, CR.75/12, p.38.

(294) Pleadings, CR.75/17, p.24.

(295) Ibid, p.29.

sovereignty over the "Mauritanian entity",²⁹⁶ and the Western Saharans were included in this.²⁹⁷

Both these claims were based therefore on the proposition that ethnic, historical and other ties pre-dating colonisation could operate to override the wishes of the people within the colonially established territorial framework, in other words, that the "self" in question was not necessarily territorially defined but could be determined in the light of ethnic, historical and other factors. Morocco, for example, noted that the problem of decolonisation in this case was identical to the return of "territories and populations torn away by colonial usurpation" to the Moroccan State.²⁹⁸ To put it another way, "the decolonisation of Western Sahara implied ipso facto its reintegration into the Moroccan State."²⁹⁹

The discussions that took place prior to the adoption of resolution 3292 (XXIX), containing the reference to the International Court, revealed considerable emphasis upon the right to self-determination with regard to Western Sahara. Spain had agreed in 1966 to the application of the principle of self-determination while pointing out some of the

(296) Ibid, p.41.

(297) Both Spain and Algeria disagreed with the Moroccan and Mauritanian contentions, see eg. Pleadings CR.75/22, pp.12-25, 41-51; Pleadings, CR.75/23, pp.2-33 and 44; Pleadings, CR.75/24, pp.9-43; and Pleadings CR.75/31, p.121. See also Supra, p.

(298) A/10023/Add.5, annex, para.298.

(299) Ibid. The Moroccan king declared that he would accept the will of the Saharan population only if it was faced with a referendum choice between continued Spanish rule or merger with Morocco, *ibid*, Appendix II, para.24. Mauritania noted that "by rejoining Mauritania the people of that area would achieve self-determination and independence", A/10023/Add.5, annex, para.387.

difficulties involved because of the nature of the territory and its people.³⁰⁰ But it was from 1973 that a new approach in Spanish policy took place. Spain gave an assurance to the Yema'a, or general assembly of the people of the territory, that the population of Sahara would freely determine its future and it guaranteed the territorial integrity of the territory.³⁰¹ In July 1974, Spain announced a new political statute for Sahara³⁰² and in August declared that it would hold a referendum under UN auspices during the first half of 1975.³⁰³ This precipitated vigorous political activity in the area and Morocco suggested to Spain that the International Court should arbitrate the matter³⁰⁴ but Spain refused.³⁰⁵ At about this time the idea arose of seeking an advisory opinion from the court on aspects of the status of Sahara at the date of Spanish colonisation. It seems that Morocco's intention was that a statement from the court accepting the existence of ties between the territory and the Moroccan State would support its claims upon the decolonisation of Western Sahara. In the discussion in the Fourth Committee, a large number of countries underlined the importance of the principle of self-determination in the light of the terms of resolution 3292 (XXIX). These included the Ivory Coast,³⁰⁶ Cameroon and Syria,³⁰⁷ Cuba, Grenada, Equatorial Guinea, Colombia, Costa

(300) A/6300/Rev. 1.

(301) A/9176, annex. IV.

(302) A/9655. See also A/10023/Add.5, annex, paras.84, 143-50.

(303) A/9714.

(304) A/9771, annex.

(305) Mauritania did not at this stage associate itself with the Moroccan initiative, A/9715, annex.

(306) A/C.4/SR.2131.

(307) A/C.4/SR.2130.

Rica, Malaysia, Venezuela, Portugal, Libya and Ecuador³⁰⁸ and Algeria.³⁰⁹

Such discussions clearly demonstrated the central role to be played in the decolonisation of Spanish Sahara by the principle of self-determination. As noted above,³¹⁰ the court emphasised the principle of self-determination as the basic assumption of the questions put to it³¹¹ and concluded that it had found no legal ties of such a nature as to affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and in particular the principle of self-determination.³¹² Self-determination was defined as "the need to pay regard to the freely expressed will of peoples"³¹³ and in terms of "the free and genuine expression of the will of the people of the territory."³¹⁴ The UN Visiting Mission to the territory, reporting within a few days of the court's opinion, stated that "there was an overwhelming consensus among Saharans within the territory in favour of independence and opposing integration with any neighbouring country"³¹⁵ and concluded "after visiting the territory that the majority of the population within the Spanish Sahara was manifestly in favour of

(308) A/C.4/SR.2131.

(309) A/C.4/SR.2125. The proposed resolution was adopted by the Fourth Committee by 81 votes to 0, with 43 abstentions and resolution 3292 (XXIX) was adopted by the General Assembly by 87 votes to 0, with 43 abstentions.

(310) *Supra*, p.174.

(311) ICJ Reports, 1975, pp.12, 36.

(312) *Ibid*, p.68.

(313) *Ibid.*, p.33. See also Judge Nagendra Singh, *ibid.*, p.81 and Judge Dillard *ibid.*, pp.120-1.

(314) *Ibid.*, p.68. As regards the relationship between the Moroccan and Mauritanian claims themselves, see A/10023/Add.5, annex, paras.14, 15, 66-7, and 381. See also ICJ Reports, 1975, pp.12, 65 and 67 and Judge De Castro, *ibid*, p.131.

(315) A/10023/Add.1, annex, para.202. See also *ibid.*, paras.201-64.

independence."³¹⁶ The sanctity of the colonially defined territorial unit as the framework for the operation of the principle of self-determination appeared to be decisively established.

However, Morocco asserted quite incorrectly that "the opinion of the court can only mean one thing: the so-called Western Sahara was part of Moroccan territory over which the sovereignty was exercised by the Kings of Morocco and that the population of this territory considered themselves and were considered to be Moroccans ... Today Moroccan claims have been recognised by the legal advisory organ of the United Nations."³¹⁷ To underline its approach, the Moroccan authorities announced their intention to organise a mass march of civilians into the territory, "to gain recognition of [the] right to national unity and territorial integrity."³¹⁸ The march took place on 6 November 1975³¹⁹ despite requests by the Security Council to States to avoid any action which might further escalate tension in the area.³²⁰ Algeria remarked that "not a single African country will fail to see consequences both immediate and long term of the success of such a solution if applied to the various boundaries and territorial problems which arise on the African continent."³²¹ The Security Council in resolution 380 (1975)

(316) Ibid, para.229. The mission was itself set up pursuant to resolution 3292 (XXIX) by the Special Committee on Decolonisation.

(317) Press release of the Permanent Mission of Morocco to the UN, 16 October 1975, quoted in S/PV,1849, p.11.

(318) S/11852. This was the so-called Green March. See also S/11874.

(319) Africa Research Bulletin, November 1975, pp.3836-8.

(320) Security Council resolutions 377 (1975) and 379 (1975). See also the Reports of the UN Secretary-General, S/11863 and S/11874.

(321) S/PV,1852, p.76.

deplored the march and called on Morocco to withdraw from the territory and resume negotiations under the aegis of the UN Secretary-General. A few days later, Morocco ordered the marchers to leave³²² and entered into negotiations with Mauritania and Spain over a solution to the problem.³²³ At the end of these talks, a joint communique was issued comprising a declaration of principles³²⁴ according to which a temporary tripartite administration over the territory was to be established, including Morocco, Mauritania and Spain, with the collaboration of the Saharan Yema'a, and Spain agreed to terminate its presence by 28 February 1976 at the latest.³²⁵ Additional terms in the agreement, which remained secret at the time, dealt with the partition of the territory between Morocco and Mauritania and various other issues.³²⁶

On 10 December 1975, the General Assembly adopted two resolutions dealing with the Sahara question. Resolution 3458A (XXX), adopted by 88 votes to none, with 41 abstentions, reaffirmed the inalienable right of the people of the territory to self-determination in accordance with resolution 1514 (XV). It also emphasised "its concern to see that principle applied to the territory of Spanish Sahara within a framework

(322) S/11876.

(323) S/11880, para.2.

(324) Ibid., annex I and annex II.

(325) Algeria regarded the declaration as null and void, refusing to recognise the right of Spain, Morocco and Mauritania to dispose of the territory, *ibid.*, annex IV.

(326) See Franck, "The Stealing of the Sahara" 70 AJIL, 1976, pp.694, 715-7. It was reported that by this agreement Spain retained a 35 percent interest in the Bou-Craa phosphate mines and secured both fishing rights for the Canary islanders and a period of Moroccan toleration for its enclaves on the southern Mediterranean shore, Mercer, "Confrontation in the Western Sahara", *The World Today*, June 1976, pp.230, 232-3.

that guarantees and permits them the free and genuine expression of their will in accordance with the relevant resolutions of the United Nations." Spain was called on to take all necessary measures "in consultation with all the parties concerned and interested so that all Saharans ... may exercise fully and freely, under United Nations supervision, their inalienable right to self-determination."

However, the effect of this resolution was confused somewhat by the adoption of resolution 3458B (XXX) by 56 votes to 42, with 34 abstentions which "takes note of the tripartite agreement concluded at Madrid on 14 November 1975." This resolution also reaffirmed the Saharan people's right to self-determination and called for its exercise "through free consultations organised with the assistance of a representative of the United Nations appointed by the Secretary-General." Although both resolutions refer to self-determination, they are inconsistent on a number of points. The former resolution called for UN supervision of the free and genuine expression of the will of the people, for instance, while the latter resolution accepted the partition agreement between Spain, Morocco and Mauritania and called only for "respect" for the aspirations of the population and merely "free consultations" organised by a UN representative rather than UN supervision of the act of self-determination. Of the African States voting on these resolutions, twenty-nine voted in favour of resolution 3458A (XXX) and eleven abstained, while twelve States (excluding Morocco and Mauritania) voted in favour of resolution 3458B (XXX), twenty-one opposed it and eight abstained. Fighting broke out in the territory during November 1975³²⁷ leading to a clash

(327) Africa Research Bulletin, December 1975, pp.3872-4.

between Algerian and Moroccan forces at Amghala.³²⁸ In February 1976, the Polisario independence movement declared the sovereign Saharan Arab Democratic Republic.³²⁹ In April 1976, Morocco and Mauritania formally agreed the division of Sahara between them. The border was to pass from the point where the western coast meets the 24th parallel near Dakhla (Villa Cisneros) eastwards to where the 23rd parallel cuts the 13th western meridian.³³⁰ The UN Secretary-General announced that the UN would refuse to legitimate the actions of Morocco and Mauritania, which together with the fighting taking place rendered any genuine consultation under resolution 3458B (XXX) impossible.³³¹

The partition solution, far from being accepted by the population as a whole, was based only on the most cursory consultations with the rump of the Yema'a.³³² In the declaration of principles in the tripartite agreement, it was argued that "the views of the Saharan population expressed through the Yema'a will be respected."³³³ In fact, the Yema'a dissolved itself by a majority vote in November 1975. Morocco claimed that eighty of its members were present at a special meeting which

(328) Ibid., pp.3910-2.

(329) Ibid., February, 1976, pp.3942-2. See also *infra*, Chapter 7 p.478. In March, Morocco and Mauritania broke off diplomatic relations with Algeria, *ibid.*, March 1976, p.3952.

(330) Ibid., April 1976, p.3985. See also *West Africa*, 3 May 1976 p.622.

(331) 6 The Diplomatic World Bulletin no. 5, pp.1237 and 1242 (8 March 1976).

(332) The Yema'a consisted of 103 members, including 40 sheikhs elected by tribal councils, 40 representatives elected by male Saharans over 21 from the family units and 16 representatives of corporate groups, see A/10023+Add.5, annex, para.136. It was created by Spain in May 1967 as the highest representative body of the local administration with certain limited powers, *ibid.*, para.127.

(333) S/11874, Annex III.

unanimously accepted the partition, but this was contradicted by press reports which put the figure at sixty, ie. less than the necessary two-thirds.³³⁴ A number of the members of the Yema'a joined Polisario and defected to Algeria.³³⁵ In other words, not only did Morocco and Mauritania refuse to hold a plebiscite in the territory, they also failed to adequately consult the very organ they had declared would express the will of the population. In March 1976, the UN Secretary-General declared that he had been asked by Mauritania to send a UN representative to observe the proceedings of the Yema'a and that he had replied that he would not do this as the necessary steps to ensure the exercise of the right to self-determination by the Saharan people had not been taken.³³⁶

The meeting of the OAU Council of Ministers in June 1976 adopted a resolution proposed by Benin with twenty-nine votes in favour unconditionally supporting the just struggle of the Sahara people and calling for respect for the territorial integrity of Western Sahara and the withdrawal of foreign and occupation forces.³³⁷ As a result of this, Morocco boycotted the subsequent OAU summit meeting and hinted that it and Mauritania might leave the OAU if the pro-Saharan resolution was supported. In the event, discussion was postponed³³⁸ and OAU plans

(334) Africa Research Bulletin, February 1976, pp.3942-3. The figure of 60 was a UPI one, according to the New York Times of 28 February 1976, p.6, the figure was 65.

(335) According to the Algerian representative at the UN, 57 members of the Yema'a left, A/PV.2435 at p.92.

(336) UNMC March 1976, pp.41-2. Zambia noted that "policies of annexation and expansion were being pursued in total disregard of the aspirations of the inhabitants of the territories concerned and the United Nations was being asked to bless these unjust designs", A/C.4/SR.2175, p.32.

(337) Africa Research Bulletin, June 1976, p.4047 and *ibid.*, July 1976, p.4081.

(338) *Ibid.*, pp.4078 and 4081.

to hold a special session on the Saharan problem put off on a number of occasions.³³⁹ At the July 1978 OAU Summit Conference a resolution was adopted which reaffirmed the intention to hold a special session on the Saharan issue and a committee was set up "to find a solution to this question compatible with the right of self-determination."³⁴⁰

IV The Spatial Factor - Conclusions

The application of the principle of self-determination to non-self-governing territories is indisputable, but the basis of the principle has been transformed from the personal concept implicit in the political definition of self-determination to the strict territorial concept of international practice. It is the territorial factor which is prescriptive and the personal element is secondary, usually being of little or no significance. The "self" of self-determination is therefore to be understood in strict spatial terms so that the right accrues to a colonial people within the framework of the existing territorial unit as established by the colonial power. Pre-colonial and/or subsisting ethnic, religious or cultural ties are not strictly relevant, for it is the people of the defined territory, who alone have the competence to exercise the right of self-determination. Indeed, practice relating to Rhodesia demonstrates further that self-determination is the right of the majority of the people and cannot be understood to mean simply freedom

(339) Ibid., July 1977, pp.4486-7; ibid. August 1977, p.4523; ibid., September 1977, p.4554; and ibid., March 1978, pp.4770-1.

(340) Ibid., July 1978, p.4914. See also ibid., September 1978, pp.4979-80. The UN General Assembly in resolution 32/22 reaffirmed its commitment to the principle of self-determination with regard to the Western Saharan case and expressed the hope that a just and lasting solution to the problem could be found in accordance with UN principles at the proposed OAU summit meeting devoted to the question.

from the control of the colonial power in all cases.³⁴¹ It can thus be stated that self-determination is to be exercised within the colonial territory treating that territory as a unit, and that therefore the principle of territorial integrity operates prior to independence in these situations as a guarantor of the territorial basis of self-determination.³⁴² This would appear to be overridden only where there are exceptional circumstances threatening peace and security, as in Ruanda-Urundi.

This interlinking of self-determination and territorial integrity in pre-independence situations is clearly demonstrated in State practice. Indeed the only exception to the rule (apart from the peace and security proviso and special cases below) in African practice relates to the Cameroons situation, which may be partly (but only partly) explained by the administrative division of the territory upon ethnic grounds as noted by a UN mission by the administering power. The basic proposition is upheld by the Saharan issue, although the inability of the international community to rectify the situation has tended to obscure this. One may also point in non-African practice to the Belize and Timor issues as reinforcing the accepted rules. In the case of Timor, the Security Council adopted unanimously resolution 384 (1975) which called

(341) See Higgins, The Development of International Law Through the Political Organs of the United Nations, 1963, p.105. Note particularly resolution 2012 (XX) which declared that the perpetuation of minority rule in Southern Rhodesia would be incompatible with the principle of equal rights and self-determination.

(342) The UK Minister of State stated in the constitutional conference held in London in 1978 regarding the Gilbert Islands, that the key principle in leading colonial territories to independence, is "the importance now widely attached to the principle of territorial integrity". Successive governments had always believed that "the wishes of the people as a whole within the existing boundaries should be the main guide". Quoted in a letter to The Guardian on 9 January 1979, p.8, by Sir Bernard Braine. See also "Report of the Gilbert Islands Constitutional Conference", cmnd.7445.

for respect for the territorial integrity of the former Portuguese colony and the right of its people to self-determination and this was repeated in resolution 389 (1976).³⁴³ Assembly resolution 3485 (XXX) deplored Indonesia's intervention and called for its withdrawal to enable the exercise of self-determination and this call was subsequently repeated a number of times.³⁴⁴ In the case of Belize, a British colony subject to Guatemalan claims, the UN has reaffirmed the right of its people to self-determination and stressed that the territorial integrity of the territory must be preserved.³⁴⁵

The essence of self-determination is the free choice open to the inhabitants of the particular territory as to their future political status.³⁴⁶ By virtue of this, the application of the right of pre-emption was overruled. This right was a device whereby one colonial power declared that in the event of disposing of a particular territory, a second power would have first option over it.³⁴⁷ In the Franco-Spanish Convention of June 1860, for instance, it was provided that if the Spanish government decided to cede its possessions in West Africa in whole or in part in favour of any party, the French government would

-
- (343) In August 1975, a civil war broke out in the Portuguese colony, which appeared to have ended in September. The following month, clashes were reported on the Indonesian-Timor border and in December, Indonesia intervened and took over the territory. See "Issue on East Timor", 7 Decolonisation, 1976. pp.19-32. See also S/12011.
- (344) See resolution 31/53 and 32/34.
- (345) See resolutions 3422 (XXX), 31/50 and 32/32.
- (346) See resolution 1514 (XV), resolution 2625 (XXV) and ICJ Reports, 1975, pp.12, 33, 66, 81 and 123. See also Article 76(b) of the UN Charter and Summary Report of Committee 1/1, doc. 1/1/1, 16 May 1945, 6 UNCIO Docs., p.296.
- (347) See Brownlie, Principles of Public International Law, 2nd ed. 1973, p.181.

have the right of pre-emption (or droit de préférence).³⁴⁸ However, when the Spanish colonies in West Africa became independent no mention of the right was made. France had also a right of pre-emption over the territory of the Congo Free State after Belgium. It was stated that "le gouvernement Belge reconnaît à la France un droit de préférence sur ses possessions congolaises en cas d'alienation de celles-ci a titre onereux, en tout ou en partie."³⁴⁹ In this case, France did seek to enforce these rights. On 26 February 1960, the French Foreign Minister informed the Belgian government that it regarded the latter as bound by the agreements granting it a right of pre-emption over the Congo, but Belgium rejected the claim and maintained that territories and populations were no longer "goods which could be the subject of international trade."³⁵⁰

The factor of free choice may be rendered precarious when other parties are given a special status with regard to the determination of the future of a territory by its population. However, this practice is highly unusual in the process of decolonisation. By resolution 2229 (XXI),

(348) Lindley, The Acquisition and Government of Backward Territory in International Law, 1926, p.168. See also the Anglo-Portuguese agreement of February 1884 by which the UK obtained a right of pre-emption regarding the Portuguese fort of St. John the Baptist of Ajouda on the Gold Coast, see Yakemtchouk, L'Afrique en Droit International, 1971, p.304.

(349) Lindley, op.cit. pp168-9.

(350) Keesings Contemporary Archives, p.17318. Belgium also noted that even if such a right existed it could not be exercised in the instant case since the transfer of power to the people of the Congo could not be regarded as an alienation of the territory by Belgium, *ibid.*

Morocco, Mauritania and "any other interested party" ie. Algeria,³⁵¹ were accorded a special status and although one explanation is based on the contention that Western Sahara was a colonial enclave,³⁵² the true reason is to be sought rather in the general geo-political situation in the area. The territorial claims by Morocco and Mauritania and the strong opposition to them by Algeria had created a delicate situation in that region and the Assembly clearly felt impelled to take account of this. Nevertheless, it is felt that the sole valid interpretation of such status is to be seen in the context of discussions and consultations rather than in the field of substantive solutions.³⁵³

Once the principle of the free choice is accepted as the basis of the exercise of self-determination, the question is then posed of the method by which it may be demonstrated. This is important since a free choice is invariably dependent upon its efficacious exercise. Such exercise may be accomplished by a variety of methods, ranging from plebiscites and elections to commissions of enquiry. It is in this field that the UN has often had a practical role to play. However, an examination of the cases in which such operations have occurred, reveals no clear pattern.³⁵⁴ Commissions of Enquiry were sent to Eritrea,³⁵⁵

-
- (351) The fact that Algeria was intended by this phrase is clear, see Pleadings CR.75/3, pp.3-4. Note also that in one of the pre-ambular paragraphs of resolution 3292 (XXIX), Algeria as well as Spain, Morocco and Mauritania is specifically named.
- (352) See Rigo Sureda, The Evolution of the Right of Self-Determination, 1973, p.214. See further infra, p.249.
- (353) This may be assimilated with the view expressed by the International Court that "the right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realised", ICJ Reports, 1975, pp.12, 36.
- (354) See Rigo Sureda, op.cit., pp.294-323; Umozurike, Self-Determination in International Law, 1972, pp.105-8 and Merle, "Plebiscites Organisés par les Nations Unies" AFOI, 1961, p.425.
- (355) Resolution 289 (IV).

British Cameroons,³⁵⁶ British Togoland,³⁵⁷ and Western Sahara,³⁵⁸ Plebiscites were held in British Cameroons, British Togoland, Ruanda-Urundi,³⁵⁹ and Papua-New Guinea, while ordinary elections sufficed in a number of cases. In the case of Eritrea³⁶⁰ the commission was not followed by a plebiscite and its report was accepted, but the report of the Visiting Mission to British Cameroons was not accepted and the General Assembly decided that plebiscites should be held in the north and south of the territory.³⁶¹ The mission to British Togoland recommended that a plebiscite be held and this indeed took place.³⁶²

In a large number of colonies, neither plebiscites nor elections were held in a way directly related to the exercise of self-determination. This is because in the majority of cases no serious alternative to independence was proposed regarding the future of the territory. In other words, a deterministic view was taken of the territory - people nexus.³⁶³ However, in the case of the trust territories in the light of

- (356) Trusteeship Council resolution 1907 (XXII).
- (357) Resolution 860 (IX). Commissions of Enquiry were also sent inter alia to Western Samoa in 1959 and Sabah and Sarawak in 1963.
- (358) Resolution 3292 (XXIX).
- (359) Regarding the question of the monarchy, or Mwami of Rwanda.
- (360) A/1285 and resolution 390 (V).
- (361) T/1440. GAOR 13th Session, 4th Committee, 844th-880th meetings and resolution 1350 (XIII).
- (362) T/1218 and resolution 944 (X).
- (363) Note that the French loi cadre of 23 June 1956 and subsequent elections in French West Africa developed the territorial framework of the eight States that subsequently became independent. Plebiscites were held in 1958 in French territories, offering the choice between autonomous status in the French community, retention of existing status with representation in the French Parliament or full integration with France. Only Guinea voted to reject the new constitution and thereby attain full independence at that time, see Keesings Contemporary Archives, pp.16544 and 16529.

the special responsibility of the United Nations³⁶⁴ and especially where a serious dispute existed as to the disposition of the territory some method of determining the wishes of the population had to be applied. Thus, although plebiscites have been comparatively rare in non-self-governing territories, they occurred with some frequency in the case of trust territories.³⁶⁵

V Special Cases

(1) Colonial Enclaves - One important exception to the proposition that the inhabitants of a non-self-governing or trust territory should have the right to determine their own political structure and future within the colonially defined borders is afforded by that category of small territories known as colonial enclaves. The normal definition of an enclave refers to an area totally surrounded by the territory of other States³⁶⁶ or the territory of one other State.³⁶⁷ However, in the case

(364) The case of Namibia is a special one. Following the termination of the Mandate by the General Assembly in 1966 in resolution 2145 (XXI), a UN Council for South-West Africa (later Namibia) was established by resolution 2248 (S-V). This Council was empowered "to administer South-West Africa until independence" and "to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the territory until a legislative assembly is established." In 1974, a Decree on the Natural Resources of Namibia was adopted by the Council requiring the Council's consent for any exploration, mining or extraction of natural resources found in Namibia, see A/C.131/33.

(365) It must be noted, however, that the effectiveness of the response of the international community to the violation of self-determination in the Sahara and Timor leaves something to be desired and marks an unfortunate precedent for the resolution of such problems as those relating to the future of Belize, Gibraltar and the Falkland Islands, see generally Franck and Hoffman, "The Right of Self-Determination in Very Small Places". 8 New York Journal of International Law and Politics, 1976, p.331.

(366) See eg. the Oxford Dictionary. See also Krenz, International Enclaves and Rights of Passage, 1961, pp.19-22 and Raton, "Les Enclaves" AFDI, 1958, p.186.

(367) Raton, loc.cit. p.186.

of colonial enclaves, the framework for discussion relates to a relatively small area totally surrounded on the landward side by the territory of one other State, thus allowing for a stretch of coast. This type of enclave is a territory detached by a colonial power from the surrounding territory and placed under the administration of a separate party from that governing the dismembered State. In such cases, the United Nations has adopted the doctrine that the country from which the enclave was originally taken should have the right to re-acquire the territory. This approach, which is fundamentally a concession to geographical and political reality, is strictly limited, for UN practice demonstrates that smallness and paucity of resources are not to be regarded as a barrier to independence.³⁶⁸ It is clearly aimed at preventing threats to international peace and security by the establishment of precariously independent small States or indeed the maintenance of colonial status of areas surrounded on the landward side by larger States with irredentist claims.³⁶⁹ It also amounts to a recognition of the validity of historical claims in restricted situations.

(368) See practice with regard to small islands, UNMC April 1973, pp.64-70. Assembly resolutions 3427 (XXX) and 3433 (XXX), for example, relating to Pacific and West Indian small island territories emphasised that the question of the territorial size, geographical isolation and limited resources should not be used to delay the implementation of resolution 1514 (XV).

(369) Claims to the maintenance of colonial enclaves appeared to reach their ultimate absurdity in the case of the Portuguese enclave of Sao Joao Baptista de Ajude (St. John the Baptist of Ajouda) taken over by Dahomy (now Benin) on 31 July 1961. It consisted of one two-storey house on 11½ acres of land demarcated by 8 boundary pillars in the former slave port of Ouidah. The enclave had two governors and no population. Portugal continued to lay claim to the enclave for a while after its seizure, see Harrison, Environment and Policies in West Africa, 1963, p.77.

The concept was utilised with regard to the Spanish enclave of Ifni, which was surrounded on its landward side by Moroccan territory. It covered an area of some fifteen hundred square kilometres, with a population estimated in 1966 of some 53,000 inhabitants, the majority of whom were nomads.³⁷⁰ The basis of Spanish title to Ifni was the treaty of Tetuan, 1860, concluded with Morocco and this title was confirmed in the Franco-Spanish conventions of 1904 and 1912. However, Spain did not actually administer the area until 1934.³⁷¹ In 1957, Morocco sought to seize the enclave and succeeded in forcing a partial Spanish withdrawal.³⁷² The issue was first examined by the UN in the discussions of the Special Committee on Decolonisation in 1963 and again in 1964.³⁷³ In resolution 2072 (XX), the General Assembly called on Spain to enter into negotiations regarding the application of resolution 1514 (XV) to Ifni and the Spanish Sahara. The differences between Ifni and the Spanish Sahara were clearly recognised by the UN. In resolution 2229 (XXI), the Assembly declared as far as Ifni was concerned that Spain was "to take immediately the necessary steps to accelerate the decolonisation of Ifni and to determine with the government of Morocco, bearing in mind the aspirations of the indigenous population, procedures for the transfer of powers" while as far as Spanish Sahara was concerned, reference was made to the need for a referendum to enable the population to "exercise

(370) Mathy, "L'Autodétermination de Petits Territoires Revendiqués par Etats Tiers (Deuxième Partie)" *Revue Belge de Droit International*, 1975, p.129.

(371) Ibid., p.130 and *Africa Research Bulletin*, January 1969, pp.103-4. See also Reyner, "Morocco's International Boundaries: A Factual Background", 1 *JMAS*, 1963, p.324.

(373) Mathy, loc.cit., p.131.

freely its right to self-determination". Resolution 2354 (XXII) was divided into distinct sections dealing separately with Ifni and Spanish Sahara, while resolution 2428 (XIII) noted in its preamble "the difference in nature of the legal status of these two territories". This resolution stressed the intention of Spain as administering power to sign a treaty with Morocco on the transfer of Ifni, while reaffirming with regard to Sahara the inalienable right of its people to self-determination and calling for a referendum to enable the people to exercise freely its right to self-determination. On 4 January 1969, the Treaty of Fez was signed between Spain and Morocco and in it the term "retrocession" is used in transferring the enclave.³⁷⁴ A number of points can thus be made with regard to the distinguishing characteristics of colonial enclaves. The surrounding State, or former possessor, is entitled to a special status during the process of decolonisation, the choice open to the inhabitants of the enclave is strictly curtailed although their views are to be considered and no referendum is available it seems to ascertain such views. It appears therefore that once the status of colonial enclave is established, the surrounding State possesses prima facie the right to assimilate the territory in question. The right of self-determination, accordingly, is not exercisable by the population

(374) Mathy loc.cit. p.132. The transfer took place on 30 June 1969 and was duly noted by the General Assembly, *ibid.* and A/7630, p.80. The International Court noted that "since 1969, Ifni, having been decolonised by transfer to Morocco, has no longer appeared in the resolutions of the Assembly", ICJ Reports, 1975, pp.12, 35. There are a number of other Spanish enclaves surrounded by Morocco. These include Ceuta, Melilla, Penon de Velez, Penon de Alhucemas, Ishote del Mar and Isla de Tierra and Islas Chafarinas, see Reyner loc.cit. pp.324-5.

save in the sense of decolonisation simpliciter. Rigo Sureda has argued that the special status accorded in UN resolutions to Morocco, Mauritania and "any other interested party" ie. Algeria with regard to self-determination for the territory of Western Sahara might be due to the status of Sahara as a colonial enclave.³⁷⁵ However, this is not a satisfactory explanation for a number of reasons including the size of the territory and the fact that it is bordered by three States not one. UN practice has also clearly demonstrated that the Sahara was not to be treated as a colonial enclave, sharply differentiating the territory from the enclave of Ifni.³⁷⁶

The status of colonial enclave has also been suggested with respect to Gibraltar.³⁷⁷ Assembly resolution 2353 (XXII) noted that "any colonial situation which partially or completely destroys the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations and specifically with paragraph six of General Assembly resolution 1514 (XV)."³⁷⁸ This, however, seems to run contrary to the traditional interpretation of paragraph six of resolution 1514 (XV), which was intended to protect the territorial integrity of independent States and not that of former entities.³⁷⁹ But if one interprets resolution 2353 (XXII) as referring to colonial enclaves alone, rather than all colonial situations, it is then possible to integrate

(375) Op.cit., p.214.

(376) Note that in the instance of the French Territory of the Afars and Issas, no special standing was claimed or accorded Ethiopia or Somalia in the decolonisation process.

(377) Rigo Sureda op.cit. pp.78-9, 183-99, and 282-8. See also A/AC.109/SR.291.

(378) See also resolutions 2070 (XX) and 2231 (XXI).

(379) See A/AC.109/PV. p.284.

the proposition within the framework of the law relating to decolonisation. A wider interpretation would be inconsistent with international practice regarding self-determination. The Assembly has recommended negotiations aimed at the transfer of power from the UK to Spain in the case of Gibraltar³⁸⁰ in similar terms as those used in the Ifni case and it does appear as if the doctrine may be applicable to Gibraltar.

The status of a territory as a colonial enclave would at the very least afford the surrounding State a locus standi in discussions covering the disposition of a territory and where this has not happened the presumption must be that a colonial enclave is not involved, as for example in the case of the French Territory of the Afars and Issas. However, the converse is not necessarily true and one may point to a number of territories where neighbouring States have been accepted as having a locus standi without the territory in question being regarded as a colonial enclave.³⁸¹

In the context of Africa, the question has arisen as to the status of the enclave of Walvis Bay.³⁸² The enclave some eleven hundred square kilometres in area with a seasonal fluctuating population of 27,000 or

(380) See resolutions 2353 (XXII) and 2429 (XXIII).

(381) For example the Western Sahara situation and the Falkland Islands case, see resolution 2065 (XX), Yearbook of UN, 1964, p.432, *ibid.*, 1966 p.659, UNMC January 1970, p.124 and A/AC.109/PET.1132. See as regards other enclave situations, Mathy *loc.cit.* and *ibid.*, "L'Autodétermination de Petits Territoires Revendiqués Par Des Etats Tiers (Première Partie)" *Revue Belge de Droit International*, 1974, p.167.

(382) See Prinsloo, Walvis Bay and the Penguin Islands: Background and Status, South African Foreign Affairs Association Study Report, no. 8, 1977, and Brooks, "The Legal Status of Walvis Bay" 2 South African Yearbook of International Law, 1976, p.187.

so constitutes the fifth largest port of South Africa and the only deep water port of Namibia. It is situated halfway down the Namibian coastline. The Penguin Islands are a number of small islands, islets and rocks a few miles off the coast, stretching along the coast of Namibia.³⁸³ In 1878, the British authorities decided to annex Walvis Bay³⁸⁴ and the surrounding area as part of the Cape Colony. In 1884, after the Cape Colony Legislature had passed the appropriate measures, the Cape Governor officially proclaimed the annexation of Walvis Bay and surrounding area as part of the Colony of the Cape of Good Hope.³⁸⁵ Between 1884 and 1890, a German protectorate was established over Namibia and its borders defined by agreements with Portugal and the UK. A dispute over the southern boundary of Walvis Bay was ultimately settled by arbitration in 1911.³⁸⁶ Following the South African Act of 1909, the Union of South Africa came into being on 31 May 1910. The Union comprised the colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River by section two of the Act, with the same boundaries as those of the colonies by section six. Since the Penguin Islands were formally annexed to the Cape Colony in 1866 and Walvis Bay in 1884, these territories became in 1910 part of the territory of the Union of South Africa. In 1931, the Union gained sovereign status and in 1961 became a republic.³⁸⁷ In 1915, South-West Africa was captured from

(383) Prinsloo op.cit. pp.5-6.

(384) Known also as Walfish and Walfisch Bay.

(385) See Prinsloo op.cit. pp.11-12. See also Marshall, "Namibia and Walvis Bay" 27 ICLQ, 1978, p.683.

(386) 104 BFSP p.50.

(387) Prinsloo op.cit. p.14, and Brooks loc.cit. p.188.

Germany and in 1920, "the territory which formerly constituted the German protectorate of South-West Africa" was given to South Africa to administer as a "C" mandate.³⁸⁸ By section 1 of the South African South-West Africa Affairs Act, Act no. 24 of 1922, Walvis Bay was to be administered as part of the mandated territory. This was basically for reasons of administrative convenience.³⁸⁹

With the moves towards a constitutional settlement in Namibia, the issue of Walvis Bay began to assume some importance. In April 1976, the South African Prime Minister stated that whatever happened with regard to Namibia, Walvis Bay remained South African territory.³⁹⁰ This was repeated in June 1977 in the context of the discussions with the five power Western nations contact group and in the Walvis Bay Administration Proclamation of 1977, it was provided that as from 1 September 1977 "Walvis Bay shall cease to be administered as if it were part of the territory [of South-West Africa] ... and shall again be administered as part of the province [of the Cape of Good Hope]."³⁹¹ The International Conference in Support of the Peoples of Zimbabwe and Namibia, 1977, recognised Walvis Bay as part of Namibia and rejected South Africa's attempts to separate it from the rest of Namibia. All governments were called upon to "decisively reject all attempts to dismember the territory of Namibia and especially the design to annex Walvis Bay."³⁹² In

(388) Article 1 of the Mandate Agreement, see Dugard, The South-West Africa/Namibia Dispute, 1973, pp.72-4.

(389) The Penguin Islands were not administered as part of South-West Africa, Prinsloo op.cit. p.20.

(390) Africa Research Bulletin, April 1976, p.4007.

(391) Prinsloo op.cit. p.17.

(392) UNMC, June 1977, pp.41, 43 and 46.

September 1977, the UN Council for Namibia issued a statement condemning "this unilateral attempt by South Africa to destroy the territorial integrity and unity of Namibia. Walvis Bay has always been an integral part of Namibia and South Africa has no right to change its status or to appropriate it as a part of its own territory."³⁹³ The General Assembly adopted resolution 32/90 in which it declared that the South African decision to "annex" Walvis Bay was an attempt to undermine the unity and territorial integrity of Namibia and was "an act of colonial expansion in violation of the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)." Such annexation, it was stated was illegal, null and void.³⁹⁴ The OAU Ministerial Council also condemned South Africa's "illegal annexation" of Walvis Bay, which was an integral part of Namibia.³⁹⁵ South Africa's action was also condemned by the Special Committee on Decolonisation, which called on all States not to take any action which "might give any semblance of legitimacy to South Africa's claim to Walvis Bay."³⁹⁶

The General Assembly discussed the Namibia issue at its ninth special session in Spring 1978, and in resolution S-9/2,³⁹⁷ adopted by 119 votes to none, with 21 abstentions, reiterated that Walvis Bay was an integral part of Namibia and strongly condemned South Africa's "annexation" of

-
- (393) UNMC October 1977 p.23 and A/AC.131/67. The South African decision was termed illegal and an act of racist and colonialist expansion, *ibid.*
- (394) Walvis Bay was stated to be "an integral part of Namibia with which it is inextricably linked by geographical, historical, economic, cultural and ethnic bonds." This resolution was adopted by 117 votes to none, with 24 abstentions.
- (395) Africa Research Bulletin, February 1978, p.4736. SWAPO declared that Walvis Bay was an inviolable and non-negotiable part of Namibia, see UNMC, March 1978, p.12. The UN Council for Namibia at its Lusaka session in 1978 repeated its earlier statements on Walvis Bay, *ibid.*, April 1978, p.45.
- (396) *Ibid.*, May 1978, p.20.
- (397) Declaration on Namibia and Programme of Action in Support of Self-Determination and National Independence for Namibia.

the territory which violated the principle of the territorial integrity of Namibia, embodied in Assembly and Security Council resolutions.³⁹⁸ The South African action was held to be illegal, null and void and an act of aggression against the Namibian people. All States were urged to do their utmost to compel South Africa to renounce its "spurious claims" to Walvis Bay and respect the territorial integrity of Namibia. In the debates, a number of States emphasised that Walvis Bay was an integral part of Namibia, the territorial integrity of which had to be preserved.³⁹⁹ The western proposals⁴⁰⁰ submitted to the Security Council on 10 April 1978⁴⁰¹ deliberately ignored the issue of Walvis Bay, since no way of settling the question could be found in the context of the negotiations held. It was stated that this question should be the subject of discussions between South Africa and the elected government of Namibia.⁴⁰² SWAPO accepted this while maintaining that Walvis Bay was part of Namibia,⁴⁰³ while South Africa emphasised that Walvis Bay was a separate and distinct issue and should be treated by the UN as such.⁴⁰⁴ The Security Council on 27 July 1978 adopted resolution 432 (1978) unanimously in which it declared that "the territorial integrity and unity of Namibia must be assured through the reintegration of Walvis Bay within its territory" and

(398) Especially Security Council resolution 385 (1976) which stressed the need to maintain the territorial integrity of Namibia.

(399) See UNMC June 1978, pp.49-106.

(400) Drawn up by the representatives of UK, USA, Canada, France and West Germany.

(401) S/12636. See also ILM, May 1978, p.762.

(402) UNMC June 1978, p.6.

(403) Africa Research Bulletin July 1978, p.4936. This was supported by the five "front-line" States of Zambia, Tanzania, Botswana, Angola and Mozambique, *ibid.*, June 1978 p.4900.

(404) *Ibid.*, July 1978 p.4936. The fear was that the Security Council might impose sanctions on South Africa because of the Walvis Bay issue, *ibid.*, p.4937. According to reports in Pretoria, the western powers gave an assurance to South Africa that they recognised its legal right to Walvis Bay, *ibid.*

decided to remain seized of the matter until such reintegration.⁴⁰⁵

On the same day, a statement on behalf of the western contact group reiterated the stand that a discussion of the legal status of Walvis Bay would not be useful, while its future should be determined in negotiations between the parties concerned. It was recognised that Walvis Bay was critical to the future of Namibia. It was further stated that there were arguments of a geographic, political, social culture and administrative nature which supported the union of Walvis Bay with Namibia, and accordingly the Security Council resolution was appropriate. The resolution, it was noted, did not prejudice the legal position of any party.⁴⁰⁶

Since the UN has therefore quite clearly asserted that Walvis Bay is part of Namibia and that any attempt by South Africa to retain control of it is illegal and null and void, the question arises as to the legal justification for this approach. International law has accepted that titles to territory acquired in the colonial era retain their validity, subject only to a right of self-determination on the part of the people concerned. Therefore the acquisition of Walvis Bay by first the UK and then the Union of South Africa was perfectly legitimate. States, in particular African States, have repeatedly reaffirmed the sanctity and legitimacy of the former colonial borders.⁴⁰⁷ Thus, South Africa's title appears lawful. Neither the arguments of geographical

(405) Emphasis added.

(406) ILM, September 1978, pp.1307-8. See also the South African restatement of its views on Walvis Bay, *ibid.*, pp.1309-10.

(407) See the 1969 Lusaka Manifesto on Southern Africa adopted later by the OAU which accepted the present boundaries of the States of Southern Africa, cited in Prinsloo *op.cit.* p.22.

contiguity nor of historical continuity can be used to invalidate the primacy of the colonially established frontiers, while the fact of joint administration of Walvis Bay and Namibia is in itself insufficient to found title in the absence of South Africa's intention to dispose of it. There would, therefore, appear to be only one viable argument in the sphere of international law as distinct from political considerations and factors upon which one might found the legality of a claim for Walvis Bay's incorporation into Namibia and that is based on the doctrine of colonial enclaves.

Walvis Bay fills the requirements of the doctrine in all but one respect. It is small, surrounded by one State from which it was originally taken and the special status of Namibia in relation to the enclave has been clearly recognised. However, the State administering the enclave while deriving its title through an act of colonisation is not itself a colonial power in the traditional sense, although it could be argued that South Africa's administration of Namibia renders it a colonial power in the broad sense. The question is whether the crucial economic importance of the enclave to Namibia plus the virtually unanimous view of the international community with respect to Walvis Bay's status as part of Namibia can overcome this problem. It is cautiously suggested that this question may be affirmatively answered. The terms of the unanimously adopted Security Council resolution to the effect that the unity of Namibia must be assured through the reintegration of Walvis Bay suggest a recognition of the enclave as part of the territory of Namibia. The ambiguous stand of the five western powers on the legal issue can hardly affect this. The critical importance of Walvis Bay to an independent Namibia coupled with the extreme difficulty of maintaining South African control in such circumstances once Namibia becomes a sovereign State, especially in the light of the enclave's dependence on

electricity and water supplies from Namibia, would appear to point to a colonial enclave status for Walvis Bay which would involve a right of reincorporation into Namibia proper.

(ii) Apartheid - The rule that the appropriate unit for decolonisation is the territorial entity as defined by the colonial power is now well established, as is the rule that the principle of self-determination in international law is applicable only in pre-independent entities within the colonial framework.⁴⁰⁸ The one accepted exception⁴⁰⁹ would appear to be with regard to South Africa and its apartheid policies. It would seem that because of apartheid, a right of self-determination has been recognised with regard to the inhabitants of that State, even though one is not confronted with a traditional colonial situation. The UN began considering "the question of race conflict in South Africa resulting from the policies of apartheid of the government of the Union of South Africa" in 1952. Apartheid was alleged to be creating a situation which constituted both a threat to international peace and security and a violation of the basic principles of the UN Charter.⁴¹⁰ In a number of resolutions, the Assembly declared that "it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination."⁴¹¹ A new phase in the relations of the UN and South Africa with respect to the apartheid issue opened in 1960,

(408) See *infra*, Chapter 5, p.268.

(409) See *infra*, p.264, regarding the Palestine question.

(410) A/2183. For the issue of the treatment of Indians in South Africa see Sohn and Buergenthal, International Protection of Human Rights, 1973, pp.556-587. As regards apartheid see eg. *ibid.*, pp.634-739; Pierson-Mathy, "L'Action des Nations Unies Contre l'Apartheid" 6 *Revue Belge de Droit International*, 1970, p.203; Apartheid and United Nations Collective Measures (ed. Leiss), 1965 and Tolen, "Les Implications Internationales de la Politique d'Apartheid" 69 *Presence Africaine*, 1969, p.164.

(411) For example resolutions 616 (VII) and 721 (VIII). See also resolutions 820 (IX), 917 (X), 1016 (XI), 1178 (XII), 1278 (XII) and 1375 (XIV).

as a result of the increasing number of African member-States of the UN following decolonisation and a series of disturbances in South Africa such as the Sharpeville shootings. The Security Council discussed the issue for the first time⁴¹² and called on South Africa to abandon its apartheid policies. The situation in South Africa was termed one that if continued might endanger international peace and security.⁴¹³ In 1962, the General Assembly adopted resolution 1761 (XVIII) in which it criticised South Africa for refusing to abandon its racial policies and called on States to initiate a diplomatic, economic and arms boycott of South Africa. A Special Committee on Apartheid was also established. In July 1963, the Security Council again discussed the situation in South Africa resulting from apartheid⁴¹⁴ and declared that it was "seriously disturbing international peace and security. South Africa was again called on to abandon apartheid and all States were requested to cease the sale and shipment of arms and ammunition to it."⁴¹⁵ In resolution 191 (1964), the Council in addition termed the policies of apartheid "contrary to the principles and purposes of the Charter of the United Nations and inconsistent with the provisions of the Universal Declaration of Human Rights as well as South Africa's obligations under the Charter."⁴¹⁶ The General Assembly began to adopt resolutions condemning apartheid in even stronger language from this point, stating that the situation constituted a threat

(412) S/4729.

(413) S/4300.

(414) A/5802.

(415) Resolution 181 (1963). See also resolutions 182 (1963) and 190 (1964).

(416) The Security Council did not discuss the apartheid issue again until 1970. For African views relating to apartheid, see Andemicael, The OAU and the UN, 1976, pp.133-9 and Cervenka, The Unfinished Quest, 1977, pp.110-22.

to international peace and security, calling for arms and economic boycotts of South Africa and appealing for assistance to be granted to the opponents of apartheid.⁴¹⁷ In resolution 2396 (XXIII), the Assembly referred to apartheid as a "crime against humanity" and reaffirmed "the urgent necessity of eliminating the policies of apartheid so that the people of South Africa as a whole can exercise their right to self-determination and attain majority rule based on universal suffrage."⁴¹⁸ In 1970, the Security Council resumed its discussions on apartheid⁴¹⁹ and in resolution 282 (1970) recognised the "legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and of the Universal Declaration of Human Rights." The situation resulting from the continued application of apartheid and the South African arms build-up constituted a "potential threat to international peace and security" and the Council called on all States to strengthen the arms embargo against South Africa. In resolution 311 (1972), the Council reiterated its total opposition to apartheid, which was contrary to South Africa's obligations under the Charter. The Assembly termed apartheid a negation of the UN Charter and a crime against humanity in resolution 2671 (XXV) and reaffirmed its recognition of "the legitimacy of the struggle of the people of South Africa to eliminate by all means at their disposal, apartheid and racial discrimination and to attain majority rule in the country as a whole based on universal suffrage." The establishment

(417) See for example resolutions 2054 (XX), 2202 (XXI) and 2307 (XXII).

(418) See also resolution 2506 (XXIV). In resolution 2636 (XXV), the Assembly refused to accept the credentials of the South African representatives on the grounds that they only represented the white minority. See also resolutions 2862 (XXVI) and 2948 (XXVII) and A/9179.

(419) A/8402.

by South Africa of bantustans was termed "a violation of the principle of self-determination and prejudicial to the territorial integrity of the State and the unity of its people."⁴²⁰ In 1976, the General Assembly took an additional step by declaring that "the racist regime of South Africa is illegitimate and has no right to represent the people of South Africa." It reaffirmed that the authentic representatives of the overwhelming majority of the South African people were the national liberation movements recognised by the OAU.⁴²¹

The World Conference for Action against Apartheid held in Lagos in 1977 issued a declaration condemning apartheid as a flagrant violation of the UN Charter and the Universal Declaration of Human Rights and a crime against the conscience and dignity of mankind.⁴²² In November 1977, the Security Council voted unanimously to impose a mandatory arms embargo against South Africa under Chapter VII of the Charter, having determined that the policies and actions of South Africa made its acquisition of arms and related material a threat to international peace and security. Specifically cited in resolution 418 (1977) were South Africa's acts of repression, its defiant continuance of the system of apartheid and its attacks against neighbouring independent States.⁴²³ Thus, the weight of the UN practice clearly demonstrates the unacceptability of apartheid

(420) See also resolution 2775E (XXVI), 2923E (XXVII), 3151G (XXVIII), 3324E (XXIX) and 3411G (XXX).

(421) Resolution 31/61. The legitimacy of the struggle of the oppressed people of South Africa by all possible means for the seizure of power and the exercise of the right of self-determination was also stressed. It was recognised that the people had no alternative but to resort to armed struggle to achieve their legitimate rights. See also resolutions 31/77 and 31/33.

(422) Apartheid was defined as the policy of institutionalised racist domination and exploitation, UNMC August-September 1977, pp.6-10 at p.7. See also A/CONF.91/9.

(423) See also Council resolution 417 (1977). Further Assembly resolutions include resolutions 32/10, 32/14, 32/35 and 32/42. In September 1978, the Special Committee against Apartheid called upon the Security Council to impose a petroleum embargo against South Africa, UNMC October 1978, p.39.

as a lawful ideology in international law. As the International Law Commission noted in its report of 1976 "the international community now appears to recognise that such acts as the forcible maintenance of colonial domination or the forcible pursuit of a policy of apartheid constitute internationally wrongful acts of a particularly serious character."⁴²⁴

The question arises therefore of the legal status of apartheid and the role of the principle of self-determination. The numerous resolutions in the UN are clearly crucial here.⁴²⁵ The basic approach stressed in such resolutions is that apartheid is contrary to the principles and purposes of the UN Charter and two provisions are particularly relevant here. Article 1(3) calls for "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion", while Article 1(2) stress that the purposes of the UN include the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination."⁴²⁶ In other words, in view of the number and contents of the appropriate Assembly and Security Council resolutions, a rule of

(424) Yearbook of the ILC, 1976, vol.II, part two, p.108. This conclusion was reached in the light of "an objective examination of State practice in the United Nations", *ibid*.

(425) Judge Jessup noted that "the accumulation of expressions of condemnation of apartheid ... especially as recorded in the resolutions of the General Assembly of the United Nations are proof of the pertinent contemporary international community standard"; ICJ Reports, 1966, pp.6, 441. McDougal, Lasswell and Chen stated that "the thrust of all these authoritative condemnations, repeated again and again with only minor variations is clearly towards the crystallisation of shared community expectations that apartheid as an aggregate set of practices is unlawful.", "The Protection of Respect and Human Rights" 24 American University Law Review, 1974, pp.919, 1010.

(426) Article 55 states that the UN shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion, while Article 56 notes that all members "pledge themselves" to take action to achieve the purposes set out in Article 55. See *supra*, Chapter 3, p.

United Nations law has emerged via a process of Charter interpretation prohibiting the practice of apartheid.⁴²⁷ The International Court declared that "to establish ... and to enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."⁴²⁸ The rule, based on the Charter, which thus determines that the establishment and enforcement by governmental authority of policies based on apartheid is unlawful is referable both to the general provision relating to human rights and to the principle of self-determination.⁴²⁹ It is to be noted that in the section dealing with the principle of equal rights and self-determination of peoples in the 1970 Declaration on Principles of International Law, it is provided that nothing in the section is to be understood as authorising or encouraging any action which would dismember or impair the territorial integrity or political unity of 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 as to race, creed or colour."

(427) Akehurst writes that while Article 56 does not appear to imply a legal obligation to observe human rights now, a State which deliberately moved backwards as far as human rights are concerned would probably be regarded as having broken Article 56, A Modern Introduction to International Law, 3rd ed. 1977, p.77.

(428) ICJ Reports, 1971, pp.16, 57. The court emphasised that in such circumstances the question of intent or governmental discretion was not relevant, nor was it necessary to investigate or determine the effects of these measures upon the welfare of the inhabitants in question, *ibid.* The specific reference to Namibia as a territory with "an international status" should not detract from the general conclusion, *ibid.*

(429) As regards apartheid and Namibia, see Assembly resolution 2145 (XXI) and ICJ Reports, 1971, pp.16, 57.

Apartheid is also unlawful under conventional international law. In the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, (which entered into force in 1969), racial discrimination is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" and Article 3 provides that States parties "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973,^{429(a)} (which came into effect in 1976), provides in Article 1 that the States parties declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid are crimes violating the principles of international law, in particular the purposes and principles of the UN Charter. A comprehensive definition of apartheid is contained in Article 2. It may also be argued that apartheid is contrary to customary international law, having regard to the Universal Declaration of Human Rights, which was stated to be an obligation for members of the international community by the UN Conference on Human Rights in Tehran in 1968,⁴³⁰ and relevant State practice.

The applicability of the principle of self-determination to the apartheid situation as a result of the governmental establishment and institutionalisation of racial discrimination has a number of consequences as regards the use of force and third party involvement and with respect

(429a) South Africa is not a party to either of these conventions.

(430) A/CONF.32/41. For a list detailing South Africa's violations of the Universal Declaration see E/CN.4/949 and Add.1-5 and E/CN.4/979 and Add.1-8. See also Farah, "South Africa's Apartheid Policy: An Assessment" in Africa and International Organisation (ed. El-Ayouty and Brooks), 1974, p.71.

to the creation of the so-called independent bantustans. These issues will be considered later,⁴³¹ but suffice it to say that the fact that it was sought to render the South African situation analogous to decolonisation in terms of international law demonstrates the significant role played in the international community by the principle of self-determination. Apart from the apartheid situation, it may be argued that South Africa can be equated with a colonial situation since it is governed by descendants of colonial settlers from Europe, who thus exercise control over the majority indigenous population.

The only other instance where the General Assembly has proclaimed the right of self-determination with respect to an independent State has been the post-1967 Palestine situation.

While the UN has considered the question of Palestinian refugees regularly since 1948,⁴³² it was only in resolution 2534B (XXIV) that reference was made to the "inalienable rights of the people of Palestine". The following year, a resolution was adopted condemning those governments denying the right of self-determination of peoples recognised as being entitled to it "especially of the peoples of Southern Africa and Palestine."⁴³³ Resolution 2672 (XXV) recognised that the "people of Palestine are entitled to equal rights and self-determination in accordance with the Charter of the United Nations" and declared that "full respect for the inalienable rights of the people of Palestine is an indispensable element in the establishment of a just and lasting peace in

(431) See *infra* Chapter 6, p.355 and Chapter 7, p.477.

(432) See for example, Assembly resolutions 194 (III), 302 (IV), 2792E (XXVI), 2963D (XXVII) and 3089D (XXVIII), and Security Council resolution 242 (1967).

(433) Resolution 2649 (XXV).

the Middle East."⁴³⁴ In resolution 3210 (XXX), the Palestinian people were treated as a party to the "question of Palestine" and the Palestine Liberation Organisation was invited to plenary deliberations. By resolution 3237 (XXX), the PLO was given observer status in the General Assembly and conferences and meetings held under UN auspices.⁴³⁵

A number of factors, however, differentiate the Palestine from the South African situation. While self-determination in the latter context would imply the democratic right of majority rule, in the Palestine case the geographical ambit is unclear. If one is referring to that part of mandatory Palestine not part of the independent State of Israel, i.e. the West Bank and Gaza areas occupied by Israel in the 1967 war, the proposition is unexceptionable, and may even be traced back to the General Assembly partition resolution of 1947. If, however, the reference is to Palestine as it was constituted in mandatory times, the majority of this unit is Jewish and Israeli. Two problems are thus posed with regard to the latter interpretation, the issue of the non-Arab majority and the question of the State of Israel. As far as the former is concerned, the Palestinian National Covenant of 1964 (as amended in 1968)⁴³⁶ proclaims that the Palestinian Arab people possesses the legal right to Palestine within its mandatory borders and when Palestine is liberated will exercise self-determination solely according to its own will and choice.⁴³⁷

(434) See also for example resolutions 2787 (XXVI), 2792D (XXVI), 2963E (XXVI), 3070 (XXVII) and 3089D (XXVIII). Resolutions 3376 (XXX), 31/20 and 32/20 referred to the inalienable national rights of the Palestinians.

(435) See also resolutions 3236 (XXX) and 3247 (XXX).

(436) See Harkabi, "The Position of the Palestinians in the Israel-Arab Conflict and Their National Covenant (1968)", 3 New York University Journal of International Law and Politics, 1970, p.209.

(437) Articles 2 and 3.

Only Jews living permanently in Palestine at the beginning of the "Zionist invasion" are deemed to be Palestinians.⁴³⁸ This, of necessity, involves the free return or immigration of Palestinian Arabs into Palestine and possibly the forcible emigration of Israelis. It also involves the extinction of the State of Israel.⁴³⁹ However, in this case one is faced with the General Assembly partition resolution which called for the creation of a Jewish State in Israel as well as resolution 273 (III) which called for the entry of Israel into the UN in 1949. While the membership of Israel of the UN cannot be regarded as requiring non-recognising States to recognise it,⁴⁴⁰ it may very well be that the UN itself is thereby estopped from denying Israel's Statehood. It is also to be noted that Security Council resolution 242 (1967), unanimously adopted, affirmed that the fulfillment of Charter principles required the establishment of a just and lasting peace in the Middle East which should include "respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognised boundaries free from threats or acts of force." In addition, the necessity for guaranteeing the territorial inviolability and political independence of every State in the area was emphasised.⁴⁴¹

In the light of the above, it is submitted that the right of the Palestinian people to self-determination as interpreted as involving the

(438) Article 6. This is dated at 1917, see Markabi, loc.cit. p.231.

(439) Articles 19,20,22 and 23 of the Palestine National Covenant.

(440) See Brownlie, Principles of Public International Law, 2nd ed. 1973, p.99.

(441) See also Security Council resolution 338 (1973).

dismantling of Israel cannot be regarded in the light of UN practice as a legal right. However, it is just possible to interpret such resolutions as referring to the West Bank and Gaza situation, in other words not affecting the existence or integrity of Israel. It is, therefore, concluded that it is only the South African case that deviates from the general rule regarding the non-applicability of the legal right of self-determination to independent States.

CHAPTER 5 - TERRITORIAL INTEGRITY

I - The Concept of Territorial Integrity

(a) Generally

In any system of international law founded upon sovereign and independent States, the principle of the protection of the integrity of the territorial expression of such States is bound to assume major importance.¹ Together with the concept of non-intervention, territorial integrity is crucial with respect to the evolution of the principles associated with the maintenance of international peace and security.² It also underlines the decentralised State-oriented character of the international political system and reflects the sovereign equality of States as a legal principle. It is, however, with regard to the rules relating to the use of force in international law that the principle of the territorial integrity of States has been most intensively examined. This is apparent both in the sphere of customary law³ and in relation to conventional formulations. Article 10 of the Covenant of the League of Nations declared that "the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all the Members of the League".⁴ Article 11 of the Montevideo Convention on Rights and Duties of States,

-
- (1) Oppenheim notes that "independence and territorial as well as personal supremacy are not rights but recognised and therefore protected qualities of States as International Persons", International Law, vol.I, 8th ed., 1955, p.286. Bowett regards this principle as fundamental in international law and an essential foundation of the legal relations between States, Self-Defence in International Law, 1958, p.29.
 - (2) Suzuki, "Self-Determination and World Public Order: Community Response to Territorial Separation", 16 Virginia Journal of International Law, 1976, pp.779, 783.
 - (3) Bowett writes that "the most obvious substantive right for which the right of self-defence serves as a means of protection is the right of territorial integrity" op.cit. p.29.
 - (4) See Langer Seizure of Territory, 1947, pp.40-45.

1933, provided that "the territory of a State is inviolate and may not be the object of military occupation nor of other measures of force imposed by another State directly or indirectly or for any motive whatever even temporary". Article 2(4) of the United Nations Charter emphasised that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". Such views have also been reflected in other documents. Article 17 of the Charter of the Organisation of American States in 1948 proclaimed that "the territory of a State is inviolate",⁵ while Article 9 of the Draft Declaration on Rights and Duties of States noted that "every State has the duty to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use of force against the territorial integrity or political independence of another State".⁶ However, one must distinguish between the concepts of territorial integrity and inviolability of frontiers. Although they are clearly connected in that a violation of a frontier, for example, could also involve a violation of the territorial integrity of a State, there is a basic conceptual difference in that not every border violation constitutes a violation of territorial integrity. The incursion across the frontiers of another State might occur as a result of the right of self-defence in which case the territorial integrity of the State is not offended in international law. There are fundamental differences between the notions of territory and frontier, since the former operates to express the physical basis of the State and manifests its identity within the international community, while the latter marks the extent of the physical expression of the State. The concept of territorial integrity is therefore broader and more fundamental than that of the inviolability of

(5) See Whiteman's Digest of International Law, vol.V, 1963, p.186.

(6) Yearbook of the ILC, 1949, pp.277, 288.

frontiers. It may indeed be that the latter is but one aspect of the former, since in many ways the inviolability of frontiers constitutes a concretisation of the concept of territorial integrity. However, the two principles have been on occasions separately treated. This was particularly so in the Final Act of the Conference on Security and Co-operation in Europe, 1975.⁷ The seminal resolution 1514(XV) declared in paragraph 6 that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" and this was echoed in the 1970 Declaration on Principles of International Law. It was noted in the section on the principle of equal rights and self-determination of peoples that every State "shall refrain from any action aimed at the partial or total destruction of the national unity and territorial integrity of any other State or country". The point was also included under the principle of the sovereign equality of States, which was deemed to include the proposition that "the territorial integrity and political independence of the State are inviolable". The 1974 Consensus Definition of Aggression noted in the preamble that States were under a duty not to use armed force to deprive peoples of their right to self-determination, freedom and independence or

(7) Cmnd.6198 Principle III on the inviolability of frontiers noted that "the participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now or in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State". Principle IV on the territorial integrity of States provided that "the participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force. The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measure of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognised as legal". Ibid, pp.3-4.

to disrupt territorial integrity and additionally that the territory of a State was not to be violated by being the object of military occupation or of other measures of force taken in contravention of the Charter. In Article 1, aggression was defined as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. Thus, it is abundantly clear that the concept of territorial integrity in international law protects the State from unlawful interference by other States with regard to its territory. It is not, however, an absolute concept since the doctrine of self-defence permits States in certain circumstances to resort to the use of force against the territorial integrity of other States. In addition, of course, a State may voluntarily alter its territorial composition by acquiring territory or ceding or exchanging territory.⁸ What is not permissible in the light of the principle would be changes in territorial extent by force. The concept of territorial integrity, however, stretches beyond this. It constitutes an important element within the context of the legal right of self-determination, since it provides the rule for identifying the people or unit entitled under international law to exercise the right to self-determination, freedom and independence. As previously noted,⁹ this right accrues to the inhabitants of the colonially defined non-self-governing territory so that the people concerned have the right to choose their political status within the framework of the territorial integrity of the colonially established unit. Two questions arise at this stage. The first would concern the issue of the territorial integrity of pre-colonial entities and whether this may be projected forward to influence either the decolonisation process or post-independence dispositions.

(8) See generally, Minh, "Remarques Sur Le Principe de l'Intangibilité des Frontières", Peuples et Etats du Tiers Monde Face à l'Ordre International (ed. Fenet), 1978, p.51.

(9) *Supra*, Chapter 4, p.171.

The second centres on the application of the concept of territorial integrity and its relationship with self-determination in post-independence situations. In other words, can the notion of territorial integrity be extended from its involvement with the protection of the territorial composition of the States to cover the threat of territorial reduction from within, that is the menace of secessionism? It can indeed be contended that the newly sovereign States have laid great store by the principle of territorial integrity in order to protect themselves from the dangers of internal secessionist movements. Thus, the principle under consideration has undergone or is undergoing a subtle change in meaning in order to create a presumption against the claims of secessionists in already independent States. It could be argued that far from its traditional posture of neutrality in such situations, international law is now adopting an adverse position. These propositions will be examined in this Chapter.

(b) African Practice

Prior to independence, African attitudes with regard to the territorial integrity of independent States were somewhat ambiguous and reflected a general dissatisfaction with the colonial boundaries that had created a variety of European delimited territories. It appeared that a general campaign of frontier re-arrangement was under consideration.¹⁰ In 1945, the Pan-African Congress held in Manchester adopted a resolution proclaiming that "the artificial divisions and territorial boundaries created by the imperialist powers are deliberate steps to obstruct the political unity of the West African peoples".¹¹ This resolution did not, however, demand the revision of frontiers.

(10) See generally Yakemtchouk, L'Afrique en Droit International, 1971, pp.63-97; Touval, The Boundary Politics of Independent Africa, 1972, and *ibid*, "African Frontiers" 42 *International Affairs*, 1966, p.641.

(11) See History of the Pan-African Congress (ed. Padmore), 1963, p.55.

Many factors combined to produce African discontent with the colonial territorial arrangements ranging from the artificial nature of such entities in geographical, ethnic and economic terms to the psychological effect of the European division of Africa. This encouraged the pre-independence African political parties to think in terms of the re-adjustment of borders once sovereignty had been achieved. The high point of this approach occurred in the All-African Peoples' Conference at Accra in 1958 which approved a resolution in four parts entitled "Frontiers, Boundaries and Federations". The third part of the resolution denounced the artificial frontiers drawn by the imperialist powers, particularly those which cut across ethnic lines and divided peoples of the same stock, and called for the abolition or adjustment of such frontiers at an early date. The guiding principle by which this was to be effected was to be "the true wishes of the people".¹²

President Nkrumah of Ghana was particularly active in seeking the re-alignment of colonial borders. He called on the Sanniquellie Conference of 1959 to examine methods of "eradicating the artificial divisions and boundaries which are responsible for the balkanisation of our continent".¹³

This kind of approach was underlined by the resolutions adopted at the conferences of the radical parties and States which supported Somalia's attempts to unify all the areas containing Somali inhabitants under its flag,¹⁴ and mirrored the approach earlier adopted as to Morocco's irredentist claims.¹⁵

(12) Legum, Pan-Africanism, 1962, pp.229-32 and Touval op.cit. pp.58-60.

(13) See Barden, Awakening Africa: The Conference of Independent African States, 1962, pp.149-50. See also the joint communique of the Presidents of Ghana and Somalia in October 1961 stressing "the imperative need to call upon the principle of self-determination as a means of removing the artificial colonial frontiers" quoted by Emerson, "Pan-Africanism" 16 International Organisation, 1962, p.278.

(14) For example, the resolution adopted at the All-Africa Peoples' Conference, Tunis, 1960, see Legum op.cit. p.246, and the resolution adopted by the Afro-Asian Peoples' Solidarity Conference, 1960, see Touval op.cit. p.63.

(15) For example, the First Afro-Asian Peoples' Solidarity Conference at Cairo, 1957, see Touval op.cit. pp.51-3.

However, within a few years the atmosphere changed and more and more African States, upon obtaining independence, sanctioned the boundaries imposed by the colonial powers. This was already evident at the debates at the UN General Assembly concerning the Mauritanian question. Morocco claimed that Mauritania was an artificial State and that its territory rightly belonged to Morocco. While such claims received some backing from the Arab and Communist States, the majority of African States rejected Morocco's demands.¹⁶ The territorial unit as determined by the Colonial powers began to be accepted as the framework for the newly independent entity. This was reflected in resolution 1514 (XV), with its expressed concern with the preservation of the national unity and territorial integrity of a country.¹⁷

The Congo crisis precipitated in 1960¹⁸ marked an important landmark as Katanga sought to secede. African States decided to uphold the territorial integrity of the Congo. At the Leopoldville Conference in August 1960, the secession was condemned,¹⁹ and at the Monrovia Conference in 1961, African States were called upon "to desist from such activities as the hasty recognition of breakaway regimes".²⁰ At the Lagos Conference in 1962 of the Monrovia bloc, the principle of respect for existing borders was proclaimed²¹ and the Conference adopted the Charter of the Inter-African and Malagasy Organisation, Article 3 of which stressed "respect for the sovereignty and territorial integrity of each State" and Article 5 of which underlined that "each State has the right of defence of

(16) See *supra*, Chapter 4, p.223.

(17) *Supra*, p.188, note 69.

(18) *Infra*, p.306.

(19) Legum, *op.cit.* p.48.

(20) This Conference involved a number of African States seeking to bridge the gap between the radical Casablanca bloc and the French-dominated Brazzaville grouping, see Zartman, International Relations in the New Africa, 1966, pp.26-34. The conferences of the more radical States at Casablanca and Cairo in early 1961 gave strong support to the territorial integrity of the Congo, see Touval *op.cit.* p.72.

(21) *Ibid*, p.78.

its territorial integrity". Although the majority of African States by the early 1960's had accepted the validity of the colonial frontiers and the preservation of the territorial status quo, expressed in terms of the overwhelming adoption of the doctrine of the territorial integrity of States, a few did dissent. Morocco pressed its claims to Mauritania and Spanish Sahara as well as parts of Algeria and Mali on historical grounds, while Somalia pursued its object of reuniting all Somali tribesmen. The Somali president expressed the view that other principles of international law could override the concept of the territorial integrity of States, which was described as an "outmoded concept....[which] must vanish from our habitual thinking because its roots are embedded in colonialism and it is incompatible with Pan-Africanism".²² The vast majority of African States, however, disagreed with such an approach and endorsed the supremacy of the principle of territorial integrity when faced with territorial claims either from within by secessionist pressures or from without by irredentist forces. This has emerged clearly from the attitudes adopted in the Conference of the Organisation of African Unity during 1963 and 1964.

At the inaugural conference of the OAU in Addis Ababa in May 1963, delegates stressed the necessity of working within the framework of the territorial integrity of States and of respecting the colonial boundaries. Ethiopia in particular pointed out that many African States would cease to exist if boundaries were redrawn on religious, racial and linguistic grounds.²³ The Mali representative noted that "we must take Africa as it is and we must renounce any territorial claims if we do not wish to introduce what we might call black imperialism in Africa....African unity

(22) The Somali Republic and African Unity, 1962, p.7 (a Somali government publication). See also Emerson, Self-Determination Revisited in the Era of Decolonisation, 1964, p.53.

(23) Proceedings of the Summit Conference of Independent African States, I, Section 2, Documents, CIAS/GEN/INF/43.

demands of each one of us complete respect for the legacy that we have received from the colonial system, that is to say, maintenance of the present frontiers of our respective States".²⁴ Other African States adopted the same approach.²⁵

Although the Charter of the Organisation of African Unity does not specifically refer to the sanctity of the colonial borders its provisions are unambiguous. The preamble refers to the determination to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of member-States. In Article 2(1)c, the Charter notes that one of the purposes of the organisation is to defend the sovereignty, territorial integrity and independence of African States, while in Article 3(3) respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence is formulated as one of the principles of the OAU.²⁶ Emerson concluded that "the net effect of such pronouncements as of the relevant sections of the 1960 UN Declaration is for all purposes to deny the legitimacy of any further disintegration or reshaping which impairs the integrity of the colonially defined States".²⁷ This view was overwhelmingly supported by the discussions at the first Ordinary Session of the Assembly of Heads of State and Government of the Organisation at Cairo in July 1964. Emperor Haile Selassie of Ethiopia declared that the

(24) Ibid, CIAS/GEN/INF/33. This countered Ghana's view that only continental unity could solve border disputes, *ibid*, CIAS/GEN/INF/36.

(25) See for example the speeches of the delegates from the Malagasy Republic, *ibid*, CIAS/GEN/INF/14 and Nigeria, *ibid*, CIAS/GEN/INF/35. Morocco refused to attend the conference as it might have been interpreted as recognition of Mauritania, see Keesings Contemporary Archives, p.19463.

(26) In Article 6, member States pledged themselves to observe scrupulously the principles enumerated in Article 3. See also Maya Krishnan, "African State Practice Relating to Certain Issues of International Law" 14 *Indian Journal of International Affairs*, 1965, pp.196, 207-8, and Cervenka, The Organisation of African Unity and its Charter, 1968.

(27) *Op.cit.* p.35.

acceptance of imperialist borders was necessary for Africa's safety and that the provisions of the OAU Charter regarding the preservation of territorial integrity must be supported.²⁸ The representative of the Ivory Coast noted that the conference "should decide as one of the surest means of achieving unity on absolute respect for the frontiers of member States of our Organisation".²⁹ President Nkrumah of Ghana in a decidedly minority stand emphasised that the artificial divisions of African States were too numerous and irrational for permanent and harmonious settlement save within the framework of continental union.³⁰ Kenya, however, called for a Charter to be drawn up with the object of preserving the territorial status quo and making impossible any frontier re-alignment except by mutual consent.³¹ In the event, a specific resolution was adopted by the Assembly in the issue. The preamble of resolution AHG/Res.16(1) noted that the borders of African States on independence constituted a "tangible reality" and recalled Articles 3(3) and 4 of the Charter of the OAU. The essence of the resolution was contained in the second operative paragraph which "solemnly declares that all member States pledge themselves to respect the borders existing on their achievement of national independence".

The resolution was not, however, unanimously accepted. Both Somalia and Morocco refused to be bound by it.³² The question also arose as to the meaning of the phrase "achievement of national independence" since it could be construed as validating the pre-colonial borders of such

(28) African Research Bulletin, July 1964, p.122.

(29) Ibid, p.123.

(30) Ibid.

(31) Ibid, pp.123-4. See also the speech of the delegate from Sierra Leone, *ibid*, p.125.

(32) Ibid, p.108.

independent entities as Morocco, Ethiopia and Liberia, and therefore used as a basis for reclaiming lost territories.³³ In addition, the resolution did not cover the problems caused by the different interpretations of documents defining boundaries, a situation a number of African States found themselves concerned with.³⁴ It is also interesting to note that the principle of self-determination was not referred to, nor was the difficulty of reconciling it with the acceptance of the territorial status quo alluded to. Nevertheless, the border resolution can be said to have marked the acceptance by Africa as a whole of a new territorial regime, one based on the legal validity of the colonial frontiers of independent States.³⁵ It is no longer possible to deny the impact of this rule as a binding practice of African States.³⁶

There are a number of reasons for this approach to the problem. Apart from the fear of anarchy and chaos if the map were to be redrawn on ethnic lines, the need is felt for a source of legitimation of Statehood. In European countries this is found in the identity of the nation-State, but African territories with only a few exceptions contain considerable numbers of different tribal groups. The vast majority of African countries do not consist of a defined "nation" as such in the western sense, and accordingly have sought the root of their legitimacy in the territorial unit rather than in the ethnic characteristics of the State. As Zartman has pointed out (as regards West Africa, but it is true

(33) See Touval, "The Organisation of African Unity and African Borders" 21 International Organisation, 1967, pp.102, 124-5. See also *infra*, p.286.

(34) See *infra* Chapter 8, p.534.

(35) See also the resolutions of the Cairo Conference of Non-Aligned Countries, 1964, which declared that "the established frontiers of States shall be inviolate" and pledged the States "to respect frontiers as they existed when [they] gained independence". See Africa Research Bulletin, October 1964, p.164.

(36) The Assistant Secretary-General of the OAU noted in 1967 that ideally the organisation should be an instrument of solidarity and defence of the territorial integrity of all African States", Africa Research Bulletin, September 1967, p.854. But note the attitudes adopted by Somalia and Morocco, *infra*, pp.

for the continent as a whole), "it is not the boundary but the nation that is artificial".³⁷

If ethnic unity does not exist in any given country, the question of self-determination of peoples in its sociological meaning of identifiable cultural groups becomes highly controversial. This is especially so since the end result could well be the creation of large numbers of competing and often hostile States each based upon a different ethnic or cultural unit. Accordingly, the legal and political emphasis has been not upon the characteristics of the population of the State but upon the territorial definition of that State and not unnaturally the doctrine of territorial integrity has been elevated to a principle of prime importance for the African continent. Save for those States like Morocco or Somalia that have founded their *raison d'être* upon historical or ethnic factors, the overwhelming majority of African countries see their existence in terms of their territorial integrity and identify their "nations" in strict territorial terms. In Africa, therefore, the notion of the nation-State has been replaced by the concept of the territorial-State. In so linking the principle of territorial integrity with the preservation of the inviolability of the colonial frontiers and thus establishing a legal basis for the rejection of both irredentist and secessionist demands,³⁸ African States have laid down the basic thesis relating to questions regarding territory on the continent. This approach has been characterised as constituting the creation of an African *Uti Possidetis*.³⁹

-
- (37) Op.cit. p.109. Yakemtchouk writes that "en Afrique, l'Etat précède la nation, il la crée, il lui imprègne ses modes d'expression et d'existence....ce processus est diamétralement opposé à celui qui se manifeste en Europe à partir du XVIe mais surtout au XIXe siècle", op.cit. p.88.
- (38) See Petkovic, "Intégrité Territoriale et Droit à l'Autodétermination en Afrique", *Revue de la Politique Internationale*, 20 February 1969, p.20.
- (39) See Yakemtchouk op.cit. pp.83-7. See generally Boggs, International Boundaries, 1940, pp.79-80 and Cukwurah, The Settlement of Boundary Disputes in International Law, 1967, pp.112-6.

This concept, derived from Roman Law,⁴⁰ is related to State Succession and was an idea adopted by the newly independent States of Latin America whereby the administrative divisions of the Spanish empire as they existed in South America in 1820 and in Central America in 1821 were deemed to constitute the basis for the frontiers of the new States. It was intended to end boundary conflicts in Southern America and forestall any attempts at European colonisation by preventing any part of the sub-continent from being regarded as terra nullius.⁴¹ The transfer of the concept to Africa has been criticised, particularly in view of the different circumstances pertaining to the two continents.⁴² Touval preferred to see the process of the acceptance of the colonial frontier as a "common law of successor States".⁴³ Whichever phrase is used, the essence of the proposition remains, namely that the doctrine of territorial integrity has been adopted specifically in Africa as a rule operating as a blocking mechanism to any post-independence territorial re-arrangement except where attained by mutual consent.⁴⁴

(c) The Temporal Definition of Territorial Integrity

The claim has been made that the critical date at which the unit of territory is to be defined should not be restricted to the post-colonial stage. This argument has been used particularly by Morocco,

-
- (4) Jolowicz, Historical Introduction to Roman Law, 1954, p.273. See also Schwarzenberger, International Law, vol.I, 1957, p.289.
- (41) See Columbia-Venezuela Arbitral Award, 1 RIAA, pp.223, 228. See also Cukwurah, *op.cit.* p.114 and De La Pradelle, La Frontière, 1928, pp.86-7.
- (42) McEwen, International Boundaries of East Africa, 1971, pp.30-1.
- (43) "Africa's Frontiers" 42 International Affairs, 1966, pp.642, 644. Touval described the concept as "the right of undisturbed possession of the inheritance; existing borders are not to be challenged, *ibid.*"
- (44) The concept was re-emphasised in a seminar on International Law and Africa organised in Ghana by UNITAR in 1971, Africa Research Bulletin, January 1971, p.1983. Note also the comment by the Upper Volta Minister of the Interior that there could be no place in Africa without scrupulous respect for the colonial borders, no matter how imperfect they may be, *ibid.*, September 1974, p.3258.

and to a lesser extent by Mauritania, to justify territorial claims. Morocco has declared that the territory which has to be considered as the relevant unit in international law today for the purposes of the rule of territorial integrity may also include the pre-colonial definition of the State. In Morocco's case the implication could well be that this might comprise all of Mauritania and Western Sahara as well as parts of Algeria, Mali and even arguably Senegal. This argument was used with respect to Morocco's claim to Mauritania in the period leading up to and immediately after the independence of the latter⁴⁵ and with regard to the Saharan question. In its assertions the Moroccan government emphasised that it was seeking the integrity of its territory, by which it meant all those areas, including Morocco as constituted in the post-colonial era, which could be regarded as having been under Moroccan sovereignty prior to the colonial period.⁴⁶ Morocco maintained that the concept of territorial integrity proclaimed in paragraph 6 of resolution 1514 (XV)⁴⁷ referred to the integrity of a country already in existence and already constituted as a State and that this had been re-emphasised in the 1970 Declaration on Principles of International Law.⁴⁸ However, by that Morocco meant that the concept of territorial integrity was available to any independent State in order to recover all of its territory as defined according to pre-colonial history. As far as Sahara was concerned, Morocco's sole concern "was the liberation of Western Sahara and its reintegration into the Moroccan State".⁴⁹ Mauritania, during the course of the hearings before the International Court in the Sahara case, added the point that the principle of African Uti Possidetis

(45) A/4445 and Add.1.

(46) A/10023/Add.5, annex para.294. See also Western Sahara case, ICJ, Pleadings CR.75/8, pp.11-16.

(47) Supra, p. 270.

(48) A/10023/Add.5, annex para.295.

(49) Ibid, para.298. See also ibid, appendix II, para.16.

only concerned States which had obtained independence and did not ban regroupings before accession to independence.⁵⁰

Algeria's stated view was that a claim to territorial integrity was more than lawful, it was sacred.⁵¹ It distinguished three varieties of territorial integrity. The territorial integrity of a colony with respect to the territory of the administering power was now well established and enshrined in the 1970 Declaration on Principles of International Law. The territorial integrity of the non-self-governing territory vis-à-vis a neighbouring State was an issue governed by the principle of *uti possidetis juris* or respect for the frontiers bequeathed by colonisation. It amounted to a general and valid rule and not a mere de facto practice and it constituted the basis upon which African States were achieving independence. More than that, Algeria emphasised that the principle of the inviolability of frontiers was one of the pillars of international law.⁵² The third type of territorial integrity derived from the concern to preserve the territorial integrity of the neighbouring State in relation to the non-self-governing territory. It concerned the question of decolonisation by integration and this, it was stressed, could take place only on the basis of the free choice of the population of the dependent territory and not by virtue of the territorial integrity of the neighbouring State.⁵³ The view that paragraph 6 of resolution 1514 (XV) could refer to territories formerly detached from a State and now the subject of a claim on the grounds of the principle of integrity was strongly rejected. Paragraph 6 related only to future attempts to impair the territorial integrity of a State and could not be used to give territorial claims priority over the principle of self-determination.⁵⁴

(50) Western Sahara case, ICJ, Pleadings, CR.75/13, p.48.

(51) Pleadings, CR.75/31, p.25.

(52) Ibid, pp.25-31.

(53) Ibid, p.36.

(54) Ibid, pp.37-8.

A variation in the temporal-shift approach to the concept of territorial integrity is afforded by Alexandrowicz's views on "reversion to sovereignty".⁵⁵ This was based on the claim by Ceylon in the General Assembly Sixth Committee discussions on the report of the International Law Commission on Succession of States and Governments in respect of Treaties that in view of its existence as an independent Kingdom prior to the nineteenth century, it should be classified not as a new State but as an original State in the Family of Nations.⁵⁶ Judge Moreno Quintana appeared to take the view that such reversion to sovereignty was essentially of a procedural character and did not therefore affect the acts of the colonial power resulting from the legitimate exercise of its right of sovereignty in the colonial period.⁵⁷ Brownlie, however, has pointed to the dangers of accepting this theory as valid in international law. The logical consequence of such a doctrine of reversion may create a threat to the security of legal relations, it is noted, for "it would follow that the successor would not be bound by territorial grants or recognition of territorial changes by the previous holder".⁵⁸ This, of course, would introduce a serious element of instability in the international system as well as challenging the dominant interpretation of self-determination.⁵⁹

The court in the Western Sahara case did not directly discuss whether the concept of territorial integrity could refer to pre-colonial States, but it did emphasise that the right to self-determination, predicated upon

(55) See "New and Original States", 45 International Affairs, 1969, p.465 and "The New States and International Law", 3 Millenium Journal of International Studies, 1974-5, p.226.

(56) A/C.6/SR.1036. See also ICJ Reports, 1960, p.6.

(57) Ibid, pp.93-6.

(58) Principles of Public International Law, 2nd ed. 1973, p.652.

(59) Alexandrowicz made the point that the doctrine would generally not apply in Africa, except for Algeria, see "New and Original States" 45 International Affairs, 1969, pp.465, 473 and 478.

"the need to pay regard to the freely expressed will of peoples" was one of the basic principles governing the decolonisation process.⁶⁰ The presumption was clearly against upsetting the wishes of the inhabitants of the territory to be decolonised and should they be against integration or re-integration with an independent State, their views would prevail.⁶¹ The legal basis for any merger would thus be the freely expressed wishes of the people of the territory and not any principle of territorial integrity accruing to another State.

Judge Dillard unambiguously made the point that "any claim to what has been called automatic retrocession is not applicable to the Western Sahara and therefore it was unnecessary for the court to pronounce upon the principle of territorial integrity embodied in paragraph 6 of resolution 1514(XV)".⁶² It was suggested that the court might have discussed the matter further had it decided that the Moroccan claim had been established, but in any event Dillard's own view of paragraph 6 "makes it unlikely that [it] could justifiably be applied to the decolonisation of Western Sahara as a principle of territorial integrity overriding the right of the people to self-determination".⁶³ Judge Nagendra Singh was of a similar opinion with respect to Western Sahara. He noted that there was no evidence of a single State comprising Morocco and Western Sahara or Mauritania and Western Sahara at the time of Spanish colonisation "which would have been dismembered by the coloniser and thus justified reunion on decolonisation at the present time",⁶⁴ and therefore paragraph 6 of resolution 1514(XV) was not applicable. The legal ties

(60) ICJ Reports, 1975, pp.12, 33 and 34.

(61) Ibid, p.68. See also Judges Dillard, *ibid*, p.123 and Nagendra Singh, *ibid*, p.81.

(62) Ibid, p.120.

(63) Ibid, footnote

(64) Ibid, pp.79-80.

which did exist at the time of Spanish colonisation between the claimants and Western Sahara "were not of such a character as to justify today the reintegration or retrocession of the territory without consulting the people".⁶⁵

The Judge appeared to leave open the possibility that if legal ties of territorial sovereignty were deemed to exist between the territory in question and a claimant State prior to colonisation, then the concept of territorial integrity might conceivably be utilised to justify a retrocession.⁶⁶ In a sense, a gap exists in the court's advisory opinion on Western Sahara. However, two things ought to be noted. Firstly, that the principle of territorial integrity in this sense is relevant in cases of colonial enclaves, where in essence the right of self-determination exists only in an extremely attenuated form,⁶⁷ and secondly, in usual decolonisation situations, the applicability of this principle may be of relevance only in a procedural context. The court noted in the Western Sahara case that "the right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realised".⁶⁸

(65) Ibid, p.79. The effect of recognition of legal ties by the court between the claimants and Sahara was to point out the possible options open to the inhabitants of the territory, *ibid*, p.80. But see resolution 1514 (XV) and the 1970 Declaration on Principles of International Law. Judge Petren noted that the question of the role of past legal ties in the decolonisation process fell within an, as yet, inadequately explored area of contemporary international law, *ibid*, p.112.

(66) Ibid, p.80. See also Judge Petren *ibid*, p.114.

(67) See *supra*, Chapter 4, p.245.

(68) ICJ Reports, 1975, pp.12, 36.

The court went on to say that as far as the future action of the General Assembly was concerned, "various possibilities exist, for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a full and genuine expression of the will of the people".^{68a} Accordingly the existence of ties might affect the form in which any plebiscite questions may be phrased, the extent of any consultations with interested parties and indeed the manner in which the inhabitants of the particular territory may be consulted. Such consultation may be, for instance, by plebiscite or by simple consent of institutions deemed representative. There is thus some scope for the expression in international practice of such ties, although care would be needed to prevent the procedural aspects from having a serious impact upon the fundamental substantive provision. One may also note with interest how the court discussed the issue of self-determination before turning to the two questions asked of it, thus emphasising the crucial role of the concept. The court stressed in particular that neither the request for the advisory opinion nor the terms of resolution 3292 (XXIX) affected the right to self-determination of the people of Sahara.^{68b}

(68a) Ibid, p.37.

(68b) Ibid, p.36.

If the temporal-shift interpretation of territorial integrity is not to be applied as regards a pre-colonial State, the question arises as to its applicability to pre-colonial non-State entities. The court, while accepting the variation in forms of States, nevertheless identified personality in terms of a legal entity in the light of the essential test as to whether the entity was in such a position as to possess in regard to its members rights which it is entitled to ask them to respect.⁶⁹ The "Mauritanian entity" at the date of colonisation was not such an entity.⁷⁰ Therefore, the notion of territory and territorial integrity in international law was of no direct relevance as far as it was concerned. It would also be logical to suggest that the concept of territorial integrity can have no applicability in the law as far as pre-colonial non-State entities are concerned.

Accordingly, one may conclude that the correct temporal context for the definition of territorial integrity is the period of decolonisation. The territorial configuration of any given entity at an earlier historical period would of itself have no legal importance, although when allied to strong historical and cultural ties, for example, existing between the successor State and the territory in question, it might at the discretion of the United Nations have some procedural relevance.⁷¹

(d) Territorial Integrity and Self-Determination

The link between the two concepts in the period of decolonisation is, therefore, crucial, for the right of the people to self-determination takes place only within the framework of the colonially defined territory.

(69) Ibid, p.63. Note also the definition of State sovereignty in terms of genuine display or exercise of the State authority, *ibid*, p.44.

(70) Ibid, pp.63-4.

(71) See footnote 68.

In post-independence situations, the link is two-fold. Firstly, it reinforces the norm of non-intervention in the internal affairs of any State, for all States have the right to choose their own political, economic and social systems. Secondly, the two principles together will operate to render unlawful any territorial diminution of an independent State which takes place in conditions where a legal right to self-determination exists and where the effect of such action would be counter to the right of the people concerned to self-determination. To date, this proposition relates specifically and uniquely to South Africa and its bantustan policy.⁷² In resolution 2775E(XXVI), the UN General Assembly stated that the bantustan policy was in pursuance of apartheid and it condemned the policy as violating the right to self-determination and as prejudicial to territorial integrity. This was repeated in resolution 3411D(XXX), which also reaffirmed that the establishment of bantustans was a measure "essentially designed to destroy the territorial integrity of the country in violation of the principles enshrined in the Charter of the United Nations". In June 1976, the OAU Council of Ministers reaffirmed "the OAU's sacred commitment to the principles of territorial and national integrity of all territories under foreign domination and fighting for liberation and self-determination" and called on all States not to recognise any of the bantustans, in particular the Transkei.⁷³ The Chairman of the Special Committee against Apartheid declared that the agreements signed between South Africa and the proposed Transkei Chief Minister⁷⁴ were of no validity and were not agreements for the granting of self-determination or independence to the African people, but a fraud.

(72) See also *supra*, Chapter 4, p.257 and *infra* Chapter 6, p.355 and Chapter 7, p.477.

(73) CM/Res.493 XXVII.

(74) Such agreements were a prelude to independence, *Africa Research Bulletin*, September 1976, p.5153.

An appeal was made to all governments and organisations for solidarity with the people of Namibia and South Africa in their struggle against the bantustan policy and for the territorial integrity of their nations.⁷⁵

On October 26, 1976, the Transkei was declared independent by South Africa,⁷⁶ and on the same day the General Assembly, in resolution 31/6a,⁷⁷ condemned the change in status of the Transkei and referred to its "sham independence". The establishment of bantustans was strongly attacked as designed to consolidate apartheid and destroy the territorial integrity of the country. All governments were called upon to deny recognition to the Transkei or any other bantustan.⁷⁷ In June 1977, the Security Council unanimously endorsed Assembly resolution 31/6A.⁷⁸ The principles behind these resolutions may be stated as follows. The right of self-determination applies to the people of South Africa as a single unit. An integral part of this right is the right to territorial integrity. Any activity involving territorial diminution not in accordance with the right of all the people to determine their political status contravenes not only the right to self-determination but also the inter-connected principle of territorial integrity. Thus, until the right

(75) UNMC October 1976, p.15.

(76) See the Status of the Transkei Act 1976, ILM, September 1976, p.1175. See also the Republic of Transkei Constitution Act, 1976, ILM, September 1976, p.1136.

(77) The resolution was sponsored by 67 States and adopted by 134 votes to none. The USA, the sole abstaining State, declared that it was prepared to support a resolution calling on all States not to recognise the Transkei and not to have official contacts with the Transkei government, but it had certain reservations about the clause prohibiting individuals from dealing with the bantustan, UNMC November 1976, p.14. See also the statement by the UN Secretary-General, *ibid*.

(78) Resolution 407 (1977). See also Assembly resolution 32/14. On 6 December 1977, the independent State of Bophuthatswana was proclaimed amidst condemnation from the OAU and the EEC, Africa Research Bulletin, November 1977, p.4631 and *ibid* December 1977, pp.4666-8. See generally Richardson, "Self-Determination, International Law and the South African Bantustan Policy" 17 Columbia Journal of Transnational Law, 1978, p.185.

of the people as a whole to exercise self-determination is granted in accordance with UN resolutions, there appears to be a duty not to reduce or adversely affect the territorial integrity of the nation. To this extent, paragraph 6 of resolution 1514(XV) is relevant.

II - The Nature of Claims Against Territorial Integrity

Once a State has become independent and thereby exercised the right to self-determination as spatially defined, the question of the temporal application of self-determination arises. In other words, does the right of self-determination in international law subsist beyond the achievement of independence to challenge the territorial integrity of the new State or is it temporally restricted to the period of decolonisation? If the latter is the case, as is contended although the potential for change exists as the South African situation demonstrates, one may posit a fundamental harmony between self-determination and territorial integrity on a number of planes. As we have seen, the colonial borders delimited the territories in Africa and gave them thereby a certain national, linguistic and cultural framework. Additionally, the territory so delimited became a unit both externally in relation to other such territories and the international community in general and internally as regards a particular self-image. However, a number of claims have been made against the territorial integrity of States, although one must distinguish between irredentist and secessionist claims since the situation in law is distinct. Such claims have revolved primarily around ethnic and historical factors, although economic and geographic contentions have also been pressed. In most situations a variety of assertions are made at the same time in order to demonstrate the strength of a particular claim, while it is interesting to note just how many are actually expressed in terms of the right of self-determination, although interpreting it in ways inconsistent with accepted formulations.

This use of the concept is presumably an attempt to derive some benefit from the charisma of the principle itself.⁷⁹ We shall note some of the types of claims made against the territorial integrity of States before proceeding in subsequent sections to an examination of practice.

(a) Historic Claims⁸⁰

These are propounded upon the basis that what has been ought now to be and that the existence (usually before colonisation) of a sovereign State should entitle it in the post-colonial era to claim the extent of its previous territorial limits. In the context of African affairs, there has been only one major such claimant and that is Morocco. Morocco has claimed all of Mauritania and Western Sahara and parts of Mali, Algeria and possibly Senegal on the basis of historical connection, since it was argued that from the eleventh century to the establishment of the French protectorate in 1912, the Kingdom of Morocco had extended from the Mediterranean to the Senegal River.⁸¹ This historical connection was expressed in terms of personal and religious allegiance to the Sultan of Morocco rather than in the light of the European concept of territorial jurisdiction within a State.⁸² Although the International Court accepted the specific character of the late nineteenth century Moroccan State, the test of extent of sovereignty was still based upon evidence of actual exercise of authority.⁸³ Using this test, it was

(79) This emphasises the point made by Hill that the "types of claims made by a State to territory reflect the doctrines and conditions dominant in international relations at the time", Claims to Territory in International Law and Relations, 1945, p.35.

(80) See Hill op.cit. pp.81-91, and Jennings, The Acquisition of Territory in International Law, 1963, pp.76-8.

(81) A/4445 and Add.1. See also Rezette, The Western Sahara and the Frontiers of Morocco, 1975, pp.35-50; Wild, "The Organisation of African Unity and the Algeria-Morocco Border Conflict" 20 International Organisation, 1966, p.18 and Zartman, "The Politics of Boundaries in North and West Africa" 3 JMAS, 1965, p.155.

(82) *Supra*, p.90.

(83) ICJ Reports, 1975, pp.12, 43-4.

concluded that although a legal tie of allegiance had existed between the Sultan and some of the peoples of the territory at the time of colonisation, Morocco's claim of immemorial possession based on the public display of sovereignty uninterrupted and uncontested for centuries was not accepted.⁸⁴ Judge De Castro in particular emphasised that the doctrine of intertemporal law, expressed in the rule *tempus regit factum*, was relevant in such cases. Whatever the ties between Morocco and Western Sahara in the 1880's, the fact of colonisation had created a new situation with sociological and legal implications which had to be assessed in accordance with the law in force at that time. In addition the decolonisation process based on the UN Charter and resolutions had created a new legal context for the non-self-governing territories and, as the court had declared in the *Namibia* case,⁸⁵ the principle of self-determination had become applicable to them all.⁸⁶ Judge De Castro noted that whatever the existing ties with Western Sahara at the time of colonisation by Spain, "legally those ties remain subject to intertemporal law and that as a consequence they cannot stand in the way of the application of the principle of self-determination".⁸⁷

Morocco's claims regarding Mauritania and Algeria,⁸⁸ similarly based on historically oriented factors, failed to arouse much international support and ultimately Morocco accepted the reality of the colonial frontiers.⁸⁹ In the Sahara, Morocco first compromised its claim by its

(84) Ibid, pp.48-9.

(85) ICJ Reports, 1971, pp.16, 31.

(86) ICJ Reports, 1975, pp.12, 168-71.

(87) Ibid, p.171. Emphasis in original. See also Judge Dillard *ibid*, p.118.

(88) In this case there was also uncertainty as to the precise location of the borders, see *infra*, p. 530.

(89) Algeria did note at one time that although it had no claims of its own, there were historical rights it could assert over territory Morocco claimed and occupied, see *Africa Research Bulletin*, March 1967, p.734.

arrangement with Mauritania and then proceeded to enforce it in defiance of the opinion of the International Court. A number of other historical claims in Africa have also been made. Liberia claimed the Mount Nimba region of Guinea and the land between the Cavally and Cess rivers in the Ivory Coast on historical grounds, but renounced these claims upon the independence of the two States.⁹⁰ In 1975, Lesotho asserted a claim before the UN for "conquered territory" in South Africa's Orange Free State and Cape, which had originally belonged to Basutoland before being added to the South African areas over one hundred years earlier.⁹¹ Uganda claimed large areas of territory taken from it in colonial times and transferred to Sudan and Kenya,⁹² while Malawi in 1968 claimed districts in Zambia and Tanzania which it asserted belonged to it on historical and other grounds and which had been detached in colonial times.⁹³ None of these claims succeeded while historical claims in general have not been accepted as valid legal claims to territory in international law.⁹⁴

(b) Ethnic Claims⁹⁵

Since claims are closely linked with the political definition of self-determination and consist of the assertion that either a particular ethnic group is entitled to secede from an existing State or that an existing State may extend its territorial limits to include all

(90) Zartman "The Politics of Boundaries in North and West Africa" 3 JMAS, 1965, pp.155, 172.

(91) Africa Research Bulletin, January 1975, pp.3485-6 and *ibid*, October 1975, pp.3783-4.

(92) *Ibid*, February 1976, pp.3919-20. Note also the historical claims by Ethiopia in 1945-8 to Eritrea and Somaliland, see A/C.1/8 and Marian, "The Background of the Ethio-Somalian Boundary Dispute" 11 JMAS, 1964, pp.189 et seq.

(93) Africa Research Bulletin, September 1968, pp.11, 78-9.

(94) See Hill *op.cit.* p.171 and Jennings *op.cit.* pp.76-8.

(95) See for example Hill *op.cit.* pp.115-30 and Yakemtchouk, L'Afrique en Droit International, 1971, pp.88-90.

members of a particular ethnic group.⁹⁶ The ethnic secessionist claim has manifested itself in a number of instances, the most prominent being the Biafra case, while the ethnic irredentist claim is most clearly instanced by the Somali case. In a number of cases the two claims have merged, so that a secessionist claim will be subsumed under an irredentist assertion by a neighbouring State.⁹⁷ The use of the ethnic argument to found title to territory has been singularly unsuccessful in this purist form, because once granted it could lead to widespread disruption and destroy the territorialist conception of the State maintained by African States.

(c) Geographic Claims⁹⁸

Allied with strategic claims or demands for a natural frontier,⁹⁹ the concept of geographic claims could have been used to a far larger extent than has in fact occurred in a continent of such arbitrary borders as Africa. The fact that it has not (apart from indirectly in the special case of colonial enclaves) reinforces the acceptance of colonial borders. Morocco attempted to use the geographic contiguity of Western Sahara as an additional reason for the foundation of its title upon an analogy with the Eastern Greenland case.¹⁰⁰ However, the International Court, after

(96) Not all ethnic groups always wish to live in the same State. See for example the case of Bugulfi, which was included in Tanganyika in the mandate agreements of 1922. In 1948, the ruler of Urundi petitioned the Trusteeship Council for the return of the area. A UN Visiting Mission in July of that year declared that Bugulfi was geographically clearly part of Urundi and its people were Barundi, T/217/Add.1, p.101. The matter was further discussed between the British and Belgian authorities, but a resolution of the Trusteeship Council in February 1950 recognised that the evidence showed that an overwhelming majority of the people of Bugulfi wished to retain the status quo and accordingly no action was taken, T/635 and resolution 116(VI).

(97) See *infra*, p. 295.

(98) See for example Hill *op.cit.* pp.71-80 and Jennings *op.cit.* p.74.

(99) See Blum, Secure Boundaries and Middle East Peace, 1971.

(100) PCIJ Series A/B, no.53.

noting that the geographic unity of Western Sahara with Morocco was in any case debatable, declared that even if the "geographic contiguity of Western Sahara with Morocco could be taken into account in the present connection it would only make paucity of evidence of unambiguous display of authority with respect to Western Sahara more difficult to reconcile with Morocco's claim to immemorial possession".¹⁰¹ On 1 November 1978, Uganda announced that it was annexing a 710 sq. mile area of Tanzania up to the Kagera river. Part of the reason for this was that Uganda saw the river as its "natural frontier" with Tanzania rather than the arbitrary land boundary fixed between Britain and Germany before the First World War. A week later under OAU pressure, Uganda proclaimed its intention to evacuate the salient.¹⁰² It is clear that under international law geographic claims are insufficient to found title¹⁰³ and African practice has underlined this.

(d) Economic Claims¹⁰⁴

Although economic reasons have underlain a number of territorial claims, direct economic claims have been very rare. However, Tunisia did claim a "prolongation" of its territory into Algerian Sahara up to marker 233 or an agreement that beyond a certain limit in the Sahara "the door opens on an area undivided and shared by all, where communications, water points, pasturage and underground wealth are at the disposal of all",¹⁰⁵ upon an analogy of the desert with the sea. Tunisia did seem to be seeking

(101) ICJ Reports, 1975, pp.12, 42-3.

(102) Africa Research Bulletin, November 1978, pp.5052-5.

(103) See for example the Island of Palmas case, 2 RIAA p.829, and Waldock, "Disputed Sovereignty in the Falkland Island Dependencies", 25 BYIL, 1948, p.342.

(104) Hill op.cit. pp.92-113 and 172.

(105) Speech by President Bourguiba of Tunisia on 5 February 1959 quoted in Zartman, loc.cit. p.113. See also Touval, The Boundary Politics of Independent Africa, 1972, pp.251-4.

economic rights rather than actual territorial acquisition, in the event, and this was expressed in the theory of *dépassement*, according to which border disputes would be left behind by a higher level of cooperation agreements. Ultimately, Tunisia formally renounced any territorial claims and recognised the territorial status quo in a series of agreements with Algeria.¹⁰⁶

III - State Practice

In this section, African State practice regarding irredentist and secessionist claims against independent States will be examined. Such claims have been made in the light of primarily historical and ethnic factors, although cultural elements were necessarily involved.

(a) Irredentist Claims

(1) Moroccan Claims to Algerian Territory

In pursuit of its pre-colonial borders, Morocco has also claimed areas of Algeria on the basis of respect for the territorial integrity of its pre-colonial territorial extent. However, large parts of the border were never demarcated in view of the nature of the territory.¹⁰⁷ Prior to its independence, the provisional Algerian government recognised the existence of a "territorial problem" with Morocco in an agreement signed at Rabat on 6 July 1961,¹⁰⁸ and negotiations were promised. However, upon the achievement of independence a year later, Algerian attitudes changed and when French troops were

(106) See Africa Research Bulletin, January 1970, p.1633 and *ibid*, May 1970, p.1748.

(107) See the Treaty of Lalla - Marnia, 1845, Keesings Contemporary Archives, p.19939 and *infra*, p.530.

(108) Keesings Contemporary Archives, p.19940 and Africa Research Bulletin, October 1966, p.632. Algeria declared that any Franco-Algerian agreement regarding territorial delimitation between it and Morocco would not be binding on Morocco, Keesings Contemporary Archives, p.19940.

withdrawn, both Morocco and Algeria sent in soldiers to occupy positions in the disputed areas. An agreement was signed in April 1963, but it proved a failure. In September, Morocco occupied border posts claimed by both sides, but they were captured the next month by Algeria. This precipitated a wider conflict and on October 15, King Hassan of Morocco declared that his country was determined "to impose respect for our national territory and the integrity of its authentic frontiers".¹⁰⁹ After a series of unsuccessful mediation attempts,¹¹⁰ a meeting was held at Bamako at the end of October with the president of Mali and the emperor of Ethiopia as mediators. This resulted in an agreement which comprised a cease-fire, a commission to determine a demilitarisation zone composed of the parties and the mediators and a proposed meeting of OAU Foreign Ministers at Addis Ababa to establish an arbitration commission.¹¹¹ This arbitration commission was set up in November with representatives of Ethiopia, Mali, Ivory Coast, Nigeria, Senegal, Sudan and Tanganyika, and the following February an agreement regarding a demilitarised zone, troop withdrawals, the establishment of a no-man's-land and an exchange of prisoners was signed.¹¹² In January 1969, Morocco and Algeria signed a Treaty of Solidarity and Cooperation valid for twenty years according to which all questions at issue were to go to joint commissions.¹¹³ On May 27, 1970, the two parties met at Tlemcen in Algeria and agreed upon a final settlement of the frontier dispute with a joint commission to map out the delimitation. The frontier was to be the same as during the colonial period, while Morocco was to have a share in mineral exploitation in the Gara-Djebilat area.¹¹⁴ In June 1972, at the Rabat Conference of

(109) Ibid.

(110) By Ghana, Syria, Tunisia, Iraq and Egypt and also by the Council of the Arab League, *ibid*, p.19941.

(111) *Ibid*, p.19942.

(112) *Ibid*.

(113) *Ibid*, p.24125.

(114) *Ibid*. See also Africa Research Bulletin, May 1970, p.1748.

the OAU, the leaders of the two countries met again and declared that the border issue was resolved. Two conventions were signed, a border agreement declaring that the disputed area of Tindouf would remain part of independent Algeria and an economic cooperation agreement regarding the mining of iron ore deposits south-east of Tindouf.¹¹⁵ King Hassan declared that "frontiers have nowadays lost their former importance."¹¹⁶ Moroccan claims to Algerian territory were never recognised by any other country and ultimately Morocco itself was compelled to accept the existing frontier as colonially defined, with some delimitation of areas that had been left undelimited. A major territorial dispute therefore resolved itself into an exercise of delimitation. It is interesting to note that when the issue was discussed at the Extraordinary Session of the OAU Council of Ministers in November 1963, a resolution was adopted proclaiming that African States must seek solutions to disputes "within the framework of the principles and the institutions prescribed by the Charter of the Organisation of African Unity",¹¹⁷ and Article 3(3) of the OAU Charter emphasises the principle of "respect for the sovereignty and territorial integrity of each State".

(2) Somali Claims to Ethiopian and Kenyan Territory

Somalia is unique among African States in being a homogeneous nation-State on European lines. It therefore has had no need for the territorial principle of State legitimacy since it possesses its own ethnic *raison d'être*. However, there are a substantial number of Somali tribesmen inhabiting areas of Ethiopia, Kenya and Djibouti and in its claims to extend its boundaries it has demonstrated the classic ethnic

(115) The signing of the conventions was witnessed by the representatives of the 40 States attending the conference, Keesings Contemporary Archives, p.25372, and Africa Research Bulletin, June 1972, p.2502.

(116) Ibid.

(117) ECM/Res. 1(1).

assertion.¹¹⁸ Somalia has consistently opposed the status quo approach to African borders and has argued instead for the right of self-determination, by which it means not the legal doctrine as defined in international practice, but rather the political concept founded as it is upon ethnic or national factors. Having no fear of secessionist movements itself since it is ethnically united,¹¹⁹ Somalia has failed to perceive African apprehensions of tribal conflict in the event of a rearrangement of borders on ethnic lines. It itself is a merger of the former British and Italian Somalilands and its constitution and five star flag¹²⁰ reflect its aim of promoting the political unification of the Somali nation. Somalia opposed the important OAU resolution on respect for colonial borders, as did Morocco. In its wishes to unite all Somalis, Somalia received some initial sympathy from the more radical gatherings of African and other States, but support has since waned appreciably.

The First Afro-Asian Peoples' Solidarity Conference at Cairo in December 1957 approved a resolution regarding the right to self-determination of the people of Somaliland,¹²¹ while the All-Africa Peoples' Conference at Tunis in 1960 supported the struggle of the Somalis "for independence and unity in order to give birth to a bigger Somaliland".¹²² The Conakry Conference of 1960 of the Afro-Asian Peoples' Solidarity Organisation adopted a resolution in favour of the "glorious struggle of the Somali people for their freedom, independence and unification".¹²³

(118) See Hill, op.cit. p.115. This is what Zartman calls "national overhang", "The Foreign and Military Politics of African Boundary Problems", African Boundary Problems (ed. Widstrand), 1969, p.81. See also Hoskyns, The Ethiopia-Somali-Kenya Dispute 1960-7, 1969.

(119) Touval, Somali Nationalism, 1963, pp.16-25 and 29.

(120) Representing British Somaliland, Italian Somaliland, Djibouti and the Somali inhabited parts of Kenya and Ethiopia.

(121) Touval, The Boundary Politics of Independent Africa, 1972, pp.51-3.

(122) Legum, Pan-Africanism, 1962, p.246.

(123) Touval, op.cit. p.63.

The Somali case was discussed at a preparatory meeting of Foreign Ministers at Addis Ababa dealing with the creation of the OAU in 1963. Somalia requested an item on the agenda dealing with territorial disputes between neighbouring African States and the establishment of machinery to resolve them.¹²⁴ It was included under item VII dealing with the creation of a Permanent Conciliation Commission but never actually dealt with as the establishment of a conciliation commission was subsumed under the discussion on the setting up of an organisation of African States.¹²⁵ At the first OAU Summit Conference, the Somali president put forward his case but was faced with arguments supporting the territorial integrity of States based upon colonial borders put forward by Ethiopia and the representatives of the pre-independent Kenya-African National Union.¹²⁶

In July 1963, Ethiopia and Kenya signed a mutual defence agreement and in January and February 1964 incidents in the Haud and Ogaden regions of Ethiopia claimed by Somalia led to fighting between the Ethiopian and Somali regular armies.¹²⁷ Somalia informed the OAU Secretariat of the fighting and requested a meeting of the Security Council.¹²⁸ On the same day, Ethiopia asked the OAU to consider its complaint against Somalia. The United Nations Secretary-General preferred an African framework to be used for the discussion of the problem¹²⁹ and the issue was accordingly placed before an Extraordinary Session of the OAU Council of Ministers at

(124) Procs.I, Sec.I, Doc. Agenda/Conf./5, May 15, 1963.

(125) CIAS/Plenary/3, May 22, 1963.

(126) CIAS/GEN/INF/25 and 43. See also Wolfers, Politics in the Organisation of African Unity, 1976, pp.132-3.

(127) Africa Research Bulletin, February 1964, pp.22-3.

(128) S/5536.

(129) See Wolfers op.cit. p.134.

Dar-Es-Salaam.¹³⁰ Somalia informed the UN Secretary-General that it would not raise the matter with the Security Council while the problem was in the hands of the OAU.¹³¹ At the conference, Somalia restricted its demands to a cease-fire and disengagement of the armies, while Kenya and Ethiopia broadened out the discussion into matters of principle. Kenya suggested that a further Charter should be established which would prohibit territorial claims. Ultimately a resolution was adopted calling for a cease-fire, cessation of hostile propaganda and negotiations for a peaceful settlement of the dispute between Somalia and Ethiopia.¹³² A resolution dealing with the Somali-Kenyan dispute was limited to calling for steps to be taken to settle the dispute without actually requesting negotiations between the parties.¹³³ The issue was further discussed at the Second Ordinary Session of the OAU Council of Ministers at Lagos. In spite of Somali objections that a territorial dispute was involved, the Ethiopian-Somali dispute was listed as a border one. Ethiopia and Kenya called on Somalia to renounce its territorial claims. A resolution was eventually adopted on the Ethiopian-Somali dispute which confirmed the Dar-Es-Salaam resolution and called on the parties to respect the cease-fire. The resolution also requested Ethiopia and Somalia to open direct negotiations and significantly referred to Article 3(3) of the OAU Charter, which specifically mentions respect for the sovereignty and territorial integrity of States.¹³⁴ The resolution on the Somali-Kenyan dispute

(130) The Extraordinary Session had been called to discuss the army mutinies in East Africa, but the dangers of renewed fighting between Ethiopia and Somalia convinced the representatives to consider the issue. Kenya's request that its dispute with Somalia be placed on the agenda was subsequently accepted by the Council, see Touval, "The Organisation of African Unity and African Borders", 21 International Organisation, 1967, pp.102, 112.

(131) S/5542. See also S/5557 and S/5558.

(132) ECM/Res.3 (II).

(133) ECM/Res.4 (II), and in accordance with Article 3(4) of the Charter of the OAU. See Touval, The Boundary Politics of Independent Africa, 1972, pp.212-6, and Hoskyns, op.cit. 1969, pp.50-61.

(134) CM/Res.16 (II).

similarly called for negotiations and referred to Article 3(3).¹³⁵ It thus appeared that African States accepted the territorial positions of Ethiopia and Kenya and were prepared only to seek means to defuse the crisis. A cease-fire was in fact agreed through Sudanese mediation in March and the joint Ethiopian-Somali communique issued at the end of the meeting noted that the talks had taken place in accordance with the OAU's recommendations.¹³⁶

The Somali disputes were to be discussed at the first OAU Assembly of Heads of State and Governments in Cairo in July 1964, but this was postponed in view of a Somali government crisis.¹³⁷ However, at this conference, the OAU resolution was adopted which called on member-States to respect the colonial borders.¹³⁸ At the second OAU Assembly at Accra in October 1965, an agreement was signed between Ethiopia and Somalia against using hostile propaganda, but the tension continued.¹³⁹ During December 1965, President Nyerere of Tanzania arranged a Somali-Kenyan meeting at Arusha, but this had no positive results. Kenya refused to negotiate about its territorial integrity, while Somalia demanded the right of self-determination for its kin in northern Kenya.¹⁴⁰ The next year, Sudan attempted to mediate between the two, but it was not until after a change in government in Somalia in June 1967 that progress could be effected. During the fourth OAU Assembly in Kinshasa in September 1967,

(135) CM/Res.17 (II).

(136) OAU Review, May 1964, vol.I, no.I, pp.40-1.

(137) The Somali Republic and the Organisation of African Unity, Mogadishu, 1964, pp.39-40.

(138) AHG/Res.16 (I). At the conference, Somalia objected to the Ethiopia-Kenyan defence pact and requested the OAU to denounce such agreements, but this item was dropped from the agenda following a note proposed by Tanzania, see Touval "The Organisation of African Unity and African Borders" 21 International Organisation, 1967, pp.102, 116-7.

(139) Africa Research Bulletin, October 1965, p.381.

(140) Hoskyns, op.cit. pp.73-4.

the Zambian President encouraged Somalia and Kenya to meet and a joint declaration emerged in which both parties agreed to negotiate in accordance with the OAU Charter and this was endorsed by the Assembly.¹⁴¹ The Kinshasa Declaration noted that "both sides have expressed their desire to respect each other's sovereignty and territorial integrity in the spirit of paragraph 3 of Article 3 of the OAU Charter".¹⁴² Thus, Somalia had appeared to accept the principle of territorial integrity in practice although its hopes for eventual unification remained.¹⁴³ In October 1967, a conference was convened between the parties at Arusha under Zambian mediation and an agreement was signed relating to the easing of tensions and the ending of the propaganda war.¹⁴⁴

The Ethiopian-Somali situation remained quiescent for a number of years. However, in 1973 the issue was revived due to a number of factors ranging from the growing tension between the two over the French Territory of the Afars and Issas to the discovery of oil and gas in the Ogaden region claimed by Somalia. At the OAU Council of Ministers in May 1973, Somalia accused Ethiopia of massing troops in the area and insisted on placing the issue on the agenda of the OAU Assembly in terms of a territorial dispute. Ethiopia maintained that it was merely a border dispute involving the demarcation of part of the boundary in accordance with existing agreements. In the event, the Council decided upon a compromise and a five-man commission was appointed.¹⁴⁵ The following month, an OAU Good Offices Committee was established at the OAU Assembly with a Sudanese mediator.¹⁴⁶ Both Ethiopia and Somalia maintained their

(141) AHG/St.1 (IV).

(142) Brownlie, Basic Documents on African Affairs, 1971, pp.362-3.

(143) See the speech by the Somali Premier quoted in Hoskyns op.cit. p.80.

(144) Ibid, pp.82-3. See also Africa Research Bulletin, October 1967, pp.880-2.

(145) Africa Research Bulletin, May 1973, p.2845.

(146) Ibid, June 1973, pp.2883-4 and 2850.

positions. At the OAU Assembly of June 1974, Ethiopia declared that the Somali dispute was only a question of demarcating an unmarked border, while Somalia pursued its territorial claim.¹⁴⁷ Throughout 1976 violence increased in the Ogaden region as the Somali-backed Western Somali Liberation Front (WSLF) forces infiltrated into the area, and by summer 1977 it was clear that the WSLF effectively controlled the whole of the Ogaden plain.¹⁴⁸ On 2 August 1977, the Ethiopians failed to secure the necessary two-thirds vote when they tried to convene an emergency session of the OAU Council of Ministers to consider the alleged Somali aggression.¹⁴⁹ The eight nation OAU Committee established in 1973 attempted to mediate but the WSLF was refused a hearing and Somalia boycotted the closing session of the meetings. A resolution was adopted by the commission which reaffirmed the inviolability of African frontiers as at the date of independence and condemned political subversion.¹⁵⁰ Somalia argued against this that the principle of the respect for borders as at the grant of independence did not apply in this case, since Somali territory had been colonised by Ethiopia in the past. It was stated that Ethiopia was a colonial State which had taken part in the partition of Africa at the 1884-5 Berlin Conference and this meant that the population of the Ogaden retained the right to self-determination.¹⁵¹ In other words, the WSLF were merely exercising the accepted right with regard to the decolonisation of a colonial territory. On February 11, 1978, Somalia officially

(147) Ibid, June 1974, p.3257.

(148) See Mayall, "The Battle for the Horn: Somali Irredentism and International Diplomacy", *The World Today*, September 1978, p.336. See further *infra*, Chapter 7, p.511.

(149) Mayall *loc.cit.* p.337.

(150) Ibid. See *infra*, Chapter 7, p.513.

(151) See *Revue Generale de Droit International Public*, 1978, pp.664-5 and UNMC November 1977, pp.52-3 and 108-9.

announced that its regular army was being sent into the Ogaden, but the Cuban and Russian aid to Ethiopia proved decisive and on March 9, Somalia declared that its forces were being withdrawn. Somalia received no international support for its irredentist activities,¹⁵² and it was made clear that military aid would only be sent to Somalia to defend its recognised borders.¹⁵³ The degree of Somalia's isolation with regard to its 1976-8 Ogaden adventure is compelling evidence as to the unacceptability of the active pursuit of irredentist aims.¹⁵⁴

(3) Ghana's Claims to the Ivory Coast

Before the independence of the Ivory Coast, a delegation of Sanwi leaders went to France to request autonomy under the terms of an 1834 treaty and after failing to receive a positive response a Sanwi independence movement was established early in 1959. This was set up in neighbouring Ghana, which supplied it with arms. In 1960, Ghana claimed the south-east corner of the Ivory Coast, which was inhabited by the Sanwis, on grounds of tribal unity, since the Sanwis were related to the Nzima tribe of the President of Ghana. However, the claim was soon dropped and aid to the Sanwi movement ceased.¹⁵⁵

(4) Ghana, Togo and the Ewe Question

The problem of the Ewe people, split between Ghana and Togo, caused severe tensions between the two countries and stimulated

- (152) The majority of African States, western countries and the USSR condemned the Somali violations of its inherited borders, *Revue Générale de Droit International Public*, 1978, p.664.
- (153) Mayall loc.cit. p.336 and infra, Chapter 7, p.514.
- (154) A dispute between Gabon and Congo (Brazzaville) over the latter's claims to territory on ethnic grounds was apparently resolved by an agreement on December 1, 1962, at Doralá, Cameroon, on the basis of respect for the sovereignty and territorial integrity of each State, see Touval, The Boundary Politics of Independent Africa, 1972, pp.196-7.
- (155) See Zartman, International Relations in the New Africa, 1966, pp.24 and 113 and Touval, "The Sources of Status Quo and Irredentist Policies", African Boundary Problems (ed. Widstrand), 1969, p.111. Personal and political antagonism between the Ghanaian and Ivory Coast Presidents exacerbated the problem, *ibid.*

irredentist claims by both. The unification of British Togoland with the Gold Coast following a plebiscite in May 1956 resulted in some one hundred thousand Ewes being divided between Ghana and Togo. President Nkrumah of Ghana called for the integration of Togo (then French Togoland) into Ghana as its seventh region in order to unify the Ewes, while the newly independent Togo favoured the reunification of the two Togos, ie. claiming the former British Togoland for the same reason.¹⁵⁶ Personal factors played a large role and the antagonism abated somewhat after the assassination of the Togo President in January 1963, although it recurred on a number of occasions in subsequent years. The Togo President in April 1966 called for a reunion of ex-British Togoland with the Republic of Togo, declaring that it was necessary to satisfy the legitimate aspirations of the people. In that month, the Ghana-Togo border was formally reopened after a three year closure.¹⁵⁷ The secessionist element which is often involved in irredentist situations came to prominence when in 1964 a call was made for the secession of Ghana's Volta region and its merger with Togo. The Ghana government declared that it had no intention of betraying the confidence reposed in it by the people of the former British Togoland in the UN plebiscite of 1956.¹⁵⁸ In February 1975, however, a delegation from the Volta region presented a letter together with resolutions, a petition and a memorandum to the Ghanaian ambassador in Togo calling for negotiations between Ghana and a national liberation movement committee to solve the reunification question concerning the two Togos. It was proclaimed that "Western Togo" could no

(156) Togo also claimed the territory on historical grounds in an attempt to reconstitute the borders of the former German colony, see Touval loc.cit. p.110 and Zartman op.cit. p.112. See also Austin, "The Uncertain Frontier : Ghana-Togo" 1 JMAS, 1963, p.139. Austin noted that there had never been an Ewe State, but rather a series of autonomous Ewe communities along the coast and in the Togo hills, *ibid*, p.141.

(157) Africa Research Bulletin, April 1966, pp.509-10.

(158) *Ibid*, March 1974, p.3162.

longer be a region or a part of a region of Ghana.¹⁵⁹ The Togo government for its part ceased to call publicly for the cession of the former British Togoland. In late 1977, however, Ghana charged that Togo was planning subversion in the Volta region, although this was denied by Togo.¹⁶⁰

(b) Secessionist Claims

(1) Katanga

At a round-table conference in Brussels in early 1960, it was agreed that the Belgian colony of the Congo would become independent on June 30, 1960. The Congo, comprising an area of some 2,345,525 sq. kilometres and a population at the time of about fourteen million persons, possessed "one of the most complex tribal structures in Africa".¹⁶¹ Tribal fighting broke out in the spring of 1960,¹⁶² while upon independence separatist strains became evident.¹⁶³ On 5 June, the Force Publique mutinied near Leopoldville and disorder spread.¹⁶⁴ On July 10, Belgian troops, stationed in military bases in the country by virtue of the Treaty of Friendship and Cooperation (which was never in fact ratified), intervened in Katanga and Kasai provinces and later throughout the

(159) Ibid, February 1975, p.3525.

(160) Ibid, September 1977, p.4555.

(161) Hoskyns, The Congo Since Independence, 1965, pp.2-5. According to the UN Economic Commission for Africa, some 80% of commercialised production was in European hands in the private sector, while this proportion was even higher in Katanga, one of the provinces of the Congo, see UN Economic Bulletin for Africa, June 1961, p.72.

(162) Particularly between the Baluba and Lulua tribes, which spread from Kasai province to Leopoldville, the capital, see Keesings Contemporary Archives, pp.17594-5.

(163) The Abako party of the Bakongo tribe threatened to create a separate government for the Bakongo areas and hinted at a merger with the French Congo, while President Tshombe of Katanga was unhappy at the exclusion of his party from discussions as to the composition of the national government, ibid, pp.17595-6. See also Hoskyns op.cit. p.81

(164) Keesings Contemporary Archives, pp.17639-40. See also Legum, Congo Disaster, 1961.

country.¹⁶⁵ The Belgian government represented its action as a form of humanitarian intervention designed to protect its nationals and the interests of the Congo and the international community.¹⁶⁶

On July 11, Tshombe announced the independence of Katanga and its secession from the Congo. Belgian aid was requested and a Belgian officer appointed by Tshombe to command his forces.¹⁶⁷ The Central Government immediately appealed to the United Nations, "not to restore the internal situation in the Congo but rather to protect the national territory against acts of aggression committed by Belgian metropolitan troops".¹⁶⁸ This request of July 12 followed upon a request for technical assistance to the Congo security forces made on July 10. Belgium was accused of engineering the secession and the urgency of the appeal was emphasised.¹⁶⁹ Ghana announced that a mission offering all aid including military aid was being sent to the Congo and stressed its recognition of Katanga as an integral part of the Congo and condemned any attempt to detach it as a "flagrant violation of the Congo's territorial integrity".¹⁷⁰ On July 13, the UN Secretary-General, acting under Article 99 of the Charter, called for an urgent meeting of the Security Council,¹⁷¹ and strongly

-
- (165) Hoskyns op.cit. pp.96-9. Tshombe had reportedly made a request for Rhodesian troops to restore order, *ibid*, p.97. See also Abi-Saab, The United Nations Operation in the Congo 1960-64, 1978, pp.7-8.
- (166) Hoskyns, op.cit. p.96. See also SCOR, 15th Year, 873rd meeting, para.196. The action could not have been justified by the Treaty of Friendship and Cooperation with the Congo as Belgium was not granted any right of intervention without the express request of the Congo government, Abi-Saab op.cit. p.8.
- (167) Hoskyns op.cit. p.99 and Keesings Contemporary Archives, p.17641. The UK, Central African Federation and Southern Rhodesia all refused to send police and military aid to Katanga, while Belgium adopted a sympathetic attitude, *ibid*, pp.17641-2.
- (168) S/4382. The Central Government had requested 3,000 American troops, but the US had advised recourse to the UN, Keesings Contemporary Archives, pp.17641-2.
- (169) S/4382. See also A/4390 and Add.1, and Auma-Osolo "A Retrospective Analysis of United Nations Activity in the Congo and its Significance for Contemporary Africa", 8 Vanderbilt Journal of Transnational Law, 1975, p.458.
- (170) Keesings Contemporary Archives, p.17642.
- (171) S/4381.

recommended sending military aid to the Congo government. The UN force would not include personnel from the permanent members of the Security Council and would not be authorised to take action beyond self-defence or action which would make it a party to internal disputes.¹⁷² The Council adopted a resolution by eight votes to none, with three abstentions, on July 14 calling on Belgium to withdraw its troops from the Congo and authorising the Secretary-General "to take the necessary steps in consultation with the government of the Republic of the Congo to provide the government with such military assistance as may be necessary".¹⁷³ The same day, the Congo broke off diplomatic relations with Belgium and Katanga declared that it would not permit the entry of UN troops.¹⁷⁴ Offers of troops from Ghana, Guinea, Morocco and Tunisia were accepted and as a first stage it was agreed that seven battalions from Ethiopia, Ghana, Guinea, Morocco and Tunisia would be sent to the Congo.¹⁷⁵

African reaction to the Katanga secession was strongly hostile. Guinea declared it was contrary to the interests of the Congo while Ghana noted that Katanga was "a natural, integral part of the Congo Republic".¹⁷⁶ The UN Secretary-General emphasised that the Security Council resolution of July 14 applied to the whole of the territory of the Congo, although UN forces would not intervene in domestic conflicts.¹⁷⁷ The Security Council adopted a resolution on July 22 recognising that it had itself called for the admission of the Congo to membership of the UN as a unit,¹⁷⁸

(172) SCOR, 15th Year, 873rd meeting, pp.3-5. See also A/3943.

(173) S/4387. See Miller, "Legal Aspects of the United Nations Action in the Congo", 55 AJIL, 1961, p.10.

(174) Keesings Contemporary Archives, pp.17644-5.

(175) Hoskyns op.cit. p.131. Ghanaian and Tunisian troops started arriving on July 15, while on that date Tshombe cabled UN members asking for recognition, Keesings Contemporary Archives, p.17645.

(176) Ibid, p.17646.

(177) SCOR, 15th Year, 877th meeting, pp.1-4. See also A/4389 and Add.1-6.

(178) By resolution S/4377 adopted unanimously on July 7, 1960.

and calling on Belgium to withdraw its troops. All States were requested to refrain from any action which might impede the restoration of law and order and undermine the territorial integrity and political independence of the Republic of the Congo.¹⁷⁹ By the end of July, the UN force in the Congo numbered over 11,000¹⁸⁰ but had not yet entered Katanga in view of Katangan hostility and the belief that violence would be involved.¹⁸¹ The Security Council adopted a resolution on August 8 calling on Belgium to withdraw its troops from Katanga under speedy modalities determined by the UN Secretary-General and declared that the entry of UN troops into that province was necessary for the full implementation of the resolution. It was reaffirmed that the UN force in the Congo would not be involved in any internal disputes.¹⁸² Ghana, Guinea and the United Arab Republic offered to send troops to end the secession if the UN was not able or willing,¹⁸³ while a number of other countries indicated their support for the territorial integrity of the Congo, but preferred action to be taken through the UN.¹⁸⁴ The Secretary-General of the UN was accused by the Congo Prime Minister of tacitly recognising Katanga's

(179) S/4405.

(180) Yearbook of the UN 1960, p.54.

(181) S/4414. This was the subject of criticism by Ghana, Guinea and the USSR, S/4415 and S/4416. See also S/4417 and Add.1-10 and Keesings Contemporary Archives, pp.17754-6. On August 7, the Prime Minister of the Congo demanded the entry of UN troops into Katanga without delay, S/4421.

(182) S/4426. The Secretary-General declared that the UN was concerned with the attitude of the Katangan authorities to the extent that it might be founded on the presence of Belgian troops; apart from this the dispute between the Congo and Katanga was one in which the UN was not a party and could not involve itself, S/4417 Add.6. The Premier of the Congo contested this view, S/4417 Add.7.

(183) See Congo 1960 vol.II, p.630, published by the Belgian Centre de Recherche et d'Information Socio-Politiques.

(184) Keesings Contemporary Archives, p.17758. These included Togo, Morocco and Tunisia.

secession by refusing to supply military assistance to enable government forces to enter the province.¹⁸⁵ The Secretary-General noted that he was primarily concerned with the international peace and security aspect of the problem, ie. the withdrawal of the Belgian troops and, although he criticised the Katangan secession and stressed the need to respect the territorial integrity of the Congo, he did not regard the ending of the secession as a function of the UN force. On the other hand, the Congo government and most African States were primarily concerned about reintegrating the province into the territory of the Congo.¹⁸⁶

A conference of African States with representatives from Cameroon, Congo (Brazzaville), Ethiopia, Ghana, Guinea, Liberia, Libya, Mali, Morocco, Sudan, Togo, Tunisia and the UAR was held in the Congo capital of Leopoldville at the end of August and it concluded with a declaration of total support for the territorial integrity of the Congo and condemnation of the secession.¹⁸⁷ During this period, the Central Government's intentions to attack Katanga became known and there was some criticism of this at the conference.¹⁸⁸ In the event, this operation foundered in Kasai province. A meeting of the Security Council in early

(185) S/4448. The situation in the Congo grew worse with the declaration of independence by Kalonji of the "Etat Minier" in South Kasai, see Keesings Contemporary Archives, p.17759. The Central Government sent forces and by the end of August claimed to have ended the rebellion, *ibid*, pp.17781-3.

(186) SCOR, 15th Year, 887-9th meetings. A Soviet draft resolution criticising UN actions was not put to the vote for lack of support, S/4453.

(187) Hoskyns, *op.cit.* pp.170-4. The Conference of African States at Monrovia in 1961 called on African States not to recognise break-away regimes, while the Casablanca Conference and the Cairo Conference of 1961 strongly supported the territorial integrity of the Congo, see Legum, Pan-Africanism, 1962, pp.192, 195 and 199.

(188) Hoskyns *op.cit.* pp.192-3.

September resulted in deadlock¹⁸⁹ and the suggestion of the US delegate to remit the whole matter to the General Assembly under the Uniting for Peace machinery was accepted.¹⁹⁰

The fourth Emergency Special Session of the General Assembly opened on September 17 with a dispute between the USA and USSR over the supply of Soviet technicians, transport planes and trucks to the Congo. Despite differences over the interpretation and implementation of the Security Council resolutions, delegates supported the territorial integrity of the Congo and condemned the Katangan secession. Libya proclaimed the need to maintain the territorial integrity of the Congo,¹⁹¹ while Ethiopia emphasised that at the start of the crisis African States had tacitly agreed on a number of fundamental principles. These were that the Congolese people were one and that the territory of the Congo must be maintained as a unit and that collective action should be taken through the United Nations in order to maintain the unity, integrity and complete independence of the Congo.¹⁹² On September 18, resolution 1474 ES-IV was adopted, by seventy votes to none, with eleven abstentions. This supported the Security Council resolutions of July 14 and 22 and August 9 and declared that it was essential for the UN to continue to assist the Central Government", with a view to preserving the unity, territorial integrity and political independence" of the Congo. The Secretary-General was requested to continue to take vigorous action to safeguard the unity, territorial integrity and political independence of

(189) This was partly the result of an internal crisis in the Congo, as the President and Prime Minister sought to dismiss each other and sent rival delegations to the UN and partly the result of a more activist policy pursued by the USSR, see S/4531, S/4523, S/4482 and Add.1-4 and S/4519.

(190) S/4526.

(191) GAOR, 4th Emergency Special Session, A/PV. paras.16-18 and 23. See also the delegates of Ghana, *ibid*, A/PV.868, paras.151-9; the UAR *ibid*, para.221 and Liberia, *ibid*, A/PV, 862, para.149.

(192) *Ibid*, A/PV.863, paras.103-7.

the Congo in the interests of international peace and security and appealed to all States to refrain from any action that might undermine that unity, territorial integrity and political independence.¹⁹³

In February 1961, the Security Council adopted a resolution by nine votes to none, with two abstentions, expressing regret at the killing of Lumumba and urging the UN to take all appropriate measures to prevent civil war in the Congo, including, in the last resort, the use of force. It expressed grave concern at the prevalence of conditions which seriously imperilled peace and order and the unity and territorial integrity of the Congo and called for the reconvening of the Parliament and the reorganisation of the Congolese armed units.¹⁹⁴ In order to implement this resolution, the UN Force was substantially increased.¹⁹⁵ In April, the General Assembly adopted three resolutions, calling inter alia for the withdrawal of Belgian and other foreign personnel,¹⁹⁶ and by the summer a government of national unity and political reconciliation was established in the Congo, one of whose aims would be to annul the secession of Katanga.¹⁹⁷ Since the February resolution of the Security Council had urged that measures be taken for the immediate withdrawal and evacuation of all Belgian and other foreign military and para-military personnel and political advisers not under UN command, and mercenaries, and since Katanga depended to a large extent upon such personnel,¹⁹⁸

(193) The issue was further discussed during the 15th session of the General Assembly, centring on the constitutional crisis in Leopoldville, see GAOR, 15th Session, plenary, meetings 911-3 and 917-24, and A/4578. Further unrest took place in the Congo with Lumumba supporters taking power in Stanleyville, the capital of Orientale province, A/4557 and Add.1, and Keesings Contemporary Archives, pp.18202-3. The Security Council discussed the situation in early December, particularly the move by Colonel Mobutu against Lumumba, see Hoskyns, op.cit. pp.266-74, but no resolution was adopted, S/4578 and Res.1, and S/4579. The Assembly resolved to keep the matter on its agenda, resolution 1592(XV).

(194) S/4741.

(195) S/4752 and Corr.1, and Add.1-4.

(196) Resolutions 1599(XV), 1600(XV) and 1601(XV). See also A/4711 and Corr.1 and Add.1-2, and S/4721.

(197) Yearbook of the UN 1961, p.60.

(198) See Hoskyns op.cit. pp.384-9.

it became apparent that a ready weapon was at hand for the UN to involve itself in the Katanga situation. On August 24, the Congo President issued an ordinance for the immediate expulsion of all non-Congolese officers and mercenaries in Katanga that had not entered into contractual arrangements with the Central Government, and UN assistance to achieve this was requested.¹⁹⁹ This was clearly designed to provide the UN with the legal authority to act within the Congo to implement the February Security Council resolution. The resulting operation by the UN in Katanga had some initial success, but fighting broke out in September.²⁰⁰ A truce was arranged and a number of agreements signed, but the UN soon alleged that they were being broken by the Katangans who had retained the foreign mercenaries.²⁰¹ It is clear that during this period the Secretary-General felt that nothing in the UN Charter or resolutions justified UN moves to end the Katangan secession and that action was to be limited to removing foreign personnel in accordance with the Security Council resolution of February.²⁰² The Security Council was reconvened on November 13²⁰³ and a resolution adopted on November 24 by nine votes to none, with two abstentions.²⁰⁴ This set out the policies and purposes of the UN with respect to the Congo. These included the maintenance of the territorial integrity and political independence of the Congo and the prevention of civil war. The resolution completely rejected the claim

(199) S/4940, Annex 1.

(200) Hoskyns op.cit. pp.404-8. See also Abi-Saab op.cit. pp.129-33 and Keesings Contemporary Archives, p.19342.

(201) S/4940 and Add.1-12. Fighting broke out in October between Central Government and Katangan forces on the borders of Kasai and Katanga provinces, S/4940 and Add.13.

(202) See Abi-Saab op.cit. pp.129-48. Dr. Hammerskjold, the Secretary-General, was killed in an aircraft in September on his way to meet Tshombe to arrange a cease-fire, Yearbook of the UN 1961, p.63.

(203) Following a request by Ethiopia, Nigeria and Sudan, S/4973.

(204) S/5002.

that Katanga was a sovereign, independent nation and strongly deprecated the secessionist activities carried out by the provincial administration of Katanga with the aid of external resources and foreign mercenaries. It also declared that all secessionist activities were contrary to the Loi Fondamentale of the Congo and Security Council decisions, and it demanded that such activities in Katanga should cease forthwith. It underlined UN support for the national unity and territorial integrity of the Congo and requested all member-States to refrain from any action which might directly or indirectly impede the policies and purposes of the UN in the Congo. This resolution clearly changed the basis of the UN actions in the Congo. On November 24, the acting Secretary-General declared that action was necessary to avert civil war and this action implied not neutrality but a sympathetic attitude to the efforts of the Central Government to suppress all secessionist activities.²⁰⁵ After more fighting,²⁰⁶ the position of the Katangan authorities became untenable. On December 19, Tshombe entered into negotiations with the Central Government at Kitona and two days later he made a declaration accepting the application of the Loi Fondamentale of the Congo, the indissoluble unity of the Republic and the authority of the Central Government over all parts of the country. President Kasavubu was also recognised as Head of State and Tshombe agreed to carry out all UN resolutions and place the Katangan gendarmerie under the President's authority.²⁰⁷ The end of the secession was formally accepted in a declaration by Tshombe on January 14, 1963, from Kolwezi.²⁰⁸

(205) S/PV.982. See also Auma-Osoto, "A Retrospective Analysis of United Nations Activity in the Congo and its Significance for Contemporary Africa", 8 Vanderbilt Journal of Transnational Law, 1975, pp.458, 468-70, for a discussion of the different attitudes to the secession adopted by Hammerskjold and his successor, U Thant.

(206) S/4940, Add.14-19.

(207) S/5038. The "Etat Minier" of South Kasai was ended in autumn 1962 with Kalonji's arrest, see Keesings Contemporary Archives, pp.19349-50.

(208) S/5053, Add.15, Annex V and S/5240.

It would be inaccurate to regard the Katangan issue as demonstrating the intention of the UN to maintain the status quo and become involved against all secessionist attempts. Although Tshombe claimed the right of self-determination,²⁰⁹ this was clearly not accepted by the international community. But to assert from this the validity of UN actions to suppress such activities would be incorrect. There was present in the Katanga situation one factor which clearly distinguished it from other secessionist attempts and that was the extent to which the secession was seen by the international community as a foreign inspired move.²¹⁰ The Belgian intervention against the Congolese mutiny of the Force Publique was the original cause of recourse to the United Nations, while the crucial Belgian presence in Katanga deemed indispensable to the survival of the secessionist regime was considered to be the single most important factor governing the relations between the UN and Katanga. The representative of the Secretary-General of the UN in the Congo in 1960 submitted a report stating that "in Katanga, Belgian influence is omnipresent. Virtually all key civilian and security posts are either held directly by officials of Belgian nationality or controlled by advisers to recently appointed and often inexperienced Congolese officials".²¹¹ The element of Belgian control of the secessionist move was regarded by the UN as justifying actions to counter the secession. Paragraph one of

(209) S/4988. On November 17, 1961, in a message to the Security Council.

(210) It could also be argued that the controlling elite in Katanga was not representative of the province at all. The Baluba of North Katanga were hostile to Tshombe's regime, while the southern intelligentsia composed primarily of Kasai Baluba had been largely reduced to refugee status in UN camps, see Abi-Saab, op.cit. pp.133 note 36 and 167. The US delegate stated before the Security Council that the present Katangan authorities had no claim to speak for the entire province, the parliament was merely a rump organisation of the original Assembly and the ethnic groupings supporting the regime were a minority of the province's inhabitants, see 42 Department of State Bulletin, 1061 and 1062 (1961).

(211) A/4557, para.38.

Security Council resolution S/5002 "strongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga, with the aid of external resources and manned by foreign mercenaries", and thus demonstrated that the fact of foreign intervention was considered to be the crucial relevant point concerning the secession. Indeed, force was to be used by the UN not to end the secession itself but to apprehend and/or deport all foreign military and para-military personnel and political advisers not under the UN command and mercenaries. Although that amounted to the same thing as ending the secession in practice, the difference is crucial, for the UN was not using force to end a secession. Nevertheless, it was always recognised by the UN that the territorial integrity and national unity of the Congo should be maintained. There was strong African hostility to the secession, which was never recognised by any State and the impact of African views was marked. Hoskyns noted that this case provided the first experiment in pan-Africanism in a practical sense and demonstrated the influence of joint African action. As soon as the UN and the USA decided to take active steps against Katanga, however, the African role diminished in importance.²¹²

(2) Biafra²¹³

The Eastern Region of Nigeria declared its independence on May 30, 1967, as the sovereign State of Biafra. This followed two coups in 1966 and widespread disturbances in the north of the country

(212) Op.cit. p.471.

(213) See generally Stremmlau, The International Politics of the Nigerian Civil War 1967-70, 1977; Wodie, "La Sécession du Biafra et le Droit International Public" 73 *Revue Générale de Droit International Public*, 1969, p.1021; Panter-Brick, "The Right of Self-Determination: Its Application to Nigeria" 44 *International Affairs*, 1968, p.254 and Post, "Is There a Case for Biafra?" 44 *International Affairs*, 1968, p.28.

which resulted in massacres of Ibos and the fleeing of the rest to the Ibo heartlands in the Eastern Region. As a result, the military government of the Eastern Region led by Colonel Ojukwu boycotted constitutional talks until the security of Ibos was guaranteed. An agreement was ultimately signed at Aburi in Ghana between the military governors of Nigeria in an attempt to resolve differences between the Eastern Region and the rest of the country, but it broke down over questions of interpretation.

In March 1967, Ojukwu announced the cessation of revenue payments to the federal treasury and the federal government responded with an economic boycott. At the end of May, a decree was issued decentralising Nigeria and creating twelve new States and this provoked the secession of the Eastern Region.²¹⁴ Fighting commenced on July 6, 1967, and continued until the Biafran surrender on January 12, 1970.²¹⁵

In spite of some Nigerian misgivings, the situation was discussed by the Organisation of African Unity at the Kinshasa Conference of the Assembly of Heads of State and Government in September 1967. The resolution that emerged reaffirmed the adherence of the African Heads of State and Government to the principle of respect for the sovereignty and territorial integrity of member-States and reiterated their "condemnation of secession in any member-State". The Nigerian situation was recognised as an internal one, the solution of which was a Nigerian responsibility and it was resolved to send a consultative mission of six Heads of State to the Head of the Nigerian Federal Government "to assure him of the Assembly's desire for the territorial integrity, unity and peace of

(214) Stremlau, op.cit. pp.59-60.

(215) Africa Research Bulletin, January 1970, pp.1642-54.

Nigeria".²¹⁶ The situation was therefore seen as a matter of legitimate concern to African States, while the support of the principle of territorial integrity and non-intervention in internal affairs and the consequent condemnation of secession were crucial in the diplomatic field. This was so, not only because any support for Biafra was at best postponed but because the UN Secretary-General emphasised that regional organisations should deal with local conflicts and accordingly the UN did not become involved.²¹⁷ The mission consisting of the Heads of State of Cameroon, Congo (Kinshasa), Ethiopia, Ghana, Liberia and Niger²¹⁸ arrived in Lagos after initial Nigerian reservations²¹⁹ on November 23. The communique issued afterwards condemned all secessionist attempts in Africa and reaffirmed that any solution to the crisis had to be in the context of Nigeria's unity and territorial integrity.²²⁰

Between April 15 and May 20, 1968, four African States (Tanzania, Gabon, the Ivory Coast and Zambia) recognised Biafra as a sovereign State. The first was Tanzania, which declared that the need for African unity was superseded by the need of the Ibo people who could not be protected in Nigeria. President Nyerere stated that "where borders were

(216) See Stremlau op.cit. p.93; Kirk-Greene, Crisis and Conflict in Nigeria: A Documentary Sourcebook 1966-70, 1971, vol.II, pp.172-3 and Africa Research Bulletin, September 1967, p.856. The Assembly also reaffirmed the principle of territorial integrity in a resolution dealing with the Israel-Arab conflict, *ibid.*

(217) See UNMC August-September 1968, p.104 and *ibid*, February 1969, p.39.

(218) In fact, the Presidents of Congo (Kinshasa) and Liberia declared that they were unable to attend due to internal duties, see Chime, "The Organisation of African Unity and African Boundaries", African Boundary Problems (ed. Widstrand), 1969, pp.74, 75.

(219) It was reported that the Nigerian Head of State only agreed to receive the mission after being reassured of OAU support for Nigerian unity and condemnation of secession, see Cervenka, The Organisation of African Unity and its Charter, 1968, p.197 and Africa Research Bulletin, November 1967, p.901.

(220) *Ibid.*

drawn up without African consent they need not be respected.²²¹ The Foreign Minister of Burundi took the view that if the war continued many African States would recognise Biafra. He noted that the civil war issue was non-political and "should be viewed from humanitarian grounds".²²² The Information Minister of Congo (Brazzaville) declared that the war had become a human problem "and it is that aspect which concerns the Congo government".²²³ However, a number of African States feared that recognition of Biafra would, far from helping the Ibos, encourage further disintegration and warfare on the continent.²²⁴ The following month three African States recognised Biafra. Gabon emphasised the pogrom against the Ibos and consequent massacres,²²⁵ the Ivory Coast declared its indignation against the "inexplicable guilty indifference of the whole world towards the massacres",²²⁶ while Zambia, although wanting African unity, emphasised the belief that "it would be morally wrong to force anyone into unity founded on bloodshed".²²⁷ Accordingly, it is within a humanitarian context that one ought to view the four African

(221) Africa Research Bulletin, April 1968, pp.1031-2 and 1041. This was ironic in view of the fact that it was Tanzania that had proposed the famous border resolution at the OAU in 1964.

(222) Ibid, p.1044.

(223) Ibid.

(224) See, for example, the comments of the governments of Congo (Kinshasa), Guinea, Madagascar and Mali, *ibid*.

(225) Ibid, May 1968, p.1072. Gabon declared later that its recognition had been because of humanitarian reasons, *ibid*, January 1970, p.1647.

(226) Ibid, May 1968, p.1073.

(227) Ibid. Nigeria broke off diplomatic relations with Tanzania, the Ivory Coast and Zambia but not with Gabon as they did not maintain embassies in each other's countries, *ibid*. The Kampala peace talks the same month broke down upon Nigeria's insistence on the renunciation of secession and Biafra's refusal to accept this, see Cervenka, *op.cit.* pp.199-204.

recognitions.²²⁸ Such recognitions did not result in the establishment of normal diplomatic relations and were apparently an effort to moderate Nigeria's declared aim of total victory and facilitate negotiations.²²⁹ The comments made by the four States at the time bear out this view.

The worsening conditions in the battle areas impelled a renewal of the activities of the OAU mission in July 1968 and the leaders of both sides went for talks to the Niger capital of Niamey at which it was decided to continue negotiations at Addis Ababa in August.²³⁰ These negotiations eventually petered out at the beginning of August, following the Nigerian declaration of a final offensive.²³¹ In September, the fifth Assembly of the OAU met at Algiers and adopted a resolution calling on member-States of the OAU and UN to refrain from any action detrimental to the peace, unity and territorial integrity of Nigeria and appealing for the restoration of peace and unity in Nigeria.²³² However, Uganda announced the next month that it was considering recognising Biafra,²³³ while Sierra Leone hinted in September 1969 that it might soon recognise the secessionist State.²³⁴ Very little mention was made of the Nigerian crisis at the 1968 session of the UN General Assembly. Only a few States raised the issue of possible UN discussion of the crisis and no State sought to have the question inscribed on the agenda.²³⁵

-
- (228) Haiti recognised Biafra in March 1969 for reasons that remain unclear, see Stremlau, op.cit. p.141.
- (229) Ibid, pp.127-8.
- (230) Cervenka, op.cit. pp.206-10.
- (231) Ibid, pp.210-16.
- (232) Ibid, p.217. See also Africa Research Bulletin, September 1968, p.1174.
- (233) Ibid, October 1968, p.1214.
- (234) Ibid, September 1969, p.1531.
- (235) Stremlau, op.cit. p.279.

The last meeting of the OAU mission was held in Monrovia, Liberia, in April 1969 and ended with no progress towards reconciling Nigeria and Biafra. The mission proposed that the "two parties of the civil war accept, in the supreme interest of Africa, a united Nigeria, which ensures all forms of security to all citizens". While Nigeria accepted this, Biafra did not.²³⁶ In September 1969, at the sixth Assembly of the OAU at Addis Ababa, a resolution was adopted which called on both sides "to agree to preserve in the overriding interests of Africa the unity of Nigeria", although the four African States that had recognised Biafra plus Sierra Leone abstained.²³⁷ On January 12, 1970, Biafra surrendered, both sides referring to the acceptance of the "OAU resolution".²³⁸

The overwhelming majority of African States clearly accepted the need to maintain Nigeria's territorial integrity and wished to achieve an African solution to the conflict that would uphold that territorial integrity. The concept of self-determination was not regarded as applicable.²³⁹ The four African recognitions of Biafra appeared to have been motivated primarily by humanitarian considerations rather than being an assessment of the fulfilment by Biafra of the criteria of Statehood in international law. The Biafran experience can be seen as a crucial piece of State practice in Africa with regard to post-independence secessions, and the high level of consensus reached by African States on this basic issue of territorial integrity demonstrates a strongly held belief militating against secessionist attempts. The viability of the colonial territorial frontiers was underlined both militarily and diplomatically.

(236) Cervenka, The Unfinished Quest for Unity, 1977, p.105.

(237) Africa Research Bulletin, September 1968, p.1531.

(238) Ibid, January 1970, pp.1643-4.

(239) See Panter-Brick loc.cit. p.256. Cf. Kamanu, "Secession and the Right of Self-Determination: An OAU Dilemma" 12 JMAS, 1974, p.361. See also Nayar, "Self-Determination Beyond the Colonial Context: Biafra in Retrospect", 10 Texas International Law Journal, 1975, p.321.

(3) Southern Sudan²⁴⁰

The three southern provinces of the Sudan, Bahr el Ghazal, Equatoria and Upper Nile, differ radically from the northern part of the country in that they are populated by Black Africans, Christian and pagan, rather than by Moslem Arabs and consequently a different cultural identity has developed. They were treated as a distinct entity under the Anglo-Egyptian condominium of 1899-1956,²⁴¹ and were far less advanced. In 1953 the Sudan was granted self-government and by independence in 1956 a mutiny had taken place in the south which greatly embittered relations between north and south and precipitated a sixteen year war.²⁴² Sudanese independence was declared on January 1, 1956, and, contrary to pledges made, consideration of federation as the basis of the proposed constitution was rejected. The military takeover of 1958 and the banning of political parties exacerbated the situation. In 1963, the Anya-Nya guerrilla organisation was formed and the fighting entered a new phase.²⁴³ In March 1965, after the overthrow of the military regime, a round-table conference was held in Khartoum attended by representatives from the south, delegates from six northern parties and observers from Algeria, the United Arab Republic, Uganda, Kenya, Nigeria and Ghana.²⁴⁴ However, it ended indecisively with the north offering some form of regional government and the south demanding self-government or federation. This led to severe action against the south and southern calls for secession

(240) See Eprile, War and Peace in the Sudan 1955-72, 1974; Kyle, "The Southern Problem in the Sudan", *The World Today*, December 1966, p.512; Shepherd, "National Integration and the Southern Sudan" 4 *JMAS*, 1966, p.193 and Gray, "The Southern Sudan" 6 *Journal of Contemporary History*, 1971, p.108.

(241) See The Basic Facts about the Southern Provinces of the Sudan, Central Office of Information, Khartoum, 1964.

(242) Eprile, *op.cit.* pp.39-48.

(243) *Ibid*, pp.90-102.

(244) *Ibid*, p.21; Shepherd *loc.cit.* p.204 and Kyle *loc.cit.* p.516. See also *Africa Research Bulletin*, December 1964, p.203, *ibid*, January 1965, p.222 and *ibid*, February 1965, p.241.

or merger with neighbouring African States. Ultimately, in 1971, the new Numeiry regime in the Sudan began negotiations with representatives of the Anya-Nya²⁴⁵ which led to a peace agreement the following year after a conference in Addis Ababa.²⁴⁶ This called for a cease-fire and amnesty, return and resettlement of refugees and regional autonomy for the south.²⁴⁷ Although some African States were sympathetic to the struggle of the Anya-Nya²⁴⁸ and Uganda appeared to tolerate the existence of its bases on its territory, there was never any support at governmental level for the proposed secession. Uganda and other concerned African States directed their influence primarily at an attempt to convince the separatists to compromise with the Sudanese authorities. Touval concludes with regard to these States that "concern over possible reprisals by the Sudanese army, fear of possible Sudanese aid to separatist movements or subversive groups in their own territories and commitment to the principle of the territorial status quo, resulted in a fluctuation of policy between assistance to the rebels and pressure on them to cease their activities and accept the Sudan government's terms".²⁴⁹

(4) Eritrea

This area was placed under Ethiopian administration in 1952 as an autonomous unit²⁵⁰ in a federal structure, but in 1955

(245) Eprile, op.cit. p.147.

(246) Ibid, p.151. See also Africa Research Bulletin, February 1972, pp.2381-4.

(247) Eprile op.cit. pp.151-2.

(248) However, the fourth Afro-Asian Peoples' Solidarity Organisation Conference in Ghana in 1965 criticised the Southern Sudan revolt as an imperialist conspiracy. See Resolutions of the Fourth Afro-Asian Peoples' Solidarity Organisation Conference, Cairo, 1965, p.52. See also Touval, The Boundary Politics of Independent Africa, 1972, p.118.

(249) Ibid, p.154.

(250) Supra, Chapter 4, p.215.

Ethiopia became a unitary State.²⁵¹ In November 1962, Eritrea was officially annexed as Ethiopia's fourteenth province,²⁵² following a period during which all signs of Eritrean separatism were abolished.²⁵³ The Eritrean armed struggle began in 1961 and received intermittent aid from Arab States, particularly Sudan, Syria, Iraq and Libya.²⁵⁴ In many respects, a curious parallel developed between Eritrea and Southern Sudan, the former an Arab-backed insurgency against an African State and the latter an African rising against an Arab State.²⁵⁵ By 1970, violence had substantially increased in the area and the declared aim of the Eritrean Liberation Front was a UN held referendum for an independent Eritrea.²⁵⁶ The headquarters of the movement was established in Damascus, and Ethiopia accused certain Arab States of causing the disorders.²⁵⁷ The Second Conference of Foreign Ministers of Islamic Countries held at Karachi in 1970 adopted a resolution pledging support for the struggle of the people of Eritrea for freedom and independence,²⁵⁸ while the Fourth

(251) Keesings Contemporary Archives, p.14598.

(252) See Cervenka, "Eritrea: Struggle for Self-Determination or Secession", 12 Afrika Spectrum, 1977, pp.37, 40.

(253) For example, political parties, labour unions and the Eritrean flag. The authorised languages of Tigrinya and Arabic were replaced by Amharic as the official language in 1959, see Bell, "Endemic Insurgency and International Order: The Eritrean Experience" 18 Orbis, 1974, pp.427, 431. Boyce notes that the federation of Ethiopia and Eritrea "was a fiasco", "The Internationalising of Internal War: Ethiopia, the Arabs and the Case of Eritrea" 5 Journal of International and Comparative Studies, 1972, pp.51, 56.

(254) Infra, Chapter 7, p.509.

(255) See Bell loc.cit. p.433.

(256) Keesings Contemporary Archives, pp.23306, 23606, 24400 and 24507.

(257) Ibid, p.24507. See also Africa Research Bulletin, December 1970, pp.1056-7.

(258) Keesings Contemporary Archives, p.24482.

Conference of this organisation in 1973 strongly backed the Eritrean Liberation Front.²⁵⁹ Arab support of the Eritrean movement was limited and sporadic at times, however.²⁶⁰ Ethiopia refused to concede the principle of its national unity and territorial integrity, as the Ten Point Plan of 1974²⁶¹ and the Nine Point Plan of 1976²⁶² demonstrated. By spring 1977, it was estimated that some two-thirds of the coast-line and some eighty per cent of the countryside of Eritrea were in Eritrean rebel hands.²⁶³ Sudan pledged open support for the separatists in early 1977²⁶⁴ and was condemned by Ethiopia for breaking the OAU Charter.²⁶⁵ With Soviet and Cuban aid, Ethiopia launched a counter-attack in Eritrea in early 1978 that met with considerable success.²⁶⁶ African attitudes towards the Eritrea issue reflected the concern for the territorial integrity of the independent African States that had proved so potent on the Continent.²⁶⁷ It is also worthy of note that the headquarters of the Organisation of African Unity is situated in Ethiopia's capital. The OAU itself has been noticeably reluctant to criticise Ethiopia and the overall African position remains that of support for the territorial integrity of that country.²⁶⁸ This has also been true of the United

-
- (259) Africa Research Bulletin, March 1973, p.2778.
- (260) See the comments of Osman Salih Sabbe, one of the Eritrean leaders, quoted in Cervenka loc.cit. p.43.
- (261) Keesings Contemporary Archives, p.27029. Point I stated that "Ethiopia would remain a united country without ethnic, religious, linguistic or cultural differences". Ibid.
- (262) Africa Research Bulletin, May 1976, p.4025. This called for an Eritrean Administrative Region.
- (263) Ibid, April 1977, pp.4393-5. See also ibid, December 1977, p.4675.
- (264) Ibid, January 1977, p.4282 and ibid, October 1977, p.4603.
- (265) Ibid, p.4603.
- (266) Ibid, May 1978, p.4840; ibid June 1978, pp.4886-7 and ibid, July 1978, p.4925. See also ibid, October 1978, pp.5027-8.
- (267) This was recognised by a spokesman for the Eritrean Liberation Front in 1973, see Cervenka loc.cit. p.45. Note also the impact of the Arab-Israeli dispute, ibid, p.46.
- (268) See Cervenka, The Unfinished Quest for Unity, 1977, pp.70 and 83.

Nations, although it could be suggested that as a result of the binding power of disposal granted the General Assembly by the Big Four Powers and the consequent Assembly resolution on the status of Eritrea,²⁶⁹ the Assembly retains a special interest in this matter in the light of the unilateral incorporation of Eritrea into a unitary Ethiopia.

(5) The Dissolution of the Mali Federation

The one example so far of a successful secession from a recognised independent State is afforded by the break-up of the Mali Federation, but there are grounds for regarding the case as exceptional.

On January 19, 1959, a federal constituent assembly drawn from the Republics of Senegal, Soudan, Dahomey and Upper Volta met at Dakar and unanimously adopted a draft constitution for the Federation of Mali consisting of sixty-two articles and a preamble adhering to the constitution of the Fifth French Republic and the fundamental rights of man.²⁷⁰ The Federation of Mali came into official existence on April 4, minus Dahomey and Upper Volta, and at the end of the year Mali requested full independence within the French community.²⁷¹ The French National Assembly ratified the agreement for Mali's independence in June and the agreement was subsequently ratified by the Assemblies of Senegal and Soudan. Mali was proclaimed an independent State on June 20 and was immediately recognised by seventeen States, including the USA, UK and USSR.²⁷² Mali's membership of the UN was unanimously approved by the Security Council on June 29.²⁷³ However, after increasing discord

(269) Supra, Chapter 4, p.218.

(270) Keesings Contemporary Archives, p.16618. See also the 1958 French Constitution, Articles 76 and 86. These Republics were not independent States, but "autonomous", *ibid*, Articles 77 and 78.

(271) Keesings Contemporary Archives, p.17207.

(272) *Ibid*, p.17513.

(273) *Ibid*, p.17535.

between the leaders of the two components of the Federation, the Senegal Legislative Assembly unanimously proclaimed its independence and secession from the Federation in August.²⁷⁴

The acting Premier of Soudan declared that the Federation was indissoluble and asked for French troops to ensure Mali's territorial integrity. An appeal was also made for UN intervention.²⁷⁵ Further requests for UN military assistance and appeals for a Security Council meeting were also made, while Senegal asked to be admitted to the organisation.²⁷⁶ On September 11, France formally recognised Senegal, which was soon recognised by a number of other countries including the UK, and the General Assembly agreed to defer a decision on the Mali Federation's application for membership. Ultimately, the Soudanese Assembly decided to proclaim Soudan independent as the Republic of Mali, declaring that the Federation had ceased to exist and that the new State was to be free of all ties with France.²⁷⁷ A few days later, France recognised the Republic of Mali and the General Assembly recommended UN membership for both Senegal and Mali.²⁷⁸ Senegal justified its secession by declaring that the component parts of the Federation remained fully sovereign States with an inherent right of withdrawal. It was argued that the Federation was a sui generis union emanating from the application of international law to African needs and that the component States therefore retained their sovereign status.²⁷⁹ The

(274) Ibid, p.17685.

(275) Ibid, p.17686.

(276) Ibid, p.17687.

(277) Ibid.

(278) Ibid, p.17688. See Security Council resolutions S/4543 and S/4544.

(279) See Cohen, "Legal Problems Arising out of the Dissolution of the Mali Federation" 36 BYIL, 1960, p.375.

tripartite thesis of sovereign status for Senegal, Soudan and the Federation of Mali was difficult to sustain absolutely in view of the provision in the Federal Constitution that "la souveraineté nationale appartient au peuple du Mali",²⁸⁰ the recognition of the Federation by a substantial number of countries and its acceptance by the Security Council for membership in the UN. According to the federal constitution, it was the Federation itself which was to make treaties, although the component States had to pass laws to enact them. Indeed treaties were made with France. This would all appear to suggest that the Federation was itself not only a legal person, but actually a State from which Senegal seceded.²⁸¹

However, to treat the matter as straightforward secession from an independent State would be to misinterpret the situation. The two component States retained considerable powers and many of the attributes and characteristics of States and the traditional international law specification of federations and unions is not particularly helpful in trying to determine the legal position in this case.²⁸² Senegal and Soudan, as autonomous States within the French Community, agreed to form a federation and became independent in that form, after which Senegal seceded. To compare this situation with that of a particular group seceding from an independent State would not be accurate in view of the solidity of the identity of the two component elements. Of particular

(280) Loi Constitutionnelle no.60-11, June 18, 1960, Journal Officiel de la République Soudanaise, 2nd yr. no.59, July 15, 1960.

(281) Zemanek, "State Succession After Decolonisation" 116 HR, 1965, pp.210-1.

(282) See O'Connell, "State Succession and the Effect Upon Treaties of Entry into a Composite Relationship" 39 BYIL, 1963, p.54, and Gandolfi, "Naissance et Mort Sur le Plan International d'un Etat Éphémère : La Fédération du Mali" AFDI, 1960, p.904.

importance was the acquiescence in and acceptance of the situation by Soudan (later Mali), while international reaction also accepted the break-up of the Federation and the emergence of two separate sovereign States.

(c) Conclusions

Unlike cession which is accomplished by virtue of the attribute of sovereignty possessed by States, secession constitutes an act contrary to the will of the State. Like cession, secession necessarily impinges upon the territorial integrity of States and the inviolability of frontiers. One must distinguish, however, between territorial diminution occurring as a result of external forces or irredentism and that occurring as a result of internal revolt or secession proper. In the former instance, two or more States are included, in the latter case only one. International law is accordingly deeply concerned with territorial aggrandisement by States or attempts to achieve the dissolution of another State's territorial integrity and this has been noted on a number of occasions and particularly in the UN Charter, resolution 1514 (XV) and the 1970 Declaration on Principles of International Law, as well as in the 1974 Consensus Definition of Aggression. Thus, irredentist claims by States against other independent States are clearly not justifiable under international law and the use of force to accomplish such aims is unlawful. These propositions are true despite the existence of strong ethnic, historic, cultural and other ties that link the claimant State with the object of its irredentist assertion. As Judge De Castro noted in the Western Sahara case, "to deduce, from the existence of ethnic, cultural and geographic analogies, the existence of legal ties is like leaping into an abyss",²⁸³ and such a leap has

(283) ICJ Reports, 1975, pp.12, 165.

proved particularly unsuccessful in Africa. Notwithstanding one or two exceptions, what is surprising with regard to African States is not the presence but the absence of territorial claims, despite the existence of ethnic and other ties across State borders. In other words, it is clearly accepted that such ties cannot found title to territory and irredentist claims offend against the principle of the territorial integrity of States.

In a rather different category, lies the problem of secessions. The international instruments relating to territorial integrity that are binding bind States and not particular inhabitants within particular States. Thus, as a general proposition, it can be stated that the principle of territorial integrity does not constitute an obligation under international law upon individual members or groups within State communities. Secession, therefore, is not contrary to international law. Where such a secession succeeds in the light of the principle of effectiveness in establishing a viable State and one that is recognised by other States, international law will recognise this situation. As a corollary to this, international law does not recognise that parts of sovereign States possess the right of secession. International law is neutral. However, what is clear from State practice, and particularly African State practice, is that the legal right of self-determination does not incorporate the right of peoples in independent States to form new States. Self-determination does not extend to secession. It may indeed be possible to go further than this and say that although international law neither permits nor prohibits secessions, the presumption of the maintenance and continuity of the concept of territorial integrity of States means that the question of the establishment of secessionist States is weighted in favour of the original State and against the secessionist endeavour. This in turn will influence the

level of proof of effectiveness relative to the creation of such a new State. State practice shows that there exists a bias in the international community against secessions, although this bias will not extend to the use of international force to suppress it in the absence of other factors. The United Nations Secretary-General noted that when a State joined the UN, there was an implied acceptance by the entire membership of its territorial integrity and sovereignty. In addition, "as an international organisation, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its member-State".²⁸⁴ This, together with specific State practice, would appear to point not to an underlining of the classic international law relating to secessions, but to a subtle modification of it to strengthen the presumption against secession.²⁸⁵

(284) UNMC, February 1970, p.36.

(285) See *infra*, Chapter 7, p.523.

CHAPTER 6 - STATEHOOD, TERRITORY AND TITLE

Within the body of international law, the concept and consequences of Statehood clearly play a crucial role.¹ The State is the primary, although not the sole subject of international law and the law cannot therefore remain indifferent to the circumstances of its coming into existence. The creation of new States can only be accomplished as a result of the break-up of or secession from existing States, since *terrae nullius* no longer present themselves.² The consequent disruption on the international scene has of necessity to be carefully regulated. The struggle for Statehood has constituted the prime objective of the decolonisation movement and has lead to a re-examination of the nature and relevance of the traditional criteria while the phenomenon of the entity of controversial status³ has added to this process.⁴

The creation of new States and their entry into international life raise questions as to the relative balance between factual and legal criteria. Is the birth of a new State primarily an issue of fact or of law? If the former, then is effectiveness sufficient to guarantee membership of the international community within the framework of international law irrespective of the method by which the result was achieved? If the latter, the problem of enforcement is immediately raised. The relationship between effectiveness and various other principles of international law deemed of relevance is of crucial importance

-
- (1) See eg. Higgins, The Development of International Law Through the Political Organs of the United Nations, 1963, p.11 and Crawford, "The Criteria for Statehood in International Law" 48 BYIL, 1976/7, p.93.
 - (2) See as regards Antarctica, O'Connell, International Law 2nd Ed. 1970 vol. 1, p.451.
 - (3) Eg. Rhodesia, Transkei, Taiwan.
 - (4) Note also the problem of the divided States, such as Korea, Germany and pre-1975 Vietnam. See eg. Caty, Le Statut Juridique des Etats Divisés 1969.

here. Of especial interest is the concept of self-determination and the extent to which it has or has not modified the traditional criteria of Statehood embodying as they do the tests of effectiveness. Other factors may also be regarded as part of the concerns of actors on the international scene such as the nature and status of dependent territories and the impact of international constitutional documents like the UN Charter.⁵ Since Statehood is but one method of participation in the international community, the question of legal personality is thus brought into focus.

I Statehood and Territory

(1) The Criteria - In any examination of the concept of Statehood in international law, the role of territory is obviously indispensable. There can be no State without territory. The most widely accepted formulation of the criteria of Statehood in international law is provided in Article 1 of the Montevideo Convention on Rights and Duties of States, 1933. This stipulates that "the State as a person of international law should possess the following qualifications: (a) a permanent population (b) a defined territory (c) government and (d) capacity to enter into relations with the other States". The definition of each of these elements is far from settled and these four elements are not to be seen as exhaustive.⁶ It is apparent, however, that this framework is to a large extent concerned with territorial effectiveness. A permanent population is, of course, essential⁷ but the notions of government and capacity to enter into relations with other States, linked as they are

(5) See Higgins op.cit., p.11.

(6) See Brownlie, Principles of Public International Law, 2nd ed. 1973, p.75 cf. Higgins op.cit. p.13.

(7) Any reasonable number of inhabitants may suffice, see the cases of Nauru and Tuvalu. As regards nationality, see O'Connell, State Succession in Municipal Law and International Law, 1967, vol. I p.497 et.seq. and Brownlie op.cit. p.638.

with the concepts of sovereignty and independence, relate to factors of internal and external authority founded upon a determinate piece of territory.

(a) - A defined territory - The requirement of a defined territory is less stringent than would first appear. It is not necessary for the frontiers of the new State to be precisely delimited or demarcated, as long as an accepted core of territory is rendered subject to the authority of the new entity. It was stated in Deutsche Continental Gas - Gesellschaft v. Polish State that in order to say that a State exists "it is enough that this territory has a sufficient consistency even though its boundaries have not yet been accurately delimited and that the State actually exercises independent public authority over that territory"⁸ Jessup declared that "one does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers ... both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory."⁹ Albania was recognised by a number of States prior to the fixing of its frontiers,¹⁰ while most of the new States that emerged after the First World War were recognised de facto or de jure before their frontiers were determined by treaties.¹¹ Despite arguments that Israel did not constitute a State since its boundaries were in dispute,¹² that country

(8) (1929) AD. 5, no.5 p.15.

(9) SCOR, 3rd Year, 383rd Meeting p.41 Jessup was speaking on behalf of the U.S. with regard to the admission of Israel to the U.N.

(10) Brownlie op.cit. p.75. See also LNOJ 1st Ass. 651 and the Monastery at St. Naoum Case, (1924) PCIJ, series B, no.9, pp.9-10.

(11) See Lauterpacht, Recognition in International Law, 1948, p.30.

(12) By Arab States eg. SCOR 3rd Year, 385th meeting pp.3-4 and *ibid.* 386th meeting pp.19-20 and by the U.K., *ibid* 383rd meeting pp.15-16.

was admitted to the UN on 11 May 1949.¹³ The general rule was reaffirmed by the International Court of Justice in the North Sea Continental Shelf case.¹⁴

In certain cases the new State may be faced with a dispute not as regards its frontiers, but with respect to all of its territory. Where this happens, the rules relating to the effective control of a central core of territory may be augmented by other principles of international law, such as that of self-determination, which lays down in colonial cases the territorial framework of the self within which the choice as to political status may be made.¹⁵ The Moroccan objection to Mauritania's independence and admission to the UN is an example of this. Morocco claimed that the territory of Mauritania belonged to it and that its sovereignty had been interrupted by French occupation. Once the French left, it was alleged, the territory should revert to Moroccan sovereignty.¹⁶ In the event, Morocco's contentions attracted little support and Mauritania was admitted to the UN.¹⁷

(b) Government - Crucially linked with the availability of a coherent piece of territory is the exercise of effective control over it by the authorities of the entity claiming Statehood. Lauterpacht defines this requirement in terms of "a sufficient degree of internal stability as expressed in the functioning of a government enjoying the habitual obedience of the bulk of the population."¹⁸ If the community is internally

(13) See General Assembly resolution 273 (III) and Security Council resolution 70 (1949). By that time, all the members of the Security Council bar Egypt had recognised Israel as had over two-thirds of the members of the General Assembly, Higgins op.cit. p.18.

(14) ICJ Reports, 1969, pp.3,32. It does not appear necessary that there should be a minimum size of territory, see Oppenheim, International Law, 8th ed., 1955, vol. I p.415.

(15) See Supra.

(16) See A/4445 and Add. 1 Supra.

(17) S/4969 and G.A. resolution 1631 (XVI). See also the case of Kuwait, Higgins, op.cit., p.19.

(18) Op.cit., p.28.

so unstable "as to be deprived of a representative and effective government" the result will be that the community "will be lacking in a vital condition of Statehood."¹⁹ The Commission of Jurists reporting on the Aaland Islands dispute declared that it was difficult to say at what date the Finnish Republic actually became a definitely constituted sovereign State. It was asserted that "this certainly did not take place until a stable political organisation had been created and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops."²⁰ Higgins has also emphasised how, prior to the admission of certain African States to the UN, a tendency had been manifest to interpret the government criterion of Statehood to mean "democratic rather than purely effective government."²¹

(c) Independence - The capacity to enter its relations with other States is not limited to States. Accordingly, this criterion is better examined in terms of the concept of independence.²² In any analysis of Statehood in international law, independence is clearly of fundamental importance. It is a manifestation of territorial effectiveness in relation to other entities of international law and to this extent it is an external aspect of government founded upon internal facts. It therefore amounts to a conclusion of law, in the light of international law, dependent upon particular circumstances. Judge Anzilotti in the classic formulation of the concept stated that "independence is really no more than the normal

(19) Ibid.

(20) LNOJ, Sp. Suppl. no. 4 (1920) pp.8-9. But cf. the view of the Commission of Rapporteurs in this case, League of Nations Council Doc B7 21/68/106 (1921) pp.22.

(21) Op.cit. p.21. Emphasis in original. See with regard to Vietnam, SCOR 7th Year 603rd meeting p.12 and Israel, SCOR 3rd Year, 385th meeting p.4-5. See also Okeke, Controversial Subjects of Contemporary International Law, 1974, p.159.

(22) See eg. Crawford loc.cit., p.119 and Brownlie op.cit., p.76.

condition of States according to international law, it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law."²³ Independence was to be contrasted with the class of dependent States, thus demonstrating the requirement of formal independence.²⁴ A certain degree of "actual" independence may also be necessary.²⁵ Independence in actuality is a relative phenomenon. In a world of increasing interdependence, absolute self-sufficiency is a rare commodity, but while a certain degree of real as distinct from formal dependence will not result in the extinction of Statehood, there may come a point beyond which such dependence may be incompatible with Statehood. An interesting instance of what may or may not prejudice independence in the legal as opposed to political sense is that afforded by defence agreements with the former colonial power.

It was argued that the treaty between the UK and Transjordan,²⁶ which provided for the latter's independence and permitted the stationing of British troops in the country legally restricted the sovereignty of Transjordan on account of its military clauses.²⁷ Similar arguments were raised with regard to Ceylon's defence arrangements with the UK.²⁸ A mutual defence agreement was arranged between the UK and the government

(23) The Austro-German Customs Union case, (1931) PCIJ Series A/B, no.41, pp.57-8. See Marek, The Identity and Continuity of States in Public International Law, 1954, pp.166-80.

(24) See Rousseau, Droit International Public, vol.2, 1974, pp.55-93.

(25) See Higgins, op.cit., p.26, Lauterpacht op.cit., pp.46-51, and Crawford op.cit., p.126. See also Lighthouses in Crete and Samos case (1937) PCIJ, Series, A/B, pp.71, 127 per Judge Hudson, and the Commission of Jurists Report on the Aaland Islands case, LNOJ Sp. Suppl. no.4 (1920), p.8-9.

(26) 6 UNTS 143.

(27) SCOR, 1st Year, 2nd ser. suppl. 4 at p.136 and GAOR 2nd sess, 117th meeting, pp.1044-53. See also Higgins op.cit., p.31 and Okoye, International Law and the New African States, 1972, p.16.

(28) SCOR 3rd Year 351st meeting pp.11-12.

of Nigeria, but for political reasons was soon abrogated.^{28a} A number of former French colonies entered into defence arrangements with France²⁹ and as of Spring 1978 France was maintaining bases in Senegal, Ivory Coast, Gabon and Djibouti³⁰ and involved in armed action in Chad and Mauritania.³¹ It was never suggested, however, that these countries thereby lost the attribute of legal independence.³²

Although the requirement of independence is primarily formal and does not necessitate an analysis of political and economic ties with other States, it may be that there is an irreducible minimum of real independence in factual terms below which an entity may not fall and be entitled to Statehood.³³ The question has been raised with regard to the grant of independence by South Africa to its Bantustans.³⁴ The OAU adopted a resolution³⁵ in which it referred to the "so-called independence" and "fraudulent pseudo-independence" of the Transkei, which was officially declared independent on October 26, 1976. General Assembly resolution 31/6A, adopted by 132 to 0, with 1 abstention (the USA), referred to the "sham independence" of the Transkei. The Transkei is heavily dependent

(28a) Commonwealth Survey (1960) p.501, Higgins op.cit., pp.31-32 and Okoye op.cit., p.17.

(29) Higgins op.cit., pp.32-33.

(30) Africa Research Bulletin, May 1978, p.4859.

(31) Infra Chapter 7, p.506 and p.480.

(32) France was accused to trying to restore colonialism in Africa by the Algerian President, *ibid*, while Libya stated that French "colonial" forces were used in Chad to repress a popular uprising using "genocidal" methods, *ibid*, July 1978 p.4924.

(33) One is talking here of entities becoming new States rather than existing States losing their Statehood. There is a presumption in international law against loss of Statehood, see eg. Crawford *loc.cit.*, p.139.

(34) Infra, p.355.

(35) CM/Res 493 (XXVII).

upon South Africa. Some 360,000 Transkeians work in South Africa each year, contributing about 70% of Transkei's internal revenue, while South Africa has provided some 70% of the entity's budget.³⁶ However, it does possess a sea-coast. Bophuthatswana, on the other hand, does not and is in addition, split into a series of areas divided by South African territory.³⁷ Over half of this entity's citizens as defined by South Africa live in South Africa itself. Bophuthatswana was declared independent on 6 December 1977.³⁸ The OAU in a press statement criticised the Bantustans as "pseudo-States".³⁹ The status of these two entities, unrecognised by any State apart from South Africa, is clearly problematic. The fact that they are heavily dependent on South Africa economically is of relevance, but numerous States are equally dependent on other States' assistance⁴⁰ and it is clear that even if they were to become economically more successful, the international community would not treat this as adequate to recognise them as States. Formally they are independent, since South Africa is able under international law to alienate parts of its sovereign territory. It is submitted that the answer to the question of their status lies elsewhere than in the traditional exposition of independence as a criterion of Statehood.⁴¹

(36) Africa Research Bulletin, October 1976, p.4189.

(37) But geographical unity is not essential for Statehood, as the case of pre-1971 Pakistan shows.

(38) Ibid, December 1977, pp.4666-8.

(39) Ibid, p.4668.

(40) Note eg. Liechtenstein, Monaco, San Marino, etc., see Mandelson, "Diminutive States in the United Nations", 21 ICLQ, 1972, p.609.

(41) Infra p.355. Note also that in April 1978, the Transkei broke off diplomatic relations with South Africa and called for international aid, Africa Research Bulletin, April 1978, p.4817.

(2) Self-Determination⁴²

(a) As Modifying the Traditional Criteria of Statehood

(i) Defined Territory - As noted above,⁴³ the principle of self-determination identifies the territorial unit within which the inhabitants determine their political status. It reinforces the notion of territorial integrity, in that the territory as colonially defined on the eve of self-determination is the recognised spatial frame for the exercise of the right. In this sense, the core of territory necessary for Statehood is reinforced in colonial instances. This is demonstrated by the acceptance of Mauritania as an independent State despite Moroccan claims, and within its colonial borders.⁴⁴

(ii) Government - It is in this category that the principle of self-determination has most affected the application of the traditional criteria of Statehood. The earlier formulations of the criteria had primarily emphasised the stability and effectiveness needed for this factor to be satisfied, while the representative and democratic nature of the government was also put forward as a requirement. The concept of self-determination has affected both.

The notion of government has, as Crawford pointed out,⁴⁵ two aspects. One is the right or title to exercise authority and the other is the actual exercise of authority. As far as the first is concerned, the principle of self-determination, in those situations to which it has been accepted that it applies, will identify the people in question,

(42) Supra, p.102.

(43) Supra, p.171.

(44) Supra, p.223. See also the Guinea-Bissau case, infra, p.342.

(45) Loc.cit., p.117.

while a grant of independence by the former sovereign will specify those entitled to exercise authority. As far as the actual exercise of authority is concerned, it is submitted that practice has demonstrated that in self-determination situations a lower level of effectiveness has now been accepted.

(a) The Congo, 1960 - the Belgian administration of the colony had virtually excluded Africans from key posts, with the result that an educated elite scarcely existed. According to the UN Economic Commission for Africa, 80% of commercialised production was in European hands.⁴⁶ By the date of independence on 30 June 1960, tribal fighting had broken out, with widespread clashes spreading to the capital.⁴⁷ On July 5, the Force Publique mutinied⁴⁸ and Belgian troops became involved again in the country.⁴⁹ On July 11, the province of Katanga announced its secession.⁵⁰ UN financial and military aid soon followed. Despite the virtual breakdown of government, the Congo was recognised by a large number of countries soon after independence and was admitted as a member state of the UN without opposition.⁵¹ The UN Security Council resolved on July 14 to provide the Congolese government with the

(46) UN Economic Bulletin for Africa, June 1961 p.72. The proportion in Katanga province was even higher, *ibid*.

(47) Keesings Contemporary Archives, pp.17594-5.

(48) *Ibid* pp.17639-40.

(49) See Hoskyns, The Congo Since Independence, 1965, pp.96-9.

(50) *Ibid* p.99.

(51) See Security Council Resolution 142 (1960) and General Assembly resolution 1480 (XV). At the time of the Assembly resolution in September 1960, two different factions of the Congolese government sought to be accepted by the UN as the legitimate representative of the Congo. The Assembly postponed a choice, referring the question to the Credentials Committee. Ultimately, the delegation authorised by the Head of State was accepted and that of the Prime Minister rejected, see Higgins *op.cit.* pp.162-4. In any event, it underlines the doubt as to the existence of a stable and effective government at the time.

necessary military assistance⁵² and ultimately took action to defeat the Katangan secession.⁵³

(b) Ruanda-Urundi, 1962⁵⁴ - Tribal fighting broke out in the territory in 1959 and a UN mission was despatched to discover the relevant facts. The UN hoped to establish one independent State, but it had to accept the independence of two States. A General Assembly Commission sent in 1962 referred to the "psychosis of mutual distrust" in the territory,⁵⁵ and expressed doubts as to the nature and degree of governmental control in Burundi, while as far as Ruanda was concerned, the situation, it was stated, was "not calculated to dispel the many misgivings which the General Assembly had always felt with regard to the conditions in which the people of Ruanda are approaching Statehood."⁵⁶ In the event, Assembly resolution 1746 (XVI), in adopting the report of the Commission, permitted Belgian troops to remain in the two States for a short while after independence. Rwanda and Burundi were soon after admitted to the UN.⁵⁷

(c) Guinea - Bissau, 1973 - After a number of years fighting in the Portuguese colony, a UN Special Mission was sent to the "liberated areas" of the territory pursuant to a decision of the Special Committee on Decolonisation,⁵⁸ approved by the General Assembly.⁵⁹ The Mission

- (52) S/4387.
- (53) *Supra*, p.306.
- (54) *Supra*, p.208.
- (55) A/5126 and Add 1.
- (56) *Ibid*, cited in Higgins *op.cit.*, p.23.
- (57) Security Council resolutions S/5149 and S/5150 and General Assembly resolutions 1748 (XVII) and 1749 (XVII).
- (58) See Yearbook of UN, 1971, pp.566-7.
- (59) Resolution 2795 (XXVI). The Special Mission consisted of representatives from Ecuador, Sweden and Tunisia and visited the area between 2 and 8 April 1972.

concluded that Portugal had lost effective administrative control of large areas of the territory. The liberation movement, PAIGC, estimated that it controlled between two thirds and three quarters of the territory, and this was verified by many foreign observers. The Mission further reported that the population in those areas supported the PAIGC, which exercised de facto administrative control in such areas and effectively protected the inhabitants' interests.⁶⁰

It was the Mission's belief that the Special Committee's recognition of the PAIGC as the de facto authority and the sole and authentic representative of the aspirations of the people of the territory should be taken into account by States and UN organs.⁶¹

The report of the Mission was endorsed by the Special Committee on 1 August, 1972. It was felt that the effectiveness of the control of the PAIGC had been proved, and many States including Bulgaria, Czechoslovakia, Guinea, India, Syria, Trinidad and Tobago and Tanzania were of the opinion that Guinea-Bissau had achieved de facto independence and that the PAIGC administration should be recognised as the de facto government. The PAIGC was recognised as the only authentic representative of the people of the territory and the successful completion of its task by the Mission was declared to constitute a major contribution to the process of decolonisation.⁶²

On 24 September 1973, the PAIGC declared the independence of the Republic of Guinea-Bissau.⁶³ Within three days, the new State was

(60) A/AC 109/L 804, p.19.

(61) Ibid.

(62) A/8723/Rev 1. The General Assembly commended the Mission for its work and also affirmed that the PAIGC was the authentic representative of the true aspirations of the people of the territory, see resolution 2918 (XXVII).

(63) Africa Research Bulletin September 1973 p.2992. See also Revue Générale de Droit International Public, 1974, p.1168.

recognised by Algeria, the Congo, Guinea, Upper Volta, Chad, Tanzania, Ghana, Somalia, Togo, Nigeria, Mauritania, Madagascar, Libya, Senegal, Syria and Yugoslavia.⁶⁴ By the beginning of October, 28 of the then 41 members of the OAU had recognised Guinea-Bissau, as well as a number of other States including the USSR, Cuba, Iraq and the German Democratic Republic.⁶⁵ During that month, Guinea-Bissau became the 18th member of the Liberation Committee of the OAU⁶⁶ and by the middle of the month 62 countries had recognised the new State.^{66a}

On 22 October an item was placed on the agenda of the General Assembly of the UN entitled "the illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic."⁶⁷

The pattern of the Assembly debate had already been set by the discussions in the General Committee, which had called for the inscription of the item by 17 votes to 1, with 5 abstentions. A number of States, including Mauritius, Somalia, Pakistan, Guinea, Madagascar and Ghana, affirmed the validity of the independence of Guinea-Bissau in international law.⁶⁸ France, Netherlands, the USA, and the United Kingdom declared that since Guinea-Bissau had not met the traditional Statehood requirement of effective control, it remained a non-self-governing territory.⁶⁹

(64) Ibid.

(65) West Africa, October 8, 1973, p.1403.

(66) Africa Research Bulletin, October 1973, p.3008.

(66a) Ibid. p.3018.

(67) Proposed by 58 States, A/9196 and Add 1 and 2.

(68) GAOR, 28th Session, General Committee, 213rd meeting, pp.25-6, 28 and 30.

(69) Ibid pp.28, 30 and 31.

A number of different approaches were adopted in the debate in the General Assembly as regards the question of the Statehood of Guinea-Bissau. Portugal noted that a State only became independent when a people in a well-defined territory have a sovereign capable of exercising supreme authority independent of any other entity.⁷⁰ A series of questions were posed regarding the territory of the "phantom State", the exercise of effective control, the existence of a capital city and the proposed siting of the diplomatic missions of the recognising States.⁷¹ The net effect of this was to emphasise that the PAIGC did not in any way fulfil the criteria for Statehood.

Portugal maintained that the UN Mission had seen only 20 square kilometres of a territory with a total area of some 36,125 square kilometres⁷² and that the territory and its population were subject to the sovereignty of the Lisbon government.⁷³ A number of western and Latin American States opposed the 65 power draft resolution⁷⁴ on the grounds expressed by Portugal. Greece, for example, declared that the functional co-existence of the three indispensable elements of territory, sovereignty and people were not fulfilled to the degree necessary to enable the new entity to assume the full rights and responsibilities of a State.⁷⁵ The UK stated that Guinea-Bissau as an independent State was factually and objectively not a reality,^{75a} while the USA declared that since Portugal controlled the population centres, most of the rural areas and the administration of the territory, it must be regarded as the sovereign

(70) GAOR, 28th Session, plenary 2156th meeting, p.12.

(71) Ibid, p.8.

(72) Ibid p.16. See also Ventes, Portugal's War in Guinea-Bissau, 1973 and Bruce, Portugal: The Last Empire, 1975.

(73) See the comments of the Portuguese foreign Minister, GAOR, 28th Session, Plenary, 2138th meeting, p.76.

(74) A/L 702.

(75) GAOR, 28th Session, plenary, 2163rd meeting, p.27.

(75a) Ibid, p.36.

under international law, otherwise facts would be disregarded.⁷⁶

The majority of the 30 abstainers to resolution 3061 (XXVIII) also denied the status of Guinea-Bissau as an independent State, on the basis that effective control over the major portion of the territory in question was not proved, while at the same time condemning Portugal's colonialism.⁷⁷

93 States, however, voted in favour of resolution 3061 (XVIII) which was accordingly adopted on 2 November 1973. This resolution welcomed "the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau."⁷⁸

Two themes may be discerned in the speeches of these States. One attitude was that Guinea-Bissau did indeed fulfil the criteria for Statehood as classically expressed. This was based on the report of the UN Special Mission. Guinea noted that after 10 years of struggle, over three-quarters of the territory had been liberated by the PAIGC, which had established a working administration, comprising schools, health services, shops etc.⁷⁹ Chana stressed that unlike the current situations in Mozambique and Angola, the people of Guinea-Bissau fulfilled the conditions for recognition of belligerency and that in addition the classical

(76) Ibid. p.56. See also the South African view, *ibid* p.62. Portugal, Greece, UK, USA, South Africa, Brazil and Spain cast the 7 negative votes to resolution 3061 (XXVIII).

(77) Eg. Bolivia, GAOR, 28th Session, Plenary, 2156th meeting, p.51 Chile, *ibid*. 2163th meeting p.31 Belgium *ibid* p.37, Australia, *ibid* p.41, Netherlands, *ibid* p.52, Ireland, *ibid* p.57, France *ibid* p.61 and West Germany, *ibid* p.66. See also the joint declaration of Denmark, Norway, Sweden, Finland and Iceland, *Revue Générale de Droit International Public*, 1974, p.1169.

(78) The resolution also demanded that Portugal desist from further violation of the sovereignty and territorial integrity of Guinea-Bissau, drew the attention of the Security Council to the critical situation resulting from the illegal presence of Portugal in Guinea-Bissau and invited all member-States of the UN and all organisations within the UN system to render all assistance to the government of Guinea-Bissau.

(79) GAOR, 28th Session, plenary, 2157th meeting, pp.22-25.

prerequisites for the recognition of a new State, viz. de facto control of territory and machinery of government, the assent of the bulk of the population and willingness to comply with international obligations, were in existence in this case.⁸⁰ The second theme manifested in a number of speeches by delegates supporting the resolution was the importance of the concept of self-determination.

Senegal declared that the western powers were applying the classical rules of international law with regard to recognition among European States to deny recognition to Guinea-Bissau, but colonial liberation called for the application of other rules of law. Such other rules were those enshrined in the Charter and resolutions of the United Nations.⁸¹

Madagascar emphasised that the agenda item under discussion resulted directly from the implementation of the principles of resolution 1514 (XV)⁸² while Uganda stressed the importance of resolutions referring to the right of self-determination such as General Assembly resolutions 1514 (XV) and 2918 (XXVII) and Security Council resolution 322 in interpreting Chapter XI of the Charter.⁸³

(d) Angola, 1975-6⁸⁴ - On November 10, 1975, the departing Portuguese High Commissioner proclaimed the independence and full sovereignty of the

(80) Ibid pp.65-7. See also Uganda, ibid 2159th meeting, pp.82-3, Ethiopia, ibid 2160th meeting, pp.21-2, Rwanda, ibid 2162nd meeting, pp.3-6 (speaking on behalf of the 18 Arab UN members) and Tanzania, ibid pp.116-18.

(81) Ibid p.36.

(82) Ibid 2158th meeting p.26. See also Ghana, ibid 2157th meeting p.62 Hungary, ibid 2158th meeting p.7 and Poland ibid pp.33-35.

(83) Ibid, 2159th meeting, p.86. Note that in February 1974, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law adopted a resolution by consensus (from which Portugal dissociated itself) calling for the participation in the Conference of the Republic of Guinea-Bissau with the same rights as all other participating States, see CDDH/SR 4, pp.33-37.

(84) See further *infra*, Chapter 7, p.515.

State of Angola. Two governments of Angola were thereupon proclaimed, that of the MPLA and that of the FNLA - Unita coalition, both purporting to speak for the whole country.⁸⁵ Both of the rival movements controlled determinate areas of territory and both received increasing foreign support. A number of States recognised the MPLA regime, but OAU policy was to seek to set up a government of national unity. In the event after the Soviet and Cuban backed MPLA victory over the South-African, Zaire and USA supported forces of FNLA and Unita, a majority of African States recognised the MPLA government. On 11 February, 1976, Angola was admitted as the 47th member of the OAU.⁸⁶ A distinction, however, has to be drawn between the existence of Angola as an independent State and the recognition of the MPLA regime as the legitimate government of that State. Whereas a recognised government only emerged as regards the majority of African States, the OAU and a large number of other States by January or February 1976, it is clear that an independent State of Angola was in existence as of 11 November 1975. The alternatives of a continuation of non-self-governing territory status until early 1976 or the existence of an intermediate status are not viable propositions.

It thus appears that practice, and primarily African practice at that, has succeeded in modifying the effective government criterion of the existence of Statehood. In the Congo, Rwanda and Burundi, and Angola, circumstances were such at the commencement of independence as to deny the existence of effective government. However, this did not result in a denial of Statehood. On the contrary, the Congo, Rwanda and Burundi were admitted to the UN at the time of upheaval or relative instability. This weakening of the effective government requirement is a result of the principle of self-determination, which stipulates that in colonial situations the people of the particular territory has the right to determine

(85) Africa Research Bulletin, November 1975, p.3819.

(86) *Infra*, p.518.

its own political status. This right is not qualified by any reference to the need for an effective government. Indeed, it is a question not of territorial control or efficacy but of status. The maintenance of the traditional approach with regard to government might well have resulted in the creation of entities with an intermediate status as territories decolonised, occasionally with weak or non-existent authorities. Such a situation, even were it remotely politically viable, would have led to serious problems as to the rights and duties of such entities. In the event, this has not proved to be the case, and the international community has accepted that in self-determination situations, the requirement of effective government for Statehood has been substantially modified. The Guinea-Bissau type of situation, nevertheless, remains problematic. While the territory was non-self-governing and its people entitled to the exercise of self-determination, one was not faced with the position where, as for example in the cases discussed above, a colonial power granted independence to an indigenous government which could not be regarded as effective. It was a situation where the colonial power was maintaining its claims to sovereignty and denying the liberation movement control over the whole of the territory. Although the report of the Special Mission of the UN stated that the overwhelming bulk of the territory was under the effective control of the PAIGC administration, many western and Latin-American States denied that this was so or at the least argued that a substantial degree of ambiguity existed as to the precise factual situation.⁸⁷ In such circumstances, it is far from clear that the facts warranted a viable claim of Statehood from the PAIGC, even in the light of the impact of self-determination.⁸⁸

(87) See eg. the statement of the US Department of State on 10 October, 1973, Digest of US Practice in International Law 1973, 1974, p.17.

(88) As to the relevance and effect of the recognitions of Guinea-Bissau, see *infra*, p.359.

Although the criterion of effective governmental control has been modified by the principle of self-determination,⁸⁹ it still exists as regards other situations. For example, it is submitted that the rule remains intact as far as secessionist attempts are concerned, and, indeed, with respect to divided States. Katanga and Biafra are both instances of entities that for a time exercised "governmental" control over determinate areas of land, but such control could not be seen as effective until the factual situation had been clearly resolved. Where there is continued fighting, effective control in the sense of the international law criteria of Statehood cannot be established. Okeke, however, has argued that Biafra satisfied the essential elements of Statehood in international law for the time it lasted.⁹⁰ But it is suggested that in such circumstances, international law requires the criteria of Statehood be fully satisfied. The exception with regard to recognised self-determination situations is not applicable in other cases, and certainly not where secession is concerned, for that involves a violation of the territorial integrity of the existing State.⁹¹ It is not in the interest of States in general to sanction the break-up of existing States by the lax application of the requirement of Statehood. Although once the factual position has been clearly resolved international law will accept the result, there is a presumption against the status of Statehood in secession situations.⁹²

(89) See also Higgins *op.cit.* pp.23-4 and Brownlie, *op.cit.* p.75.

(90) *Op.cit.* p.165 cf. Higgins "International Law and Civil Conflict" in The International Regulation of Civil Wars (ed. Luard), 1972, pp.169, 175.

(91) Secession itself, of course, is not contrary to international law, see Lauterpacht, *op.cit.* p.409.

(92) As regards the Katanga and Biafra cases, see *supra* pp.306 and 316.

(iii) Independence - The concept of self-determination, once the people concerned has attained sovereignty, emphasises the independence of the new State as against external interference. It maintains that the people as a whole and as previously defined⁹³ may freely determine its political status and freely pursue its economic, social and cultural development. It reinforces the domestic jurisdiction provisions of international law.

(b) An additional requirement of Statehood

The principle of self-determination has clearly had an important effect in qualifying the traditional criteria of Statehood in certain circumstances. Is it then possible to go further than this and state that it has become itself one of the criteria of Statehood? If this were to be so, not only would Statehood be concerned with the right of a colonial people to become independent but the nature of that people's progress to independence would also be at issue. In general, it would appear that international law is not interested in how a people exercises its right to determine its political status and pursue its economic, social and cultural development. It imposes no restriction on the type of political structure chosen nor does it bar particular economic systems from consideration. But it seems as if there may be an important exception to this, with regard to racial discrimination. The argument would be that in situations of racial discrimination enshrined in the political system of a new entity, that entity may be denied the status of Statehood in international law even though the criteria traditionally enumerated have been fully complied with. The issue is clearly a difficult one, and important State practice with respect to it has, however, been rather sparse. The Rhodesia case is the prime instance of material which is of relevance and one may also add the case of the "independent" South Africa Bantustans.

(93) Supra, p. 171 et. seq.

(1) Rhodesia - In October 1965, the General Assembly adopted resolution 2012 (XX) which called on the UK not to accept a unilateral declaration of independence by the authorities in that territory as it would be in the sole interest of the minority. Resolution 2022 (XX), adopted on November 5, called on the UK to effect, if necessary by force, the release of political detainees and the repeal of all discriminatory legislation. The day after UDI, on November 12, the Assembly adopted resolution 2024 (XX) condemning the UDI "made by the racist minority" and requesting the UK to end the rebellion. Resolution 2151 (XXI) re-affirmed the inalienable right of the Africans to freedom and independence and condemned any arrangement for the transference of power unless based on self-determination. Security Council resolution 216 (1965) called on all States not to recognise "this illegal racist minority regime" or assist it, while resolution 217 (1965) called the continuance in time of the rebellion a threat to international peace and security. The declaration of independence was deemed to be of "no legal validity" and the regime in power an "illegal authority". The UK view was that UDI had no constitutional effect and that the only way the territory could become independent was by way of an Act of Parliament.⁹⁴ In international law, of course, this is not strictly correct. The test revolves around the criteria of Statehood and the municipal law requirements of the metropolitan State are not critical. Lauterpacht has written that "the refusal of the mother country to recognise such independence is not conclusive" and that once evidence has demonstrated the displacement of the mother country and that the "effectiveness of its authority does not exceed a mere assertion of right ... the illegality of origin, from the point of view of the constitutional law of the parent State, is of no consequence."⁹⁵ Fawcett had written

(94) See Fawcett, "Security Council Resolutions on Rhodesia" 41 BYIL, 1965-6, pp.103, 107.

(95) Op.cit. p.26.

that the UK claim with regard to post-UDI Rhodesia is only a "mere assertion of right."⁹⁶ In factual terms, the undoubtedly effective control maintained by the Smith regime over the territory and population of the former Southern Rhodesia for some years after UDI meant that in this respect at least the entity seemed to fulfil the classical requirements of Statehood. The British response could not be described as a vigorous attempt to end the rebellion by all possible means. However, no State recognised Rhodesia. The UN persisted in regarding it as a non-self-governing territory⁹⁷ and the legal responsibility of the UK⁹⁸ and adopted a number of resolutions denying legal validity to the regime in power.⁹⁹ One could nevertheless still regard Rhodesia as a State in the light of its satisfaction of the factual requirements of Statehood in international law, but this seems a dubious proposition.^{99a} The fact that no State at all has recognised it as a State coupled with the strenuous denunciations of the validity of its declared independence detract substantially from the viability of this alternative.¹⁰⁰ Adoption of the constitutive theory of recognition would solve the problem of the reason in law for its existence as a State, but there are strong objections to this theory.¹⁰¹⁻²

(96) Op.cit. p.112.

(97) See the statement by the UN Secretary General, SCOR, 21st Year, 1280th meeting, p.23.

(98) See eg. Security Council resolutions 217 (1965), 221 (1966), 232 (1966), 253 (1968), 277 (1970), 288 (1970) and 328 (1973) and Assembly resolution 2024 (XX).

(99) Supra, p.352.

(99a) But cf. Okeke, op.cit. pp.104-5.

(100) See also Higgins, "International Law, Rhodesia and the United Nations" The World Today, (1967) pp.94, 98 and Brownlie, op.cit. p.101.

(101-2) See further infra, p.358.

It would seem that the firmest legal foundation for denying the existence of Rhodesia as a State lies in the development of an additional criterion of Statehood, viz. the principle of self-determination. According to this approach, if the requirement of consistency with the provisions of self-determination was not present on entity claiming Statehood would not fulfil the requisite conditions and its claim would therefore fail. However, the proposition cannot be as broadly stated as that, for the reasons that practice has demonstrated that States have emerged with regimes in control which have not acted in accordance with the postulates of self-determination. The application of this additional criterion of Statehood is restricted at the moment, it is suggested, to those peoples regarded as having the right in international law of self-determination. It would therefore not apply in cases of secessions from existing States, for example. One may envisage a situation in which the international community might wish for this to happen, but practice to date is insufficient to substantiate this. The proposition does not operate in cases of already existing States so as to lead to the extinction of Statehood. The instance of South Africa demonstrates this. It has never been argued that South Africa has ceased to be a State, despite apartheid and violation of the principle of self-determination. However, in the case of an entity seeking to become a State and accepted by the international community as being entitled to exercise the right of self-determination, it may well be necessary to demonstrate that internally it is complying with the requirements of the principle of self-determination. In view of State practice to date, one cannot define this condition too severely, but institutionalised and systematic discrimination will seem invalidate a claim to Statehood.¹⁰³

(103) See Fawcett, op.cit. pp.112-3, and *ibid*, The Law of Nations 2nd Ed. 1971 p.46. Cf. Devine, "The Requirements of Statehood Re-examined" 34 MLR, 1971, p.410.

It has been suggested that this additional requirement forms an appendage to the criterion of effective government.¹⁰⁴ However, while the concept of self-determination in this context is naturally concerned with the character of government of the territory in question, it does appear a confusion to link the two in this fashion. Government as an element in the creation of Statehood refers primarily to the relationship between the authority of an entity and the territory involved, although clearly the notion of effectiveness is related to the degree of acceptability of that authority by the inhabitants concerned. It has been seen also how in self-determination situations, the requirement of effectiveness has been modified. The notion of self-determination as an additional requirement for Statehood is essentially concerned with the relationship between the government and the people and centres around the absence of systematised discrimination within that entity. While the object of such discrimination could be religious, cultural and distinct national groups, the issue is most likely to be raised in a racial context.¹⁰⁵

(ii) The "Independent" Bantustans - If an entity claiming Statehood may be denied such a claim on the grounds that it is a territory recognised as within the self-determination context and it has enshrined a discriminatory system within its authority structures, the prime example being the Rhodesian situation, is it possible to go beyond this to deal with cases where the new entity is being established as part of

(104) See eg. Obozuwa, "Some Legal Aspects of the Rhodesian Situation". 5 Nigerian Journal of Contemporary Law, (1974) pp.1,19. Starke defines "government" as it appears in Article 1 of the Montevideo Convention as "a government to which the population renders habitual obedience", Introduction to International Law, 8th ed. 1977, p.107.

(105) See Higgins op.cit. p.106.

a campaign to deny self-determination? This is one of the questions raised by the purported grant of independence by South Africa to its Bantustans.¹⁰⁶ A sovereign State may legitimately dispose of part of its own territory should it so wish. This is one aspect of the sovereignty of States under international law and it has been regarded as being more or less without exception. What is therefore under consideration is a derogation from the general rule, such exception being based upon the principle of self-determination.

The Status of the Transkei Act adopted in 1976 by South Africa declared the territory known as the Transkei to be a sovereign and independent State, free from any authority exercised by the Republic of South Africa.¹⁰⁷

However, it was South Africa which determined the relevant citizenship conditions for the new entity. In particular, it covered a large number of Xhosas living in the Republic itself.¹⁰⁸ The Prime Minister of the Transkei took exception to this, stating that the Transkei was not responsible for the Xhosas living and working in South Africa.¹⁰⁹ As noted above,¹¹⁰ the UN and the OAU have declared themselves firmly against

(106) Supra, p.287.

(107) ILM, September 1976, p.1175.

(108) The Status of the Transkei Act 1976 also included as Transkei citizens, every South African citizen, not a citizen of a territory within the Republic who speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei or who is related to any such a person or who has identified himself with any part of such population or is culturally or otherwise associated with any member as part of such population, see paras (f) and (g) of schedule B, ibid p.1177.

(109) African Research Bulletin, October 1976 p.4189.

(110) Supra, p.287.

recognising any of the Bantustans as independent and no State apart from South Africa has recognised such independence.¹¹¹ As reasons for such non-recognition UN resolutions have cited the principles of territorial integrity and self-determination.¹¹² As far as the former is concerned it is to be doubted whether it may be understood to include the proposition that a State's territorial definition may never be altered. The principle of self-determination, however, is more relevant. It has been suggested that this principle applies to South Africa, as the one exception to date to the rule that the principle applies only to non-independent States,¹¹³ in the light of the institutionalised and systematic racial discrimination established by the government of that country.¹¹⁴ Accordingly the policy of creating the Bantustans and purporting to endow them with Statehood in an attempt to further the policy of apartheid may be seen as a device to avoid the norms of self-determination as relevant in that particular case and thus as a violation of that principle. It would thus appear that where an entity is granted independence in order to prevent the legitimate exercise by a people of the right to self-determination, such an entity would not be acceptable as a State.

(111) Bophuthatswana was declared "independent" on 6 December 1977, African Research Bulletin, December 1977, p.4666, while a third Bantustan, Venda, is scheduled for "independence" in the latter half of 1979, *ibid*, April 1978 p.4817.

(112) Eg. Assembly resolution 2775 E (XXVI).

(113) Self-determination is relevant with regard to independent States in the sense that it reinforces the sovereignty of that State and underlines the doctrine of non-interference in internal affairs.

(114) *Supra*, p.257.

(3) Recognition

Recognition is one mechanism whereby the international community accepts certain factual situations and endows them with legal significance.¹¹⁵ But the relationship between fact and law is a complex one and susceptible to many conflicting interpretations. The law may endorse the legality of a particular situation even though it is factually precarious and the extent of the interaction between effectiveness and the law is a constantly changing one. As far as Statehood itself is concerned, two opposing doctrines have been preferred. The constitutive theory "deduces the legal existence of new States from the will of those already established"¹¹⁶ so that it is only through recognition that a State becomes an international person under international law;¹¹⁷ the declaratory theory, on the other hand, maintains that once a State satisfies the criteria of Statehood, it becomes a subject of international law and recognition is merely a political act of no legal significance in this context.¹¹⁸ The problem with the former approach is that State practice appears to be inconsistent with it,¹¹⁹ and it

-
- (115) Blum notes that recognition is one of the main means of expressing consent in international relations, Historic Titles in International Law, 1965 p.49. Schwarzenberger writes that recognition is of a general character and has a "wide actual, and a still greater potential, scope", "The Fundamental Principles of International Law" 87 HR, 1955, pp.195, 228.
- (116) Lauterpacht, op.cit. p.38.
- (117) Oppenheim op.cit. p.125. See also generally Kelsen "Recognition in International Law" 35 AJIL, 1941, p.605, Kunz "Critical Remarks on Lauterpacht's Recognition in International Law". 44 AJIL, 1950, p.713 and Wright "Some Thoughts about Recognition" ibid, p.549.
- (118) See Chen, The International Law of Recognition, 1951, Charpentier, La Reconnaissance Internationale et l'Evolution du Droit des Gens, 1956 and Lauterpacht op.cit. pp.41-2.
- (119) See eg. Deutsche Continental Gas Gesellschaft v. Polish State (1929) AD 5, no.5 p.15, The Report of the Commission of Jurists on the Aaland Islands case LNOJ sp. Suppl. no.4 (1920) p.8, The Tinoco Concessions Arbitration, (1923) 1 RIAA p.369 and Article 3 of the Montevideo Convention on Rights and Duties of States, 1933. See also Brownlie op.cit. p.94 O'Connell op.cit. pp.123-4 and Akehurst, A Modern Introduction to International Law, 3rd ed. 1977, p.60-63.

copes with difficulty with the question of the unrecognised State.¹²⁰
 The problem with the declaratory approach is that it ignores or decries
 the effect upon a situation of its recognition by States of the
 international community. The constitutive position cannot be accepted
 as formulated, it is suggested, while the declaratory theory needs to be
 modified. Lauterpacht's view that once the criteria of Statehood are
 fulfilled, a legal duty to recognise arises¹²¹ is not borne out in
 State practice,¹²² but as Brownlie notes "if an entity bears the marks
 of Statehood, other States put themselves at risk legally if they ignore
 the basic obligations of State relations."^{122a} Recognition can have a
 strong evidential effect as regards fulfillment of the various criteria
 of Statehood. In those cases, where there is dispute as to the satis-
 faction of the necessary factual requirements recognition by States will
 tend to settle the issue. This may also be true with respect to non-
 recognition. African practice has provided examples of both.

The PAIGC movement in the Portuguese territory of Guinea (Bissau)
 declared itself independent on 26 September 1973 and within a short
 space of time was recognised by the majority of States in the international
 community.¹²³ This was despite the fact that Portugal controlled at least
 one-third of the territory by the PAIGC's admission and all of it by its
 own account. In addition to States' recognitions of the new Republic of
 Guinea-Bissau, 93 States voted in favour of resolution 3061 (XXVIII),

(120) States not recognising other States do not regard the latter
 as free from the obligations of international law eg. with
 regard to the law relating to the use of force, see Brownlie
 op.cit. p.92 note 1.

(121) Op.cit. pp.73-7.

(122) See Brownlie op.cit. pp94-5 and Kunz op.cit. pp.713-9.

(122a) Op.cit. p.94.

(123) Supra, p.342.

which "welcomes the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau". A number of questions thereby arise. Was such recognition (prior to Portugal's recognition on 10 September 1974)¹²⁴ premature? What is the effect of such recognitions? And, what was the effect of the General Assembly resolution?

Oppenheim states that an untimely and precipitate recognition not only violates the dignity of the mother State, but is an unlawful act and "it is frequently maintained that such untimely recognition amounts to intervention".¹²⁵ The test of whether an entity is sufficiently well established to be recognised (in the absence of the recognition of the mother-State) may be found "either in the fact that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary State back under its sway."¹²⁶ None of these was the case with regard to the Republic of Guinea-Bissau at the time in question. Thus, the issue centres around whether the fact that the conflict was a self-determination one effects any change in the traditional position.

Portugal maintained during the General Assembly debate in October 1973 that since the PAIGC regime did not exercise effective control over the particular territory and population and did not alternatively possess control over a substantial part of the territory and population and was

(124) See 78 *Revue Générale de Droit International Public*, 1974, p.1170.

(125) *Op.cit.* p.128. See also Hyde, International Law Chiefly as Interpreted and Applied by the US, 2nd rev. ed. 1947, vol 1, pp.152-3.

(126) *Ibid* p.129. See also Lauterpacht *op.cit.* p.283 and Hall, *International Law*, 8th ed. 1924, para. 26.

not in a position to displace the parent State's government, any recognition was premature and premature recognition was tantamount to intervention and participation in the conflict.¹²⁷ A couple of States invoked the French recognition of the United States in 1778 and the US and UK recognitions of the former Spanish colonies in the 1820's, as well as the American recognition of Panama immediately after its secession from Columbia in 1903, as valid precedents for recognising Guinea-Bissau.¹²⁸ However, it is to be doubted whether such examples constitute a strong justification for the recognition of Guinea-Bissau prior to Portuguese recognition. French recognition of and military aid to the USA in 1778 has been accepted as "precipitate"¹²⁹ and a "breach of international law".¹³⁰ The British and American recognition of the former Spanish South American colonies occurred over a decade after the initial declarations of independence in 1810,¹³¹ while the immediate American recognition of Panama was declared by Oppenheim to be an intervention.¹³² These instances, therefore, illustrate the parameters of premature recognition and are of relevance with regard to secessionist attempts to break away from existing, independent States, but not necessarily in self-determination situations.

There was little attempt in the debates by those supporting the PAIGC to argue that the effect of the numerous recognitions was to endow Guinea-Bissau with Statehood, but this is perhaps not surprising since

(127) GAOR 28th Sess., plenary, 2156th meeting, pp.12-13.

(128) Ibid 2157th meeting p.26 (Guinea) and ibid 2158th meeting pp.77-81 (Uganda).

(129) Oppenheim op.cit. p.129 note 2.

(130) Lauterpacht op.cit. p.8.

(131) Oppenheim op.cit. p.129 note 2.

(132) Ibid, note 1.

the preponderant argument was that Guinea-Bissau did indeed fulfil the requisite criteria for Statehood. Cameroon did state that the view that Guinea-Bissau was a fiction could not be maintained since a fiction recognised by over 70 UN members was a reality,¹³³ while Nigeria declared that the large number of UN members recognising the new Republic was evidence that Guinea-Bissau was a reality.¹³⁴ Apart from this the effect of such recognitions was not discussed. This in itself argues against the constitutive position, but it should not be taken to mean that the question is peripheral. It has been seen that in self-determination cases, the requirements for Statehood have been modified, so that the test for effectivity of government is by no means as stringent as in other cases of claims for Statehood. Recognition is one way in which a State may signal its belief that a particular entity has complied with the pre-requisites of Statehood. In the normal course of events, the impact of individual recognitions in terms of the generality of international law will be minimal. However, in difficult cases where the factual conditions have not been conclusively ascertained, recognition may constitute evidence of the fulfilment of the necessary requirements. The large number of recognitions of Guinea-Bissau,¹³⁵ therefore, demonstrates that a majority of States in the international community accepted that the new State satisfied the relevant conditions, as modified by the doctrine of self-determination.

Recognition by one or two or a small number of States might have

(133) GAOR, 28th Session, plenary, 2161st meeting p.92.

(134) Ibid, 2162nd meeting, p.107.

(135) See generally, Fall, "La Reconnaissance de la Guinée-Bissau et le Droit International" *Annales Africaines* (1973) p.153.

been regarded as premature,^{135a} but where some 80-90 States are involved, it is submitted, a decisive statement with regard to the relevant factual situation has been made.¹³⁶

The effect of such recognitions was reinforced by the admission of Guinea-Bissau as a member of the OAU¹³⁷ and by resolution 3061 (XXVIII).¹³⁸ Both mark further evidence of conformity with formal criteria on the part of Guinea-Bissau. The former is of interest not only as a forceful example of Africa State practice but also as providing for one of the possible consequences of Statehood in Africa. The General Assembly resolution was not of itself binding, of course, but it is an instance of collective recognition, and as such of importance, though this importance is diminished by the fact that Guinea-Bissau was not admitted to the UN as a member-State until 17 September 1974, ie. one week after Portuguese recognition.¹³⁹

The non-recognition of Rhodesia also illustrates this point for it may be taken as evidence of the non-compliance of Rhodesia with the necessary requirements of Statehood. The fact that this was also the

(135a) As for example in the Biafra case, see Ijalaye, "Was 'Biafra' at any time a State in International Law?", 65 AJIL, 1971, p.551.

(136) See also Akehurst op.cit. p.58 and Higgins op.cit. p.41.

(137) Noted in a letter circulated on 20 November 1973 by Morocco in the UN, A/9332 and S/11125.

(138) See also Assembly resolution 3181 (XXVIII), adopted by 108 votes to 0, with 9 abstentions, which approved the credentials of the Portuguese representatives "on the clear understanding that they represent Portugal as it exists within its frontiers in Europe and that they do not represent the Portuguese-dominated territories of Angola and Mozambique nor could they represent Guinea-Bissau, which is an independent State."

(139) Note also Guinea-Bissau's membership of the World Health Organisation on 16 May 1974, see 78 Revue Générale de Droit International Public, 1974, p.1171, and its admission to the Conference on International Humanitarian Law as a participating State by consensus, see CDDH/SR4 p.34 (28 February 1974).

result of UN direction makes it of added emphasis.¹⁴⁰ The UN had implicitly called for the non-recognition of Katanga in 1960-1¹⁴¹ and with respect to South Africa's Bantustans, the General Assembly explicitly called on all governments to deny any form of recognition to the "so-called independent Transkei".¹⁴² According to the constitutive theory, such entities cannot be States in the absence of all recognition, while in the view of the adherents of the declaratory theory, the issue revolves around the possession or otherwise of the necessary requirements of Statehood. It is suggested that Rhodesia and the two Bantustans^{142a} declared "independent" by South Africa are not States in international law, not because they have not been recognised but because they have failed to conform with the criteria for Statehood as modified by the principle of self-determination, and the absence of recognition constitutes evidence of this. A further question arises at this stage, and that is whether there exists a duty not to recognise in such circumstances.

Recognition here may be deemed contrary to the principle of self-determination since it is aimed at the acceptance of a situation based upon its contravention. Non-recognition¹⁴³ may operate as a sanction of international society, but its use is sometimes controversial and not always efficacious. States may be obliged not to recognise territorial

(140) Supra, p.352 et. seq.

(141) Supra, p.306.

(142) Resolution 31/6A. See further supra, p.287.

(142a) See generally Fischer, "La Non-Reconnaissance du Transkei" AFDI, 1976, p.63.

(143) See generally, Lauterpacht op.cit. Chapter XXI Langer, Seizure of Territory, 1947 and Sagay "Non-Recognition of the Illegal Occupation of Territory," 16 Indian Journal of International Law, 1976, p.219.

changes based upon the use of force,¹⁴⁴ but recognition may sometimes be the means whereby the law accepts factual situations despite illegality of origin. As a policy weapon, non-recognition is clearly of value here, but it is felt that abuses of self-determination which prevent the attainment of Statehood should not be endorsed by the use of recognition and that until the facts demonstrate compliance with the criterion of self-determination in Statehood cases, a positive duty of non-recognition may arise.

The consequences of non-recognition were discussed by the International Court of Justice in the Namibia case,¹⁴⁵ in which it was stated that acts, treaties etc. which implied recognition of governmental authority were illegal, although in cases of general conventions of a humanitarian character, the non-performance of which may adversely affect the people of the territory, the same rule would not apply. Non-recognition should not in general result in depriving the people involved of any advantages derived from international co-operation.¹⁴⁶

In the cases of Rhodesia and the Bantustans concerned, de jure title remains in the UK and South Africa respectively, although de facto administration may be carried on by other regimes. This sui generis status will clearly cause some problems in municipal courts¹⁴⁷ but this should not detract from the importance of maintaining such status and refusing to accept the Statehood of such entities. Denial of Statehood in such cases cannot be taken to mean that the issue is removed from the jurisdiction of international law. Practice has shown that with regard

(144) *Infra*, p.525.

(145) ICJ Reports, 1971, p.16.

(146) *Ibid* pp.55-6. Cf. Judges Petren *ibid* p.134 and Onyeama, *ibid* p.149.

(147) See eg. Madzimbamuto v. Lardner - Burke [1969] 1 A.C. 645, and Re James [1977] Ch. 41.

to Rhodesia, the rules of international law regarding the use of force are applicable¹⁴⁸ and the same would be true if analogous situations arose with respect to the so-called independent Bantustans. It is clear that other relevant norms of international law would apply in such cases, since to deny such applicability would be to create a situation wherein such entities of dubious origin would be unrestricted by law in their activities and thus in an advantageous position vis-à-vis States and other subjects of international law. To conclude that international law covers such entities does not mean that such entities must be regarded as States, since international law regulates international activity in general and its scope is not confined to inter-State relations.¹⁴⁹

Conclusions

The doctrine of Statehood in international law has historically been an ambiguous amalgam of law and fact. The birth of a new State is a question of fact. That is clear. One cannot spirit a State out of a vacuum. On the other hand, it is a question to which the law is not indifferent. To put it another way, the criteria of Statehood may be founded upon effectiveness, but not exclusively so. The traditional view of the requirements of Statehood has, it is felt, concentrated heavily upon the notion of effectiveness as the basis of the creation of new States. Moushkely notes that in this context "il s'agit d'un phénomène sociologique et historique indépendant de toute condition juridique."¹⁵⁰

(148) *Infra*, Chapter 7, p.423.

(149) Such an entity would not, however, be able to benefit from the whole range of international rules, for example it cannot maintain full diplomatic and consular relations with existing States while the scope for the conclusion of treaties is necessarily limited.

(150) "La Naissance des Etats en Droit International Public" 66 *Revue Générale de Droit International Public*, 1962, pp.469, 472. See also Charpentier *op.cit.* pp.127-8 and the comments of the Israeli delegate to the UN, Briggs, The Law of Nations, 2nd ed. 1953, p.66.

While effectiveness itself may well be a criterion or prerequisite established by law, it is in essence a political manifestation and not a legal one. Thus law followed demonstrated fact. Modern practice, however, has seen a modification of the exclusive reliance upon effectiveness, and such modification has arisen as a result of the principle of self-determination. In the case of Rhodesia,¹⁵¹ effectiveness alone would have posited the existence of a State, and the same would apply as regards the "independent" Bantustans. But their creation without fulfilling the criterion of self-determination, as evidenced by the lack of third party recognition, has meant that such entities are not States, despite the factual situation. On the other hand, it is believed that the case of Guinea-Bissau demonstrates that the criterion of effectiveness is seriously weakened in self-determination situations, so that while a reliance upon effectiveness alone would have led to a denial of Statehood, this must be qualified in the light of the principle of self-determination. The large number of recognitions made by States of the new entity as a State must enhance the conclusion that Guinea-Bissau, despite the factual situation, was, at that stage and prior to Portuguese recognition, a State. In other situations, effectiveness remains the prime basis for Statehood. It is only with regard to the scope and contents of self-determination that this criterion is qualified. It is believed that this is consistent with the classic formulation of Lauterpacht to the effect that "international law acknowledges as a source of rights and obligations such facts and situations as are not the result of acts which it prohibits and stigmatises as unlawful."¹⁵²

(151) See also the case of Taiwan.

(152) Op.cit. p.409.

II New States and Title to Territory

Under traditional international law, a severe problem was posed concerning the acquisition by new States of title to their own territory since until the new State was created there was no legal person competent to hold the title. This demonstrated a gap in legal theory for title to territory is a fundamental requirement of Statehood.¹⁵³ The classical modes of acquisition of territory are unhelpful in this respect since they are predicated upon activity by a particular type of subject of international law and in any event fail to explain the factual circumstances involved.

There are a number of ways in which the theoretical problems may be overcome, but first a brief survey of the means whereby an entity can obtain independence will be attempted. The most usual method is by the consent and agreement of the colonial power, whether it be signalled by internal legislation or by some form of agreement with the accepted representatives of the new entity.¹⁵⁴ In some cases, a plebiscite will be held putting various options to the population, including that of independence, as for example the Algerian plebiscite of July 1962. Independence may be achieved, on the other hand, as a result of a rebellion contrary to the wishes of the administering power. Although in most cases, a successful war of secession from the colonial power has culminated in a grant of independence as for example in Algeria, Angola and Mozambique,

(153) Jennings has written that the case of the emergence of a new State is "by far the most important case of territorial change at the present time" and that international law respecting this problem is "singularly undeveloped, uncertain and ... comparatively unstudied". The Acquisition of Territory in International Law, 1963, p.12. See also *ibid* p.8.

(154) Starke, "The Acquisition of Title to Territory by Newly Emerged States" 41 BYIL (1965-6) p.411. See, for example, the manner in which the French African territories became independent, Keesings Contemporary Archives, pp.17513, and 17569.

the theoretical problem is posed since it is not invariably so. Title cannot be derived through the previous territorial sovereign where the latter has refused consent. It is also possible for such a rebellion against the administering power to be contrary to international law. The Rhodesian case is the prime example of this.

One factor which has constrained the development of the law in this field has been that the doctrine of domestic jurisdiction has historically hidden from international law those events taking place prior to the establishment of a new State, so that the way in which territory was acquired was not a matter of concern to the traditional law. This appeared to lead to either one of two conclusions. Either the factual possession by a State of territory was just accepted in law, or the constitutive theory of recognition extended to legitimise the acquisition by the State of its own territory. The classic approach to the problem was put by Oppenheim, who noted that the "formation of a new State is ... a matter of fact not law" and that the foundation of a new State must not be confused with the acquisition of territory by an existing State.¹⁵⁵ International law did not create States but recognises their factual existence and gives legal effect to that situation. The declaratory view of recognition and Statehood would seem leave the issue at this point, relying fundamentally upon the principle of effectiveness. However, this approach can no longer be strictly maintained. The right of peoples to self-determination in certain circumstances has imposed a corresponding duty upon administering States to permit the exercise of that right and international law has been vitally concerned with this process. This has led to a reassessment

(155) Op.cit. p.544.

of the role of domestic jurisdiction in such cases and therefore the consideration of particular events and facts prior to the establishment of the new State. It also means that international law theory can no longer merely assume that States have acquired the right to their territory by virtue of the factual situation upon independence, but may have to delve further.

One approach to the problem is that of the constitutive theory of recognition. This view proposes that recognition not only constitutes the new State as an international legal person but also vests the title to its territory in that State.¹⁵⁶ By this method, a series of recognitions would establish a new legal personality complete with a good title to its territory. This has led Starke to refer to an "international quasi-adjudication of territory".¹⁵⁷ Jennings appears to be in favour of this approach, and notes that in such a situation "recognition plays a primary and perhaps decisive role in the constitution of a territorial title."¹⁵⁸ He continues by saying that in this case "it is ordinarily impracticable to separate out from the process of the creation of the new State the simple element of title to sovereignty over its territory for each is a constituent of the other."¹⁵⁹ In other words, the creation of a State of necessity involves the acquisition by it of title to its territory. This is achieved, however, by recognition or rather a series of recognitions since international law has not developed any collective machinery in this respect. It is a process which may be termed non-historical consolidation since time is unimportant.¹⁶⁰ Many of the

(156) See *ibid.*

(157) *Op.cit.* p.413.

(158) *Op.cit.* p.37.

(159) *Ibid.*

(160) *Ibid.*

criticisms made with regard to the constitutive theory are applicable in this context, for example inconsistent State practice and the problem of the status in international law of an entity recognised by some States as a State, but not by others. Title to territory and Statehood must march together, so that in this sense non-recognition by a large number of States can be a crucial problem.^{160a} The issue of the unrecognised entity may be disposed of by the constitutive theory, but it is to be queried whether the means whereby this is accomplished are truly satisfactory, particularly in view of the development of the doctrine of self-determination. The 'factual' approach to the problem of newly emerged States and title to territory suffers from the disadvantage that matters prior to the establishment of the new State upon the basis of the principle of effectiveness are clearly of relevance in the contemporary law of territory. Self-determination has undoubtedly effected an important change here and one that cannot be ignored. The problem with accepting the alternative "recognition" thesis is that it is predicated upon an espousal of the constitutive doctrine of recognition and it is believed that the disadvantages of this theory make it unwise to found the solution to the question of tracing title to territory upon it.

There exist a number of other possibilities. Various writers have concentrated upon the vast majority of cases whereby non-independent territories have become independent with the consent of the administering power, and have characterised the situation as one of succession,¹⁶¹ or

(160a) A further problem with the constitutive approach to a new State's title to territory is that the boundaries of that State might thus be left uncertain, since it is rare for a recognising State to specify the extent of the recognised State's territory.

(161) Greig, International Law, 2nd ed. 1976, p.156. Greig believes that where the territory establishes its independence by force, however, "the international status and the creation of the new title to the territory depend upon recognition", *ibid.*

quasi-cession^{161a} or quasi-prescription.^{161b} Such cases are based on the proposition that in non-self-governing territories, sovereignty rests with the administering power which then transfers title to the people or representatives of the emerging State. But such approaches also appear to accept the legitimacy of looking beyond the fact of independence to establish title and in a way which centres upon the relationship between the administering power and the pre-State entity.

The approaches which concern themselves with the question of the nature of this pre-State entity will be examined, but first the distinction between self-determination and non-self-determination situations must be stressed. In the latter case, and the primary example of such a situation will be secession from an existing non-colonial State, the traditional rules of Statehood apply, so that the seceding State will establish its Statehood by adhering to the relevant conditions and its title to territory will be based upon its successful acquisition of the same from the parent State. The element of effectiveness is thus crucial. Recognitions by third States and particularly by the parent State will constitute vital evidence of the compliance of the new State with the necessary criteria. In such cases, the fact of Statehood will comprise also the transference of title.

In the case, however, of non-independent territories within the purview of the right to self-determination, the interposition of that right creates a different juridical situation. Where mandate and trust territories were concerned, of course, it was always accepted that sovereignty

(161a) Akehurst op.cit. p.141 but cf. Starke op.cit. p.415.

(161b) Akehurst op.cit. p.143. But prescription is founded upon an adverse or at the least uncertain title which is then validated though the process of time and acquiescence, see Greig op. cit. p.163.

and title did not lie with the administering power; Judge McNair declared that a new legal institution was involved which did not fit the old conception of sovereignty and that indeed sovereignty was in abeyance until "the inhabitants of the territory obtain recognition as an independent State."¹⁶² The International Court noted that the "rights of the mandatory in relation to the mandated territory and their inhabitants have their foundation in the obligations of the mandatory and they are so to speak mere tools given to enable it to fulfil its obligations."¹⁶³ These obligations related to the eventual self-determination of the population of the territory.^{163a}

Judge Nervo declared with regard to Namibia that "the mandate did not confer ownership or sovereignty or permanent rights but consisted only of a conditional grant of powers for the achievement of a purpose - not for the benefit of the grantee but for the benefit of a third party, the people and territory of Namibia."¹⁶⁴

Sovereignty over colonies and other non-self-governing territories, on the other hand, lay with the administering power. But the development of the principle of self-determination as a legal concept appeared to render the situation with regard to such territories on a par with mandated and trust territories,¹⁶⁵ although there was apparently a difference as regards the immediate sovereign. With the acceptance of the right to

(162) ICJ Reports 1950, pp.128, 150.

(163) ICJ Reports, 1962, pp.319, 329.

(163a) ICJ Reports, 1971, pp.16, 31.

(164) Ibid, p.115 Judge Ammoun declared that Namibia was a subject of law lacking only the exercise of its national sovereignty which "did not cease to belong to the people subject to mandate", *ibid* p.68. See also Brownlie, "A Provisional View of the Dispute concerning sovereignty over Lake Malawi/Nyasa", *East Africa Law Review*, 1968, p.258, 271.

(165) Ibid p.31. See also the Western Sahara case, ICJ Reports, 1975, pp.12, 31.

self-determination it could no longer be said that the administering power possessed absolute sovereignty, since it was clearly subject to a duty with regard to the exercise of the right. As the 1970 Declaration on Principles of international law stated "the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it ... until the people of the colony or non-self-governing territory have exercised the right to self-determination." The Declaration did not state that title rested with the people concerned, it should be noted. Indeed, a number of territorial adjustments were made by the colonial powers,¹⁶⁶ so that title was accepted as residing in the administering authority. However, contemporary international law has restricted the sovereignty of the administering State and made it subject to the right of the people to self-determination. Thus, while the administering State in such a situation still possesses the title to the territory in question, it is qualified by the right of the people of the territory to call for its transfer in the context of the exercise of self-determination. In cases, where the administering power seeks by force to deprive the relevant population of this right, the people may take action in order to establish its own sovereignty and Statehood, and consequently title to that territory. It is believed that the Guinea-Bissau episode, 1973-4, demonstrates this. But it is predicated upon a number of factors, viz. the active hampering by the use of force of the right of the people to self-determination, action taken by the people to counter-act this, the achievement of a certain minimum of success expressed in terms of territorial control and effectiveness by the people and the consequent formal

(166) See further *supra*, p.87 et. seq.

declaration of independence which will implicitly include a claim to the title of the territory concerned. The point that differentiates this situation from an attempt to secede from a non-colonial independent State is the lower level of effectiveness that needs to be manifested as a result of the operation of the principle of self-determination. In addition, the territory with regard to which title is claimed, will be all of that territory formerly administered by the colonial power, unless there are exceptional circumstances.¹⁶⁷

This means that the veil of domestic jurisdiction barring inquiry by international law before actual independence has been clearly pierced in self-determination situations. It leads to the conclusion that events and facts prior to the claim to formal independence may be examined in order to test the legitimacy of the claim, as for example in the Rhodesia and Bantustan cases. Indeed, the test of self-determination may prevent a successful claim to title and Statehood. In addition, it opens the way to a consideration of the proposition that territorial sovereignty may be transferred prior to the moment of independence, thus obviating the doctrinal problem relating to the tracing of title. This suggests that where a people is entitled in law to self-determination and demonstrates the intention to seek Statehood and title, then, providing the minimum effectiveness criterion is satisfied, title may be acquired pending or at the same time as Statehood.

Since in the case of non-independent territories (not forming part of a non-colonial sovereign State) title remains in the administering power but subject to the right of the people to call for its transfer in conformity with the principle of self-determination, while in the case of mandated and trust territories the territorial sovereignty possessed

(167) As for example in the mandated territory of Palestine, 1948, and the trust territory of Rwanda-Urundi, 1961-2, *supra*, pp.264 and 208.

by the administering power is further restricted, it is not possible to talk in terms of absolute title. Title in either case is to a certain degree subject to external constraint. This raises the further question of the identity of the transferee in such instances. Is it the people as a whole or the representatives of people or some other entity? It is submitted that in general one should regard the people of the territory in question as a whole as the legal personality capable of receiving the transfer of title, then held by the authorities of the new State on its behalf. This is because the right of self-determination is vested in the people as an entity and not in some other body. The theoretical possibility of the disposal of part of the territory by the people prior to the actual emergence of the new State is thus presented, but for many reasons this is highly unlikely to take place in practice.

This leaves open the question of the status of national liberation movements in the process of acquiring title and Statehood, and to this issue we shall now briefly turn.

III The Status of National Liberation Movements and the Question of Title

As Lauterpacht noted, "the orthodox positivist doctrine has been explicit in the affirmation that only States are subjects of international law."¹⁶⁸ However, this doctrine has been modified, particularly in the years since 1945. The International Court of Justice recognised the status of the UN as an international person and subject of international

(168) "The Subjects of International Law" in International Law vol. 2, part 1, 1975, p.489. See also Anzilotti, Cours de Droit International, 1929, p.134, Schwarzenberger, International Law, 3rd ed. 1957 pp.140, 155, Kelsen, Principles of International Law, 2nd ed. 1966 p.180, Briggs, The Law of Nations, 2nd ed. 1953 p.95 and Jessup, A Modern Law of Nations, 1948 p.16.

law in the Reparations case¹⁶⁹ while the characterisation of individuals as subjects of international law has proceeded apace.¹⁷⁰ In addition, the development of the concept of self-determination has raised the question of peoples as subjects of international law. The issue of personality in the law is therefore complex and the required conditions needed to be satisfied rather ambiguous. In fact, it has to be left to international practice to determine whether an entity is accepted as a legal person and the consequences in international law of such personality as is presented.¹⁷¹ Although the UN Charter restricts membership to States, recent years have witnessed a proliferation of what have been variously termed non-territorial actors,¹⁷² non-governmental entities¹⁷³ and supranational functional communities.^{173a} Therefore, the question as to the status of national liberation movements has to be discussed in the light of the developing requirements of the international community as demonstrated through practice.¹⁷⁴

In the early years of the UN, the peoples of non-self-governing territories were regarded as within the jurisdiction of the administering

(169) ICJ Reports, 1949 pp.178, 179.

(170) See Lauterpacht, International Law and Human Rights, 1950, and Brownlie, Principles of Public International Law, 2nd ed. 1973, pp.535-81.

(171) Lauterpacht, op.cit. previous footnote, p.12.

(172) Falk, "A New Paradigm for International Legal Studies. Prospects and Proposals" 84 Yale Law Journal, 1975, p.969.

(173) "US Positions at 29th UN General Assembly", US Department of State, Special Report no. 13 (1975) p.4.

(173a) Verzijl, International Law in Historical Perspective, vol. 2 1969, p.205.

(174) See Lauterpacht, International Law, vol. 2, part 1, 1975, p.137.

power and not entitled to a separate status.¹⁷⁵ The next stage involved the characterisation of what might be generally regarded as prototype national liberation movements as petitioners within the framework of the UN. It was originally part of the trusteeship system¹⁷⁶ but was extended beyond this to relate to colonial territories in general. However, the hearing of such petitions was discretionary and the petitioners themselves participated as private individuals and not as representatives of organisations.¹⁷⁷ As a result of dissatisfaction with this approach,¹⁷⁸ the General Assembly Fourth Committee (which deals with trusteeship and non-self-governing territories) decided to admit representatives of certain national liberation movements to take part in proceedings in an observer capacity. The request for observer status in order to enable representatives of national liberation movements to participate in discussions in the Fourth Committee on the questions of the Portuguese African territories, Southern Rhodesia and Namibia emanated from a letter sent to that committee from the chairman of the Special Committee on Decolonisation.¹⁷⁹ Significantly, the invitation was to be made in consultation with the OAU. This proposal was accepted by the Fourth Committee by a vote of 79 to 13, with 16 abstentions on 27 September 1972.¹⁸⁰ In accordance with this decision, representatives

(175) However, in the cases of a number of international organisations non-independent territories were permitted separate representation, see Kovar, "La Participation des Territoires non Autonomes aux Organisations Internationales", AFDI, 1969, p.522.

(176) Beauté, Le Droit de Petition dans les Territoires Sous Tutelle, 1958.

(177) Lazarus, "Le Statut des Mouvements de Libération Nationale à l'Organisation des Nations Unies", AFDI, 1974, pp.173, 177.

(178) Not all States were dissatisfied with this approach, however, see eg. A/C4/SR 1976.

(179) A/C4/744.

(180) A/C4/SR 1975 p.20. An Irish proposal to seek the opinion of the UN Legal Counsel was rejected, *ibid*.

of Frelimo and the PAIGC took part in the debates regarding Portugal's African territories. In 1973, representatives of those movements and those of the FNLA and MPLA took part as observers in the discussions in the committee on Portugal's colonies in Africa,¹⁸¹ and the pattern was established.

The interposition of the OAU requirement was intended as a screening process and also as a method of excluding in practice secessionist movements from such status and participation. In effect, only those movements recognised by the OAU¹⁸² were to benefit from observer status in the UN. The OAU organ with the capacity to recognise such movements is the Liberation Committee.¹⁸³ The main criteria for recognition centre upon the effectiveness of the struggle of the organisation concerned and the degree of support it enjoys.¹⁸⁴ Although ideological and political considerations are supposed to be absent, in fact they are often crucial. The backing given to FNLA by Zaire and to Unita by Zambia complicated the issue as regards Angola, and threats by Morocco and Mauritania to leave the OAU if Polisario was given the status of an OAU liberation organisation proved effective.¹⁸⁵ The importance awarded OAU recognition in the context of the status of liberation movements was never actually debated by the UN, but arose naturally out of the conscious use by the African group at the UN of its power in order to further OAU

(181) A/C4/759 and A/9174.

(182) This was extended to the Arab League, see eg. resolution 3102 (XXVII). Only the Palestine Liberation Organisation has been so recognised.

(183) See Boutros-Ghali, L'Organisation de l'Unité Africaine, 1968, pp.70-74 and *infra* Chapter 7, p.491.

(184) Cervenka, The Unfinished Quest for Unity, 1977, p.47. The recognition awarded to the FNLA in 1963 was withdrawn the following year for failing to meet the criteria, *ibid*.

(185) *Ibid* p.48.

objectives, such as decolonisation.¹⁸⁶ One should note here in particular that by resolution 3151G (XXVII), the General Assembly authorised the Committee on Apartheid, in consultation with the OAU, to associate the African liberation movements recognised by the OAU, with its work. In accordance with this, the ANC and PAC¹⁸⁷ joined the committee as observers, in 1974.¹⁸⁸

The General Assembly endorsed the Fourth Committee's decision regarding observer status for liberation movements recognised by the OAU, in resolution 2918 (XXVII). The process continued in resolution 3247 (XXIX) whereby liberation movements recognised by the OAU or the Arab League were to participate as observers in sessions of the General Assembly, in conferences held under the auspices of the Assembly as well as in meetings of specialised UN agencies and its various organs.¹⁸⁹ Attempts to persuade the Assembly to permit a declaration before it by one of the leaders of African liberation movements, Amilcar Cabral, failed¹⁹⁰ and further attempts were rendered pointless by the Portuguese coup of April 1974. However, the leader of the PLO was invited to deliver a speech at the Assembly.¹⁹¹

(186) See generally Andemicael, The OAU and the UN, 1976, and especially pp.29-30. See also Lazarus, loc.cit. p.181. A slightly different situation operates with regard to the UN administered territory of Namibia, where the UN Council for Namibia acts as inter alia the recognising agent, see A/8024 paras. 28-36, resolution 2248 (S-V) and A/AC 131/SR 77 p.6.

(187) The two South African liberation movements recognised by the OAU.

(188) Lazarus loc.cit. p.189.

(189) See also resolution 3280 (XXIX).

(190) A/C4/SR 1978 p.23.

(191) Resolution 3237 (XXIX). A strong argument may be made criticising this move by the Assembly and the recognition of the PLO as a liberation movement relating to a non-colonial situation, see eg. Lazarus loc.cit. pp.193-4 and Silverburg, "The Palestine Liberation Organisation in the United Nations: Some Implications for International Law and Relations" 12 Israel Law Review (1977) p.365.

National liberation movements have also been invited to attend a number of international conferences, for example the World Conferences on Population (held in Bucharest in 1974) and Food (held in Rome in 1974).¹⁹² The World Health Organisation in resolution EB 53 R58 recommended that liberation movements recognised by the OAU should be permitted to participate in WHO activities.¹⁹³ At the Caracas session of the Third Conference on the Law of the Sea, the internal rules of the conference were amended in order to permit national liberation movements recognised by the OAU and the Arab League to participate.¹⁹⁴ In the case of the conference on International Humanitarian Law, the General Assembly had already adopted a resolution¹⁹⁵ urging that the liberation movements recognised by the various regional intergovernmental agencies concerned be invited to participate in the conference as observers "in accordance with the practice of the United Nations." Accordingly and despite some opposition the Conference adopted by consensus a proposal permitting this, at its first 1974 session.²⁰⁰

It may therefore, be stated that the question of observer status for liberation movements recognised by the appropriate regional intergovernmental organisation has been affirmatively settled in international practice. The issue of the meaning in law of such status is consequently raised.

(192) See Lazarus loc.cit. p.195.

(193) Handbook of Resolutions and Decisions of the World Health Assembly and Executive Board, 1st ed. 1973-4, vol. II p.76.

(194) A/Conf 62/SR 38. The voting was 88 to 2 with 35 abstentions.

(195) Resolution 3102 (XXVIII).

(200) CDDH/SR 7 p.1.

In general, the term observer in such a context would seem to imply that the party concerned has been recognised as having an interest with regard to the matter being discussed in the particular forum and possibly that that party possesses some form of international personality. By itself, not more than this would seem to be implied. However, by relating this to the principle of self-determination something wider might seem to emerge. The link between the two is constituted by the recognition of the movements as the authentic representatives of the people as a whole of the territory. At the ninth summit of the OAU, liberation movements were given the status of representatives of their people at OAU sessions instead of their former status of observers,²⁰¹ while a number of UN General Assembly resolutions have commented on the nature of particular movements. Resolution 2918 (XXVII), for example, declared that "the national liberation movements of Angola, Guinea (Bissau) and Cape Verde and Mozambique are the authentic representatives of the true aspirations of the peoples of those territories" and this was repeated in resolution 3113 (XXVIII).²⁰² By resolution 3295 (XXIX), SWAPO was recognised as the authentic representative of the Namibian people. What would seem to be suggested is that such movements represent

(201) See Resulovic "Ten Years of the Organisation of African Unity" 24 Review of International Affairs, 1973, p.34.

(202) But without reference to Guinea (Bissau) which had declared independence. A number of UN resolutions have stated that the views of particular movements have been taken into account, eg. resolutions 2707 (XXV) 2795 (XXVI), 2871 (XXVI), 2652 (XXV), 2796 (XXVI) and 31/30, while many resolutions have called specifically for moral and material assistance to be given to national liberation movements generally and particularly, see eg. resolutions 2105 (XX), 2189 (XXI), 2704 (XXV), 2874 (XXVI) 3118 (XXVIII), 3300 (XXIX) and 3421 (XXX). Prisoner-of-war status for captured members of such movements has been called for, see resolutions 2674 (XXV), 2621 (XXV), 2795 (XXVI), 2796 (XXVI) and 3103 (XXVIII), see also Article 44, Protocol I, additional to the General Conventions of 1949. The use of mercenaries against such movements has been declared to be criminal, see eg. resolutions 2548 (XXIV), 2708 (XXV) and 3103 (XXVIII).

the attempt of the people concerned to secure the exercise of the right to self-determination and thus are seised of that right by virtue of a process of delegation. It is important to note, however, that recognition plays a vital role in this as well as effectiveness. The fact that a people is deemed in law to possess the right to self-determination has an effect upon the minimum of effectiveness necessary for the purposes of status and Statehood; recognition plays here an evidential role. However, in deciding whether a movement can be taken to embody the rights of a people, what is needed is recognition by the appropriate regional organisation. In this sense and in this context, recognition can be stated to be playing a constitutive role. Effectiveness is, of course, an important determining factor in leading to recognition but it itself cannot create the necessary status for the movement in question. In the absence of such recognition, as in Rhodesia^{202a} or Angola for example, the full right to self-determination remains in the people as a whole and it is left to the principle of effectiveness to resolve the dilemma of the identity of the authority of the emerging State.

Ago has written that "what in fact, characterises the situation created by the emergence of an insurrectional movement as defined in international law is the very existence parallel with the State and in a portion of the territory under its sovereignty of a separate subject of international law."²⁰³ Such a movement is essentially a "provisional"

(202a) But note that while in resolution 3297 (XXIX) it was reaffirmed that the national liberation movements of Zimbabwe were the sole and authentic representatives of the true aspirations of the people, no attempt was made to designate which of the competing movements was to be treated as the representative.

(203) Fourth Report of the Special Rapporteur on State Responsibility, Yearbook of the ILC, 1972, vol. II, p.129.

subject of international law²⁰⁴ since it is on its way to Statehood, or even an "embryo State".²⁰⁵ Ago was writing of insurrectional movements in general in the light of a new State's retroactive responsibility for acts of the successful liberation movement, not specifically those operating within the context of self-determination, and related the question of personality solely, it seems, to the criterion of effectiveness,²⁰⁶ but he was prepared to accept the possibility not only of international personality but also that "the structures of the organisation of the insurrectional movement then became those of the organisation of the new State."²⁰⁷ This appears to be suggesting that such movements are potentially States, only requiring a particular level of effectiveness to be manifested before Statehood is actually acquired. Accordingly, could one accept that such entities may hold title to territory pending actual Statehood? It is recognised that for some legal purposes there may be continuity before and after Statehood is firmly established.²⁰⁸ National liberation movements²⁰⁹ ultimately derive their personality from the right of the people of the territory in question to self-determination.²¹⁰ Such peoples are subjects of international law by virtue

(204) Ibid.

(205) Ibid, p.131.

(206) He was criticised on this point, rightly it is suggested, by Reuter, Yearbook of the ILC, 1975, vol. I p.45.

(207) Op.cit. p.131.

(208) Brownlie op.cit. p.82.

(209) Insurrectional movements in general may possess personality in the light of rules relating to insurgency and belligerency; see Lauterpacht, Recognition in International Law, 1948, part III. It is here suggested that movements relating to people accepted as entitled in law to exercise the right of self-determination form a distinct category subject to special rules. See also Yearbook of the ILC, 1975 vol. I p.59.

(210) See to this effect eg. the Moroccan delegate to the 1974 session of the conference on International Humanitarian Law, CDDH/I/SR2 p.6 and the Senegalese delegate, CDDH/I/SR.6 p.3. See also Article 1 (4) of Protocol I additional to the Geneva Conventions of 1949.

of this right, although this does not mean that they are thereby assimilated to States,²¹¹ since "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community".²¹² The issue of personality in this context is particularly acute where there is armed conflict between the people and the administering power. Farer has characterised the status of "rebellious non-self-governing territories" as "inchoate States with a right of immediate accession to full participation in the international community",²¹³ while Sanborn has talked of "quasi-States" in the sense of entities with international rights and duties but lacking one or more of the criteria of Statehood.²¹⁴ Clearly, such entities are not entitled to the same rights as States nor are they subject to the same obligations.²¹⁵ One must not confuse personality and capacity. However, it is felt that such peoples may acquire title to the territory in question pending Statehood. It could be argued that this title may be acquired and

(211) But cf. Blishchenko and Solntseva, "The Struggle Against Portuguese Colonialism in the Light of International Law," 8 International Affairs (Moscow) 1971, p.60.

(212) The Reparations case, ICJ Reports, 1949, pp.174 178. See also the Western Sahara case ICJ Reports 1975 pp.12, 63.

(213) "The Regulation of Foreign Intervention in Civil Armed Conflict". 142 H.R., 1974, pp.291, 369.

(214) "Standing Before the International Court of Justice: The Question of Palestinian Statehood Exemplifies the Inconsistencies of the Requirement of Statehood", 7 California Western International Law Journal, 1977, pp.454, 456.

(215) Abi-Saab has argued that common Article 2 of the Geneva Conventions of 1949 could cover both States and non-State entities in particular belligerent entities, "Wars of National Liberation and the Laws of War" 3 Annals of International Studies 1972, pp.102, 107. See also Sagay "The Legal Status of Freedom Fighters in Africa" 6 East Africa Law Review, 1975, pp.15, 27. But cf. letter by Draper in The Times, 22 September 1978 p.15.

held on their behalf by national liberation movements, by virtue of a process of delegation, in relation to which effectiveness and recognition are crucial, but State practice is not sufficiently developed to be able to accept this proposition. Indeed, it is noticeable that no such claim has apparently been put forward by any State.²¹⁶

(216) Note that in the case of Namibia, UN resolutions have characterised the armed conflict as between South Africa and the people of Namibia, see eg. resolutions 2787 (XXVI) and Security Council resolutions 264 (1969) and 301 (1971). This would appear to minimise the status of the UN itself with regard to the territory.

CHAPTER 7 - THE USE OF FORCE

The rules governing the use of force form a central element within the system of international law and pose crucial issues for the international community. Linked as they inextricably are to the concepts underlying the notion of territorial sovereignty, such rules and the changes to which they have been subject reflect some of the predominant preoccupations of the post-war era. They have also been deeply influenced by the changing expectations of actors upon the international scene, expressed both within and without the United Nations framework. African practice has been marked in this field and has emerged in general terms, through the United Nations and the OAU and, more specifically, in relation to particular colonial and other problems. Indeed, it is felt that any discussion of the principles relating to territory in the light of African practice would be deficient if an analysis of the relevant rules with respect to force was not attempted.

The legal regulation of armed conflicts between sovereign States resolves around the twin Charter provisions of Articles 2(4) and 51. Article 2(4) stipulates that all U.N. members¹ "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". Article 51 declares that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain

(1) Article 2(6) of the Charter notes that "the Organisation shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security". See Kelsen, The Law of the United Nations, 1950, pp. 109-110.

international peace and security". The precise relationship between these provisions has occasioned considerable scholarly debate,² concerned to a large extent with the exhaustiveness or otherwise of the Charter in the legal regulation of force. Certain writers³ posit a wide interpretation of Article 2(4) and a narrow interpretation of Article 51, while others⁴ take the view that the scope of Article 51 is wider than some analyses would indicate. The point is also made that the use of the phrase "inherent right" in that Article underlines the continuing applicability of the customary rules of international law relating to self-defence.⁵

Whatever the accepted connection, it is at least indisputable that these two Articles constitute the primary considerations in any discussion of the legality or otherwise of an armed conflict between States. When one seeks to analyse the situation, however, where one of the parties involved in the conflict is not a State, the problem of the relevant legal framework is immediately raised. Such situations would include insurrectionary movements ranging from national liberation movements in accepted anti-colonial wars to internal attempts to overthrow governments, secessionist wars and third party intervention in such conflicts. We shall examine in the course of this Chapter the changes that have occurred in international law concerned with such phenomena and the guidelines that may be utilised in determining the legality of any given situation.

-
- (2) See in particular Brownlie, International Law and the Use of Force by States, 1963, pp.264-280, Bowett Self-Defence in International Law, 1958, pp.184-199, Stone Aggression and World Order, 1958, and Legal Controls of International Conflict, 1958, McDougal and Feliciano Law and Minimum World Public Order, 1961, and Waldock "The Regulation of the Use of Force by Individual States in International Law", 81 HR, 1952, p.455.
- (3) Eg. Brownlie, op.cit. p.113.
- (4) Eg. Bowett, op.cit. pp.185-6, and Stone, op.cit. pp.43-44 and 97-98.
- (5) Brierly, The Law of Nations 6th ed. 1963, pp.417-8, and O'Connell International Law 2nd ed. 1970, vol.1, p.317. See also UNCIO Vol.6 p.334, to the effect that "the use of arms in legitimate self-defence remains admitted and unimpaired".

The primary distinction that has been drawn in the field of armed conflicts⁶ is that between international and internal conflicts. Traditional international law posited the differentiating criterion as the test of status, the status of the contending parties. As Siotis notes, in the case of international armed conflicts two or more subjects of international law are involved, whereas in the case of non-international (or internal) armed conflicts, only one subject of international law is involved.⁷ As far as the former are concerned, the rules of customary and conventional international law clearly apply. However, international law does not govern all internal conflicts. A further division was therefore made between those internal acts of violence purely within the legal order of the State concerned and those acts deemed also within the purview of international law. It is here that customary law developed the categories of rebellion, insurgency and belligerency.⁸⁻¹⁸

I - The Use of Force by the Colonial Power

(a) International Doctrine

Much depends upon the characterisation of colonialism in international law. If it is regarded as a lawful institution, the use of a certain degree of force by the colonial power would have to be

-
- (6) As to the technical meaning of "armed conflict" see Brownlie op.cit. pp.392 and 399-401. Article 2, common to the four Geneva Conventions of 1949, specifies that the Conventions are to "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them". The use of the phrase in the Conventions was intended to obviate the difficulties caused by definitional controversies concerning the existence of a legal state of war, see Draper, The Red Cross Conventions of 1949, 1958, p.11.
- (7) Le Droit de la Guerre et les Conflicts Armés d'un Caractère Non-International, 1958, p.21. Siotis qualifies this by referring to subjects with full legal capacity, so as to point to the availability of the status of belligerency, *ibid*.
- (8-18) See further Lauterpacht, Recognition in International Law, 1947, pp.175-328, Falk, "Janus Tormented: The International Law of Internal War", International Aspects of Civil Strife (ed. Rosenau), 1964, p.185, Kotzsch, The Concept of War in Contemporary History and International Law 1956, Higgins "Internal War and International Law", The Future of the International Legal Order, vol.3, Conflict Management (ed. Black and Falk), 1971, p.81, and Castren, Civil War, 1966.

accepted as lawful, whereas its definition as an illicit relationship would undermine this. The U.N. Charter acknowledges the lawfulness of "the administration of territories whose peoples have not yet attained a full measure of self-government" and in Chapter XI seeks to regulate it. One cannot regulate what is illegal, therefore the institution of colonialism was recognised as well as circumscribed, by the Charter in 1945. As far as the use of force is involved, Article 2(4) is predicated upon the phrase "all members shall refrain in their international relations". So the use of force by Members of the U.N. not "in their international relations" would not be within the purview of Article 2(4). That at the time the question of force within the colonial sphere was regarded as not within the scope of States' international relations is fairly clear.¹⁹ This can be illustrated by reference to the Geneva Conventions of 1949. Common Article 2 stipulates that "in addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance". The point that colonial wars do not come within the umbrella of international armed conflict is rendered even more explicit in a draft prepared by the International Committee of the Red Cross and submitted to the XVII International Red Cross Conference at Stockholm. This would have added to the proposed

(19) Abi-Saab "Wars of National Liberation and the Laws of War". 3 *Annals of International Studies*, 1972, pp.93, 94-6
 Salmon "La Conférence Diplomatique sur la Réaffirmation et le Développement du Droit International Humanitaire et les Guerres de Libération Nationale", 12 *Revue Belge de Droit International*, 1976, p.27.

Article 2, a paragraph specifying that "in all cases of armed conflict which are not of an international character, especially cases of Civil War, colonial conflict or war of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementation of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status".²⁰

Although this was not accepted, the 1949 Conventions clearly regarded colonial conflicts as non-international armed conflicts.²¹ In other words, the rules of customary international law, as briefly noted in the preceding section, still applied in the case of colonial conflict as a species of internal wars. This, therefore, Permitted the administrating power to use force in the territory. Conversely the use of force by inhabitants of the territory in question was governed exclusively by the municipal law of the colonial power, subject to the aforementioned rules of insurgency and belligerency.

The change in this predominantly State-oriented approach to the international law of force can be traced to the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the U.N. General Assembly on 14th December 1960 - resolution 1514(XV). This solemnly proclaimed the necessity of bringing to a speedy and unconditional end, colonialism in all its forms and manifestations and to that end declared that the subjection of peoples to alien

(20) Commentary on the Geneva Conventions of 1949 (ed. Pictet) vol.III, 1960, p.31.

(21) In fact, common Article 3 provided for a minimum protection for both parties in cases of a non-international armed conflict occurring in territory of one of the High Contracting Parties. The application of the provisions was not to affect the legal status of the parties to the conflict.

subjugation, domination and exploitation constituted a denial of fundamental human rights and was contrary to the U.N. Charter. All peoples had the right to self-determination and "all armed action or repressive measures of all kinds directed against dependent peoples" were to cease in order to enable them to exercise their right to independence. This resolution implicitly acknowledged the legality hitherto of colonialism in international law and stated that from that point immediate steps were to be taken in non-independent territories to transfer all power to the people of their territories, without any conditions or reservations. However, within a short time the emphasis had changed. The preamble to General Assembly resolution 2105 (XX)²² adopted on 20 December 1965, declared that the continuation of colonial rule and apartheid, as well as all forms of racial discrimination, threatened international peace and security and constituted a crime against humanity.²³ Resolution 2131 (XX) adopted the following day, declared in operative paragraph 3 that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention". The confluence of the principles of non-intervention, self-determination and the use of force achieved in this resolution, marked out the path that was to follow.²⁴ The important Declaration on Principles of

-
- (22) This resolution also called on all States and international institutions, including the specialised agencies of the U.N., to withhold assistance of any kind to the governments of Portugal and South Africa until the policies of colonial domination and racial discrimination were renounced.
 - (23) This preambular paragraph was adopted by 63 votes to 16, with 22 abstentions, the resolution as a whole by 74 votes to 6 with 27 abstentions, a clear indication of the contentious nature of the provision in the preamble.
 - (24) Resolution 2160 (I) adopted by 98 votes to 2 with 8 abstentions, declared that any forcible action direct or indirect which deprived a people under foreign domination of the right to self-determination, freedom and independence constituted a violation of the Charter and reaffirmed the provisions of Res.2131 (XX). The continuation of colonialism was declared to threaten international peace and security, see resolutions 2189(XXI), 2326(XXII), 2465(XXIII) and 2548(XXIV).

International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations adopted by the Assembly without a vote on 24th October 1970, in resolution 2625(XXV), stipulated that "every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence". It was further provided that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention" while it was reaffirmed that the territory of a colony and other non-self-governing territory had under the Charter "a status separate and distinct from the territory of the State administering it". One of the aims of the principle of equal rights and self-determination of peoples, as elaborated in the Declaration, was to bring a speedy end to colonialism. The 1970 Declaration, thus, does not declare colonialism illegal per se, although the subjection of peoples to alien subjugation and domination is deemed contrary to the Charter as well as a violation of the principle of self-determination.²⁵ The position, therefore, appeared to be that the administering power was bound to apply the principle of self-determination and was prevented from treating the non-self-governing territory as an integral part of its own territory. The use of force contrary to the terms of the principle violated, it seems, a number of legal norms including those concerned with self-determination, non-intervention and human rights. None of this, however, would prevent the use of force in pure law and order situations, and to prevent an armed attack from outside in certain situations.²⁶

(25) See in particular the Reports of the Special Committee on Principles, 1966 A/6230 paras. 457 and 458, and *ibid* 1969, A/7619, paras. 161 and 162. See also Chapters on Self-Determination, *supra*, pp.102 and 171.

(26) See further *infra*, p.395.

This interpretation of the regulation of force by the administering power is borne out by an analysis of the discussions of the Special Committee on Principles. The issue of the use of force by the colonial power was first introduced in a Czechoslovakian proposal of 1966. Paragraph 3²⁷ provided that "every State has the duty to refrain from all armed actions or repressive measures of any kind directed against peoples struggling against colonialism for their freedom and independence". In the same session, a proposal by five Latin American powers²⁸ suggested that "every State has the duty to refrain from the threat or use of force against those dependent peoples to which General Assembly resolution 1514(XV) on the granting of independence to colonial countries and peoples is applicable". Differing opinions were put forward on those formulations. There was the belief expressed that all armed actions or repressive measures against peoples demanding recognition of the right to self-determination, should be prohibited, while on the other hand, others declared that under the Charter, administering powers had to preserve law and order.²⁹ During the 1969 session, the view was put forward that force against oppressed peoples fighting for independence constituted a crime and violated the Charter.³⁰ Conversely, it was stated that international law required the protection of the interests and nationals of other States within the jurisdiction and that therefore there was a duty to prevent disturbances from damaging such interests in dependent territories as well as in the metropolitan territories.³¹ The final text approved in 1970 marks thus a move away from the very wide-ranging

(27) A/AC.125/L. 16 part 1. See also A/6230, para. 25.

(28) A/AC.125/L. 49/Rev. 1.

(29) Eg. Reports of the Special Committee, 1968 A/7326, para. 173.

(30) A/7619, para.164.

(31) Ibid, para.165.

proposals put forward. The Australian delegate correctly noted that while States could not act forcibly to deprive peoples of the right to self-determination, normal action to maintain law and order, which would by definition be of a temporary nature, could still be taken.³² This was underlined by the U.K. delegate, who noted that the violation of self-determination by forcible action meant action involving the use of military or other armed force. Limited police action to maintain or restore law and order to establish conditions in which the peoples of non-self-governing territories could proceed to exercise the right of self-determination was not precluded.³³ Similarly, the view expressed in the 1966 Czechoslovakian proposal declaring colonialism to be "contrary to the foundation of international law and to the Charter"³⁴ was not incorporated in the final Declaration, nor indeed had it been included in the influential 13 Afro-Asian powers proposal of 1966.³⁵ Therefore, the institution of colonialism itself could not be said to be illegal, although there was clearly a duty to bring it to a speedy end. Accordingly, the use of force by the colonial power could not be said to be illegal merely on account of that.

Interestingly, the provision that all States were under a duty to refrain from forcible action which deprives peoples of their right to self-determination appears both in the section dealing with the principle that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations" (one of which is the development of friendly relations among States based on respect for

(32) Report of the Special Committee 1970 A/8018 para.204. See also the French delegate, *ibid* para. 151.

(33) *Ibid*, para.234.

(34) A/6230, para.457.

(35) *Ibid*, para.458.

for self-determination) and the principle concerned with equal rights and self-determination of peoples. This demonstrates clearly the uncertainty as to whether the use of colonial force was illegal by virtue of the Article 2(4) principle or by virtue of the principle of self-determination, or indeed by virtue of both. A number of States took the view that Article 2(4) was concerned only with the use of force by one State against another and did not apply to situations relating to dependent peoples and therefore the proposition should have been properly stated within the context of the elaboration of the principle of self-determination.³⁶ One was not dealing with "international relations". On the other hand, the majority view appeared to be that "international relations" is not restricted to interstate relations and did include issues concerning non-self-governing territories, particularly since Chapter XI of the Charter regulated such relationships.³⁷

The view that force by the colonial power to prevent the attainment of self-determination was illegal, was reaffirmed in a series of UN resolutions during the 1970's. Assembly resolution 2734(XXV)³⁸

(36) See eg. A/7619, para.168, and A/8018, para.228. A point in fact made also by Skubiszewski, "Use of force by States", Manual of International Law (ed. Sørensen), 1968, pp.739, 771, but see Stone 63 AJIL, 1969, pp.157, 162.

(37) A/8018, paras.187, 207 and 217. See also Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations : A Survey", 65 AJIL, 1971, pp.713, 720, and Sinclair, "Principles of International Law concerning Friendly Relations and Co-operation among States", Essays on International Law in Honour of Krishna Rao, 1976, pp.107, 120-121. See also, generally, McWhinney, "The 'New' Countries and the 'New' International Law: The UN Special Conference on Friendly Relations and Co-operation among States" 60 AJIL, 1966, p.1, Lee "The Mexico City Conference of the UN Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States" 14 ICLQ, 1965, p.1296; and Howben, "Principles of International Law concerning Friendly Relations and Co-operation among States" 61 AJIL, 1967, p.703.

(38) As recommended by the First Committee, A/8096.

adopted by 120 votes to one (South Africa) with one abstention (Portugal), called on all States to desist from any forcible or other attack which deprives peoples, in particular those still under colonial or any other form of external domination of their inalienable right to self-determination, freedom and independence and to refrain from military and repressive measures aimed at preventing the attainment of independence by the dependent people. Resolution 2908(XXVII)³⁹ reaffirmed that the continuation of colonialism in all its forms and manifestations, including the waging of colonial wars against the national liberation movements of the colonial territories in Africa, was incompatible with the UN Charter, the Universal Declaration of Human Rights and the Colonial Declaration and posed a threat to international peace and security. Resolution 3103(XXVII) set out the basic principle governing the legal status of combatants struggling against colonial and alien domination and racist regimes. It declared that the continuation of colonialism was a crime (not, it should be noted, colonialism per se) and specified that any attempt to suppress the struggle against colonial and alien domination and racist regimes was incompatible with the Charter, the 1970 Declaration of Principles of International Law, the Universal Declaration of Human Rights and the Colonial Declaration. It also stated that armed conflicts involving the struggle of peoples against such domination and regimes, were to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions. This is a point that was taken up later in the Conference on international humanitarian law.⁴⁰

(39) Based on a 55 power draft A/L.677 adopted by 99 votes to 5 with 23 abstentions. See A/8723/Rev.1. See also resolutions 2621(XXV), 3163(XXVIII), 3328(XXIX), 3481(XXX) and 31/91.

(40) See further, *infra* p. 401.

Further protracted discussions on the inter-relationship between the principles relating to the use of force and the concept of self-determination took place in the meetings of the Special Committee on the Question of Defining Aggression,⁴¹ out of which ultimately emerged the definition of aggression,⁴² adopted by the General Assembly in 1974, without a vote, in resolution 3314(XXIX). The discussions regarding this aspect of the definition revolved around the capacity of the people in question seeking self-determination to use force against the power denying it and as such will be looked at in a following section. However, the definition does reaffirm in the preamble "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity", and a number of representatives posited a right of self-defence by such peoples, which in turn depended upon a prior designation of the activities of the colonial power as aggression.

At the first session of the Special Committee, a 12 power proposal⁴³ suggested that "any use of force tending to prevent a dependent people from exercising its inherent right to self-determination in accordance with General Assembly Resolution 1514(XV), is a violation of the Charter of the United Nations". Virtually the same formulation was used in a draft proposal by 4 Latin American States.⁴⁴ In the Sixth Committee,

(41) Established, on the recommendation of the Sixth Committee, A/6988 para.21 by the Assembly on 18 December 1967 in resolution 2330(XXII). It consisted of 35 member States appointed by the President of the Assembly. It was in fact the fourth Special Committee on the subject since the inception of the UN. For a general introduction to those and earlier attempts to define aggression, see Ferencz, Defining International Aggression, 2 vols, 1975.

(42) See in particular Stone, Aggression and World Order, 1958, and McDougal and Feliciano, Law and Minimum World Order, 1961, pp.121-260.

(43) A/AC.134/L.3 and Corr.1 and 2 and Add. 1.

(44) A/AC.134/L.4/Rev.1 and Corr.1 and Add.1. A farbroader proposal was contained in an amendment by the Sudan and the UAR (A/AC.134/L.8) to a 13 power draft, A/AC.134/L.6 and Add.1 and 2, to the effect that "any use of force tending to deprive any people of its inherent right to self-determination, sovereignty and territorial integrity, is a violation of the Charter of the United Nations".

some representatives made the point that apartheid, racism and colonialism were forms of aggression.⁴⁵ In the 1969 session, the USSR submitted a draft proposal⁴⁶ in which a preambular paragraph stated that "the use of force to deprive dependent peoples of the exercise of their inherent right to self-determination in accordance with General Assembly resolution 1514(XV) is a denial of fundamental human rights, is contrary to the Charter of the United Nations and hinders the development of co-operation and the establishment of peace throughout the world". A number of representatives made the point in the ensuing debate that a definition should include a clause relating to the principle that the use of force against a people exercising self-determination was a violation of the Charter. Others, however, thought such a provision would be out of place in this definition,⁴⁷ and a 6 power western nations draft was severely criticised for ignoring self-determination.⁴⁸ The view that dependent peoples were the victims of a permanent attack on their sovereignty, thus enabling them to resort to force in self-defence under Article 51 of the UN Charter, was also strongly put in succeeding years.⁴⁹ It was also stated that colonialism per se was aggression as was the use of force to prevent self-determination.⁵⁰ One formulation proposed in the debates in the Sixth Committee in 1972 was to the effect that "the use of armed forces or other instruments of control to impose or maintain colonial rule over a people or deprive them of the fundamental right to self-determination

(45) Report of the Sixth Committee, 1968, A/7402, para.16

(46) A/AC.134/L.12 and Corr.1. A 13 power draft submitted that session merely noted that none of its preceding provisions were to be interpreted as limiting the Charter's provisions regarding self-determination, A/AC.134/L.16 and Corr.1 and Add.1 and 2.

(47) A/7620 para.49. These sentiments were echoed in the debate in the Sixth Committee, Report of the Sixth Committee, 1969, A/7853 para.18.

(48) Ibid, para.77

(49) Eg. A/8019, para.143 (1970).

(50) Report of the Sixth Committee 1970, A/8171, para.35.

and independence" qualified as aggression. Colonial domination, in effect, could be assimilated to continued aggression.⁵¹ It was argued as against this that there was no basis in the Charter or the works of legal writers for linking the concept of aggression to the right of self-determination. It merely created an extraneous issue.⁵² In an effort to reach a consensus on a number of contentious points, a Working Group was established in 1973. A consolidated text was produced which referred in the preamble to "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence".⁵³ It was proposed in the Sixth Committee to extend this by amending it to refer to all forms of the use of force and to the principle of territorial integrity.⁵⁴ The argument that any form of colonialism, military occupation or foreign domination constituted in itself an act of continuing aggression was reiterated.⁵⁵

The final definition in this respect, quoted above, is very similar to the corresponding provision in the 1970 Declaration on Principles of International Law, apart from the addition of a reference to territorial integrity and the substitution of "armed force" for "forcible action". It is a moot point, therefore, whether the 1974 definition is narrower as regards this issue. The conclusion must be that these debates and the definition relating to aggression went in this respect no further than the 1970 Declaration had done. Colonialism as such was not stigmatised

(51) Report of the Sixth Committee, 1972, A/8929, para.33.

(52) Ibid, para.34

(53) A/9019, Annex II, Appendix A, p.15

(54) Report of the Sixth Committee, 1973, A/9411, para.11.

(55) Ibid, para.26. See also A/C.6/SR 1476 para.15, where the representative of the German Democratic Republic declared that colonialism, apartheid and alien suppression constituted permanent aggression.

as aggression, despite demands that it should be so characterised and the use of force by the colonial power was illegitimate only to the extent that it was applied to deprive peoples of their acknowledged right to self-determination.

Discussions on colonial wars also took place in 1974, within the framework of the first session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in Geneva. The Conference was intended to supplement the four Geneva Conventions of 1949 and followed a series of resolutions by the General Assembly relating to human rights in periods of armed conflict.⁵⁶ Two additional protocols were under discussion, the first of which related to the protection of victims of international armed conflicts. Article 1 of Protocol 1 was concerned with general principles and scope of application and was intended to supplement common Article 2 of the 1949 Convention.⁵⁷ The crucial question was whether national liberation or self-determination wars were to be included in this Article 1. If they were, then they would be clearly recognised as international armed conflicts, a fact which would influence the characterisation of such conflicts within the terms of Article 2(4) of the Charter. In the event, they were so recognised. Article 1(4) as discussed and accepted included within Protocol 1 "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".⁵⁸

(56) Eg. resolutions 2444(XXIII), 2597(XXIV), 2674(XXV), 2676(XXV), 2852(XXVI), 3032(XXVII), 3102(XXVIII), 3242(XXIX), 3318(XXIX), 3500(XXX), 31/19 and 31/64. The conference was convened by the Swiss Federal Government and was preceded by the 1968 Teheran Conference on Human Rights, and the XXist International Red Cross Conference held in Istanbul in 1969 and two Conferences of Government Experts in Geneva in 1971 and 1972. See also the Reports by the UN Secretary-General in 1969 (A/7720), 1970 (A/8052) and 1971 (A/8370).

(57) Supra, p. 389.

(58) See further infra, p. 429.

The effect of this was to make clear that conflicts involving the use of force and concerning the struggle for self-determination can no longer be regarded as internal only. In this, the pattern of the relationship between Article 2(7) of the Charter and self-determination has been repeated with respect to Article 2(4). The use of the phrase "international relations" to mean "interstate relations" can, it is submitted, no longer be adequately maintained.⁵⁹ International doctrine has accepted that certain issues of self-determination, that is basically those arising in a colonial context, are susceptible to international legal regulation. This has arisen as a result of the evolution of norms relating to self-determination contained in the Charter⁶⁰ and with regard to Article 2(4), which can be understood to oblige States to refrain from the threat or use of force in any manner inconsistent with the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Article 2(4) therefore manifests a link between rules regulating the use of force and the principle of self-determination. States, therefore, are prohibited from the use of force to deprive such peoples as are entitled to exercise the right of self-determination,⁶¹ so to do. Again, there is nothing inherently objectionable about the duplication of this norm within the context of the principles of international law relating to force on the one hand and self-determination on the other. In a sense, its incorporation within the framework of Article 2(4) emphasises it more clearly as a manifestation of international law. This was the implication behind the desire of the UK and French

(59) But see Contra, Wengler "L'Interdiction de Recourir à la Force". Revue Belge de Droit International, 1971, pp.401, 422, and Ronzitti "Resort to Force in Wars of National Liberation", Current Problems of International Law (ed. Cassese), 1975, pp.319, 323.

(60) See the Namibia case, ICJ Reports, 1971, pp.16, 31.

(61) See *supra*, p.171 et seq.

representatives to subsume the colonial force element under the heading of the principle of self-determination.⁶² It is true that no resolution has as yet criticised States in such situations upon the basis of a breach of Article 2(4)⁶³ as distinct from contravention of the right of self-determination, but this of itself cannot prevent the relevance of the provision. In any event, a number of resolutions already referred to⁶⁴ have declared that the waging of colonial wars to suppress the liberation movements of the colonial territories in Africa was incompatible with inter alia the UN Charter. It is difficult to specify the moment at which the "international relations" barrier succumbed and rendered Article 2(4) relevant. The debates surrounding the adoption of one of the early resolutions, resolution 2160(XI), demonstrate that it was not so at that date. A number of western countries manifested particularly strong opposition.⁶⁵ However, by 1970 this opposition to the prohibition of force in such circumstances appears to have subsided. The Declaration on Principles was passed without dissent,⁶⁶ and the comments made by States in the Special Committee after the declaration had been drawn up demonstrate that it was felt by virtually all that the use of force in circumstances outlined in the Declaration contrary to self-determination was unlawful.⁶⁷ The adoption without

(62) A/8018 paras.149 (France) and 228 (UK)

(63) But see *infra*, p.429.

(64) See *supra*, footnote 39.

(65) See eg. GAOR, 21st session, plenary meeting 1482 paras.65-70 (UK), 74-79 (USA), 89-98 (Australia), 135-6 (New Zealand), 139 (Italy) and 221 (Lebanon).

(66) A/PV. 1860, 1870-1883

(67) A/8018, paras.151 (France), 204 (Australia) and 228 (UK). In the context of discussions relating to international terrorism, the US stated that it was "opposed to the use of force to deny the right to self-determination", A/AC. 160/1 at p.44.

dissent of the 1974 Definition of Aggression reinforces the universal acceptance of the ban on force by administering powers contrary to the exercise of the right of self-determination by the peoples concerned and is strong evidence with regard to the characterisation of colonial wars as part of international relations.

Further, it has been suggested that the maintenance by forcible action of a colonial situation may constitute an international crime. This appears in Article 19(3) of the International Law Commission's draft Articles on State Responsibility, which provides that "an international crime may result from a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples such as that prohibiting the establishment or maintenance by force of colonial domination".⁶⁸

(b) Practice Relating to Africa

(1) The Tunisian Question

On 13 February 1958, the Tunisian Government sent a letter to the United Nations entitled "Complaint by Tunisia in respect of an act of aggression committed against it by French on 8 February 1958 at Sakiet-Sidi-Youssef".⁶⁹ This was followed the next day by a communication from France on "The Situation Resulting from the Aid Furnished by Tunisia to rebels enabling them to conduct operations from Tunisian territory Directed against the Integrity of French Territory and the Safety of the Persons and Property of French Nationals",⁷⁰

The issue then came before the Security Council. Tunisia alleged that on 8 February, the village of Sakiet was bombed by twenty-five B26 airplanes coming from Algeria. Three-quarters of the village was

(68) Yearbook of the ILC. 1976 Vol.II, part 2, p.75.

(69) S/3952

(70) S/3954

destroyed, Red Cross lorries were damaged. 71 people were killed and 130 wounded.⁷¹ French troops had therefore been prohibited from leaving their barracks in Tunisia.⁷² On 18 February the debate was adjourned on hearing of a good offices offer from the United Kingdom and United States and an agreement was reached on 15 March providing for the evacuation of French troops from the areas outside the base at Bizerta.⁷³ However, a series of incidents including air attacks and raids, brought renewed complaints from both Tunisia and France,⁷⁴ again as a consequence of the spreading of the Algerian war,⁷⁵ and the Security Council debate resumed. Tunisia declared that for nearly two years it had been subject to acts of aggression by French troops, both those stationed in Tunisia and those engaged in hostilities in Algeria, who had violated Tunisia's territorial integrity and airspace. It requested the Council to determine the existence of an act of aggression in this particular case.⁷⁶ The French view was that Sakiet was a military centre of the Algerian rebels supported by the Tunisian army and administration. It had served as a training centre for the rebels and a transit point for the supply of arms to Algeria and was protected by the Tunisian army.⁷⁷ The support given to the Algerian rebel F.L.N. by Tunisia constituted an aggression and infringed the principle of non-intervention.⁷⁸ Accordingly, the French

(71) SCOR, 13th Year, 819th Meeting, para.9.

(72) Ibid, paras.10 and 11

(73) Ibid, paras.13-17

(74) Ibid, paras.23-32 and S/4013 (Tunisia) and S/4015 (France).

(75) See Fraleigh, "The Algerian Revolution as a Case Study in International Law". The International Law of Civil War (ed. Falk), 1971, pp.179, 206-7.

(76) SCOR 13th Year, 819th Meeting, paras.51-55

(77) Ibid, paras.70-71

(78) Ibid, paras.74 and 80

argument rested upon its right of self-defence in respect of the administered territory of Algeria. In the event, the debate was adjourned in a further attempt to negotiate an agreement. The Council was later informed by the parties of the successful completion of an agreement based on the evacuation of the French troops.⁷⁹ The issue never came before the Council again, although a number of letters were sent by both parties during the latter stages of the Algerian war, reflecting a continuing series of minor incidents across the Algerian-Tunisian border.⁸⁰ However, the matter was inconclusively resolved from the point of view of a determination of international legal violation of the norms relating to force by either of the parties.⁸¹

(2)-The Question of Portugal's African Territories

The issue of the use of force by Portugal in its African territories⁸² first came before the UN in 1961, following an uprising in Angola, which induced Portugal to introduce repressive measures.⁸³ At the request of Liberia,⁸⁴ the matter came before the Security Council,

(79) SCOR, 13th Year, 826th Meeting, paras.3-4 (France) and 9 (Tunisia).

(80) See eg. S/4163, S/4307 and S/5000 from Tunisia, and S/4309 from France.

(81) The treatment of the Indonesian question by the UN in 1947 also demonstrated that the use of force at that stage by the administering power was not per se illegal, even when used in operations to crush a nationalist movement. The prime consideration for the UN in this case was the conclusion and enforcement of a cease-fire based upon the de facto areas controlled by the parties. See Security Council resolutions 30 (1947), 36 (1947) and 63 (1948). See also Collins "The United Nations and Indonesia" International Conciliation, 1950, pp.113-200.

(82) Resolution 1542(XV) classified such territories as non-self-governing territories within Chapter XI of the UN Charter. This was not accepted by Portugal, who regarded them as "overseas provinces" under the constitution of 1951. See Nogueira, The United Nations and Portugal, 1963, p.78.

(83) See Andemicael, The OAU and the UN, 1976, p.109; Cervenka, The Unfinished Quest for Unity, 1977, p.135, and Gibson, African Liberation Movements, 1972, p.199 et seq.

(84) S/4738

but a draft resolution calling for the appointment of a Committee of Inquiry and for Portuguese reforms was not adopted.⁸⁵ The General Assembly then adopted a resolution⁸⁶ which recalled resolution 1514 (XV) (the Colonial Declaration) and declared that failure to act speedily and effectively to ameliorate the disabilities of the African peoples of Angola was likely to endanger international peace and security. Following further disturbances in the territory, the Security Council met again at the request of 44 Afro-Asian States, and adopted resolution 163 (1961) without opposition (UK and France abstaining), in which it stated that the situation was "likely to endanger the maintenance of international peace and security". In other words, the situation was not yet one which under the provisions of Article 39 of the UN Charter would render enforcement measures a possibility. The resolution, however, did call upon Portugal to "desist forthwith from repressive measures". However, in December 1962, Assembly resolution 1819 (XVII), adopted by 57 votes to 14, with 18 abstentions, declared that the waging of a "colonial war" by the Portuguese in Angola constituted "a serious threat to international peace and security". It recommended that Portugal be denied support which could be used to suppress Angolans and that the Security Council should take appropriate measures, including sanctions, to secure Portuguese compliance with UN resolutions.^{86a}

The establishment of the OAU in 1963 provided an additional forum and organisational mechanism for the pressuring of Portugal. One of the

-
- (85) It received 5 votes to 0 with 6 abstentions, thus failing to obtain the necessary 7 concurring votes.
- (86) Res. 1603 (XV). A Special Committee on Territories under Portuguese Administration was set up under resolution 1699 (XVI).
- (86a) It is interesting to note Higgins' comment that at this stage "it is difficult to believe that the Assembly's attitude towards... Portuguese repression has been anything other than patient and moderate", The Development of International Law Through the Political Organs of the United Nations, 1963, p.126.

purposes of the OAU, in Article 2(i)d of its Charter, was the eradication of all forms of colonialism from Africa, while Article III(6) stated that as a principle of the organisation "absolute dedication to the total emancipation of the African Territories which are still dependent". The 1963 Addis Ababa resolution on Decolonisation declared that the colonial administration of the dependent territories was "a flagrant violation of the inalienable rights of the legitimate inhabitants of the territories concerned". The Portuguese were accused of conducting "a real war of genocide" in Africa and a diplomatic and economic boycott against that country was proclaimed.⁸⁷ The OAU also sent a delegation in 1963 to the UN to draw the Security Council's attention to the explosive situation arising from Portugal's colonial policy and South African apartheid practices, and the Council accordingly met in the latter part of 1963.⁸⁸ The Council called on Portugal to negotiate the independence of the territories and recommended that all States prevent the sale and supply of arms and military equipment that would enable Portugal to continue its repressive policies.⁸⁹ In resolution 218 (1965), the Council declared that the situation "seriously disturbs international peace and security" and recommended the broadening of the arms embargo.⁹⁰ The OAU similarly recommended diplomatic and economic measures against Portugal.⁹¹ In 1967, the Assembly adopted

(87) CIAS/Plen 2/Rev.2, Res.A. See also Cervenka, The Organisation of African Unity and its Charter, 1968, pp.16-8. The resolution also set up a Special Fund to be used for aiding the African national liberation movements.

(88) Andemicael op.cit. p.109

(89) Resolutions 180 (1963) and 183 (1963).

(90) Negotiations between Portugal and representatives of the African Group at the UN speedily broke down, following the former's refusal to accept the principle of self-determination, S/5448, pp.55-61.

(91) See eg. OAU Assembly resolutions AHG/Res.9(I) and AHG/Res.45/II) and Council of Ministers' resolutions CM/Res.34(III) and CM/Res.49/IV).

resolution 2270 (XXII)⁹² in which it declared itself "gravely concerned about the critical and explosive situation which is threatening international peace and security owing to the methods of aggression and the military operations which continue to be used against the African peoples of the Territories under Portuguese domination". The Assembly condemned Portugal's actions which were designed to perpetuate "its oppressive foreign rule" and strongly attacked "the colonial war being waged by the Government of Portugal against the peaceful peoples of the Territories under its domination, which constitutes a crime against humanity and a grave threat to international peace and security". It urged that country to desist forthwith from all acts of repression and to withdraw all military and other forces which it was using for that purpose.

In 1972 the Security Council met in Addis Ababa⁹³ and further considered the problem of the Portuguese territories. It adopted resolution 312 (1972) in which grave concern was expressed that Portugal was continuing its measures of repression in its military operations against the African peoples of Angola, Mozambique and Guinea (Bissau) in order to suppress the legitimate aspirations of the peoples for self-determination and independence. It reaffirmed that Portuguese policies both in its colonies and in its provocations against neighbouring States seriously disturbed international peace and security in the African continent. Portugal was called upon to "cease immediately the colonial wars and all acts of repression against the peoples of Angola, Mozambique and Guinea (Bissau)" and to "withdraw all its armed

(92) Adopted by 82 votes to 7 with 21 abstentions. See also Assembly resolutions 2107 (X) and 2184 (XXI).

(93) Resolution 308 (1972). Adopted unanimously.

forces as presently employed for the purpose of the repression of the peoples" of these territories. The resolution was adopted by 9 votes to 0 with 6 abstentions.⁹⁴ In resolution 322 (1972), unanimously adopted, the Council further called on Portugal to cease forthwith its military operations and all acts of repression against the peoples of its African territories. In a similar vein, the General Assembly adopted resolution 2918 (XXVII) that year⁹⁵ in which the immediate cessation of the colonial wars and all acts of repression, withdrawal of Portuguese forces and the elimination of all practices violating the inalienable rights of the peoples of those territories were demanded. And in resolution 3113 (XXVIII)⁹⁶ the Assembly condemned in the strongest possible terms, the intensified armed repression by Portugal including massacres, destruction of villages and the use of chemical substances and demanded the cessation of the colonial wars and the withdrawal of the Portuguese troops. The Assembly also called on Portugal to treat captured guerrilla fighters as prisoners of war in accordance with the 1949 Geneva Conventions.

Issues relating to the use of force by the colonial power were posed in the case of Guinea-Bissau during 1973.⁹⁷ 58 Member States of the UN requested that an additional item be included on the agenda of

(94) Argentina, Belgium, France, Italy, UK and USA. The resolution was based on a proposal by Guinea, Somalia and Sudan, as orally amended by Japan, S/10607 and rev.1. The Council also expressed in this resolution its deep disturbance at the reported use by Portugal of chemical substances in operations against the peoples of its African territories. See also, the resolution of the Special Committee on Decolonisation, 1971, A/AC109/368.

(95) By 98 votes to 6 with 8 abstentions. See also resolution 2795(XXVI).

(96) Adopted by 105 votes to 8 with 16 abstentions. See also the Declaration on Territories under Portuguese Domination, adopted by the Assembly of Heads of State and Government of the OAU at its 10th Ordinary Session, held at Addis Ababa 1973.

(97) The facts relating to the declaration of independence by the PAIGC liberation movement and subsequent recognitions are discussed supra, Chapter 6, p.359.

the 28th Session of the General Assembly as a matter of priority entitled "Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic".⁹⁸ The request was granted by the General Committee of the Assembly⁹⁹ at which Mauritius speaking on behalf of the African States declared that Portugal's illegal occupation of parts of the territory was an open breach of the fundamental principles of the United Nations.¹⁰⁰ The resolution adopted by the Assembly¹⁰¹ by 93 votes to 7¹⁰² with 30 abstentions, strongly condemned the policies of the Government of Portugal in perpetrating its illegal occupation of certain sectors of the Republic of Guinea-Bissau and the repeated acts of aggression committed by its armed forces against the people of Guinea-Bissau and Cape Verde and demanded that Portugal desist forthwith from further violation of the sovereignty and territorial integrity of the Republic and from all acts of aggression against the people of Guinea-Bissau and Cape Verde by immediately withdrawing its armed forces from those territories. The attention of the Security Council was drawn to the critical situation resulting from Portugal's illegal presence in Guinea-Bissau. In an interesting move, the Assembly in that resolution specifically recalled Article 2(4) of the Charter, to the effect that States must refrain in their international relations from the threat of use of force. The proclamation of independence by the PAIGC inserted a qualitative change in the discussions with respect to this

(98) A/9196 and Add.1 and 2.

(99) GAOR, 28th Session, General Committee 213rd Meeting. By 17 votes to 1, with 5 abstentions. See A/9200/Add.5.

(100) Ibid, para.5

(101) Resolution 3061 (XXVIII) on 2 November 1973 as proposed by 65 powers, A/L702.

(102) Brazil, Greece, Portugal, South Africa, Spain, UK and USA.

territory, and this can be seen by way of comparison with the treatment of both Angola and Mozambique. The discussions in the plenary sessions of the Assembly centred primarily upon the validity of Guinea-Bissau's independence as a sovereign State with the corollary that Portugal was thereby illegally occupying part of the territory of an independent State. Virtually no analysis of Article 2(4) in the light of this situation took place,¹⁰³ but this was probably because once one accepted the independence of Guinea-Bissau, it became self-evident that Article 2(4) was being violated by Portugal.¹⁰⁴ The crucial point in the debate was rather the international legal validity of the declaration of independence. It was on this point that the contributing States concentrated.¹⁰⁵ The inclusion of the reference to Article 2(4) in this resolution can therefore be seen as a reaffirmation of the vital function of the article within the framework of inter-State relations rather than as a guide to its validity in the case of self-determination armed conflicts simpliciter. The sponsors of the resolution did not argue that the PAIGC remained solely a national liberation movement and that therefore Article 2(4) applied. They argued that Guinea-Bissau was an independent State. Those who opposed the resolution, and many of those abstaining based their decision virtually exclusively upon the failure of Guinea-Bissau to fulfill the necessary criteria for the recognition of Statehood. The arguments with regard to the relevance of Article 2(4) in self-determination situations thus remained unaffected one way or the other by this case.

(103) But see the delegate of the GDR, GAOR 28th Session. Plenary Meetings, 2160th meeting, p.27.

(104) But cf. Ronzitti "Resort to force in Wars of National Liberation" Current Problems of International Law (ed. Cassese), 1975, pp.327-9, who argues that the resolution is of little practical value as evidence as to whether a government exercising repression in a war of national liberation is violating Article 2(4).

(105) See *supra*, Chapter 6, p.359 et seq.

(3) - Portuguese Attacks on Neighbouring States

At one time or another, Portugal used its African territories of Angola, Mozambique and Guinea-Bissau to launch armed raids into the neighbouring States of Guinea, Senegal and Zambia as part of its continuing war against the national liberation movements of its territories.

The first time the issue of such use of colonial territories came before the UN was in April 1963 following a request by Senegal to the Security Council to consider the repeated violations of its territory and airspace that had taken place from Portuguese Guinea-Bissau¹⁰⁶.

It was claimed in particular that the village of Boumick had been bombed on April 8.¹⁰⁷ Portugal maintained that only small-scale

operations had occurred and those had taken place within its own territory.¹⁰⁸ It accused Senegal of allowing infiltrators to enter

Guinea-Bissau and broadcasting anti-Portuguese propaganda.¹⁰⁹ Senegal

rejected a Portuguese proposal that a commission be set up to

investigate the allegations it had made.¹¹⁰ The Council unanimously

adopted resolution 178 (1963) which deplored Portuguese invasions into

Senegal and called on its Government to take action to prevent any

violation of Senegal's sovereignty and territorial integrity. In May

1965, Senegal brought a similar complaint before the Council alleging

that Portuguese troops had invaded a number of villages, causing damage.

Portugal rejected those charges and declared that Senegal had aided

guerilla attacks on Guinea-Bissau.¹¹¹ In resolution 204 (1965)

(106) S/5279

(107) SCOR 18th Year, 1027th meeting, para.48 et seq.

(108) Ibid, para.76 et seq.

(109) Ibid, para.103

(110) SCOR 18th Year 1031st meeting, para.14.

(111) SCOR 20th Year, 1206th meeting, para.3 et seq.

unanimously adopted, the Security Council again called on Portugal to respect Senegal's sovereignty and territorial integrity.¹¹²

In July 1969, Zambia requested a meeting of the Council to discuss a series of Portuguese violations of Zambian territory, including the bombing of a village in the Katete District of its Eastern Province.¹¹³ At the meeting, Zambia claimed that between May 1966 and June 1969, there had been some 60 Portuguese incursions into its territory in open violation of Article 2(4) of the Charter.¹¹⁴ Portugal, on the other hand, denied that the bombing of the village had taken place. It noted that prior to 1966 no incidents had occurred. It was only in that year that Zambia had decided to open its territory to hostile activities against Angola and Mozambique and had authorised the establishment of training and supply bases for armed attacks on the adjoining Portuguese territories. While Portugal had issued strict instructions to its forces to respect Zambia's sovereignty and territorial integrity, it could not allow its forces to be fired upon from across the border without reacting in self-defence.¹¹⁵ In resolution 268 (1969),¹¹⁶ the Council strongly censured Portugal for its attack on the village and called upon it to desist forthwith from violating Zambia's territorial integrity.

Senegal again requested the Security Council to discuss Portuguese attacks in November 1969.¹¹⁷ The representatives of Senegal recounted

- (112) Note that in Security Council resolutions 226 (1966) and 241 (1967) Portugal was called upon not to allow mercenaries to use Angola as a base for operations in the Congo (Zaire).
- (113) S/9331. This request was supported by 35 Member States acting on behalf of the Organisation of African Unity, S/9340 and Add.1-3.
- (114) SCOR 24th Year, 1496th meeting para.6 et seq.
- (115) Ibid, para.63 et seq. See also ibid 1488th meeting para.27 and 28.
- (116) Adopted by 11 votes to 0 with 4 abstentions.
- (117) S/9513. 36 African States supported the request and condemned Portuguese aggression, S/9524 and Add.1.

earlier incidents and recalled Security Council resolutions 178 (1963) and 204 (1965), and accused Portugal of shelling a village in Southern Senegal.¹¹⁸ Portugal pointed to continuing artillery attacks and raids on Guinea-Bissau coming from Senegal and declared that fire had been returned. No one could contest its right of self-defence.¹¹⁹ During the discussion, this claim to self-defence was denied. It was stated by a number of countries that since Portugal's continued colonial presence in Africa was illegitimate and in contravention of the UN Charter and Security Council and General Assembly resolutions, it had no such right of self-defence.¹²⁰ Portugal replied that its right of self-defence under Article 51 of the Charter could not be denied and criticised the "double standard" adopted in its case.¹²¹ In resolution 273 (1969), adopted by 13 votes to 0 with 2 abstentions, the Council strongly condemned Portugal and called upon it to desist from violating the sovereignty and territorial integrity of Senegal. Although it did not therefore rule on the general principle of the applicability of Article 51 in such circumstances, it clearly did not accept the Portuguese point of view.

In December 1969, Guinea called for a meeting of the Security Council to discuss "the aggression recently committed by the Portuguese colonial army" against its territorial integrity. A series of attacks and shellings were instanced.¹²² The Council again condemned Portugal

(118) SCOR, 24th Year, 1516th meeting, para.47 et seq. Further incidents took place in December 1969, S/9541.

(119) Ibid, para.101 et seq.

(120) See SCOR 24th Year, 1518th meeting, paras.18-9 (Madagascar), 131-2 (Mauritania), 116-21 (Nepal), 37 and 42-4 (Tunisia), 104-5 (USSR), 57-62 (UAR), 17 (Pakistan) and 46 (Syria).

(121) SCOR 24th Year, 1520th meeting, paras.9-19.

(122) S/9525, S/9528 and S/9554. The request was supported by 40 African States, S/9549.

and called upon it to desist from violating Guinea's sovereignty and territorial integrity.¹²³ Portugal was also solemnly warned that if such acts were repeated, "the Council would have to seriously consider further steps to give effect to this decision". In fact, the issue reappeared on the Council's agenda within a year. By a letter of 22 November 1970, Guinea requested an urgent meeting of the Council. It was stated that Portuguese forces had landed at the capital of Guinea and the town had been shelled. A request for immediate intervention by UN troops was made.¹²⁴ Portugal, however, denied the charge.¹²⁵ The Council treated this incident differently from preceding events, on the grounds of the large number of forces involved and the more serious nature of the allegation. As a first step, it was unanimously decided to send a special mission to Guinea to report on the situation immediately.¹²⁶ The mission reported that in its best judgment the force of 350-400 men that had invaded Guinea had been assembled in Guinea-Bissau and was composed of naval and military units of the Portuguese armed forces acting in conjunction with Guinean dissident elements from outside Guinea.¹²⁷ The representative of Guinea made the point, which was becoming more and more a crucial element in the discussion of Colonial situations, that Portuguese aggression was rooted in the determination of imperialism to deny African peoples their sovereignty and independence. The grave

(123) Resolution 275 (1969). Adopted by 9 votes to 0 with 6 abstentions.

(124) S/9987.

(125) S/9989. See also S/10014.

(126) Resolution 289 (1970).

(127) S/10009 and Add.1. See African Contemporary Record, 1970/1, 1972, pp.13365-71 for a detailed account of the event. See also Cervenka, The Unfinished Quest for Unity, 1977, pp.136-7. Portugal, however, declared that the mission's conclusions were not acceptable S/10024.

situation, which constituted a constant threat to international peace and security, resulted from the persistence of the Portuguese colonial regimes in Africa.¹²⁸ Algeria noted that all Africa was involved and Algeria regarded itself as directly concerned by the aggression against Guinea.¹²⁹ Tanzania called for effective measures to be taken under Articles 39 and 41 of the Charter.¹³⁰ The Council in resolution 290 (1970)¹³¹ emphasised the right of the peoples of Angola, Mozambique and Guinea-Bissau to self-determination and significantly declared that the presence of Portuguese colonialism on the African continent was a serious threat to the peace and security of independent African States. Portugal was condemned for the attack and requested to pay full compensation. In addition, it was warned that in the event of any repetition of armed attacks on African States, the Council would immediately consider appropriate effective steps or measures in accordance with the Charter.¹³²

Incidents took place, however, the following year with respect both to Senegal and to Guinea, and the Council continued its more active involvement. Senegal complained in July 1971 to the Security Council that Portugal had inter alia been laying anti-tank and anti-personnel mines in its territory.¹³³ The Council sent a special mission to

(128) SCOR, 25th Year, 1559th meeting, paras.21-39 and 45.

(129) Ibid, paras.52-6

(130) Ibid, paras.102 and 111-3

(131) Adopted by 11 votes to 0 with 4 abstentions.

(132) The emergency session of the OAU Council of Ministers convened at Lagos in December 1970 resolved to set up a special fund to provide aid to Guinea, to increase its aid to the anti-Portuguese liberation movements and to coordinate cooperation between Member States on all questions of defence and security, see resolutions ECM/17 (VII) and ECM/18 (VII).

(133) S/10251. See also S/10182 and S/10227. Portugal maintained that the PAIGC was in fact responsible for these incidents, S/10255.

examine the situation along the Guinea-Bissau - Senegal border.¹³⁴

Its report designated the Portuguese authorities as responsible for the incidents and concluded that the acts of violence and destruction were the consequence of the special situation prevailing in Guinea-Bissau which was in contradiction to General Assembly resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples.¹³⁵

These conclusions were categorically rejected by Portugal,¹³⁶ which stressed its right to self-defence under Article 51 of the Charter.

It should be noted that the mission was the first to which the Council had granted authority to make recommendations necessary to guarantee peace and security in the region,¹³⁷ and it recommended that Portugal should respect the sovereignty and territorial integrity of Senegal and enable the right of self-determination and independence of the people of Guinea-Bissau to be exercised without further delay. Security Council resolution 302 (1971) adopted by 14 votes to 0 with 1 abstention, condemned Portuguese attacks on Senegal and called for the exercise of self-determination by the people of Guinea-Bissau. A special mission was similarly despatched to Guinea following further complaints by that country.¹³⁸

The mission made no recommendations and submitted no conclusions,¹³⁹ and the Council issued a statement of consensus.¹⁴⁰

(134) Resolution 294 (1971).

(135) S/10308 and Corr.1.

(136) S/10343.

(137) SCOR 26th Year, 1586th meeting, paras.5-8.

(138) Security Council resolution 295 (1971). See S/10280.

(139) S/10309/Rev.1.

(140) SCOR 26th Year, Resolutions and Decisions, p.5.

This expressed Guinea's concern at the possibility of renewed acts of violence against it and emphasised that "the failure by Portugal to apply the principle of self-determination, including the right to independence in Guinea-Bissau is having an unsettling effect on conditions in the area".

The Council also dealt with complaints against Portuguese activities emanating from its African territories in 1972. Senegal declared that a frontier post had been attacked and persons killed and wounded.¹⁴¹ The Council in resolution 321 (1972) condemned the attacks and called on Portugal to respect the sovereignty and territorial integrity of the independent African States and to take immediate steps to apply the principle of self-determination.¹⁴²

The Security Council debates and decisions relating to Portuguese armed activities against neighbouring independent African States during the years 1963-1972 are very important in evaluating the relevant norms governing the use of force by the colonial power. The Council consistently accepted the facts as alleged by the complainant States and ignored Portuguese requests to establish commissions of enquiry. On the other hand, when Portugal did not make such a request, the Council proceeded to set up and despatch special missions to examine the relevant facts. The Council did not accept Portuguese arguments that the neighbouring States were to blame for encouraging and aiding guerrillas to attack Portuguese administered Guinea-Bissau. Although one cannot go so far as to declare that the Security Council established that

(141) S/10672/Rev.1. This incident was admitted by Portugal, and the mental instability of the unit commander involved blamed, S/10682.

(142) The General Assembly in resolution 3113 (XXVIII) condemned the repeated acts of aggression committed by the armed forces of Portugal against independent African States.

Portugal by virtue of its colonial position was denied a right of self-defence from its African territories, it certainly seems that it accepted that conditions under which the right would operate in respect of colonial territories were not the same as those that apply in normal inter-State situations. The reduced reliance upon the facts of any given incident as objectively ascertained that appears to have been operative in these cases is thus the consequence of the consensus perception of the dubious legality of the use of force by the colonial power to suppress the liberation movements of the particular territories and thus by implication to suppress the right to self-determination. In two of the three cases in which the Council sent out special missions, Portugal was condemned before the reports of the missions were compiled. This suggests that the real use of such missions was more in the nature of a demonstration of support for the claimant State than an attempt to ascertain the facts and apportion blame objectively with regard to the particular incidents involved. Accordingly, and in the light of the separate and special status of colonial territories,¹⁴³ the colonial power could not successfully defend its use of force in neighbouring States on the grounds of the role of such States in participating in violence against it. In other words, in self-determination situations, the colonial power was not able to involve Article 51 as its legal justification. The separate status of colonial territories was a crucial factor here. This is reinforced by the clear declaration in Council resolution 290 (1970) that the presence of Portuguese colonialism in Africa was of itself a serious threat to the peace and security of African States.

(143) See *supra*, p.134 et seq.

(4) - The United Kingdom and Rhodesia

The conclusion that while the use of force to suppress self-determination in colonial situations is contrary to international law, a total ban on force in such situations is not suggested can be illustrated by reference to the UN view of the role of the UK with regard to the Rhodesian problem.

By virtue of Assembly resolution 1747 (XVI) adopted on 28 June 1962, Southern Rhodesia was declared to be a non-self-governing territory within the meaning of Articles 73 and 74 of the UN Charter and Assembly resolution 1514 (XV). The UK, however, rejected this, arguing that since 1923 Southern Rhodesia had been a self-governing colony. The 1923 arrangement and the 1961 constitution, it was noted, curtailed the powers and functions of the UK government to such an extent that the territory could not validly fall within the scope of UN non-self-governing territories.¹⁴⁴ By autumn 1965, with a unilateral declaration of independence by the white minority apparently imminent, the OAU called on Britain to suspend the 1961 Constitution of Southern Rhodesia and "take all necessary steps including the use of armed force" in order to resume control over the territory's administration and set up a Constitutional Conference.¹⁴⁵ In resolution 2012 (XX), the General Assembly called on the UK to take all possible measures to prevent a UDI and in the event of such a declaration "to take all steps necessary to put an immediate end to the rebellion". Resolution 2022 (XX) requested the UK government to employ "all necessary measures including military force", in order to remove all the restrictions on African

(144) See eg. GAOR, 17th session, 4th Committee, 1360th meeting, paras.31-53.

(145) AHG/Res. 25/Rev.1 (II).

political activity in the territory and call a conference to make new constitutional arrangements. Once UDI had occurred on 11 November 1965, the international community continued to press the UK to use all means necessary to end the rebellion in the territory.¹⁴⁶ The Security Council called on the UK to "quell this rebellion of the racist minority" and to "take all other appropriate measures" in order to eliminate the authority of the usurpers.¹⁴⁷ The UK, after UDI, declared that it was a British responsibility to re-establish the rule of law in Southern Rhodesia and it also accepted that the UN had an interest.¹⁴⁸

The African States in a series of OAU resolutions consistently demanded inter alia that the UK apply effective measures, including the use of force, to end UDI and to prevent supplies reaching the illegal regime,¹⁴⁹ and the terms of such resolutions were usually reflected in resolutions adopted by the General Assembly.¹⁵⁰ The Security Council, however, took a more cautious line due to fears of a western or UK veto. The word "force" was rejected in favour of "appropriate measures"¹⁵¹ and the Council ultimately adopted a policy of economic sanctions.¹⁵² In the face of a British unwillingness to use force, an African policy which included pressure on the UN to induce the UK to use force was

(146) See Assembly resolution 2024 (XX) adopted by 107 votes to 2 (Portugal and South Africa), with 1 abstention (France). The UK and Uruguay did not participate in the voting.

(147) Resolution 217 (1965) adopted by 10 votes to 0 with 1 abstention (France).

(148) SCOR, 20th Year, 1257th meeting, paras.19-22.

(149) See eg. OAU resolutions AHG/Res. 25/Rev. I(II), AHG/Res. 39(B) (II), ECM/Res.13(VI), ECM/Res.14(VI), CM/Res.75(VI) and CM/Res.78(VII).

(150) See eg. resolutions 2138 (XXI) and 2151 (XXI)

(151) Eg. in Security Council resolution 217 (1965)

(152) See resolutions 233 (1966) and 253 (1968)

established.¹⁵³ This had some success in the General Assembly,¹⁵⁴ but the Security Council refrained from recommending the use of force by the UK against the illegal regime.¹⁵⁵ In 1970, the OAU strongly condemned Britain for its consistent refusal to use force and again urged it so to act.¹⁵⁶

Although the Security Council did not demand that Britain use force to remedy the situation, it accepted that Britain possessed the legal basis for such action should the intention be present. UN practice, as well as African practice, quite clearly recognised that the UK, as the responsible power until the exercise of self-determination, could use force to end UDI. In other words, colonial force was legitimate where used in order to further or protect the right of the inhabitants of the particular territory to self-determination.

II - The Use of Force by Illegal Regimes

The two major provisions regarding the use of force in international law both assume a substantial degree of personality by the actor involved. Article 2(4) of the Charter provides that "all Members shall refrain" although this is widened somewhat by Article 2(6) to the effect that the UN should ensure that non-Member States should act in accordance with the principles of the UN,¹⁵⁷ while the corresponding provision in the 1970 Declaration on Principles of International Law

(153) A good example is OAU resolution CM/Res.153 (XI)

(154) See resolution 2508 (XXIV)

(155) See resolution 277 (1970)

(156) CM/Res.207 (XIV)

(157) By virtue of the pacta-tertiis rule, this cannot, however, be regarded as creating of itself obligations under international law for third parties.

stipulates that "every State has the duty" to refrain from the threat or use of force.¹⁵⁸ The question, therefore, is whether non-State entities are bound by this fundamental provision in international law. A strict interpretation would lead to the result that such entities would possess a degree of freedom of action unregulated by law which would render absurd any claim for international law to be a viable mechanism of conflict management. Arab non-recognition of Israel as a State has never included the proposition that Israel is totally free from international law restraints regarding the use of force.¹⁵⁹ Practice in the UN in particular has shown that the organisation has not hesitated to condemn the illegitimate use of force by unrecognised States or indeed non-State entities of controversial personality.¹⁶⁰ Brownlie regards it as "certain that, for the purposes of applying the provisions of Chapter VII of the Charter of the United Nations, de facto governments may be treated as equivalent to States."¹⁶¹ It now seems acknowledged that beyond this the use of force by such entities falls to be regulated under Article 2(4) or more accurately by customary law provisions equivalent to the terms of Article 2(4) save for the identity of the author of the event. In addition, of course, illegal regimes, such as those in Rhodesia and Namibia, are bound by the principle of self-determination so that forcible actions preventing the exercise of the right by the inhabitants of the territory in question are unlawful.

(158) Note that by virtue of explanatory note (a) attached to Article 1 of the 1974 Definition of Aggression, the term "State" is used without prejudice to questions of recognition or whether a State is a Member of the UN. See also Article 1 of the 1974 Definition of Aggression.

(159) See Brownlie, International Law and the Use of Force by States, 1963, p.379.

(160) Brownlie instances references to North Korea and Communist China in the early 1950's, op.cit. p.380.

(161) Ibid.

(1) The Case of Rhodesia

The intensification of the guerrilla war during the early 1970's led to the illegal régime's use of force against targets within neighbouring independent African States. The UN adopted a number of resolutions condemning those actions. In February 1977, the Security Council in resolution 403 (1977) unanimously condemned the attacks made by the illegal Rhodesian regime on neighbouring Botswana¹⁶² and this was repeated in resolution 406 (1977), which reaffirmed support for the sovereignty and territorial integrity of Botswana against the "continued attacks and acts of provocation by the illegal racist regime of Southern Rhodesia".¹⁶³ In July that year, the Security Council unanimously condemned the "illicit, racist, minority regime in Southern Rhodesia" for attacks on Mozambique,¹⁶⁴ and this was followed by a resolution of the Special Committee on Decolonisation condemning Rhodesian attacks on Mozambique, Zambia and Botswana.¹⁶⁵ Such attacks continued, however. In September 1977, an air raid into Zambia was made,¹⁶⁶ while a major attack on Mozambique took place in November, reportedly killing some 1,200 persons.¹⁶⁷ In February 1978 an incursion took place by Rhodesian troops into Botswana.¹⁶⁸ A more serious incident occurred on 6 March 1978 when Rhodesian troops crossed into Zambia to destroy guerilla bases. Aircraft were reportedly involved in this attack.¹⁶⁹ Zambia brought this incident before the

(162) See UNMC February 1977 pp.5-15. See also resolutions 326 (1973) and 328 (1973).

(163) Also unanimously adopted.

(164) Resolution 411 (1977). See also Africa Research Bulletin, August 1976, p.4133.

(165) A/AC. 109/554-5.

(166) Africa Research Bulletin, September 1977, p.4580.

(167) Ibid, November, 1977, pp.4644-5.

(168) Ibid, March, 1978, p.4793.

(169) Ibid.

Security Council¹⁷⁰ which unanimously adopted resolution 424 (1978). This resolution strongly condemned the invasion into Zambia "by the illegal racist minority regime in the British colony of Southern Rhodesia" which constituted "a flagrant violation of the sovereignty and territorial integrity of Zambia". In the Security Council debate preceding this resolution, Zambia claimed that Rhodesian forces had repeatedly launched premeditated attacks against Zambia along its entire border with Rhodesia. Villages had been destroyed and mines laid.¹⁷¹ The representative of Upper Volta, speaking on behalf of the African Group, termed the 6 March attack a case of premeditated aggression,¹⁷² while the Canadian delegate spoke of a long series of irresponsible raids against the territorial integrity and sovereignty of Zambia, Botswana and Mozambique.¹⁷³

The fact that all the resolutions dealing with the Rhodesian attacks referred to the violation of the territorial integrity and sovereignty of the neighbouring African States, demonstrates that it was understood that the Rhodesian actions had violated international legal norms relating to the use of force. The existence of an entity of dubious personality under international law as the author of aggression could not be held to constitute a barrier against the application of the relevant provisions of international law. The terms of the resolutions of the UN relating to Rhodesia also reveal

(170) S/12589

(171) UNMC April 1978, p.33.

(172) Ibid, p.34.

(173) Ibid, p.35. See the statement of the UK representative, ibid, p.41. Note also the major Rhodesian attack on nationalist bases of Nkomo in October 1978 causing an estimated 300 deaths, African Research Bulletin, October 1978, pp.5041-3.

that the use of force by the illegal regime to suppress the rights of the inhabitants including that of self-determination was unlawful.¹⁷⁴

(2) The Case of Namibia

The growing guerrilla war in this territory illegally occupied by South Africa¹⁷⁵ similarly led to raids being conducted against neighbouring States. In October 1971, Zambia requested a meeting of the Security Council¹⁷⁶ to consider a series of serious incidents and violations of its sovereignty, airspace and territorial integrity by South African forces. The Zambian delegate referred to an incident at Katine Mulilo in which South African boats and helicopters had entered Zambia as well as 24 other incidents which had taken place since October 1968.¹⁷⁷ The South African representative stressed that Zambia had violated South West Africa's airspace and that persons laying mines inside the territory had returned to Zambia. Armed bands had infiltrated into the Caprivi Strip from Zambia causing death and destruction, and such bands had operated from Zambia and had received support from the Zambian government. South Africa, it was stated, had a duty to protect the inhabitants of South Africa and South West Africa against terrorist acts.¹⁷⁸ The Security Council unanimously adopted resolution 300 (1971) in which it called upon South Africa to respect the sovereignty and territorial integrity of Zambia and further declared that in the event of South Africa violating Zambia's sovereignty or

(174) See eg. Security Council resolutions 253 (1968), 277 (1970) and 326 (1973).

(175) The Namibia case, ICJ Reports, 1971, pp.16, 58.

(176) S/10352. Supported by 48 States, S/10364 and S/10368.

(177) SCOR 26th Year, 1590th meeting, para.7 et seq.

(178) Ibid, paras.59-72.

territorial integrity, the Council would meet again to examine the situation in accordance with the relevant provisions of the Charter. No mention was made of the South African claims. Indeed, the Security Council later made the point that it was the continued illegal occupation of the territory by South Africa that created "conditions detrimental to the maintenance of peace and security in the region".¹⁷⁹ This was reinforced by Declaration of Lusaka adopted by the UN Council for Namibia in March 1978.¹⁸⁰ In it, it was asserted that the aggressive nature of the South African occupation regime was reflected in its repeated acts of aggression against neighbouring independent African States. In May 1978, a major operation by South African forces based in Namibia took place against Angola. In the 12 hour invasion involving 700 South African troops and aircraft, several hundred persons were killed.¹⁸¹ The Security Council adopted a resolution¹⁸² unanimously condemning the raid, referring to "this latest armed invasion perpetrated by the South African racist regime against the People's Republic of Angola". The resolution demanded the "immediate and unconditional withdrawal" of all South African forces from Angola and stated that in the event of further violation of Angolan sovereignty and territory by South Africa, the Council would meet again "to consider the adoption of more effective measures".¹⁸³ In other words, the use of force by the illegal South African regime in Namibia against

(179) Resolution 310 (1972).

(180) A/S-9/2-S/1263. See also UNMC April 1978 pp.42-6.

(181) For the details see African Research Bulletin, May 1978, pp:4865-8.

(182) Resolution 428 (1978). See also resolution 387 (1976).

(183) Condemnatory statements were also issued by the OAU and the five western members of the Security Council known as the "contact group". African Research Bulletin, May 1978, p.4866.

the neighbouring States, as well as against the indigenous inhabitants,¹⁸⁴
 was a violation of international law.¹⁸⁵

III - The Use of Force by Peoples Entitled Under International Law to Self-Determination

Until a number of years ago, it could be stated that customary international law in regarding self-determination wars as internal wars and therefore exclusively within the jurisdiction of the State concerned, did not govern the use of force in such circumstances. The use of force by both the administering power and rebel and/or liberation movements was outside the regulatory mechanisms of customary international law and Article 2(4) of the Charter. However, international doctrine has now altered that perception and this has been reinforced by practice relating to particular territories.

(a) International Doctrine

The development of self-determination as a legal principle was the method used whereby the traditional rules relating to the use of force and colonial peoples were modified. But the recognition of the legality of armed struggle as a means of achieving self-determination under international law lagged behind the acceptance of self-determination as the right of peoples in colonial situations. The Charter does not refer to the use of force within a self-determination context, and neither does resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples. The issue was, however, raised in the course of the Security Council debates following the Indian take-over of Portuguese Goa in 1961. India argued that the Portuguese title to the

(184) See eg. Security Council resolutions 310 (1972) and Assembly resolution 31/146.

(185) See *infra* with regard to the situation in South Africa itself, p.459.

enclave was unlawfully acquired through conquests in 1510 and that since Goa was inhabited by Indians and was geographically part of India, India could not commit aggression against it. Indeed, it was argued that since colonialism constituted permanent aggression, India was entitled to act in self-defence.¹⁸⁶ A resolution¹⁸⁷ declaring the enclaves a threat to international peace and security and rejecting the Portuguese complaint was defeated by 4 votes to 7, while a resolution¹⁸⁸ deploring the use of force by India and calling for an Indian withdrawal received 7 votes to 4; it was defeated by virtue of a Soviet veto. The Indian thesis was not accepted¹⁸⁹ but the issue once raised remained alive. A series of resolutions beginning with Assembly resolution 2105 (XX) in 1965 recognised the legitimacy of the struggle of peoples under colonial rule to exercise their right to self-determination and independence, but without stating that such legitimate struggles could encompass armed struggles.¹⁹⁰

The question concerning the relationship between colonialism, self-determination and the right of peoples to struggle to attain self-determination was exhaustively examined in the debates of the Special Committee culminating in the adoption of the Declaration on Principles of International Law in 1970. Czechoslovakia introduced a proposal at the first session of the Special Committee in 1964 to the effect that one of the exceptions to the prohibition of the use of force was the

(186) SCOR, 16th Year, 987th meeting, pp.9-11.

(187) S/5032.

(188) S/5033.

(189) See Wright, "The Goa Incident" 56 AJIL, 1962, p.617. As regards Portugal's title to the enclaves, see the Right of Passage case, ICJ Reports, 1960, p.8.

(190) Eg. resolutions 2189 (XXI), 2326 (XXII), 2465 (XXIII) and 2548 (XXIV).

thesis that a right of self-defence of peoples against colonial domination in the exercise of the right to self-determination existed.¹⁹¹ This was reflected in a Yugoslav-India-Ghanaian proposal.¹⁹² While some representatives believed that the Charter and resolution 1514 (XV) supported this contention, others regarded the issue as being outside Charter provisions in the light of the reference in Article 2(4) to "international relations".¹⁹³ In the Czechoslovak proposal of 1966, it was stated that peoples had a right to self-defence against colonial domination in the exercise of their right to self-determination and that colonial domination could be eliminated by such peoples "by whatever means".¹⁹⁴ A 13 power proposal drawn up by Afro-Asian States provided that peoples in the exercise of their legitimate right to self-determination were entitled to exercise "their inherent right of self-defence".¹⁹⁵ This aroused both fervent support and strong criticism. Some representatives asserted that the Declaration could proclaim the right of peoples under colonial domination to fight for their liberation by armed force if necessary, should the colonial power refuse to recognise the right of self-determination. Such struggles were a sacred right. Colonialism could only be defeated by force.¹⁹⁶ On the other hand, it was stated that one could not legalise in advance revolution and violence.¹⁹⁷ To recognise a right of self-defence in

(191) Report of the Special Committee, 1964 A/5746 p.20.

(192) Ibid, p.23

(193) Ibid, pp.42-5

(194) A/AC. 125/L 16 part I. Colonialism was declared to be contrary to the foundations of international law and to the Charter *ibid*.

(195) A/AC. 125/L 31 and Add.1-3. See also the similar provision in a 10 power proposal, A/AC. 125/L 48.

(196) Report of the Special Committee 1968, A/7326, paras.103 and 109. See also *ibid* para.175.

(197) *Ibid*, para.105.

such circumstances would be contrary to the prohibition of force and the principles of non-intervention and the peaceful settlement of disputes.¹⁹⁸ It was also maintained that peoples could not be identified with States and did not have the same rights, such as, for example, the right to self-defence.¹⁹⁹ As against this, one representative asserted that where there was a right, there was a remedy.²⁰⁰

In the event, the Declaration declared that all States were under a duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence,²⁰¹ and that "in their actions against, and resistance to, such forcible action", such peoples could receive support in accordance with the purposes and principles of the Charter. This limited formulation, tied as it is to the forcible action taken to suppress self-determination and replacing the phrase "legitimate struggle" which had been understood implicitly to include the use of force,²⁰² can hardly be regarded as recognising a right of self-defence inherent in peoples entitled to self-determination. The phrase is ambiguous as regards the acknowledgement of the use of force by such peoples; even in response to forcible action taken to deprive them of the right to self-determination, it could be taken to refer solely to non-violent actions and resistance. The modest phraseology was criticised by a number of representatives in their comments

(198) Ibid, para.177

(199) Report of the Special Committee 1969, A/7619, para.168

(200) Ibid, para.167

(201) Supra, p.395. Note that Schwebel called this "a remarkably bold and progressive step", "Wars of Liberation as fought in UN Organs" Law and Civil War in the Modern World (ed. J.N. Moore), 1974, pp.446, 453.

(202) See Sinclair "Principles of International Law concerning Friendly Relations and Cooperation among States", Essays on International Law in Honour of Krishna Rao, 1976, p.135.

after the Declaration had been agreed. Yugoslavia's representative stated that he would have preferred an unequivocal affirmation of the right of self-defence of peoples under colonial rule.²⁰³ The UK representative emphasised that the provision "could not be regarded as affording legal sanction for any and every course of action which might be taken in the circumstances contemplated". The UN Charter neither confirmed nor denied a right of rebellion. It was neutral.²⁰⁴ This view must be regarded as correct.²⁰⁵ However, in 1970 General Assembly resolution 2649 (XXV) affirmed the legitimacy of the struggle of peoples under alien and colonial domination recognised as being entitled to the right of self-determination to restore to themselves the right by any means at their disposal. This was re-emphasised in resolutions 2708 (XXV) and 2627 (XXV), 2734 (XXV) and 2621 (XXV), which referred to the inherent right of colonial peoples to struggle "by all necessary means at their disposal" against colonial powers suppressing the aspiration for freedom and independence. Another approach adopted in the Assembly at that time was to call for the participants in such struggles for self-determination to be treated on arrest as prisoners-of-war in accordance with the Hague Conventions of 1907 and the Geneva Conventions of 1949.²⁰⁶ The aim of this was to reinforce the thesis of a right of armed struggle for self-determination. In any event, it marked a further step in the recognition of the distinctive status

(203) Report of the Special Committee, 1970, A/8018, para.161. See also eg. Kenya, *ibid*, para.187, and cf. Syria, *ibid*, para.206.

(204) *Ibid*, para.235.

(205) See Schwebel "Aggression, Intervention and Self-Defence in Modern International Law", 136 HR 1972, pp.484 n.20 and 486 n.22, and Farer, "The Regulation of Foreign Intervention in Civil Armed Conflict" 142 HR 1974, pp.291, 369.

(206) Resolutions 2674 (XXV) adopted by 78 votes to 0 with 28 abstentions, and 2621 (XXV). See also A/8086.

under international law of national liberation movements. Both of these approaches were repeated in succeeding years.²⁰⁷ In 1973 a further step was taken when resolution 3070 (XXVIII)²⁰⁸ reaffirmed the legitimacy of the struggle of peoples for liberation from colonial and foreign domination and alien subjugation by "all available means including armed struggle". And this was reaffirmed a number of times at succeeding sessions.²⁰⁹ In resolution 3103 (XXVII) the recognition of the legitimacy of such struggles was coupled with a provision to the effect that struggles against colonial and alien domination and racist regimes were to be regarded as international armed conflicts, in the sense of the Geneva Conventions of 1949, and a declaration that captured combatants in such struggles were to be accorded the status of prisoners-of-war.

These positions came under discussion in the debates in the Special Committee leading to the consensus definition of aggression in 1974. The view was put that action by subject or colonised peoples for national liberation should be regarded as legitimate and in accordance with the terms of the Charter of the UN,²¹⁰ while on the other hand the opinion was expressed that this issue was not appropriate for inclusion in a definition of aggression.²¹¹ A Soviet draft in 1969 included the provision that "nothing in the foregoing shall prevent the use of armed

(207) See resolutions 2787 (XXVI), 2878 (XXVI), 2955 (XXVII), 2909 (XXVII) and 3185 (XXVIII).

(208) Adopted by 97 votes to 5 with 28 abstentions.

(209) See also resolutions 3163 (XXVIII), 3332 (XXIX), 3246 (XXIX), 3222 (XXIX), 3328 (XXIX), 3481 (XXX), 31/91, 31/92, 31/34, 32/42 and 32/154.

(210) A/7185/Rev.1 para.60. See also A/7402, para.16.

(211) Ibid, para.61.

force in accordance with the Charter, including its use by dependent peoples in order to exercise their inherent right to self-determination in accordance with resolution 1514 (XV).²¹² A number of representatives argued that the definition should specifically include a clause providing an exception when force was necessary to ensure the exercise of the right to self-determination, based on the principle that force against peoples in such cases was a violation of the Charter,²¹³ and this was reiterated in the discussions in the Sixth Committee.²¹⁴ The same arguments centring around the USSR, 13-power and 6-power draft proposals reappeared in subsequent years. Some representatives felt that the issue was extraneous to a definition of aggression,²¹⁵ others that it should be acknowledged that the use of force was legitimate in the case of national liberation movements or oppressed peoples, as derived from the inherent right of self-defence.²¹⁶ The argument regarding self-defence was countered by the view that since the prohibition of force related only to international relations, Article 51 in principle did not apply to civil wars or to liberation movements.²¹⁷ This view also held that the definition of aggression under consideration should only be concerned with acts directed by one State against another. The Charter had established an effective system to govern self-determination

(212) A/AC.134/L.12 and Corr.1. The 13 power draft of that year merely provided that none of its preceding provisions were to be interpreted as limiting the Charter's provisions regarding the right of peoples to self-determination, sovereignty and territorial integrity, A/AC.134/L.16 and Corr.1 and Add.1 and 2. A 6-power western draft did not include any reference to self-determination. A/AC.134/L.17 and Add.1.

(213) A/7620, para.49.

(214) A/7853, para.18.

(215) A/8019, para.47. See also A/8419, para.39 and A/8929, para.34.

(216) Ibid, para.73.

(217) Ibid, para.74.

which did not envisage the use of armed force by dependent territories.²¹⁸

Many representatives, however, denied that the dependent territories issue was not international. It was suggested that the use of force by dependent peoples to liberate themselves from oppression stemmed from the notion of self-defence in Article 51 of the Charter, because such peoples were the victims of a permanent attack on their sovereignty.²¹⁹

The confusion that was appearing with regard to the self-defence thesis became apparent in the Sixth Committee in 1970, when a number of representatives declared that colonialism was

aggression.²²⁰ The question is thus posed as to whether the use of force by dependent peoples was legitimate as self-defence against the very existence of colonialism itself or whether as a response to force utilised to suppress the right of self-determination. Both approaches were expressed. There was no agreement on the issue of self-

determination wars and the definition of aggression in the reports of the working groups set up,²²¹ and a series of alternative formulations were discussed in the reports of the 1972²²² and 1973²²³ working groups. It was eventually agreed that some reference to the Charter provisions relating to self-determination should be made, but some representatives agreed that this could only be achieved by peaceful and non-violent means while others believed that acts committed to realise self-determination were legitimate exercises of the right of self-defence as expressed in Article 51 of the UN Charter.²²⁴ In the event, Article 7 of the

(218) Ibid, para.142.

(219) Ibid, para.143. See also A/8929, para.33.

(220) A/8171, para.36.

(221) See A/8419, Annex III, paras.22-24.

(222) A/8719, Annex II, Appendix A, para.II. See also *ibid*, Appendix B, paras.B, C and E.

(223) A/9019 Annex II, Appendix A and Appendix B, paras.B, F and J.

(224) A/9411, paras.26 and 27.

consensus Definition of Aggression provides, in a somewhat cumbersome formulation, that "nothing in this definition, and in particular Article 3,²²⁵ could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples, forcibly deprived of that right and referred to in the Declaration on Principles of International Law, concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes, or other forms of alien domination, nor the right of those peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration".

The comments of members of the Special Committee made at the concluding stage of the 1974 session following the adoption of the draft definition by consensus reveal some ambiguity as to the meaning of Article 7. A number of representatives felt that the Article did not sanction the use of force by peoples in self-determination situations.²²⁶ Others declared that it did.²²⁷ These opposing interpretations were repeated in the Sixth Committee in 1974.²²⁸ A number of delegates also

(225) This Article specifies a series of acts qualifying as acts of aggression.

(226) Eg. A/9619, Annex I, pp.22 (France), 24 (USA), 32 (UK) and 35 (Canada).

(227) Ibid, pp.26 (Yugoslavia), 37 (USSR), 38 (Algeria) and 40 (Egypt).

(228) See eg. A/C.6/SR. 1472, paras.5 (USSR), 27 (Italy) and 48 (Jordan); A/C.6/SR.1473, para.15 (Canada); A/C.6/SR.1474, paras.12 (Mongolia), 24 (Kenya), 33 (France) and 39 (Madagascar); A/C.6/SR.1475, paras.10 (Yugoslavia), 13 (China) and 20 (Syria); A/C.6/SR.1476, paras.11 (Belgium) and 15 (GDR)- A/C.6/SR.1477, para. 24 (UK); A/C.6/SR.1478, paras.19 (Federal Republic of Germany), 22 (Portugal) and 41 (Hungary); A/C.6/SR.1479, paras.9 (Yugoslavia), 27 (Democratic Yemen), 29 (Algeria) and 42 (Cuba); A/C.6/SR.1480, paras.8(Mali), 17 (Senegal), 25 (Ghana) and 73 (USA); A/C.6/SR.1482, paras.8 (Burundi) and 26 (Tunisia); A/C.6/SR.1483, paras.14 (Cameroon) and 32 (Egypt), and A/C.6/SR.1504, para.13 (Sudan).

referred to the ambiguous nature of the Article.²²⁹ What is clear is that no consensus existed at that stage regarding the legality under international law of the use of force by dependent peoples in the struggle to achieve self-determination. Article 7, by linking the right of peoples to struggle for self-determination to the provisions of the Charter and the 1970 Declaration on Principles of International Law, and indeed omitting the adjective "armed", cannot be cited in support of a right to use force in such circumstances. The existence of widely diverging subsequent interpretations of Article 7 reinforces this thesis. The fact that it was only in 1973 that UN resolutions began specifically referring to the use of armed force by peoples in order to achieve self-determination may also be noted.

However, crucial discussions on these issues took place during the 1974 session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts where, following on from resolution 3103 (XXVII), attempts were made to characterise wars of self-determination as international armed conflicts. A large number of States declared that the legitimacy of such wars in international law had already been established and that practice, particularly in the UN, provided abundant proof of the international character of national liberation conflicts.²³⁰ Other delegates, primarily Western, denied that self-determination conflicts could be regarded as international. Various arguments were adduced in support of this approach. One recurring theme was to the effect that a

(229) Eg. A/C.6/SR.1472, para.38 (Spain), and A/C.6/SR.1478, para.35 (Congo). See in general Stone, Conflict Through Consensus, 1977, pp.66-86.

(230) See in particular the Egyptian delegate, CDDH/I/SR.2, paras.8-11. See also *ibid* paras.17 (Yugoslavia), 36 (GDR) and 41 (Nigeria), and CDDH/I/SR.3, paras.1 (USSR) and 2 (Burundi).

basic principle of humanitarian law reflected inter alia in the Hague Conventions of 1907 and the Geneva Conventions of 1949 was that legal and humanitarian protection applied irrespective of the motives of those engaged in the struggle.²³¹ This fear of the introduction of subjective criteria was stressed by the Swiss delegate who declared that "it would be very dangerous, and against the spirit of humanitarian law, to classify armed conflicts on the basis of non-objective and non-legal criteria". The question of the legitimacy of national liberation struggles lay within the province of other forums.²³² The USA representative declared in the plenary sessions of the conference in 1974 that the introduction into humanitarian law of "just war" concepts would inevitably result in a lowering of the standards of protection afforded to war victims.²³³ Some delegates, however, took the view that humanitarian law had to distinguish between the aggressor and the victim and afford greater protection to the victim acting in the exercise of the right of self-defence.²³⁴ A further argument raised against the concept of self-determination wars as international armed conflicts was the need to separate the political approach dealing with political solutions to specific problems as exemplified in the UN and the norms of humanitarian law as developed via the International Committee of the Red Cross, which were to remain free of political motivation.²³⁵ This view was an attempt to undermine one of the main

-
- (231) This was specially argued by Col. Draper, the UK delegate CDDH/I/SR.2, paras.44 and 45.
- (232) CDDH/I/SR.3, para.13. See also *ibid* paras.3 (Uruguay), 19 (Spain), CDDH/I/SR.4, para.39 (Netherlands), CDDH/I/SR.5, para.22 (Denmark). The Japanese delegate declared that any attempt to apply the 1949 Convention as a whole to armed conflicts in which entities other than States were involved, would tend to destroy the established system and would lead to practical difficulties, CDDH/I/SR.5 para.49.
- (233) CDDH/SR.11 para.47. See the Netherlands delegate, *ibid*, para.5. See also Graham, "The 1974 Diplomatic Conference on the Law of War", 32 Washington and Lee Law Review, 1975, p.25.
- (234) See in particular *ibid* para.12 (Rumania) and CDDH/SR.12 paras.15-16 (China). See also CDDH/I/SR.4 para.17 (China).
- (235) CDDH/I/SR.2, para.49 (France and *ibid* paras.50-51 (USA)).

bases of the self-determination argument, which relied heavily upon the international legitimacy of the right to self-determination as expressed through the UN. It was answered by the Egyptian delegate who declared that international law constituted an indissoluble body of complementary rules. No separation could be made between the decisions of the UN and the work of the conference.²³⁶

A 9-power proposal drafted by Communist States with Algeria, Morocco and Tanzania provided that Article 1 of Protocol I (dealing with international armed conflicts) should include a provision that international armed conflicts also comprised "conflicts where peoples fight against colonial and alien domination and against racist regimes".²³⁷ A 15-power proposal submitted by Afro-Asian and Arab States, with Norway, Australia and Yugoslavia, provided that the situations referred to in common Article 2 of the 1949 Geneva Conventions (relating to international armed conflicts) should include "armed struggles waged by peoples in the exercise of their right of self-determination" as enshrined in the Charter and defined in the 1970 Declaration on Principles of International Law.²³⁸ It was the latter amendment which formed the centrepiece of the 1974 debates. It was founded upon the recognition of the international character of wars of national liberation by contemporary international law and was aimed at applying this general rule within the particular context of humanitarian law.²³⁹

(236) CDDH/I/SR.5 para.2. See also CDDH/K/SR.6 paras.2 (Tanzania) and 10 (Senegal).

(237) CDDH/I/5 and Add. 1.

(238) CDDH/I/11 and Add. 1.

(239) See CDDH/I/SR.2 paras.8-11 (Egypt), 16-20 (Yugoslavia) and 21-29 (Norway). See also Abi-Saab "Wars of National Liberation and the Development of Humanitarian Law", in Declarations on Principles (ed. Akkerman, Van Kreiken and Pannenborg), 1977, p.43. As to the arguments that national liberation movements already came within the purview of common Article 2 of the 1949 Conventions, see Abi-Saab, "Wars of National Liberation and the Laws of War" 3 *Annals of International Studies*, 1972, pp.93, 102-7. Cf. CDDH/I/SR.3 para.38 (Italy).

A number of proposals sought to bridge the gap between the States advocating the inclusion of wars of self-determination in Protocol I and those opposed.²⁴⁰ In the event, an amendment²⁴¹ was adopted, by 70 votes to 21 with 13 abstentions, which ultimately formed the basis of Article 1(4) of Protocol I. This declares that the situations referred to in common Article 2 of the 1949 Conventions, relating to international armed conflicts, "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" as enshrined in the Charter of the UN and the 1970 Declaration on Principles of International Law. Article 1 of Protocol I was adopted in plenary by 87 votes to 1 (Israel) with 11 abstentions. The result of this is that such conflicts cannot be recognised as being purely internal and this has consequences with regard to the relative status of the parties involved.

A number of States regarded Article 1(4) as reaffirming the right of peoples to fight against colonialism, alien domination and racism.²⁴² Others treated it as rather ambiguous and vague.²⁴³ Some States were disquieted by the absence of objective criteria of a basically legal character in the paragraph,²⁴⁴ and yet others expressed concern that the reference to the motives and cause for which belligerents were fighting was in contradiction to the norms of international humanitarian law.²⁴⁵ One significant point of

(240) Eg. CDDH/I/12 (by Members of the Western Group) and CDDH/I/41 (by Sponsors of CDDH/I/11).

(241) CDDH/I/71.

(242) See the Explanations of votes at the plenary session of the Conference 1977, eg. CDDH/SR.36 paras.65 (USSR), 72 (GDR), 79 (Hungary) and 90 (Nigeria).

(243) Eg. *ibid*, para.77 (Italy)

(244) Eg. *ibid*, Annex p.61 (Federal Republic of Germany)

(245) *Ibid*, paras.60 (Israel) and 83 (UK).

interpretation was made by the UK delegate. He emphasised that the "armed conflicts" to which Protocol I applied could not be of less intensity than those to which Protocol II would apply. A certain level of intensity of fighting had to be present before Protocol I could be relevant.²⁴⁶ Linked with Article 1(4) was Article 44 of Protocol I, the effect of which was to grant prisoner-of-war status to combatants in situations of self-determination conflicts and many of the same arguments reappeared.²⁴⁷ If one is to accept that peoples involved in self-determination situations, as defined in international law, have the right to use force under certain circumstances, the juridical basis for this must be clear. There are, as has been seen, a number of alternatives. One might regard such peoples as subjects of international law entitled to the benefit of the international law right of self-defence either because the colonial power is per se an aggressor or because it is involved in suppressing the exercise of self-determination. Another possibility is to treat the legitimacy of the recourse to force as an integral element of the principle of self-determination. Wars of national liberation²⁴⁸ have been an important phenomenon of the post-World War II years and have accompanied the process of decolonisation

(246) Ibid, paras.87-8.

(247) See CDDH/SR.18 paras.2-8 (1974), CDDH/III/SR.6 Annex (1975), CDDH/III/SR.41-53 (1976), CDDH/III/SR.54060 (1977) and CDDH/SR.40-41 (1977). The Article was adopted by 73 votes to 1 (Israel) with 21 abstentions.

(248) This term also may be used to cover the struggles of peoples against an invading power, eg. resistance movements in the Second World War, and conflicts with the aim of changing government. We are here concerned with struggles to attain self-determination as it has been defined earlier, see *supra*. See also Ronzitti, "Wars of National Liberation - A Legal Definition". (1975) 1 Italian Yearbook of International Law p.192, and Ginsburgs, "Wars of National Liberation and the Modern Law of Nations - The Soviet Thesis" The Soviet Impact on International Law (ed. Baade), 1965, p.66.

and the birth of scores of new States. Those in favour of the thesis that peoples entitled under international law to self-determination may use force in self-defence may argue either that the original act of colonisation was an unlawful aggression and that the people therefore have a continuing right of self-defence by virtue of Article 51 of the Charter as a kind of notional State, or that, by denying the exercise of the right of self-determination, administering powers are violating Article 2(4) of the Charter and the consequence of this is that Article 51 is applicable. The former argument is dependent upon the acceptance of the original colonisation as a continuing illegal act under international law as well as the characterisation of the inhabitants of the territory in question as colonially defined as a notional State or at least a subject of international law. The first condition is, however, unacceptable. Apart from the fact that the original colonisation may very well not have taken place by the use of force, international law has clearly accepted the legitimacy of colonial titles. Certainly during the 19th century and for much of the 20th century, until the establishment of the legal right of self-determination queried the validity of colonial titles, international law acknowledged that the colonial power possessed legally valid titles to all territories in question. There is more to be said for the second point. It is now accepted that, as the 1970 Declaration on Principles of International Law states, "the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and

principles". However, it is doubtful indeed that international law recognised this separate status, this statement of juridical personality, at the time of colonisation and thereafter. It is only a relatively recent phenomenon under international law, therefore the argument under Article 51 has to be founded on a reverse perspective. That is, a people now recognised as a subject of international law may extend this recognition back over time to claim a continuing right of self-defence against the colonisation.²⁴⁹ This is highly questionable.^{249a} A further objection to this thesis is that Article 51 provides that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations" (emphasis added) and such peoples cannot be so regarded. The thesis that by suppressing the right of self-determination the colonial power is acting in contravention of Article 2(4) of the Charter is more solidly based. As we have seen, the "international relations" barrier has been dismantled over the years, so that it is quite clear that self-determination conflicts are part of the administering States' international relations.²⁵⁰ The question is therefore what is the position of a people denied the right having recourse to force under international law? In particular, does Article 51 apply? A number

(249) Alexandrowicz has argued that once the people have attained independence the new State reverts to its former sovereignty. "New and Original States", 45 International Affairs, 1969, p.465.

(249a) Nor can it be said that any definition of the customary right of self-defence could encompass this.

(250) See also Bedjaoui, ILC Yearbook 1975 vol.I, p.49.

of States²⁵¹ and authors²⁵² believe that it does. The representative of the GDR stated in the 1974 session of the International Humanitarian Law Conference that "in international practice, a people under colonial oppression had the same right to self-defence as a State under armed attack".²⁵³ But the problem remains of the terminology of Article 51 requiring as it does an armed attack against a Member of the UN. The barrier seems insuperable and recourse must therefore be had to the customary right of self-defence, preserved as it is, in Article 51 and as amended by UN resolutions²⁵⁴ to incorporate dependent peoples, or to re-interpretations of Articles 51 and 2(4) in the light of UN resolutions. In both cases, there are difficulties but the dynamic of international activity since the 1960's has been leading to the recognition of a jus ad bellum for peoples entitled to self-determination, especially in the light of the contravention of Article 2(4) by colonial action to suppress self-determination and the acknowledgement of the special status in international law of colonial territories. It is therefore believed that the former proposition relating to the development of customary norms is the more viable of the two. But the problem here is that a customary rule does not bind a State which has "always opposed any attempt to apply it".²⁵⁵

(251) See supra, p.431 et seq.

(252) See eg. Blischchenko and Solntseva "The Struggle Against Portuguese Colonialism in the Light of International Law" 8 International Affairs (Moscow), 1971, p.60, and Bokor-Szego, New States and International Law 1970, pp.35-39. But cf. Ronzitti "Resort to Force in Wars of National Liberation", Current Problems of International Law (ed. Cassese) 1975, pp.319, 323, and Dugard "The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism". 16 ICLQ, 1967, p.157.

(253) CDDH/I/SR.2, para.36.

(254) Supra, p.433.

(255) The Anglo-Norwegian Fisheries case, ICJ Reports, 1951, pp.116, 131. See also the Asylum case, ICJ Reports, 1950, pp.226, 276-8. Akehurst writes that a State can prevent a customary rule becoming binding on it provided it opposes the rule in the early days of the rule's existence or formation and maintains its opposition consistently thereafter, "Custom as a Source of International Law", 47 BYIL, 1974-5, pp.1, 24.

There is, however, another possibility, and that is that the principle of self-determination, as recognised in international law, incorporates within its framework the right of dependent peoples to resort to force, where forcible action has been taken to deprive such peoples of the exercise of the right. The principle would, of course, refer only to such force as was necessary to achieve self-determination and would directly relate to the level of force used by the administering power. This approach would be compatible with the terms of UN resolutions which have consistently upheld the legitimacy of the struggle of dependent peoples to exercise the right of self-determination by all necessary means.²⁵⁶ Skubiszewski has written that the right of peoples to fight against colonial governments *inter alia* "is not to be deduced from the law on the use of force but rather from the principle of self-determination".²⁵⁷ Crawford has noted that with regard to self-determination, "it seems most unlikely that the use of force to assert that right should be illegal".²⁵⁸ But he continues rather curiously that "the use of force by a non-State entity in exercise of a right of self-determination is legally neutral; that is, not regulated by law at all".²⁵⁹ This would appear on the face of it to be a reversion to the traditional law regarding such conflicts as internal conflicts, but since Crawford accepts that force to suppress self-determination is a violation of Article 2(4)²⁶⁰ one is left with a strange situation, one that could be remedied by an analysis of the principle of self-determination which includes the right to resort to

(256) *Supra*, p. 433 et seq.

(257) "The Use of Force by States", Manual of Public International Law (ed. Sørensen), 1968, pp.739, 771.

(258) "The Criteria for Statehood in International Law" 48 BYIL 1976-7, pp.93, 167.

(259) *Ibid.*

(260) *Ibid*, p.172.

force in response to forcible action to suppress the exercise of the right to self-determination.²⁶¹ Doctrine, it is believed, favours this approach since a right to self-defence in colonial situations, although often posited, has met with a great deal of opposition and has not been formally incorporated in any international document. The fact that a breach of Article 2(4) in such situations does not automatically bring into operation the self-defence provision of Article 51²⁶² can be regarded as one consequence of the status of dependent peoples, ie. subjects of international law but not sovereign States.^{262a}

(b) Practice Relating to Africa

African doctrine as expressed through the OAU has long accepted the legitimacy of the struggles of dependent peoples and, as will be seen in the following section, machinery has been established to realise this support. At this stage, it suffices to quote from the message marking the eighth anniversary of the OAU from the organisation's Administrative Secretary-General. He wrote that "since it was established, the Organisation of African Unity's prime and urgent objective has been the total liberation of our Continent from all forms of foreign occupations, oppression and exploitation".²⁶³

-
- (261) Judge Ammoun has declared that the struggle of peoples has been "one if not indeed the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognised". ICJ Reports 1971, p.70. See also *ibid*, ICJ Reports 1975, pp.99-100.
- (262) Judge Ammoun, however, stated that in law "the legitimacy of the people's struggle cannot be in any doubt for it follows from the right of self-defence inherent in human nature which is confirmed by Article 51 of the United Nations Charter". *Ibid*. It is submitted that this is misleading.
- (262a) It could be argued that UN resolutions regarding the use of force by liberation movements merely reiterated the traditional legal position that civil wars were not per se unlawful. However, the terms and frequency of such resolutions demonstrate, it is felt, that what was previously a liberty to resort to force in such cases has now been transmuted, in certain situations, into a right.
- (263) Press-Release of the OAU Secretariat, Addis Ababa, May 25 1971 quoted in Cervenka, "Major Policy Shifts in the Organisation of African Unity, 1963-1973", Foreign Relations of African States (ed. Ingham), 1974, pp.323, 336.

(i) Portugal's African Territories²⁶⁴

Although the UN dealt with the question of the territories under Portuguese domination in Assembly resolution 1542 (XV) and proceeded to condemn Portuguese repressions in subsequent resolutions²⁶⁵ and later called for an arms embargo,²⁶⁶ it was only in 1965 that references were made to the struggle of the peoples concerned. Resolution 2109 (XX) recognised the legitimacy of the struggle to achieve the rights laid down in the UN Charter, the Universal Declaration on Human Rights and resolution 1514 (XV). The right of the people of the Portuguese administered territories in Africa to freedom and independence in accordance with resolution 1514 (XV) and their right to struggle to that end was reaffirmed in a series of resolutions.²⁶⁷ Resolution 2707 (XXV) introduced the phrase "by all necessary means at their disposal". In 1972 at its meetings held in Addis Ababa, the Security Council discussed the problems inter alia of the Portuguese administered territories,²⁶⁸ and in resolution 312 (1972) reaffirmed the inalienable right of the peoples of Angola, Guinea-Bissau and Mozambique to self-determination and independence, as recognised by the General Assembly in its resolution 1514 (XV) and the legitimacy of the struggle by those peoples to achieve the right. This resolution adopted by 9 votes to 0 with 6 abstentions was succeeded later in the year by resolution 322 (1972)

(264) Although the General Assembly recognised the right of the Algeria people to self-determination in 1960 in resolution 1573 (XV), no reference was made relating to the use of force or to the legitimacy of the struggle for self-determination, see Fraleigh, "The Algerian Revolution as a Case Study in International Law" The International Law of Civil War (ed. Falk) 1971, pp.179, 190.

(265) Eg. Assembly resolutions 1819 (XVII) and 1913 (XVIII) and Security Council resolution 163 (1961).

(266) See Security Council resolutions 180 (1963), 183 (1963) and 218 (1965).

(267) See resolutions 2184, (XXI), 2270 (XXII), 2395 (XXIII), 2507 (XXIV), 2707 (XXV) and 2795 (XXVI).

(268) SCOR, 29th Year, Meetings 1627-39.

in which the Council unanimously repeated its reaffirmation of the right to self-determination and its recognition of the legitimacy of the struggle to attain that goal.²⁶⁹ The Special Committee on Decolonisation that year adopted a resolution in which the legitimacy of the struggle to achieve self-determination and independence "by all available means" was recognised,²⁷⁰ and in resolution 2918 (XXVII)²⁷¹ adopted by 98 votes to 6 with 8 abstentions, the General Assembly noted "with satisfaction the progress towards national independence and freedom made by the national liberation movements in their territories, both through their struggle and through reconstruction programmes". The legitimacy of the struggle was reaffirmed once again. This resolution also affirmed that the national liberation movements of these territories were the authentic representatives of the true aspirations of the peoples of the territories and called for the treatment of captured freedom fighters as prisoners-of-war in accordance with the 1949 Conventions.²⁷² These points were re-emphasised the following year in Assembly resolution 3113 (XVIII) which this time recognised the legitimacy of the struggle of the peoples "by all ways and means at their disposal". By 1972-73, any possible ambiguity over the nature of the "struggle" whose legitimacy was recognised by the UN must surely have been dispelled. The recognition of the liberation movements as the authentic representatives of the aspirations of the peoples and the satisfaction expressed at the progress made towards independence through struggle, as well as the call for the

(269) The Security Council Meeting, at which this resolution was passed was requested by 37 African States S/10828.

(270) A/8723/Rev. 1.

(271) As recommended by the Fourth Committee, A/8889.

(272) See also the resolution of the Special Committee on Decolonisation of 1973, adopted by 21 votes to 0 with 1 abstention, A/9023/Rev.1.

treatment of captured guerillas as prisoners-of-war, underline this. The additional phrase inserted in the Assembly resolution of 1973 must be regarded as a manifestation of this situation. By 1974, however, with the Portuguese coup d'etat, the issue was resolved and Assembly resolution 3294 (XXIX), adopted without objection, welcomed Portugal's acceptance of self-determination and the timetable for the independence of its African territories.

(ii) Namibia²⁷³

In resolution 2074 (XX) the General Assembly referred for the first time to the legitimate struggle for freedom and independence of the indigenous people of South West Africa. The following year, the Assembly terminated the mandate of South Africa for the territory and entrusted the UN with direct responsibility for the administration of the territory.²⁷⁴ Thereafter the UN was continually concerned with the issue, both from the viewpoint of the inhabitants of Namibia and from the viewpoint of the organisation itself. This interesting dualism can be seen in the series of resolutions on the problem as from the late 1960's. The Assembly adopted resolution 2248 (S.V.) a six-power proposal,²⁷⁵ already endorsed by the OAU²⁷⁶ setting up an international administration for the territory by means of a UN Council. Any action by South Africa which obstructed the work of the Council would be regarded as an act of aggression against the people and territorial integrity of the territory, which would require enforcement action by the Security Council under Chapter VII of the Charter. In resolution 2372 (XXII), the Assembly declared that the continued South African occupation of the territory

(273) See Supra, p.191.

(274) Resolution 2145 (XXI).

(275) A/6640, paras.45, 52, 66 and 82.

(276) CM/Res.97 (VIII).

constituted a grave threat to international peace and security and called on the Security Council to take effective measures in accordance with "the appropriate provisions of the Charter". Security Council resolution 264 (1969) declared that in the event of a South African refusal to withdraw from the territory, it would meet to determine the necessary steps or measures, and this was in essence repeated in resolution 269 (1969). Resolution 269 (1969) also recognised the legitimacy of the struggle of the Namibia people against foreign occupation. There were a number of Assembly resolutions to the same effect.²⁷⁷ Following the Namibia case,²⁷⁸ an OAU delegation was sent to the UN,²⁷⁹ but it failed in its attempt to persuade the Security Council to apply the provisions of Chapter VII of the UN Charter.²⁸⁰ The Assembly, however, in resolution 2871 (XXVI) reaffirmed the legitimacy of the struggle of the people "by all means" against the illegal occupation of the territory by South Africa.^{280a} This was repeated in resolutions 3031 (XXVII),²⁸¹ 3111 (XXVIII)²⁸² and 3295 (XXIX).²⁸³ The South West Africa People's Organisation (SWAPO) was also recognised as the authentic representative of the Namibia people by the latter two resolutions, and South Africa's illegal occupation was condemned. An

(277) See eg. resolutions 2403 (XXIII), 2498 (XXIV) and 2519 (XXIV) and 2678 (XXV).

(278) ICJ Reports, 1971, p.16.

(279) AHG/Res.65 (VIII).

(280) See Andemicael The OAU and the UN, 1976, p.130. See also resolutions 309 (1972) and 310 (1972).

(280a) See also The Report of the Special Committee on Decolonisation, 1972, A/723/Rev.1, especially Chapter IX B (Consensus adopted on Namibia).

(281) Adopted by 112 votes to 2 with 15 abstentions.

(282) Adopted by 107 votes to 2 with 17 abstentions.

(283) Adopted by 112 votes to 0 with 15 abstentions.

International Conference on Namibia and Human Rights held in Dakar during January 1976, sponsored by the UN Council for Namibia, declared that the use of force in the situation was justified²⁸⁴ and, in April of that year, the Special Committee on Decolonisation again reaffirmed the legitimacy of the struggle by all means against the illegal occupation of Namibia by South Africa.²⁸⁵ A proposal²⁸⁶ that year to have the Security Council declare the situation in Namibia a threat to international peace and security and institute an arms ban, acting under Chapter VII of the Charter was, however, defeated.²⁸⁷ Assembly resolution 31/146²⁸⁸ in December 1976 rendered UN support for the Namibian people's struggle more explicit. It reaffirmed the legitimacy of the struggle of the people "by all means at their disposal" against the illegal occupation and in a significant move declared in operative paragraph 3 that the Assembly "supports the armed struggle of the Namibian people, led by the South West Africa People's Organisation, to achieve self-determination, freedom and national independence in a unified Namibia". It is to be noted that this paragraph stands separately from the one that reaffirms the legitimacy of struggle against the illegal occupation, and that it relates not to the end of the occupation but to the attainment of self-determination. It also refers explicitly to the armed struggle of the people. The conclusion must therefore be that the use of force by the people is legitimate both in the light of the particular situation of Namibia as an illegally occupied international territory, and within the context of the denial by force of the exercise of the right to self-determination. The resolution also reiterated that the continued illegal

(284) Africa Research Bulletin January 1976, p.3909. See also UNMC February 1976, pp.31-2.

(285) See UNMC April 1976, p.34.

(286) S/12211.

(287) See UNMC November 1976, pp.4-10 and 115-21.

(288) Adopted by 107 votes to 6 with 12 abstentions.

occupation by South Africa constituted an act of aggression against the people and against the UN as the legal authority there until independence, and also was a threat to international peace and security. In accordance with this the Security Council was called upon to impose a mandatory arms embargo against South Africa. Thus, the special situation in Namibia gave rise not only to the legitimacy of the struggle by the people, but also to a legally valid internationally imposed reaction.²⁸⁹ In fact, a mandatory arms embargo against South Africa was unanimously imposed by the Security Council in November 1977, by resolution 418 (1977) under Chapter VII of the Charter.²⁹⁰ The relevant terms of resolution 31/146, referred to above, were substantially repeated in resolution 32/9D, adopted by 117 votes to 0 with 24 abstentions.²⁹¹ In the Lusaka Declaration adopted by the UN Council for Namibia in March 1978,²⁹² the Council stated that it considered the illegal occupation of Namibia by South Africa to be a threat to international security and urged the Security Council and the Assembly to adopt the necessary measures, and a special session of the Assembly dealing with the problem was held in Spring 1978.²⁹³ The use of force by the people of Namibia, at least, in pursuance of the right of self-determination, it is submitted, has been clearly accepted by the international community, in addition to the legitimacy of the struggle to end the illegal occupation.

(289) See also the Programme of Action Adopted for the Liberation of Namibia at the Maputo Conference in Support of the Peoples of Zimbabwe and Namibia, May 1977, UNMC June 1977, pp.41-8.

(290) See UNMC December 1977, pp.5-14, acts of repression in continuance of the apartheid system and attacks against neighbouring independent States. Namibia was not mentioned. See *supra*, p.260.

(291) A number of States expressed reservations about the condoning of armed struggle by the UN, eg. Australia, New Zealand, Finland, Belgium, Italy, Austria, the Netherlands, Norway, Iceland, Ireland and Costa Rica. See UNMC December 1977, pp.38-41. Their arguments did not appear to centre on whether the people of Namibia did or did not possess a legitimate right to use force, but rather on the UN stand with respect to the support of force.

(292) A/S-9/2-S/12631.

(293) See UNMC May 1978, pp.18-21.

(iii) Rhodesia

That the administering power, the UK, could legitimately use force to end the illegal regime, and thus advance the right of the people of the territory to self-determination, has been discussed.²⁹⁴ The question at this stage is whether the people themselves could lawfully resort to force within the context of the rules of international law. Following the unilateral declaration of independence in November 1965, the UN called on the UK to end the rebellion and in the meantime on all States not to recognise or assist the illegal regime.²⁹⁵ The General Assembly in resolution 2151 (XXI) referred to the legitimate struggle of the people to overthrow the illegal, racist regime and achieve freedom and independence, and this was re-emphasised in subsequent years, reference being made to resolution 1514 (XV).^{295a} The general approach was reiterated in Security Council resolution 253 (1968) in which the Council recognised the legitimacy of the struggle of the people of Southern Rhodesia to secure the enjoyment of their rights as set forth in the UN Charter and in conformity with the objectives of resolution 1514 (XV). This resolution also affirmed the primary responsibility of the UK government to enable the Southern Rhodesian people to achieve self-determination and independence, and imposed sanctions under Chapter VII of the Charter, having determined that the situation in the territory constituted a threat to international peace and security. This three-tier structure dealing with the issue of Rhodesia is a fascinating example of the interaction of various levels of responsibility under international law. The absence of any reference

(294) Supra, p.425 et seq.

(295) General Assembly resolution 2024 (XX) and Security Council resolutions 216 (1965) and 217 (1965).

(295a) See resolutions 2262 (XXII), 2283 (XXIII) and 2508 (XXIV).

to self-determination in the provisions relating to the struggle of the people is marked and probably indicated a desire to emphasise the primary obligation of the UK as a means of pressure upon that State to end the illegal situation. Resolution 2652 (XXV) in its reaffirmation of the legitimacy of the struggle of the people to obtain freedom and independence in accordance with resolution 1514 (XV) added the phrase "by all means at their disposal". This was repeated in resolution 2796 (XXVI). The phraseology used by the Security Council in resolution 253 (1968) remained constant in resolutions 277 (1970) and 318 (1972) and in resolution 328 (1973) with the difference that Zimbabwe was substituted for Southern Rhodesia. The continuing concern of the UN with the levels of responsibility maintained by the UK and the UN itself was also manifested in resolutions adopted.²⁹⁶ Reference to the right of the people to self-determination as well as to freedom and independence within the context of the legitimacy of the struggle was, however, made in resolution 2769 (XXVI) and repeated in resolution 2945 (XXVII), and can be seen as a change in emphasis within the international community from reliance upon the primary responsibility of the UK to concentration upon the people of Zimbabwe itself. This can also be demonstrated with the change in 1974 in resolution 3297 (XXIX) adopted by 111 votes to none with 18 abstentions, in which the Assembly reaffirmed that the national liberation movements of Zimbabwe were the sole and authentic representatives of the true aspirations of the people. In resolution 31/154, the Assembly referred to the leadership of the national liberation movement in the people's determination to achieve freedom and independence and reaffirmed the legitimacy of the struggle,

(296) Eg. Security Council resolutions 288 (1970), 314 (1972), 318 (1972), 320 (1972), 328 (1973) and 333 (1973).

by all means at the disposal of the people, for self-determination. The UK was defined as having the primary responsibility for putting an end to the critical situation in Southern Rhodesia (Zimbabwe). The Maputo Declaration of May 1977²⁹⁷ stated that the development of the armed struggle and the concerted efforts of the international community were creating positive conditions for a negotiated settlement based on majority rule.²⁹⁸ The General Assembly, later that year, invited the OAU and the UN to cooperate fully in speedy implementation of the Maputo Declaration,²⁹⁹ the provisions of which were reaffirmed in Assembly resolutions 32/41 and 32/42. The latter resolution, it will be remembered, underlined the legitimacy of the struggle of peoples under colonial and alien domination for self-determination and independence by all the necessary means at their disposal. This provision was made specific with regard to Zimbabwe in resolution 32/116 by which the Assembly stated that it "firmly supports" the struggle of the people of Zimbabwe for self-determination by all means at their disposal. The recognition by the international community of the right of the Zimbabwe people to resort to force to achieve self-determination was not expressed in such explicit terms as in the Portuguese Africa territories and Namibia cases, but this should be seen in the light of the sanctions imposed by the Security Council in an attempt to obtain a settlement in accordance with the right of self-determination,³⁰⁰ and with reference to the juridical framework which placed primary

(297) See footnote 289. See also the resolution of the Special Committee on Decolonisation in 1977 reaffirming the legitimacy of the struggle of the people by all means at their disposal for self-determination and independence, A/AC.109/554-5.

(298) UNMC June 1977, p.42.

(299) Resolution 32/19 adopted without a vote.

(300) See eg. Security Council resolution 423 (1978).

responsibility upon the UK Government - a responsibility maintained by the UK as well as by the UN.³⁰¹ And since the UK has adopted policy guidelines which amount to an acceptance of the conventional view of self-determination in international law,³⁰² the situation is therefore very different from the Portuguese African territories case (up until 1974) and the Namibia question, with regard to the perceived functions within an international law framework of the administering power concerned.

It is believed that practice relating to Africa in situations in which the right to self-determination has been recognised demonstrates that the use of force is legitimate in order to secure the exercise of the right, but that this situation has crystalised over a number of years since the early 1960's. The use of the term "struggle" does not, of course, automatically mean armed struggle, but the comprehension of the term was refined in each particular case over the years, so that by the mid-1970's a right to resort to force by a people acknowledged by the international community as entitled to exercise self-determination to the extent necessary to attain that right was clearly established. The opposition expressed by a number of Western States, when examined, as regards later resolutions, seems to centre around the approval by the UN of the resort to force rather than on the right of the people concerned to use force legitimately within the framework of international law.³⁰³

(301) See the comments of the UK delegate to the UN, UNMC April 1978, p.85.

(302) See eg. cmd.2807, 1965, pp.65-8.

(303) See eg. UNMC January 1978, pp.42-4. Although it is, in essence, difficult to separate the two.

Conclusions as to the Use of Force in Recognised Self-Determination Situations

We have seen how the traditional law with regard to internal conflicts recognised the applicability of international law once the rebels, in general terms, had attained those objectives which to some extent resembled the legal conditions of Statehood, viz. an organisation with a clear authority structure and the possession of territory. These basic conditions, of course, were surrounded by some degree of uncertainty, particularly with respect to the concept of insurgency, but they remain valid conditions nonetheless. However, a number of changes have taken place respecting those situations in which international law has recognised the applicability of the right of self-determination. In such cases, international law is relevant and regulates the resort to force by both sides, so that the administering power may not use force to suppress the exercise of the right to self-determination, while the people may legitimately use force to attain freedom and independence where denied contrary to international law. For our purpose it is the characterisation of the situation as one concerned with self-determination that determines the applicable rules of international law rather than the question of the possession of territory by the rebel side. In other words, status rather than effectiveness acts as the factor triggering the appropriate responses of international law. Many of the national liberation movements never gained undisputed possession of territory but rather disputed possession of areas with the forces of the administering powers. Often it was at night that the liberation forces controlled areas with the administering power controlling these areas by day. This does not mean to say that the factor of effectiveness or the undisputed control of territory ceases to be relevant. On the contrary, the Guinea-Bissau

case demonstrates that this factor may be crucial with regard to the proclamation of independence by the liberation organisation, thus moving the conflict from the category of a self-determination war to that of an inter-State war. But in other cases, the characterisation of the conflict as one concerned with self-determination, as internationally recognised, is sufficient to make the rules of international law applicable and render the situation governable by the norms of the international community.

Where conflicts of a non-self-determination character are involved, the traditional classification and exposition of international legal rules become operative. Thus, conflicts may be either international or internal and the appropriate norms apply. For example, the various secession wars of Africa such as Nigeria, the Congo and Southern Sudan may be regarded as internal wars. Although it could be argued that in such instances peoples were seeking self-determination, the situations do not fall within the recognised international law typology of self-determination cases. The issue is further discussed in the section on intervention.

IV - Apartheid and the Use of Force³⁰⁴

Following the Sharpeville incident of 1960 in which South African police fired on an unarmed African crowd, killing 69 and wounding 180,³⁰⁵ the Security Council adopted resolution 134 (1960)³⁰⁶ declaring the situation in that country as "one that has led to international friction and if continued might endanger international peace and security".

(304) Supra, Chapter 4, p.257.

(305) See Gibson, African Liberation Movements, 1972, p.56.

(306) By 9 votes to 0 with 2 abstentions (UK and France).

In resolution 1761 (XVII) the General Assembly called on Member States, separately or collectively, to apply diplomatic and economic sanctions and an arms embargo against South Africa, and established a Special Committee on Apartheid.³⁰⁷ Under OAU pressure, the Council imposed a non-mandatory ban on the sale and supply of arms to South Africa,³⁰⁸ and resolution 182 (1963) described the situation as one "seriously disturbing international peace and security". The OAU continued to seek an extension of the sanctions as well as their application³⁰⁹ and in 1965 the General Assembly in resolution 2054A (XX) declared that the only means of peacefully solving the apartheid problem was by universal application of economic sanctions under Chapter VII of the Charter.³¹⁰ In addition to the attempt to apply Chapter VII sanctions against South Africa, other approaches were adopted. In resolution 2396 (XXIII)³¹¹ the Assembly called apartheid "a crime against humanity" and called for the exercise of "their right to self-determination" by the inhabitants in order to "attain majority rule based on universal suffrage". The Security Council was requested to adopt comprehensive mandatory sanctions against South Africa. All States were called on to provide assistance "to the South African liberation movement in its legitimate struggle", and "freedom fighters" captured by South Africa were to be treated as

(307) See a similar resolution at the June 1960 Conference of Independent African States, Legum, Pan-Africanism 1962, pp.155-6. See also Assembly resolutions 1598 (XV) and 1663 (XVI) and OAU resolution AHG/Res.7 (I).

(308) Resolutions 181 (1963) and 182 (1963). By resolution 191 (1964) an expert committee of Council members was set up to study measures which could be taken by the Council in the situation under the Charter. It did not reach agreement. See S/6210 and Add.1.

(309) See OAU resolution AHG/Res.34 (II).

(310) The resolution was adopted by 80 votes to 2 (Portugal and South Africa) with 16 abstentions. The Special Committee on Apartheid was also enlarged.

(311) Adopted by 85 votes to 2 with 14 abstentions. See also resolution 2309 (XXII).

prisoners-of-war. This went further than the Council was likely to go and in any event in the late 1960's the focus of attention centred on Namibia and Rhodesia. In 1970, however, the Council condemned violations of the arms embargo it had previously called for and appealed for its strengthening.³¹² In resolution 311 (1972) the Council by 14 votes to 0 with 1 abstention (France) declared that the situation in South Africa seriously disturbed international peace and security in Southern Africa and recognised "the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter and the Universal Declaration of Human Rights". In this resolution all States were called upon to observe strictly the arms embargo. The absence of any reference to self-determination should be noted, but it did mark a new stage for the Council in its treatment of the South African problem. In the same year, the Assembly adopted resolution 2923 E (XXVII) by which it reaffirmed "the legitimacy of the struggle of the oppressed people of South Africa to eradicate apartheid and racial discrimination by all available means and to attain in the country as a whole majority rule based on universal suffrage". This was reaffirmed in resolution 3055 (XXVIII) and resolution 3151 (XXVIII). In the latter resolution,³¹³ it was declared that "the struggle of the oppressed people of South Africa by all available means for the total eradication of apartheid is legitimate and deserves the support of the international community".

(312) Security Council resolution 282 (1970). The UK and France had earlier declared that they would continue to supply arms for South Africa's external defence. See SCOR, 18th Year, 1078th meeting, paras.16-20 (UK) and 31 (France).

(313) Adopted by 88 votes to 7 with 28 abstentions. By resolution 3151 C (XXVIII) the Unit on Apartheid and the Office of Public Information of the Secretariat of the UN were requested to publicise as widely as possible inter alia the legitimate and just struggle of the people of South Africa for the eradication of apartheid.

In the same year, the Assembly adopted in resolution 3068 (XXVIII) the International Convention on the Suppression and Punishment of the Crime of Apartheid,³¹⁴ article 1 of which declared that apartheid was a crime against humanity.³¹⁵ The Assembly rendered its view more explicit in resolution 31/61.³¹⁶ It declared the South African regime illegitimate and reaffirmed the legitimacy of the struggle of the oppressed people of South Africa and their liberation movements by all possible means for the seizure of power by the people and the exercise of the inalienable right to self-determination.³¹⁷ It declared that the situation in South Africa was a grave threat to peace and required action under Chapter VII of the Charter. In addition to this resolution following the violent disturbances at Soweto during the summer of 1976,³¹⁸ the Security Council also adopted by consensus resolution 392 (1976) in which it expressed its conviction that the situation involving "the callous shooting of African people" was brought about by the continued imposition of apartheid. The South African Government was strongly condemned for its resort to "massive violence against and killings of the African people" and the Council reaffirmed that apartheid was a crime against the conscience and dignity of mankind and seriously disturbed international peace and security. The South African government was

(314) See also Article 3, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, and Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968.

(315) The Convention entered into force on 18th July 1976.

(316) Adopted by 108 votes to 11 with 22 abstentions. The EEC countries objected to this resolution, particularly the references to illegitimacy and self-determination in a non-colonial context, see UNMC December 1976, pp.39-40.

(317) This was reaffirmed in resolution 31/77. See also A/CONF 91/4 and Addenda, and resolution 3324 C (XXIX).

(318) See S/12100 and S/12101. See also Africa Research Bulletin, August 1976, pp.4123-7, and September 1976, pp.4158-61.

urged to end the violence, and the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination was recognised.³¹⁹ A World Conference for Action against Apartheid was held in Lagos, Nigeria, during August 1977. In its Declaration, adopted by acclamation, apartheid was emphasised to be a crime against humanity as well as a violation of the inalienable right to self-determination of all of the people of South Africa. The Conference referred to the UN recognition of the legitimacy of the struggle of the South African people and condemned the South African regime for its repressive measures designed to perpetuate white racist domination. The "inalienable right of the oppressed South African people and their national liberation movement to resort to all available means of their choice to secure their freedom" was recognised.³²⁰ In resolution 32/19, the Assembly invited the OAU and the UN to cooperate fully in order to implement this speedily.³²¹ Despite the strongly held view that self-determination does not apply as respects an independent State,³²² it is believed that international doctrine and practice have recognised an exception with regard to racial discrimination or apartheid practised by a government in a broad and systematic fashion.³²³ The question therefore is as regards the use of force within the context of international law. To recognise the resort to force against an independent State in a non-colonial situation as an international legal right is clearly a serious step to take, for it could be used to legitimate a whole series of foreign

(319) See also resolution 417 (1977).

(320) See UNMC August-September 1977, pp.6-9, and S/12426.

(321) See also resolutions 32/14 and 32/42.

(322) Supra, p.268 et seq.

(323) See further supra, p.257.

interventions on behalf of the peoples concerned. It therefore must be treated as highly exceptional. On the basis of the particular facts regarding South Africa and in the light of the material referred to in this section, it is submitted that the apartheid situation is sui generis and that the rules as to force in international law pertaining to the principle of self-determination are applicable. The use of force to enforce the apartheid system is against international law; for one cannot regard as legitimate an attempt to set up and enforce a structure deemed contrary to international law. The struggle may encompass the right under international law to resort to force.³²⁴

V - Intervention by Third Parties

The traditional law relating to third party intervention in armed conflicts is founded upon the dichotomy of international and internal wars. In the former case, the primary norms are exemplified in Articles 2(4) and 51 of the UN Charter,³²⁵ while in the latter case the relevant rules depend upon the characterisation of the situation as one of rebellion, insurgency or belligerency. These traditional rules, however, have come under increasing attack. The question of the nature of internal wars and changing community perspectives as to policy objectives in such wars have provided the backcloth upon which the

(324) Note, of course, that Article 1(4) of Protocol I, additional to the Geneva Conventions includes in international armed conflicts those in which peoples are fighting against racist regimes.

(325) Resolution 2131 (XX) declared that "No State has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political economic and cultural elements, are condemned".

re-evaluation has taken place.³²⁶ The Charter does not provide any assistance with regard to the legitimacy of intervention in internal conflicts, being primarily concerned with inter-State armed aggression and the corollary of the right of States to self-defence, while customary law concepts have proved inadequate in an age of ideological rivalry, subversion and decolonisation. The traditional rules, basically concerned with stability and sovereignty, seemed to posit the lawfulness of aid to a recognised government and the unlawfulness of aid to the rebels until the recognition of belligerency.³²⁷ Upon recognition of belligerency, neither side could be assisted. This in turn depended upon a particular factual situation, so that the key to the rules of intervention under international law was the notion of effectiveness.

Other approaches, however, were also suggested. Wright put forward the view that aid to either side in a conflict for control of authority structures was not permitted in international law once the outcome of the struggle had become uncertain.³²⁸ Falk divides violent conflict into four types, ranging from massive use of military force across

-
- (326) See eg. Falk "Janus Tormented: The International Law of Internal Law" International Aspects of Civil Strife (ed. Roseman), 1964, p.185, and Higgins "Internal War and International Law", The Future of the International Legal Order (ed. Black and Falk), vol.3, 1971, p.81, and also Moore, "The Control of Foreign Intervention in Internal Conflict" Law and the Indo-China War (ed. Moore), 1972, p.115; Rohlik, "Some Remarks on Self-Defence and Intervention" 6 Georgia Journal of International and Comparative Law, 1976, p.395.
- (327) See Moore loc.cit. p.252, Falk loc.cit. pp.206-7 and Friedmann, "Intervention, Civil War and the Rule of International Law" PASIL 1965, pp.67, 72. See also Lauterpacht, Recognition in International Law, 1947, pp.230-3.
- (328) "United States Intervention in the Lebanon" 53 AJIL, 1959, pp.112, 122. See also Hall International Law 8th ed. 1924, p.347, and Friedmann The Changing Structure of International Law, 1964, pp.264-7. This approach is criticised by Moore for its bias against legitimate governments, loc.cit. p.256. See also Akehurst, A Modern Introduction to International Law, 3rd ed. 1977, pp.263-7.

frontiers to internal struggles, the outcome of which is dependent upon external participation and a hierarchy of appropriate responses is proposed.³²⁹ Farer has suggested there should be a flat prohibition of foreign participation in tactical military operations in internal conflicts,³³⁰ while Barnett declares that only UN collective intervention is lawful.³³¹ Moore proposes that intervention may be lawful *inter alia* where authorised by the UN and where it is to aid a widely recognised government prior to insurgency (during insurgency, pre-insurgency aid may be continued but not increased) or in the event of impermissible assistance to insurgents.³³² One interesting approach, although suffering from difficulties of practical application, is that adopted by Boals, who suggests a principle of modernising legitimacy as a central criterion for evaluating the lawfulness of intervention.³³³ These approaches have demonstrated the inadequacy of the traditional rules and a number of mutually incompatible alternative formulations have been suggested, but the situation with regard to the theoretical structure of international law relating to foreign intervention remains fluid.

(329) Legal Order in a Violent World, 1968, pp.227-8 and 273.

(330) "Intervention in Civil Wars: A Modest Proposal" 67 Columbia Law Review, 1967, pp.266, 275. Thus, foreign forces "could not even enter a zone in which combat with enemy units was foreseeable, either to fight, advise or transport". Ibid.

(331) Intervention and Revolution 1968, pp.278-80.

(332) Loc.cit. pp.280-2.

(333) She writes that "in order for a State's intervention to be permissible, there would have to be a reasonable expectation that it would contribute to the modernisation of the society in which it took place" - "The Relevance of International Law to the Internal War in Yemen", The International Law of Civil War (ed. Falk), 1971, pp.303, 342-6.

One of the major reasons for the reconsideration of this subject in international law, has been the process of decolonisation.³³⁴ Communist³³⁵ and Afro-Asian³³⁶ States have affirmed the legitimacy of wars of national liberation and the lawfulness of third party assistance. Ideological and anti-colonialist sentiments combined and precipitated attempts to change the international law of intervention in self-determination situations.

1. Intervention Contrary to Self-Determination

In many ways, the development of principles concerning intervention contrary to self-determination parallels the creation of the legal right to self-determination itself, since intervention to defeat the application of an accepted legal right has to be unlawful. Such intervention can be seen as contrary to the purposes of the UN Charter one of which, according to Article 1(2) is the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. This of course raises issues of interpretation already discussed.³³⁷ There may be a viable argument that certain types of intervention are forbidden under resolution 1514(XV) paragraph 4 of which states that "all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence".³³⁸ While this prohibition is primarily aimed at the administering power, the expressions used certainly permit the

(334) Other major reasons include the American intervention in the Vietnam war and super-power intervention within spheres of interest, US in the Dominican Republic in 1965 and the USSR in Czechoslovakia in 1968.

(335) See Ginsbergs loc.cit. and Falk loc.cit. p.233.

(336) See eg. Anand, New States and International Law 1972, pp.53-60.

(337) Supra, p.102 et seq and p.171 et seq.

(338) Emphasis added.

interpretation that armed interventions by third parties against such peoples are illicit. In a similar vein, resolution 2131 (XX), the Declaration on Inadmissibility of Intervention, stated that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention" and this approach was reaffirmed in a number of UN resolutions.³³⁹ Since the UN has now termed colonialism a crime and called for its speedy end,³⁴⁰ action by third parties to prolong colonialism would be unlawful. This is so not only upon the grounds of contravention of the principle of self-determination, but also in the light of the application of Article 2(4).to self-determination situations.³⁴¹ The Declaration on Principles of International Law, 1970, stated that every State was under the duty to refrain from any forcible action which would deprive peoples entitled to self-determination of the exercise of their rights, while in the section discussing the principle concerning the duty not to intervene within the domestic jurisdiction of any State, in accordance with the Charter, it was noted that the use of force to deprive peoples of their national identity constituted a violation of their inalienable rights and of the principle of non-intervention.³⁴² The consensus definition of aggression of 1974 reaffirmed "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence."³⁴³

(339) Eg. resolutions 2160 (XXI), 2189 (XXI) and 2734 (XXV).

(340) Eg. resolutions 1514 (XV), 2105 (XX), 2189 (XXI), 2326 (XXII), 2465 (XXIII), 2548 (XXIV), 2708 (XXV), 2621 (XXV), 2908 (XXVII), 3070 (XXVIII), 3103 (XXVIII) and 3481 (XXX).

(341) Supra, p. 402.

(342) See also A/7326 paras.28, 83 and 173, and A/7619 paras.164 and 165.

(343) Article 1 of the definition declared that aggression was the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or "in any other manner inconsistent with the Charter of the United Nations".

In terms of State practice relating to Africa, the Algerian conflict can be seen as an important stage in the relative development of the decolonisation approach to intervention situations as against the traditional norms. With regard to support given to the French authorities, the Arab States in particular made strenuous efforts to prevent American equipment supplied to the colonial power from being used in Algeria.³⁴⁴ During 1956 and 1957, it was argued that American-supplied equipment was being utilised to suppress the liberties of the Algerian people.³⁴⁵ In fact, the USA did impose some restrictions. In August 1955, a statement was forthcoming from the French Foreign Minister to the effect that in accordance with assurances given to the USA, American supplies were not being used for the "maintenance of order" in Algeria.³⁴⁶ However, by late 1956 and 1957, the US government declared its unwillingness to attach a non-Algerian use condition to military equipment for France.³⁴⁷ Reference was made in 1958, following the use of US-supplied aircraft in bombing raids on Sakiet,³⁴⁸ to the existence of some restrictions on use of American equipment in North Africa by the French.³⁴⁹ Fraleigh concludes that the US satisfied the requirements neither of the traditional law of neutrality³⁵⁰ nor of the developing law of decolonisation.³⁵¹ In this, he is correct. American

(344) See Fraleigh loc.cit. pp.215-18.

(345) See eg. American Foreign Policy: Current Documents 1957 pp.1067-69

(346) Fraleigh loc.cit. p.216.

(347) Ibid.

(348) Supra, p.404.

(349) Fraleigh loc.cit. p.219. See also American Foreign Policy: Current Documents 1958, pp.1086-87.

(350) The US Government in fact never stated whether or not the conflict in Algeria could be categorised in terms of belligerency. See also Whiteman's Digest of International Law, vol.IV, 1964, pp.513-4.

(351) Loc.cit. p.216.

policy seemed at times uncertain. No recognition of belligerency was made, as, in terms of the traditional law, the US either regarded the conflict as a rebellion, in which case it could freely supply arms to France as the legitimate government, or as an insurgency, in which case it could create such rights and duties with regard to the situation as it wished. In both instances, America could lawfully assist the French. The fact that it clearly felt some constraint may be seen as the effect of the nascent law of decolonisation in the political field. It cannot really be seen as recognition of a legal constraint, however.³⁵²

It was with regard, however, to the policies of Portugal, South Africa and the rebel regime in Rhodesia that the norms of decolonisation relating to intervention on behalf of the colonial power or power acting in defiance of self-determination particularly developed. In 1963, the OAU adopted its resolution on decolonisation in which it inter alia called upon the western powers, especially Britain and the United States, to cease all direct and indirect support given to Portugal, which was conducting "a real war of genocide" in Africa. The year before, the General Assembly in resolution 1807 (XVII) had pointed out that Portugal was using equipment supplied by its allies for the purposes of repression and called upon States to refrain from assisting the Portuguese repression and to take all measures to prevent the sale and supply of arms and military equipment to Portugal. In resolution 1819 (XVII) States were requested to deny Portugal any support or assistance which might be used for the suppression of the people of Angola and to terminate the supply of arms. The OAU had

(352) In 1960 the FLN submitted a memorandum to the NATO powers declaring that military aid to France was unlawful as contrary to the laws of neutrality, whereas aid to the FLN itself was not so banned; see Fraleigh loc.cit. p.218. This may be seen as an attempt to reconcile the traditional law of intervention with the developing norms of decolonisation.

since its inception sought to establish a diplomatic and economic boycott of Portugal.³⁵³ The attempt in November 1965 by the African States to persuade the Security Council to adopt diplomatic and economic sanctions against Portugal failed, but these efforts succeeded with respect to the General Assembly with its adoption of resolution 2107 (XX) by 66 votes to 26 with 15 abstentions. It should be noted, however, that France, the UK and the USA did not accept that Portugal was using military supplies in Africa received from its NATO partners.³⁵⁴ In succeeding years, the Assembly adopted further resolutions calling on all States, especially those in NATO, to desist forthwith from giving Portugal any assistance which would enable it to continue the repression in Africa and to prevent the sale and supply of arms and military equipment.³⁵⁵ The OAU secretariat in accordance with AHG (Res.9(I) of 21 July 1964) established a coordinating bureau of sanctions, but this met with relatively little success. The aid provided by South Africa to Portugal with regard to the latter's African colonies,³⁵⁶ was also criticised by the UN. In resolution 2507 (XXIV), South African intervention against the peoples in the Portuguese territories was condemned and this was repeated in resolutions 2707 (XXV) and 2795 (XXVI). The Assembly condemned the continued collaboration of Portugal, South Africa and the illegal regime in Southern Rhodesia, "designed to perpetuate colonialist and racialist domination in the region, and the

(353) See eg. CIAS/Plen 2/Rev 2 Resolution A, AHG/Res 9(I), AHG/Res 45(II), CM/Res 34 (III) and CM/Res 49 (IV).

(354) GAOR, 20th Session, Plenary 1407th Meeting, paras.57-60 (France) and ibid 4th Committee, 1592nd Meeting, paras.10 (US) and 24 (UK).

(355) Eg. resolutions 2184 (XXI), 2270 (XXII), 2395 (XXIII), 2507 (XXIV), 2707 (XXV), 2918 (XXVII) and 3113 (XXVIII).

(356) See passim, Arnold, The Last Bunker, 1976.

persistent intervention against the peoples in the territories concerned³⁵⁷ by police and armed forces as well as mercenaries from South Africa and Southern Rhodesia.³⁵⁸

Portuguese and South African intervention on the side of the illegal regime in Rhodesia clearly represented substantial assistance. This was so particularly with regard to South Africa who committed armed forces for the use of that regime for a number of years. South African units first appeared in Rhodesia during the latter part of 1967 and suffered their first casualty in Spring 1968.³⁵⁹ Following the growth of the guerrilla war during 1972, South African troops in Rhodesia were increased, their numbers ranging from 2,000 to 5,000.³⁶⁰ Both the OAU and the General Assembly of the UN adopted resolutions with respect to sanctions³⁶¹ and condemning Portugal and South Africa for their support of the illegal regime.³⁶² Shortly after the unilateral declaration of independence by the minority regime, the Security Council called upon all States not to recognise the regime in Southern Rhodesia and to refrain from rendering any assistance to it.³⁶³ Resolution 217 (1965), similarly adopted by the Council, with only France abstaining, specified in particular the need to desist from providing the illegal regime with arms, equipment and military material and called for an oil

(357) I.e. those under Portuguese domination.

(358) Resolutions 2918 (XXVII) adopted by 98 votes to 6 with 8 abstentions and 3113 (XXVIII) adopted by 105 votes to 8 with 16 abstentions.

(359) Arnold, op.cit. pp.147-49.

(360) Ibid p.149.

(361) Supra, p.421 et seq.

(362) Eg. AHG/Res 25/Rev.1 (II), AHG/Res 39(b) (II), ECM/Res 13 (VI), ECM/Res 14 (VI), CM/Res 75 (VI), CM/Res 78 (VII) and General Assembly resolutions 2022 (XX), 2138 (XXI) and 2151 (XXI).

(363) Resolution 216 (1965).

embargo.³⁶⁴ The UK was called upon to prevent, by the use of force if necessary, the arrival at the Mozambique port of Beira of vessels reasonably believed to be carrying oil destined for Rhodesia.³⁶⁵ In 1967, the Assembly criticised States still trading with Rhodesia, particularly Portugal and South Africa, and condemned the presence of South African armed forces in Rhodesia and its arms aid for suppressing the legitimate struggle of the people.³⁶⁶ In resolution 2283 (XXIII), adopted by 86 votes to 9 with 19 abstentions, the Assembly again condemned the "illegal intervention" of South African forces in Rhodesia, characterising it additionally as a serious threat to the sovereignty and territorial integrity of African States, and called on the UK as the administering power to ensure the immediate expulsion of such forces and to prevent all armed assistance to the regime.³⁶⁷ The Security Council in 1970 by 14 votes to none with 1 abstention (Spain), acting under Chapter VII of the Charter, decided that member States "shall refrain from recognising this illegal regime or from rendering any assistance to it". It condemned the policies of the South African and Portuguese governments for maintaining links with the regime and demanded "the immediate withdrawal" of South African police and armed personnel from Southern Rhodesia.³⁶⁸ The General Assembly in succeeding years condemned South African intervention in contravention of this resolution.³⁶⁹ Thus the illegality of South African armed intervention

(364) Mandatory economic sanctions were instituted in Security Council resolution 232 (1966) and extended in resolutions 253 (1968), 277 (1970) and 388 (1976).

(365) Resolution 221 (1966).

(366) Resolution 2262 (XXII).

(367) See also General Assembly resolution 2508 (XXIV).

(368) Resolution 277 (1970). See also resolutions 320 (1972), 328 (1973) and 333 (1973).

(369) Eg. resolutions 2652 (XXV), 2796 (XXVI) and 3297 (XXIX).

in support of the illegal regime was quite clearly demonstrated by the international community, and on the grounds not only of the suppression of the right to self-determination but also as constituting a serious threat to the sovereignty and territorial integrity of African States, primarily Zambia.³⁷⁰

The case of Namibia is special in that one is concerned with an illegal occupation by South Africa of a former mandated territory, rather than a traditional colonial situation. In other words, the legal position revolves around not only the right of self-determination of the people of the territory but also the terms of the mandate and the situation created by its revocation. Nevertheless, it is submitted that South Africa is in an analogous position to an unlawful colonial situation and that intervention on its behalf with respect to the territory is unlawful as contrary to the principle of self-determination. The International Court in the Namibia case declared that so far as third States were concerned, they were "under obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration".³⁷¹ This would clearly cover intervention on the side of South Africa with regard to the territory of Namibia. Indeed the General Assembly has deplored on a number of occasions, support given by any State to South Africa relating to the territory³⁷² including the supply of military equipment.³⁷³

(370) Note, that the South African action was also contrary to the wishes of the colonial power.

(371) ICJ Reports 1971, pp.16, 58.

(372) See eg. Assembly resolutions 1899 (XVIII), 2871 (XXVI), 3031 (XXVII) and 3111 (XXVIII).

(373) See eg. Assembly resolutions 31/146 and 32/9.

In a different category to the issues of the Portuguese African territories, Rhodesia and Namibia is the problem posed by South Africa's apartheid policy. South Africa is an independent State and it cannot be classified as a colonialist entity, but as we have seen³⁷⁴ the right of self-determination is applicable to the situation as a direct result of the apartheid policy of wide-ranging and institutionalised systematic racial discrimination. In traditional international law, aid to South Africa's government is perfectly legitimate since a state of belligerency or of insurgency does not exist, nor can one talk in terms of a rebellion. But the application of the principle of self-determination has clearly had an effect with regard to the perceived relevance of norms relating to the control of intervention. This case, arguably more than any other, demonstrates with clarity how in self-determination situations the traditional rules relating to intervention have been modified so that they rely upon status rather than an acceptable level of territorially based effectiveness. Under the impact particularly of the African States and, after 1963, the OAU, the General Assembly has adopted a number of resolutions calling for diplomatic and economic sanctions against South Africa.³⁷⁵ The Security Council in 1963 adopted resolution 181, with France and the UK abstaining, calling on all States to stop the sale and shipment of arms, ammunition and military vehicles to South Africa. This was extended in resolution 182, adopted unanimously, to include equipment and materials for the manufacture and maintenance of armaments. Britain and France maintained in fact that the embargo covered only arms that could be used for internal repression and that arms for external defence could be supplied.³⁷⁶ The Council in resolution 282 (1970) strongly condemned all violations of the arms embargo called for in

(374) Supra, p. 257.

(375) Eg. resolutions 1761 (XVII), 2054 (XX) and 2396 (XXIII).

(376) SCOR 18th Year, 1078th meeting, paras.16-20 (UK) and ibid para.31 (France).

previous resolutions. It urged the strengthening of the arms ban by a variety of means including withholding the supply of all vehicles, equipment and spare parts for the use of the armed forces and paramilitary organisations of South Africa. An attempt to declare a mandatory arms ban on South Africa failed in June 1975 due to a triple veto cast by the UK, USA and France,³⁷⁷ and in 1976.³⁷⁸ The Anti-Apartheid Conference at Lagos 1977,³⁷⁹ organised by the UN in co-operation with the OAU and Nigeria, called on all States to "cease forthwith" all sales and supplies of arms and military equipment and to refrain from any assistance to the South African regime in its military build-up and in its attempts to obtain a nuclear capability. The Conference also recognised the urgent need for economic and other measures, universally applied, to secure the elimination of apartheid, and called upon the UN and all governments, as well as economic interests including transnational corporations, urgently to consider such measures. The termination of sporting contacts with South Africa was also recommended.³⁸⁰ In November 1977 the Security Council unanimously imposed a mandatory arms embargo against South Africa.³⁸¹

(377) The OAU called this action a testimony to "their well-known commitment on the side of the South African racist regime". See CM/Res 428 (XXV) which also criticised the increasing aid given to South Africa by those three countries and the Federal Republic of Germany.

(378) But with regard to the situation in Namibia, see S/12211.

(379) Attended by representatives of 112 Governments, as well as by representatives of the OAU, liberation movements, UN bodies, apartheid groups and prominent individuals.

(380) UN Monthly Chronicle, August-September 1977, p.8. The General Assembly had earlier declared that States and organisations aiding the colonial and racist regimes in Southern Africa were accomplices to inhuman practices, see resolutions 31/33 and 31/6. In resolution 32/35, the Assembly condemned strongly all States which collaborated politically, diplomatically, economically and militarily with South Africa. See also resolutions 32/14 and 32/42.

(381) Resolution 418 (1977), citing acts of repression by South Africa, its defiant continuation of the system of apartheid and its attacks against neighbouring independent States. See *supra*, p.260.

The South African policy of creating independent Bantustans has also been greatly criticised by the international community and aid by third parties to implement it condemned. In General Assembly resolution 3411 D (XXX), all governments and organisations were urged not to deal with any institutions or authorities of the Bantustans or to accord any form of recognition to them.³⁸² In resolution 31/6A adopted by the Assembly on the same day as the purported independence of the Transkei, all governments were urged to deny any form of recognition to that entity and to refrain from any dealings with it or with any other Bantustan. All States were requested to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with any Bantustan.³⁸³ The OAU urged member-States not to recognise any Bantustan and declared that a violation of this commitment would be seen as a betrayal of the continent of Africa. The OAU also committed itself to a campaign to dissuade all UN member-States from recognising the Transkei.³⁸⁴ In June 1977, the Security Council unanimously endorsed Assembly resolution 31/6A.³⁸⁵ From the foregoing survey of practice with regard to South Africa, it can be stated that arms aid to that country is now illegal as would be any form of military intervention. In other words, the world community has recognised the existence of a self-determination situation in South Africa and has condemned the resort by the authorities of that country to various means, including the policy of Bantustanisation, to suppress that legitimate right. Accordingly, intervention on the side of South Africa in its repressive activities would be contrary to international law.

(382) Adopted by 99 votes to none with 8 abstentions.

(383) A number of western countries expressed reservations about this request, see UN Monthly Chronicle, November 1976, pp.14-15.

(384) CM/Res 493 (XXVII).

(385) Resolution 407 (1977). See also Assembly resolution 32/14.

It is submitted that a clear example of the use of force by a third party contrary to the principle of self-determination is afforded by the case of Western Sahara. The conclusion of the UN Visiting Mission was that there was an overwhelming consensus among Saharans in the territory in favour of independence and opposing integration with any neighbouring country,³⁸⁶ while the International Court declared that there existed no legal ties between the territory and neighbouring countries which would affect the right of the population to self-determination.^{386a} Within a couple of days of the publication of these documents in mid-October 1975, the Moroccan Government stated that a march of some 350,000 civilians from Morocco into the Sahara territory would take place to urge recognition for its claims.³⁸⁷ Spain declared that the proposed march threatened international peace and security and brought the matter to the Security Council.³⁸⁸ The Council adopted resolution 398 (1975) calling upon the Secretary-General to consult the concerned and interested parties and to report back to enable the appropriate measures to be taken.³⁸⁹ It also called for restraint and moderation, and, while not explicitly referring to self-determination, reaffirmed Assembly resolution 1514 (XV) and all other relevant General Assembly resolutions relating to the territory. The report of the Secretary-General summarised the positions of the parties and declared the situation to be grave.³⁹⁰ Spain called for a further meeting of the Council on November 1st since Morocco had announced that the proposed march ("the green march") would commence on November 4th.³⁹¹ The Spanish

(386) A/10023/Add 1. Annex paras.202 and 229. See also supra, p.227.

(386a) ICJ Reports 1975, pp.12, 68.

(387) S/11852.

(388) S/11851.

(389) A stronger Costa Rica draft resolution calling upon Morocco to desist immediately from the proposed march was not adopted, S/11853.

(390) S/11863.

(391) S/11864.

representative declared that if necessary force would be used to defend the territory.³⁹² In resolution 379 (1975) the Council called on concerned and interested parties "to avoid any unilateral or other action which might further escalate the tension in the area".³⁹³ On the 6th November, the first wave of the "Green March" left Tarfaya in Morocco to cross the border, to be followed by a second wave the next day.³⁹⁴ The Security Council reconvened and in resolution 380 (1975) deplored the march and called on Morocco to withdraw all marchers from the territory and resume negotiations. The Secretary-General declared that the march had increased tension.³⁹⁵ On the 9 November, King Hassan of Morocco announced that the marchers would be withdrawn and two days later talks between Spain, Morocco and Mauritania commenced.³⁹⁶ These led to a tripartite agreement, partitioning the territory between Morocco and Mauritania.³⁹⁷

The Moroccan action in employing "the threat or use of force" in a "manner inconsistent with the purposes of the United Nations" contrary to Article 2(4) of the Charter in the light of the provisions relating to self-determination, constituted an unlawful intervention contrary to the principle of self-determination. The meek response of the UN cannot disguise the fact that the action concerned directly contravened the terms of the principle as can be clearly seen by an examination of the report of the UN Visiting Mission and the opinion of the ICJ. The

(392) S/PV.1852, pp.13-15.

(393) French and American pressure succeeded in preventing any stronger reaction, see Franck "The Stealing of the Sahara" 70 AJIL, 1976, pp.694, 713.

(394) See Gretton, Western Sahara - The Fight for Self-Determination 1976, p.47. See also African Research Bulletin, November 1975, pp.3836-8.

(395) S/11874.

(396) Africa Research Bulletin, November 1975, pp.3836-8.

(397) See *supra*, Chapter 4, p.235.

inhabitants of the territory were faced with a fait accompli produced by the tripartite agreement and were thus prevented from "the free and genuine expression of the will of the peoples of the territory" noted by the ICJ.³⁹⁸ The sad conclusion that the UN proved itself incapable of enforcing or pressing hard the right it had itself strenuously emphasised is inescapable, but this should not obscure the recognition of the illegality of the Moroccan action. If the measures taken by Morocco and Mauritania contrary to the free exercise of the right to self-determination of the inhabitants of the territory of Western Sahara cannot be accepted as legitimate, the question arises as to the characterisation of the armed support given by France to Mauritania.

Following the partition of the territory, hostilities commenced between Morocco and Mauritania on the one hand and the Algerian-backed forces of the Polisario on the other. Since Mauritania was the weaker partner of the anti-Polisario alliance, it became the favoured target for attack.³⁹⁹ Moroccan troops with Mauritanian permission entered Mauritania and the Mauritanian-held part of Western Sahara. According to the Moroccan Foreign Minister in January 1978, some 6,000 Moroccan troops and half of its air force were stationed in Mauritania and equipment was also being supplied.⁴⁰⁰ In addition to this help, Mauritania had also requested French arms and military equipment in June 1977.⁴⁰¹ In November 1977, French paratroopers were sent to Senegal

(398) ICJ Reports, 1975, pp.12, 68.

(399) See eg. Africa Research Bulletin, May 1976, pp.4029-30. The capital of Mauritania was twice attacked, see Keesings Contemporary Archives, pp.28343 (June 1976) and 28574 (July 1977).

(400) West Africa, 9 January 1978, p.81.

(401) Keesings Contemporary Archives, p.28492. On May 1, 1977, Polisario had attacked the Mauritanian mining town of Zouerate and a French couple were killed and 6 French nationals taken hostage, *ibid* p.28573.

and French planes began reconnaissance flights over Algerian desert areas.⁴⁰² A systematic photo-survey of Mauritania's desert regions was completed at the end of November and was followed by a series of direct air strikes against Polisario guerrillas, involving Jaguar combat jets.⁴⁰³ In addition, French arms deliveries arrived in Mauritania and that country's telecommunications network was expanded and operated by French military experts.⁴⁰⁴ Polisario expressed the view that the war had become a direct French aggression against the Saharan people and had adopted the form of genocide.⁴⁰⁵

As a general principle, governments not involved in a belligerency situation may legitimately request foreign aid, even military aid. This does not apply where the government concerned represents a colonial administration and is acting in a fashion contrary to the principle of self-determination. Mauritania is not in this category. However, it is clearly pursuing a course of action incompatible with the implementation of the internationally recognised right of the Saharan people to self-determination. French aid took the form inter alia of direct air assaults upon the Polisario movement in an attempt to protect Mauritanian installations and economic interests and French nationals working in the area. The UN Visiting Mission in 1975 found that Polisario had considerable support among all sections of the population⁴⁰⁶ and was able to organise

(402) West Africa, 7 November 1977, pp.2234-5. Ostensibly to search for French nationals seized, see previous footnote. Eight hostages were released in December 1977, Africa Research Bulletin, December 1977, p.4688.

(403) Africa Research Bulletin December 1977, pp.4690-2. Three major battles involving French aircraft were reported during this month of which two were confirmed by the French and Mauritanian authorities, see *ibid* and Keesings Contemporary Archives, p.28822.

(404) *Ibid* p.4690. For further details of the French involvement in Mauritania, see *ibid*, February 1978, p.4750.

(405) *Ibid*, June 1978, p.4875. The French involvement was also criticised in the Benin Conference on Mercenaries held in January 1978. See *ibid*, January 1978, p.4699.

(406) A/10023/Add 5, Annex para.219.

mass public demonstrations.⁴⁰⁷ It clearly formed the vanguard for the expression of the view of the Saharan people. Indeed, both the commander of Spanish forces in the Saharan territory during 1975 and the Secretary General of the government of Spanish Sahara during 1975 stated before the Spanish Parliament in March 1978 that Polisario was the sole representative of the Saharan people in 1975.⁴⁰⁸ The conclusion appears, therefore, that France has militarily intervened against a legitimate self-determination movement and the legitimacy of this action must be seen as highly dubious.

International practice, and African practice in particular, has clearly established a principle to the effect that certain types of intervention on behalf of colonial and other regimes acting contrary to the right of self-determination⁴⁰⁹ are unlawful.

It is notoriously difficult to define the nature and extent of intervention,⁴¹⁰ and extremely difficult to determine the types of intervention, in favour of States acting contrary to the principle of self-determination, which would be unlawful. Clearly military intervention would be illicit and possibly also the supply of military arms and equipment, though this would depend upon the particular situation.⁴¹¹ Nevertheless, a presumption against such supply would not be unreasonable. The question of other forms of aid is, however, on a different plane. It is believed that the onus of proof that such

(407) Ibid para.220. The movement succeeded in producing mass support among the population, ibid para.237.

(408) Africa Research Bulletin March 1978, p.4771.

(409) The test of behaviour with regard to self-determination is crucial since international aid to the UK, the colonial power in the Rhodesian situation, has been consistently called for, see further supra. p.421.

(410) See Thomas and Thomas, Non-Intervention, 1956, pp.67-78.

(411) Included in this category would be the supply of mercenaries, see eg. resolution 31/7 and OAU resolutions ECM/Res 5 (III) and AHG/Res.49 (IV).

assistance is unlawful shifts in these circumstances, so that it is the complainant States that have to establish a reasonable case. The test of validity would here revolve around the nature, extent and efforts of such aid within the context of the particular case concerned. It should be noted, for example, that the UN on a number of occasions has adopted resolutions condemning the activities of foreign economic and other interests in the colonial territories that impede the implementation of resolution 1514 (XV) and the efforts to eliminate colonialism, apartheid and racial discrimination.⁴¹²

2. Intervention to Promote Self-Determination

UN Practice - Article 2(4) of the Charter stipulates the basic rule prohibiting the threat or use of force against the territorial integrity or political independence of any State. Resolution 1514 (XV) notes that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the UN Charter, while the 1965 Declaration of Inadmissibility of intervention (resolution 2131 (XX)) stated that "no State has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State". In addition, it was stated that "no State shall organise, assist, forment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State". Those propositions were reiterated in the 1970 Declaration on Principles of International Law.⁴¹³ In the face of those expressions of what must be

(412) See eg. resolutions 2621 (XXV), 3398 (XXX), 31/7 and 32/35. See also the Declaration in Support of the Peoples of Zimbabwe and Namibia, 1977, and the Declaration of the World Conference for Action against Apartheid, 1977. Nuclear collaboration with South Africa has been especially condemned, see resolutions 31/7 and 32/35.

(413) See also the 1974 Definition of Aggression.

regarded as a fundamental norm of international law and in the light of the establishment of the legal right to self-determination, the question arises as to the lawfulness of intervention by States on behalf of peoples struggling for self-determination. It is more difficult to satisfy the requirements regarding the possible legitimacy of such intervention than to demonstrate either the legality of the resort to force by the peoples concerned or the illegality of intervention contrary to self-determination. This is because the legal rules circumscribing the recourse to force by States are far more substantial and fundamental than those in the preceding situations. The question of the legal justification required to demonstrate the alleged exception to this basic rule of international law is therefore more problematic. There are a number of possible bases for the licit nature of intervention on the side of peoples recognised as having the right to self-determination, including the concept of self-determination itself, the notion of collective self-defence and the justification of humanitarian intervention. A brief survey of some relevant international practice will first be attempted.

The first UN resolution that called for aid to such peoples in general terms is Assembly resolution 2105 (XX). This invited all States to provide material and moral assistance to the national liberation movements in the colonial territories.⁴¹⁴ Resolution 2160 (XX) recognised that peoples subject to colonial oppression were entitled to seek and receive all support in their struggle which is in accordance with the purposes and principles of the Charter, while resolution 2465 (XXIII) called for political, moral and material support for the peoples of colonial territories. The relevant paragraph in the 1970 Declaration

(414) See also resolution 2187 (XXI).

on Principles of International Law confined itself to a statement that "in their actions against, and resistance to, such forcible action⁴¹⁵ in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter". It should be noted that the word support is not enhanced by the insertion of "all" or "armed". This leads to the conclusion that the 1970 Declaration cannot be so construed as to recognise or establish a right to provide every kind of support to such peoples by States, in particular armed support.⁴¹⁶

A number of resolutions in 1970, however, adopted by the General Assembly of the UN recognised the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance in accordance with the resolutions of the UN and the spirit of the Charter.⁴¹⁷ In all cases, reference was made to the right of self-determination and aid rendered in accordance with the Charter. These constituted the only restraints upon the provision of help to such peoples. The former defined the permitted recipients of assistance and

(415) I.e. any forcible action which deprives peoples entitled to self-determination of their right to self-determination, freedom and independence.

(416) See for example the remarks of the UK representative to the Special Committee on Principles of International Law, 1970, A/8018 paras.234 and 235. See also the comments of the USA delegate *ibid* para.269, and the Australian representative *ibid* para.204. Cf. the Kenyan delegate *ibid* para.187, the Syrian delegate *ibid* para.207 and the Indian delegate *ibid* para.217. Rosenstock notes that the question of the type of response permitted to forcible deprivation of self-determination was ambiguously phrased "to permit acceptance by those who believe third States have a duty to send arms and men and those who believe third States should supply only moral and political support", "The Declaration of Principles of International Law concerning Friendly Relations: A Survey" 65 AJIL 1971, pp.713, 732.

(417) Resolutions 2649 (XXV), 2627 (XXV), 2621 (XXV) and 2734 (XXV).

the latter the extent of permitted assistance. In view of the continuing series of resolutions in such terms adopted since 1970,⁴¹⁸ it does appear as if the request for the provision of all assistance to peoples entitled to self-determination has become an accepted component within the principle of self-determination as defined by UN practice. But the question is whether all assistance comprises also the provision of military supplies, bases and men from third States. No resolution has explicitly stated this, but they have spoken rather of all political, moral and material assistance in accordance with the UN Charter. The provision of such aid to anti-government forces within a State by another State is clearly illegitimate. But is there an exception to this rule in self-determination cases? The answer in terms of UN declarations and resolutions has always appeared to be ambiguous. This is so also with regard to the results of the deliberations of the Special Committee on Aggression. It was argued that the draft definition had to contain a provision with regard to self-determination in order to protect States supporting peoples entitled to exercise the right from being accused of indirectly aiding aggression.⁴¹⁹ The point was also made that the proposed definition should cover the case where a dependent people was operating from a territory other than its own, ie. that of a third State.⁴²⁰ As against this, it was stated that recognition of the legitimacy of the use of force to aid dependent and oppressed peoples might well provide a pretext for manifest acts of aggression and that therefore the formula adopted in the 1970 Declaration on Principles should be retained intact.⁴²¹ A number of representatives strongly

(418) Eg. resolutions 2787 (XXVI), 2878 (XXVI), 2908 (XXVII), 3070 (XXVIII), 3163 (XXVIII), 3118 (XVIII), 3246 (XXIX), 3328 (XXIX), 3421 (XXX), 31/92, 31/30, 31/33, 32/10 and 32/154.

(419) A/8019 para.144.

(420) Ibid para.145.

(421) A/8171 para.36. See also A/8419 para.43 and ibid Annex III para.22.

maintained that States which gave material support to dependent peoples could not be accused of supporting aggression,⁴²² while others felt that the linking of self-determination and aggression created an extraneous issue. There was no exception to Article 2(4) of the Charter.⁴²³ Some representatives declared that any reference to self-determination should not lead to a weakening of the prohibition of aggression or the use of force. The proposed definition was intended to restrain not encourage violence.⁴²⁴ In the event, Article 7 provided that nothing in the definition of aggression could in any way prejudice the right to self-determination of peoples "forcibly deprived of that right ... nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter" and in conformity with the 1970 Declaration on Principles of International Law. Article 3 was particularly mentioned as not being able to affect such rights. This article enumerated certain examples of acts of aggression and two of them are especially relevant. Article 3(f) dealt with the action of a State in allowing its territory which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State. Article 3(g) is concerned with the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State or its substantial involvement therein. It should also be noted that in addition to express references to the 1970 Declaration on Principles of International Law,⁴²⁵ the definition states explicitly that nothing contained in it shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning

(422) A/8929 para.33.

(423) Ibid para.34.

(424) A/9411 para.27.

(425) In preambular paragraph 8 and Article 7.

cases in which the use of force is lawful.⁴²⁶ The interpretation of intervention by third States in support of peoples entitled to exercise the right of self-determination as expressed in the 1974 Definition therefore depends upon the inter-relationship of all these factors. The ambiguity of the formulation in Article 7 opened the way to diverse interpretations. Some of the western powers, bearing in mind references to the Charter and the 1970 Declaration and the absence of an explicit reference to the use of force in Article 7, declared that the right to struggle meant only struggle by peaceful means. The American representative, for example, stated that Article 7, like Article 6, merely provided assurances with regard to rules not being dealt with. It did not legitimise acts of armed force by a State which would otherwise constitute aggression.⁴²⁷ The French representative declared that Article 7 was a safeguarding clause, essentially political in nature and somewhat alien to the text of the definition,⁴²⁸ while the Netherlands delegate emphasised that it was important to guard against interpreting the affirmation of the right of peoples to receive support for self-determination as a legitimisation of armed support.⁴²⁹ On the other hand, representatives from Communist and Third World States took a different view. The USSR representative declared that nothing in Article 3(g) could be construed as casting doubt on the legitimacy of guerrilla warfare and peoples in self-determination struggles had the right to receive material and political aid.⁴³⁰ It was the Yugoslav view that struggle meant struggle by all means at the disposal of such peoples⁴³¹ while the Mongolian

(426) Article 6.

(427) A/9619, Annex I p.24. See also the Canadian delegate *ibid* p.35.

(428) *Ibid* p.22.

(429) A/C.6/SR.1473 para.5. See also the Belgian representative, A/C.6/SR.1476 para.11 and the UK representative A/C.6/SR.1477 para.24.

(430) A/9619, Annex I p.37.

(431) *Ibid* p.26. See also the Democratic Yemeni representative, A/C.6/SR.1479 para.27.

representative declared that Article 7 recognised another case where the use of force was lawful.⁴³² The Algerian representative argued that Article 7 included the right to use armed force in pursuit of self-determination and every State had the right, even the duty, to provide support of all kinds to ensure the exercise of that right.⁴³³ What is interesting, however, was the view expressed by a number of third world representatives to the effect that Article 7 should have provided unequivocally that a State furnishing armed or other support to national liberation movements was not committing aggression.⁴³⁴ In spite of this, many delegates strenuously denied that Article 3(g) could affect the right of States to support self-determination struggles.⁴³⁵ In the light of this clear division in the interpretation of the right of support by third States for peoples in self-determination situations and in view of the absence of express affirmation in the text itself, it is difficult to maintain that the 1974 consensus Definition of Aggression altered the existing state of affairs.⁴³⁶ It merely safeguarded the status quo, although there was a diversity of opinion as to what that consisted of.

(432) A/C.6/SR.1479 para.12. See also the Hungarian representative, A/C.6/SR.1478 para.41.

(433) A/C.6/SR.1479 para.36. See also the representatives of Senegal A/C.6/SR.1480 para.17; Ghana, *ibid* para.25; Burundi A/C.6/SR.1482 para.8; Cameroon A/C.6/SR.1483 para.14; Egypt *ibid* para.32 and Sudan *ibid* para.13.

(434) Eg. The Congo A/C.6/SR.1478 para.35; Upper Volta A/C.6/SR.1480 para.36 and Dahomey A/C.6/SR.1482 para.39. See also Egypt A/9619, Annex 1 p.40.

(435) Eg. those from Bulgaria A/C.6/SR.1472 para.43; Kenya A/C.6/SR.1474 para.24; Algeria A/C.6/SR.1479 para.33; Cuba *ibid* para.42; Mali A/C.6/SR.1480 para.8; Uganda *ibid* para.20; Upper Volta *ibid* para.36 and Egypt A/C.6/SR.1483 para.32.

(436) See in particular Stone, Conflict Through Consensus, 1977, pp.66-86, and Ferencz, Defining International Aggression vol.2, 1975, p.48.

African Practice

Since UN practice is unclear as to whether third States may provide armed and other types of military assistance to peoples struggling for the legitimate exercise of self-determination, recourse must be had to other material. It should be recognised, however, that the acceptance of a legal right to self-determination in certain situations does impose an obligation upon States not to act in a fashion contrary to its legitimate exercise and does permit States to give their political and moral support should they so wish. The only outstanding question is whether armed support may also be lawfully proffered.

OAU practice in this respect offers a relatively consistent pattern. At the Addis Ababa conference of African States in 1963 which led to the creation of the organisation, a major speech was made by the Algerian President in which he pledged 10,000 Algerian volunteers to free African nations still under colonial or white minority control. Other African leaders offered facilities for training troops for such purposes.⁴³⁷ The Charter of the OAU declared as one of its purposes the eradication of colonialism in all its forms and as one of its principles absolute dedication to the total emancipation of the African territories still dependent. One of the specialised commissions created by the organisation was the Defence Commission. It first met in Ghana in 1963 and attempts were made to institute an African High Command. While its primary function would be to defend the territorial integrity and independence of African States, another important function was declared to be the provision of assistance to the freedom fighters of Africa, as properly organised and recognised, to liberate their countries from

(437) Cervenka, The Organisation of African Unity and its Charter 1968, pp.12-13.

foreign domination.⁴³⁸ For a variety of reasons, both political and military, the Defence Commission proved ineffective.⁴³⁹

Of crucial importance was the resolution on decolonisation adopted in 1963 by the Addis Ababa conference. This stated that "it is the duty of all African independent States to support dependent peoples of Africa in their struggle for freedom and independence". Six decisions were incorporated in this resolution. These included the creation of a coordinating Committee (later called the OAU Liberation Committee) to supervise operations against colonial and white minority regimes, a special Fund managed by this Committee to provide the necessary practical and financial aid to the liberation movements and agreements to assist nationalists from the liberation movements in their educational training and in other ways. Cervenka interpreted this resolution as *inter alia* conference pledges to buy arms for the freedom fighters, militarily train them and offer them shelter and transit in the forthcoming guerrilla wars.⁴⁴⁰ The Liberation Committee, based in Dar-Es-Salaam, has faced a certain amount of political turmoil. It performs basic liaison and diplomatic functions with respect to the various liberation movements accredited to it.⁴⁴¹ The fact that such movements have first to be recognised by the OAU is of great importance, for it enables the OAU not only to control the various financial and other advantages accruing upon recognition to a liberation movement, but also to perform something

(438) See the memorandum entitled Rationale for an African High Command AHG/3 (1964) quoted in Cervenka, The Unfinished Quest for Unity, 1977, pp.38-9.

(439) See Wolfers, Politics in the Organisation of African Unity 1976, pp.92-97, and Cervenka *op.cit.* pp.38-44.

(440) The Organisation of African Unity and its Charter, 1968, p.17.

(441) See generally Wolfers *op.cit.* pp.163-194, and Cervenka, The Unfinished Quest for Unity, 1977, pp.45-63.

of a legitimising function.⁴⁴² The creation of the Liberation Committee also involved the institutionalisation of aid to the anti-colonial and anti-racist struggle in general and to certain liberation movements in particular. The Committee consists of 21 members (in 1977) and its policy position has been that while it will assist in various financial training and supply matters the actual fighting is to be undertaken by the liberation movement concerned.⁴⁴³ In 1973, the Accra Declaration on the new Strategy for the Liberation of Africa emphasised that the liberation of Africa was the collective responsibility of all African States. Such collective responsibility was defined to include the payment of outstanding dues to the Special Fund,⁴⁴⁴ the provision of additional national and financial aid to the liberation movements and the establishment of training facilities for members of the liberation movements. States were also to be ready to provide collective military and other assistance to any OAU State should it become the victim of aggression from Portugal, Rhodesia or South Africa.⁴⁴⁵ In any event, the attitude of the OAU in general terms was quite clearly expressed from the start in terms of the collective provision of support for the liberation movements of the colonial and racist territories of Africa. The only restraint (apart from practical considerations and various personality and policy clashes) was that troops of the independent African States were not to be committed.⁴⁴⁶

(442) See *supra*, Chapter 6, p.379 et seq.

(443) Cervenka *op.cit.* p.52 et seq.

(444) In 1972, the OAU Conference of Heads of State resolved to increase by 50% its aid to the Liberation Committee, see Africa Contemporary Record 1972-3, 1973, p.C42.

(445) Africa Research Bulletin January 1973, pp.2714-5.

(446) This was also the wish of the Liberation Movements themselves, see Cervenka *op.cit.* pp.58-9.

Thus one can see that whereas the attitude of the UN to the problem of military support for peoples struggling for self-determination has been ambiguously formulated, that of the OAU has been consistently favourable.

UN resolutions dealing with specific African territories have over the years called for all moral and material assistance to the peoples struggling for self-determination. Resolution 2107 (XX), dealing with Portugal's African territories, declared that all States were, in co-operation with the OAU, to render all moral and material support necessary for the restoration of the inalienable rights of the peoples concerned.^{446a} This is expanded to include specialised agencies and international organisations.⁴⁴⁷ Similarly, the UN called for all moral and material assistance for the people of Zimbabwe in its legitimate struggle,⁴⁴⁸ and for the people of Namibia.⁴⁴⁹ A number of these resolutions specifically referred to the OAU, either in terms of assistance being provided with its co-operation⁴⁵⁰ or as a conduit for such assistance.⁴⁵¹ This can be regarded as highly significant, for the special status thus accorded to the OAU can be seen as having repercussions with respect to the interpretation of such resolutions. A request by the UN to provide "all moral and material assistance" in

(446a) See also eg. resolutions 2184 (XXI) and 2395 (XXIII).

(447) See eg. resolution 2507 (XXIV).

(448) See eg. resolutions 2151 (XXI), 2283 (XXIII), 2508 (XXIV), 2652 (XXV) and 2796 (XXVI).

(449) See eg. resolutions 2074 (XX), 2678 (XXV) and 3295 (XXIX). Note that in resolution 3324 C (XXIX), all States and international organisations were called upon to provide appropriate political, moral and material assistance to the oppressed peoples of South Africa and their liberation movements in the struggle for the eradication of apartheid, see also resolution 2505 (XXIV).

(450) Eg. resolution 2107 (XX) relating to the Portuguese territories and 2508 (XXIV) relating to Rhodesia. One should bear in mind, with regard to Namibia, the special status of that territory as an international territory administered de jure by the UN itself.

(451) See resolution 2283 (XXIII).

African colonial and racist situations with an explicit reference to the OAU may be understood in the light of the OAU comprehension of that phrase. So that if the OAU understands "all" assistance to comprise armed support (falling short of outright military intervention by foreign troops) this can play a relevant part in the interpretation of such UN resolutions. The views adopted by the OAU with regard to specific situations in Africa are of importance here and the OAU called for the intensification of the armed struggles of the peoples of Portuguese Africa,⁴⁵² Zimbabwe⁴⁵³ and Namibia,⁴⁵⁴ and for increased assistance to the relevant national liberation movements to achieve this. A significant step was taken with the publication of the Lusaka Manifesto on Southern Africa in 1969. Originally adopted at the Conference of East and Central African States held at Lusaka in April 1969, it was endorsed by the OAU Assembly in September of that year.⁴⁵⁵ It was welcomed by the UN General Assembly in resolution 2505 (XXIV) adopted by 113 votes to 2 (Portugal and South Africa) with 2 abstentions. The manifesto stated that the aim of the signatories was the right of self-determination for the peoples of Southern Africa and noted that while peaceful progress was blocked by those in power in the States of Southern Africa, there was no other choice but to give the peoples of the territories all the support of which the signatories were capable in their struggle.⁴⁵⁶ Following the OAU's rejection of "dialogue" with

(452) Africa Contemporary Record 1972/3, 1973 p.C10

(453) Africa Contemporary Record 1975/6, 1976 pp.C9-C10

(454) CM/Res 499 (XXVII).

(455) A/7754.

(456) The Manifesto also contained a number of conciliatory expressions which set in train the unsuccessful period of "dialogue" with South Africa, see Cervenka The Organisation of African Unity and its Charter, 1969, pp.114-22.

South Africa in 1971 at the Addis Ababa Summit Conference,⁴⁵⁷ the signatories of the Lusaka Manifesto adopted the Mogadishu Declaration which concluded that "there is no way left to the liberation of Southern Africa except armed struggle to which we already give and will increasingly continue to give our fullest support".⁴⁵⁸

An intensification of fighting in Southern Africa in fact resulted.⁴⁵⁹ As far as South Africa itself was concerned, the OAU on a number of occasions called for member-States to render maximum support to the people of that country for the intensification of armed struggle and the legitimacy of the struggle for the seizure of power by the people was reaffirmed.⁴⁶⁰ The UN-OAU Conference on Southern Africa held at Oslo in 1973 called for "massive assistance" to the liberation movements to isolate the colonial and apartheid regimes.⁴⁶¹ The important OAU Declaration of Dar-Es-Salaam on Southern Africa 1975 identified the objective of the organisation in the region (following the demise of the Portuguese empire) as the total liquidation of the twin evils of colonialism and racism. The full commitment of the OAU to this aim could not be questioned and if peaceful progress towards this objective was blocked the OAU "will support the armed struggle carried out by the peoples of the oppressed areas". This was the "unshakeable position" of the OAU.⁴⁶² The Maputo Conference in support of the peoples of Zimbabwe and Namibia 1977 called on governments to provide and increase

(457) CM/St.5 (XXVII).

(458) See UN Document UN/93 (137), 23 February 1972

(459) Cervenka The Unfinished Quest for Unity, 1977, p.119.

(460) See eg. Africa Contemporary Record 1972/3, 1973 pp.C13-C14; CM/res 428 (XXV); Africa Contemporary Record 1975/6, 1976, pp.C33-C34; CM/res 490 (XXVII) and CM/res 500 (XXVII).

(461) The UN-OAU Conference, Oslo, 9-14 April 1973 (ed. Stokke and Widstrand) 1973, p.18. See also *ibid* pp.30-36.

(462) Africa Contemporary Record 1975/6, 1976, pp.C71-C75.

material and financial support to the people of Zimbabwe and Namibia and their national liberation movements in consultation and cooperation with the OAU,⁴⁶³ while the Lagos World Conference for Action against Apartheid urged governments, organisations and individuals to provide all appropriate assistance to the oppressed people of South Africa and its national liberation movement.⁴⁶⁴

In other words, the OAU in general and African States in particular have been quite clearly committed to providing assistance to the peoples of colonial and racist States in Africa and such assistance included the provision of training facilities for guerrillas as well as economic aid and help in acquiring military supplies. It equally clearly did not extend to direct military intervention in the sense of providing troops. This policy also conditioned Africa's attitude to non-African aid to oppressed peoples recognised as entitled to exercise self-determination. Economic and arms supply assistance was accepted plus limited numbers of foreign advisers to aid in training guerrillas, but the use of troops from abroad in such situations remained unacceptable.⁴⁶⁵

It should be noted that in no Security Council or General Assembly resolution has there been any condemnation of the support activities of the OAU, its Liberation Committee or African or other States. This remains true despite knowledge by the UN of the facts.⁴⁶⁶ Critical

(463) UN Monthly Chronicle June 1977, p.45. Note also the statement by the Five Front-line Presidents (of Tanzania, Zambia, Angola, Mozambique and Botswana) in September 1976 reaffirming their commitment to the cause of liberation in Zimbabwe and the armed struggles. See Legum, Southern Africa - The Year of the Whirlwind, 1977, p.68.

(464) UNMC August-September 1977, p.7.

(465) See eg. Legum op.cit. pp.57-59.

(466) See eg. the Complaints made to the Security Council by South Africa and Portugal, SCOR 18th Year, 1042nd meeting paras.13 and 38-39 and ibid 1050th meeting para.6.

comment was reserved only for the policies and activities of the colonial and apartheid authorities and their supporters. One could well treat this as important evidence to the effect that the support provided for peoples exercising self-determination did not contravene the terms of the UN Charter. However, the question remains as to the basis in international law for such support, in the light of Article 2(4) of the Charter and the prohibition on the organisation, assistance, incitement etc. of armed activities directed towards the violent overthrow of the regime of another State.⁴⁶⁷

One possible argument is on the basis of the collective self-defence of the African continent. The President of Guinea stated at the 1963 Addis Ababa Conference that "it is essential that this Conference lays down a dead-line for the end of foreign domination in Africa, after which date our armed forces should intervene in the legitimate defence of the African continent against aggressors".⁴⁶⁸ The Algerian delegate to the Sixth Committee of the UN noted that the Charter accepted that the use of force was lawful in certain circumstances, one of which was individual and collective action in the exercise of the right of self-defence. The Addis Ababa Conference, it was declared, "simply exercised that right by providing for collective action to assist national liberation".⁴⁶⁹ Judge Ammoun in his Separate Opinion in the Namibia case, strongly expressed the view that "in law, the legitimacy of the peoples' struggle cannot be in any doubt, for it

(467) See the Declaration on the Inadmissibility of Intervention, 1965, the Declaration on Principles of International Law 1970 and the Definition of Aggression 1974.

(468) 7 Ethiopia Observer, 1963, No.1, p.30, quoted in Dugard "The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism" 16 ICLQ, 1969, pp.159,165.

(469) GAOR, 18th Session, Sixth Committee, 805th meeting, para.13.

follows from the right of self-defence, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter. It is also an accepted principle that self-defence may be collective; thus we see the other peoples of Africa, members of the Organisation of African Unity, associated with the Namibians in their fight for freedom".⁴⁷⁰ While it is perfectly legitimate under international law for independent States to establish a collective self-defence arrangement,⁴⁷¹ and indeed African States have declared that any aggression against any OAU member-State by colonial and racist regimes is to be regarded as an aggression against all the members of the OAU,⁴⁷² it appears distinctly odd to extend this to include peoples denied self-determination. The legal right to collective defence as provided in Article 51 of the Charter is restricted to where an armed attack occurs against a member of the UN⁴⁷³ and could by no means be interpreted to include a non-State people.⁴⁷⁴ Nor is it believed that the principle of enforcement by regional agencies permitted under Article 52(I) of the UN Charter could be of use, especially since Article 53 requires that no such enforcement action be undertaken under regional arrangements or agencies without the

(470) ICJ Reports 1971, pp.16, 70.

(471) See Article 51 of the Charter. See also Brownlie op.cit. footnote 2, pp.328-31, and Bowett op.cit. footnote 2, pp.200-248.

(472) CM/Res 154 (XI). See also AHG/Res 80 (XIII). But note that unlike the Charter of the Organisation of American States and the NATO and Warsaw treaties, the OAU Charter contains no reference to collective self-defence.

(473) But see S/1501, S/1511 and S/1588 re the Korean war. See also Brownlie op.cit. footnote 2, p.331, and Bowett op.cit. footnote 2, p.194. There is a controversy over the interpretation of "armed attack". See eg. Bowett op.cit. p.185, and Brownlie op.cit. p.280.

(474) As far as the contending theories as to the legal basis of the right to collective self-defence are concerned, see Bowett Self-Defence in International Law, 1958, pp.200-207, Brownlie International Law and the Use of Force by States, 1963, pp.329-331, Stone, Aggression and World Order, p.264, and McDougal and Feliciano, Law and Minimum World Public Order, 1961, pp.244-53.

authorisation of the Security Council.⁴⁷⁵ Similarly, it is submitted that the customary right of self-defence does not extend to the recognition of the use of force in self-defence by third States on behalf of non-State peoples. States cannot be permitted to resort to force to defend any perceived interest, particularly such interests beyond territorial integrity and political independence and even more so when no nationals are involved, on the legal ground of self-defence. For that concept to have any relatively stable case of meaning, a careful definition of "self" is mandatory, and an aim to end colonialism and racism would not be sufficient within this category.

It may be argued that third States may legitimately intervene on grounds of humanitarian concern. Whether such a doctrine does exist in international law⁴⁷⁶ or not,⁴⁷⁷ the question of the international protection of human rights is highly controversial. It is to be doubted whether international law permits States to intervene militarily in other States in order to remedy an alleged violation of human rights. Even if one were to accept the doctrine of humanitarian intervention in customary law, certain limits would have to be recognised as regards the situations in which such interventions would not be illicit. Some of the authors in favour of the existence of such a right have laid down

(475) See Akehurst, "Enforcement Action by Regional Agencies" 42 BYIL, 1967, p.175.

(476) See eg. Lillich (ed.) Humanitarian Intervention and the UN, 1973, *ibid* "Forcible Self-help by States to Protect Human Rights" 53 Iowa Law Review, p.325, *ibid* "Intervention to Protect Human Rights", 15 McGill Law Journal, p.205; Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention : Its Current Validity under the UN Charter" 4 California Western International Law Journal p.203, and Chilstrom "Humanitarian Intervention under Contemporary International Law : A Policy-Oriented Approach" 1 Yale Studies in World Public Order, p.93.

(477) See eg. Brownlie "Humanitarian Intervention" in Law and Civil War in the Modern World (ed. J.N. Moore) 1974, p.217, *ibid* International Law and the Use of Force by States 1963, pp.338-42 and Franck and Rodley "After Bangladesh : The Law of Humanitarian Intervention by Military Force" 67 AJIL, 1973, p.275.

criteria for its application. Lillich discusses five tests as follows:

(1) the immediacy of the violation of human rights, (2) the extent of the violation of human rights, (3) the existence of an invitation by appropriate authorities, (4) the degree of coercive measures employed and (5) the relative disinterestedness of the State involved in the coercive measures.⁴⁷⁸ Lillich further notes that such intervention may

begin "only on those rare occasions when the danger to the individuals concerned is imminent and the State whose duty it is to protect them is unable or unwilling to do so".⁴⁷⁹ Nanda has proposed the following

guidelines: (1) a specific limited purpose, (2) an invitation by the recognised government, (3) limited duration of the operation,

(4) limited use of coercive measures and (5) lack of any other recourse.⁴⁸⁰

Moore had additionally referred to "a minimal effect on authority

structures, a prompt disengagement consistent with the purpose of the

action and immediate full reporting to the Security Council and

appropriate regional organisations".⁴⁸¹ Intervention for the protection

of human rights should be permissible beyond pre-insurgency assistance

at the request of a widely recognised government, he writes, where

inter alia there is "an immediate and extensive threat to fundamental

human rights, particularly a threat of widespread loss of human life".⁴⁸²

(478) "Forcible Self-Help" loc.cit. pp.347-51.

(479) Ibid p.347.

(480) "The United States' Action in the 1965 Dominican Crisis : Impact on World Order - Part I" 43 Denver Law Journal, pp.437, 475.

(481) "The Control of Foreign Intervention in Internal Conflict", Law and the Indo-China War 1972, pp.115, 185, Moore notes that to allow unilateral action in such cases would be to permit "all manner of self-serving claims for the overthrow of authority structures" ibid, p.186.

(482) Ibid.

It can thus be seen that even those authors sympathetic to the existence of a right of humanitarian intervention express the criteria for validity of such action in restrictive terms. While such criteria may well have been, or be, extant with regard to a particular situation in colonially or racist dominated Africa at a given time or place,⁴⁸³ it is submitted that they cannot be regarded as having been fulfilled throughout the period of existence of the colonial and/or racist regimes, or more particularly since 1945. The doctrine of humanitarian intervention, if it exists in international law, cannot be used in the context of permitting a regular and institutionalised system of assistance to the oppressed peoples in Africa.⁴⁸⁴

It is the concept of self-determination itself that provides by far the most satisfactory legal mechanism for the acceptance of the legitimacy in international law of the assistance provided to the peoples of the colonial and racist territories concerned. It provides for the identification of the peoples entitled to decide their own political future in international law and regulates in a general sense the situations regarding the use of force by the parties concerned. By virtue of incorporating in accepted international documents, such as the 1970 Declaration on Principles of International Law and the 1974 Consensus Definition of Aggression, the entitlement of peoples to seek and receive support in their struggle, within sections devoted to self-determination, the approach is enhanced that the provision of assistance may be subsumed under the general rubric of self-determination. It is

(483) Possibly if the Soweto riots of July 1976 had been repeated over a wider area in South Africa and provoked a more bloody response.

(484) The doctrine of the protection of nationals abroad in certain circumstances, while more firmly based in international law, is not relevant here, see generally Akehurst, "The Use of Force to Protect Nationals Abroad" 5 International Relations, 1977, p.3. It is believed that the argument that there exists a right to use force "to protect kith and kin" as such abroad is incorrect, see Dugard loc.cit. pp.177-187.

clearly consistent with the stipulations of the principle and the phrasing of the relevant UN resolutions reinforces this approach. It is not, however, the case that third States have the right to intervene in support of every people entitled to exercise self-determination. This would be unwarranted and could prove highly disruptive in international society. Where a people, however, would be justified in resorting to force in the face of forcible action to deprive it of exercising the right to self-determination, it is suggested that a third State may legitimately intervene. Otherwise, no such right can be acknowledged.^{484a} Nor is it correct to state that the right of intervention encompasses all possible measures the third State (or organisation) may wish to adopt. Practice demonstrates that it does not include the provision of foreign troops,^{484b} but that it can include financial aid, training facilities, transit privileges and the supply of arms, as well as diplomatic support. The exception that this constitutes to the general rules of international law concerning assistance to groups acting to overthrow a particular regime has developed via the right of self-determination and the extent of assistance permitted in African situations has emerged as a result of the clear interpretation afforded by African practice of UN resolutions and declarations.

(484a) Higgins has argued that "the promotion of the right of self-determination is counterbalanced by considerations of stability" and that "until the rebels have established themselves with a status tantamount to that traditionally regarded as meriting a recognition of belligerency, normal relations including the supply of arms may continue with the recognised government", op.cit. p.103. It is submitted that in self-determination situations as previously defined under international law, this is misleading. The concepts of stability and belligerency are not regarded as directly relevant in modern interpretations of the use of force in such situations.

(484b) As distinct from small numbers of non-combatant military advisers.

It can, therefore, be seen that the concept of self-determination has affected the traditional rules of international law relating to intervention. In recognised self-determination situations, the relative status in law of the parties will determine the appropriate rules once the appropriate threshold of force has been reached. The classic criteria concerned with effectiveness, extent of control over territory and military success have given way in such cases to a consideration of the positions in law of the parties to the conflict in the light of the framework created by the principle of self-determination. Thus, the traditional approach based upon facts associated primarily with territory has been superseded and replaced by a status-oriented approach.

3 Intervention in Post-Self-Determination Situations^{484c}

International law does not recognise any remaining rights to self-determination by sub-national groups once the colonially defined people has obtained sovereignty. The only exception to the general proposition that the people cannot exercise self-determination more than once is South Africa as a result of its systematical and State organised application of racial discrimination. Therefore, if a conflict breaks out after independence, the ordinary rules of international law dealing with intervention become relevant. The presumption in favour of the State authorities that exists in non-belligerency situations under the law, in fact reflects another aspect of self-determination and that is the emphasis upon the free exercise of sovereignty by the people of a State via the recognised State machinery. Each State has the right freely to choose and develop its political, social, economic and cultural systems without external interference and this necessarily involves refraining from intervening as regards the governmental

(484c) See in particular Moore loc.cit; Falk loc.cit. and Higgins loc.cit.

authorities and processes of any given State. Where a part of the population of the independent State rebel, immediate aid to the rebels would prima facie offend against the principle of self-determination as defined in international law. This applies all the more so, when the rebels concerned are aiming not at capturing control of the government to replace it, but at the secession of a portion of the territory of the State concerned. In this situation, aid to the rebel secessionists would infringe the fundamental rule of international law that "every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country".⁴⁸⁵ In so doing the principle of self-determination would be undermined not enhanced. Should any secessionist enterprise meet with success, its defect in title would be cured by international recognition.⁴⁸⁶

(a) Intervention in Struggles to Overthrow Governments

(i) The Zaire-Shaba Crisis 1977-8

In March 1977, the Zaire Province of Shaba (the former Katanga) was invaded by members of the Congolese National Liberation Front (FNLC) most of whom had been living in Angola. The reported aim of the campaign was not the secession of Shaba, but the overthrow of General Mobutu and the creation of a government of national unity. Mobutu appealed to western countries for help. The USA provided a grant of \$1m of non-military aid, while the French despatched military equipment. Morocco sent troops, transported to the scene of the conflict by French

(485) See the 1970 Declaration on Principles of International Law and paragraph 6 of the resolution 1514 (XV).

(486) Eg. the Bangladesh case. The legality of India's intervention remains in doubt, see Okeke, Controversial Subjects of Contemporary International Law 1974, pp.142-57.

planes. By the end of May, the rebels had retreated into Angola.⁴⁸⁷ In May 1978, however, rebel forces captured the town of Kolwezi in Shaba. A western powers operation was mounted to rescue Europeans in the town. US planes supplied military equipment, while French and Belgian troops parachuted into Kolwezi. This mission was undertaken at the request of the Zaire government.⁴⁸⁸ The French troops, in fact, continued the operation and pursued the rebel forces. French speaking African States supported the French intervention, as did Nigeria, Egypt and other countries.⁴⁸⁹ Angola was accused of aiding the rebels but denied doing so.⁴⁹⁰ A Pan-African force was sent to the province to replace the French troops.⁴⁹¹ Despite opposition to both the French and "Pan-African" operations,⁴⁹² there appeared to be no argument that such interventions were legally, as distinct from politically, wrong. The case can be seen as support for the accepted view that a recognised government may call on outside assistance, even military intervention in certain situations. On the other hand, no State was prepared to admit aiding the rebels, a fact which is significant in that it tends to underline the view that such aid would be unlawful intervention in the affairs of a State.⁴⁹³

-
- (487) Africa Research Bulletin, March 1977, pp.4348-51, and Cervenka op.cit. footnote 83 pp.95-6.
- (488) Africa Research Bulletin, May 1978, p.4855. The stated aim was to protect French and foreign residents of Kolwezi and to re-establish security there, *ibid*.
- (489) *Ibid* p.4860. A Franco-African summit attended by 20 African leaders unanimously endorsed the French action, *ibid* p.4861.
- (490) Africa Research Bulletin, June 1978, pp.4890-1.
- (491) This consisted of troops from Morocco, Senegal, Central African Empire, Togo, Egypt, Gabon and the Ivory Coast, *ibid* p.4891. Morocco stated that the force was intervening because of external involvement in the Zaire situation, *ibid*.
- (492) See *ibid* pp.4892-3.
- (493) Note, that in October 1965, the OAU adopted a Declaration on the Problem of Subversion in which member-States pledged not to tolerate subversive activities aimed at fellow member-States, AHG/Res 27 (II). Note also that in Security Council resolutions 226 (1966) and 241 (1967) the use by Portugal of Angola as a base of operations to overthrow the Congolese government was unanimously condemned. See Akehurst, op.cit. pp.264-6.

(ii) Chad

In the continuing struggle between the government of Chad and the National Liberation Front, Frolinat, foreign aid has been given to both sides. France officially announced on July 19th 1977, that it had given military aid to the Chad government to enable it to fight the rebels.⁴⁹⁴ This was provided following an appeal by the Chad government and within the framework of bilateral accords.⁴⁹⁵ By April 1978 this aid consisted, according to the French Minister of Defence, of some 1,200 men and aircraft including 10 Jaguar fighter bombers.⁴⁹⁶ The US declared that the intervention of French troops was justified since it was a result of an appeal by the government of Chad.^{496a} By Summer 1978 it had become clear that only the activities of the French troops prevented the advancing Frolinat forces from capturing the Chadian capital.⁴⁹⁷ Libya⁴⁹⁸ has provided aid to the rebel forces and, it has been alleged,

(494) Africa Research Bulletin, July 1977, p.4492. The rebellion had broken out in the north of Chad in 1966, *ibid*, and French troops and equipment sent in 1968. These troops were withdrawn in 1971, see Hollick, "French Intervention in Africa in 1978", *The World Today*, February 1979, pp.71, 73.

(495) *Ibid*.

(496) Africa Research Bulletin, April 1978, p.4821. See *ibid* March 1976, p.3975, regarding the original agreements relating to French military "cooperants". There was a report by a Spanish journalist in June 1978 that some 3,000 French troops were involved in Chad and that they had virtually replaced the Chad army which had been decimated in battle and had suffered a large rate of desertions, Africa Research Bulletin, June 1978, p.4884.

(496a) Africa Research Bulletin, May 1978, p.4849. The US refused to draw a parallel between French and Cuban presences in Africa since France had "unique relations with some of its former colonies in Africa for obvious historical and cultural reasons" *ibid*. If this is intended as a qualitative legal justification for intervention, it must surely be incorrect. However, it may only have been intended to explain the greater political acceptability of such intervention by French speaking African States.

(497) Africa Research Bulletin, July 1978, p.4924.

(498) For the Libyan-Chad border situation and the annexation of Chadian territory by Libya see *infra*, Chapter 8, p.594.

troops as well.⁴⁹⁹ Although Chad recognised Frolinat in Spring 1978,⁵⁰⁰ Libyan aid would appear to be unlawful, certainly in the earlier phases of the operation.

(b) Intervention in Struggles for Secession

(i) The Congo 1960-64⁵⁰¹

The UN became involved at a fairly early stage of the Congolese Civil War and the Katangan secession, more specifically following the re-entry of Belgian troops purportedly to protect its nationals in the wake of the mutiny of the Force Publique. Although the UN was at first against the use of its troops sent as military assistance to the Congo to intervene in domestic conflicts, it gradually became more and more drawn into the problem of the Katangan secession. The Security Council defined the mandate of the UN in the situation in terms of the protection of the territorial integrity and political independence of the Congo. All States were called upon to refrain from any action which might undermine these.⁵⁰² The General Assembly called for UN assistance with a view to preserving the unity, territorial integrity and political independence of the Congo.⁵⁰³ Ultimately, the Security Council resolved to take all appropriate measures to prevent civil war in the Congo, including the use of force.⁵⁰⁴ In resolution S/5002, the Council underlined UN support for

(499) See eg. Africa Research Bulletin, July 1977, p.4492, and ibid June 1978, p.4884. Libyan aid to the rebels appears to have been the reason for a split in Frolinat and the defection of one section to the government side, ibid August 1978, p.4958. See also ibid September 1978, pp.4982-3.

(500) Africa Research Bulletin, March 1978, p.4781. This stated recognition was presumably of a party to the internal conflict. It would not appear to have been intended as a recognition of belligerency. It occurred within the context of a ceasefire agreement guaranteed by Libya and Niger.

(501) See supra, Chapter 5, p.306.

(502) See resolution S/4405.

(503) Resolution 1474 ES-IV.

(504) S/4741.

the unity of the Congo and condemned secessionist activities. UN forces were involved in military action to end the secession on the basis of this resolution. African States were against the secession⁵⁰⁵ and condemned any assistance to the Katangans. It should be noted that the role played by the Belgians and by foreign mercenaries was significant as regards the reactions of the UN throughout the period. Without such foreign support, the secession would probably not have occurred and would not have been suppressed with the use of UN force. Nevertheless, the events constitute support for the legal position in favour of the recognised governmental authorities with regard to third party intervention.

(ii) Nigeria, 1967-70⁵⁰⁶

OAU opinion and that of the majority of African States was against the Biafran secession. At the Kinshasa Conference of the organisation in September 1969 a resolution was adopted condemning secession and recognising the Nigerian situation as a purely internal affair.⁵⁰⁷ A mission sent by the Conference to Nigeria declared that any solution to the crisis had to be in the context of Nigeria's unity and territorial integrity.⁵⁰⁸ Arms were supplied to the federal government of Nigeria by the UK, USSR, Czechoslovakia and Egypt and Biafra received some supplies from France and Portuguese sources.⁵⁰⁹ However, as far as Biafra was concerned very little aid was forthcoming from foreign governments.⁵¹⁰ Four African States (Tanzania, Gabon,

(505) Supra, Chapter 5, p.306 et seq.

(506) See supra, Chapter 5, p.316.

(507) Africa Research Bulletin, September 1969, p.856.

(508) Africa Research Bulletin, November 1967, p.901.

(509) See Cervenka, The Unfinished Quest for Unity, 1977, pp.97-8. See also Stremlau, The International Politics of the Nigerian Civil War 1977, pp.220-23, 296-9.

(510) Stremlau, op.cit. p.223.

Ivory Coast and Zambia) in fact recognised Biafra during Spring 1968, although feelings of sympathy for the suffering Biafrans appears to have been a strong consideration.⁵¹¹ The overwhelming majority of African States, however, accepted Nigeria's unity and territorial integrity.⁵¹² Had Biafra succeeded in ensuring its existence in any permanent fashion, it is likely that more African States might have considered recognition, but its failure to do so meant a reliance in legal terms by States upon the notion of self-determination as reinforcing the sovereignty and integrity of independent States.

(iii) Eritrea⁵¹³

The Eritrean Liberation Movement was formed in Cairo by refugees from the province in the late 1950's and by 1961 was firmly established as the Eritrean Liberation Front (ELF).⁵¹⁴ ELF offices were opened subsequently in a number of other Arab capitals. In the early years, Egypt provided some support to the ELF,⁵¹⁵ as did Sudan⁵¹⁶ and Somalia.⁵¹⁷ Syria and Iraq gave aid also,⁵¹⁸ but by the mid-1970's it appeared that Saudi Arabia and Kuwait provided the main financial support,

(511) Supra, p.316 et seq.

(512) See Africa Research Bulletin, September 1968, p.174 and ibid September 1969, p.1517.

(513) See supra, Chapter 5, p.323.

(514) Keesings Contemporary Archives, p.21611, and Legum and Lee, Conflict in the Horn of Africa, 1977, p.23.

(515) See Boyce, "The Internationalising of Internal War : Ethiopia, the Arabs and the Case of Eritrea" 5 Journal of International and Comparative Studies, 1972, pp.51, 58-60.

(516) Keesings Contemporary Archives, p.21611.

(517) Legum and Lee op.cit. p.25.

(518) Keesings Contemporary Archives, p.24507, and Africa Research Bulletin, December 1970, pp.1056-7.

while Libya was the major arms supplier.⁵¹⁹ By this time, there were three Eritrean liberation organisations.⁵²⁰ Until the Ethiopian revolution in 1974, some assistance was also provided by the USSR and China. However, the OAU attitude adopted by the non-Arab members of the organisations, has remained one of central concern with the principle of the preservation of colonial boundaries and the territorial integrity of States and thus it has not supported the Eritrean struggle.⁵²¹

In 1976 the USSR began supplying arms and advisers to the new Ethiopian government.⁵²² Unlike the Ogaden case,⁵²³ Cuban troops did not intervene massively on the side of the Ethiopians, but they were, however, introduced to Eritrea to strengthen the position of government forces besieged in the main towns of the province.^{523a} The Eritrean movement EPLF, declared in the Spring of 1978 that some 3,500 Cuban troops were stationed in the province. However, there appeared to be no sign that Cuba was joining the Ethiopian offensive in the area on anything like a big scale and Russia, too, was cautious in its support of the Ethiopian attempt to achieve a military victory in Eritrea.⁵²⁴ The Ethiopian head of State, in fact, denied in June 1978 that Russian or Cuban troops were playing a supportive combat role against the Eritrean movements.⁵²⁵

(519) Legum and Lee op.cit. p.26. The Palestine Liberation Organisation also gave aid to the Eritrean movements, *ibid*.

(520) *Ibid* pp.57-8.

(521) See eg. Cervenka "Eritrea : Struggle for Self-Determination or Secession" 12 *Afrika Spectrum*, 1977, pp.37, 45-6.

(522) Legum and Lee op.cit. pp.12-3.

(523) See *infra*, p.511.

(523a) *Africa Research Bulletin*, January 1978, p.4705.

(524) *Africa Research Bulletin*, May 1978, pp.4840-1.

(525) *Africa Research Bulletin*, June 1978, pp.4886-7.

Cuban advice and Soviet military suppliers, nevertheless, could reasonably be assumed to have been indispensable.

(iv) The Ogaden⁵²⁶

The Western Somali Liberation Front (WSLF) was established in 1961 and Somalis living in Ethiopia were recruited for training. Those recruits served in the Somali army and became the leaders of the struggle for the Ogaden.⁵²⁷ In January 1976, the WSLF claimed additional provinces in the south of Ethiopia, so that the area alleged to be inhabited by Somali peoples consisted of some 625,000 square kilometres.⁵²⁸ Throughout that year, violence increased.⁵²⁹ By May 1977, it was confirmed that between 3,000 and 6,000 heavily armed WSLF members had invaded the Ogaden region from Somalia.⁵³⁰ The attack met with success. Strategic bridges were destroyed and sections of the vital Addis-Djibouti railway line were taken over by the WSLF.⁵³¹ In June, Ethiopia claimed that regular Somalia soldiers were involved in the fighting,⁵³² and Kenya complained that 3,000 Somali troops had attacked a border police post.⁵³³ By August, it was clear that a full scale war was in progress, and that the WSLF had captured a large part of the Ogaden.⁵³⁴ An attempt

(526) See *supra*, Chapter 5, p.297.

(527) Legum and Lee *op.cit.* p.33.

(528) *Ibid* and Keesings Contemporary Archives p.28633.

(529) *Ibid* p.68.

(530) *Ibid* p.87 and Keesings Contemporary Archives p.28633.

(531) *Ibid* and Keesings Contemporary Archives p.28634.

(532) *Ibid*.

(533) Africa Research Bulletin, June 1977, p.4496. This was denied by Somalia, *ibid*, but it aroused Kenyan fears and led to its declaration of support for Ethiopia, see Africa Research Bulletin, September 1977, p.4556.

(534) Keesings Contemporary Archives p.28634, and Legum and Lee *op.cit.* p.88.

to mediate by an eight nation OAU commission failed when a WSLF delegation was refused a hearing and Somalia boycotted the closing session of the commission. The commission reaffirmed the principle of respect for borders as in existence at the date of independence and the territorial integrity of member-States of the OAU.⁵³⁵ Although Somalia denied any involvement in the Ogaden at this stage,⁵³⁶ remains of Somali tanks and planes were shown to correspondents in that region.⁵³⁷ Somalia called for the application of the principle of self-determination to the inhabitants of the area and diplomatic relations between it and Ethiopia were broken at the start of September, with the latter declaring that a full scale war was in progress between the countries.⁵³⁸ The fall of the main Ethiopian tank and radar base in the area, Jijiga, and the strategic passes around it on September 14th 1977, after a particularly heavy battle, marked the greatest extent of the WSLF advance.⁵³⁹ At about this time, the Soviet Union began supplying Ethiopia with military equipment, including large numbers of tanks and planes, and Cuba sent advisers. Both countries expressed total support for Ethiopia's struggle.⁵⁴⁰ Somalia denounced its treaty of friendship with the USSR and expelled all Russian advisers and broke diplomatic relations with Cuba, claiming that up to 15,000 Cuban troops

(535) Africa Research Bulletin, August 1977, pp.4525-6.

(536) Ibid. Somalia did say, however, that "off duty soldiers were allowed to "volunteer" to serve with the WSLF, Legum and Lee op.cit. p.88.

(537) Ibid p.4530.

(538) Africa Research Bulletin, September 1977, p.4556. It was claimed that Somalia had sent its regular armed forces into the Ogaden, ibid p.4558.

(539) Ibid pp.4557-8.

(540) Ibid and Africa Research Bulletin, October 1977, p.4592. Kenya also expressed full support for Ethiopia; ibid p.4591.

were fighting in the Ogaden.⁵⁴¹ The Ethiopian counter-offensive, spearheaded by Soviet equipment manned by Russians and Cubans, commenced in early 1978. On February 11th, Somalia officially announced that its regular army was being sent into the Ogaden. Until this point, Somalia had admitted moral and material support for the WSLF, but had denied any involvement by its regular forces.⁵⁴² This action did not affect the situation and on March 9th, Somalia declared that its forces were being withdrawn from the Ogaden.⁵⁴³ Ethiopian forces stopped at the border, but threatened to cross it if Somali support for the WSLF continued.⁵⁴⁴ In fact, WSLF activity continued, with pledges of Somali support,⁵⁴⁵ and Ethiopian planes carried out air raids on two towns in northern Somalia.⁵⁴⁶

Somalia received no international support for its expansionist activities. The eight-nation OAU good offices commission, in calling for respect for borders as existing at the date of independence and for the principle of territorial integrity, implicitly condemned Somalia while west and pro-western States, fearful of the Soviet Union's

-
- (541) Africa Research Bulletin, November 1977, p.4651. The USSR had ended arms shipments to Somalia, *ibid*. The US criticised the "excessive quantities of weapons" sent to Ethiopia as part of the Soviet Union's "unwarranted involvement" in the Horn of Africa, *ibid*, January 1978, p.470. Ethiopia declared that it could establish relations and receive aid from whatever quarter, *ibid*. The US estimated that by February 1978 between 800 and 1000 Soviet military advisers were in Ethiopia and about 3,000 Cubans, 2,000 of whom were involved in combat, *ibid*, February 1978, p.4740.
- (542) Africa Research Bulletin, February 1978, p.4742. At this stage, the US estimated that between 10,000 and 11,000 Cuban troops were in Ethiopia, *ibid* pp.4743-4.
- (543) Africa Research Bulletin, March 1978, p.4773. Somalia announced on March 15th that all its regular forces had been withdrawn from Ethiopian territory, *ibid* p.4774. For details of the defeats suffered by Somalia see *ibid* pp.4773-4.
- (544) Africa Research Bulletin, April 1978, p.4809.
- (545) *Ibid* May 1978, p.4840. See also *ibid* July 1978, p.4917.
- (546) *Ibid* June 1978, p.4878.

ambitions in the area, made it clear that arms aid would only be forthcoming to defend Somalia's recognised frontiers. Iran and Saudi Arabia announced they would come to Somalia's assistance if its internationally recognised borders were violated.⁵⁴⁷ France declared that, once Somalia withdrew its forces from the Ogaden, it might be given military aid.⁵⁴⁸ The US called on Somalia to renounce any claims to territory in Ethiopia, Kenya and Djibouti.⁵⁴⁹ African States refrained from any support of Somalia's stance⁵⁵⁰ and the OAU called for an end to all foreign interference.⁵⁵¹ Kenya expressed strong support for Ethiopia,⁵⁵² as did the USSR, Cuba and communist countries in general. Somalia received some financial aid from Iran, Saudi Arabia and Abu Dhabi and some equipment from Egypt.⁵⁵³ It was, however, apparent that no State was willing to provide more than token military aid while Somali troops were still in the Ogaden, and that no western or African States would endorse Somalia's territorial claims in the region. It is equally clear that Somalia's strong moral and material support of the WSLF was an illicit intervention in Ethiopia's internal

(547) Africa Research Bulletin, December 1977, p.4676, and *ibid* January 1978, p.4701.

(548) Africa Research Bulletin, February 1978, p.4743.

(549) Africa Research Bulletin, March 1978, p.4776. At the beginning of June, the US announced that it would send a delegation to assess Somalia's defensive weapons requirements, after Somalia gave a written undertaking not to alter boundaries by force, *ibid* June 1978, p.4878.

(550) *Ibid*.

(551) *Ibid* January 1978, p.4702, in a press statement.

(552) *Supra*, note 533.

(553) Africa Research Bulletin, March 1978, p.4776. An Egyptian plane carrying 19 tons of artillery and mortar shells for Somalia was forced to land in Kenya. This action by Egypt in providing some military equipment for Somalia was severely criticised by the OAU, *ibid* February 1978, p.4742.

affairs, while its invasion of the Ogaden by its regular troops was contrary to international legal rules. The support that Ethiopia received, on the other hand, was perfectly legitimate as it was provided after an appeal by the acknowledged government in the face of an act of aggression. The fact that such support extended to vast quantities of Russian equipment and some 12,000 Cuban troops should not detract from this, especially since no counter-invasion of Somalia was attempted.

(c) Intervention in Situations of Authority Vacuum

Angola. While the traditional rules of international law provide some guide to the legitimacy of intervention in civil war situations, the position where there exists an authority vacuum is rather different. This is because of the absence of an accepted government and the consequent lack of recognised effectiveness criteria by which to measure the status of the insurgent forces. The case of Angola during 1975-6 illustrates this, especially in the light of the extent of foreign intervention.

On 15 January 1975, the Portuguese government signed an independence agreement at Alvor with the three Angolan nationalist movements, the Popular Movement for the Liberation of Angola (MPLA), the National Front for the Liberation of Angola (FNLA) and the National Union for the Total Independence of Angola (UNITA).⁵⁵⁴ This provided for the three movements to work with Portugal in a transitional government until the date of independence, 11 November 1975. However, fighting broke out between the MPLA, receiving arms from Russia and Yugoslavia, and the FNLA, strongly supported with Zairean money (some of it from the US) and arms.⁵⁵⁵

(554) See Africa Contemporary Record 1974/5, 1975, pp. B539, C217. See further *supra*, Chapter 6.

(555) Legum and Hodges, After Angola, 1976, pp.13-14.

In June 1975 the three movements signed the Nakuru agreement, under OAU pressure, with a view to restoring peace in Angola, but this rapidly broke down.⁵⁵⁶ By September, the MPLA appeared in a commanding military position, controlling more territory than its rivals and 11 of the 16 provincial capitals, as well as Luanda, the national capital, and practically the entire seaboard of Angola. Large quantities of Soviet and Yugoslav arms appeared to arrive in Angola for the MPLA as from March 1975 and Cuban troops seem to have aided the MPLA, initially in relatively small numbers, as from July of that year.⁵⁵⁷ The US began sending arms to the FNLA and Unita movements (as distinct from money) in September 1975.⁵⁵⁸

The turning point in the crisis came on 23 October 1975, when South African forces invaded Angola as a result of earlier negotiations with FNLA representatives.⁵⁵⁹ By early November, the MPLA had suffered heavy losses, US supplies were arriving almost daily from Zaire and increasing numbers of South African troops were entering the country. However, Russian tanks, rocket launchers and troop carriers were being supplied to the MPLA in large quantities and some 1,500 - 3,000 Cuban combat troops were arriving from staging posts in neighbouring Congo.⁵⁶⁰ This was at a time when the legal authority in the country was vested (theoretically at least) in the coalition transitional administration of Portugal and the

(556) Ibid pp.52 and 69-75.

(557) Ibid pp.19-21.

(558) Ibid p.27. However, there were suggestions that small quantities of arms were shipped in June, *ibid*.

(559) Ibid p.15. South African forces had conducted raids on SWAPO camps in Southern Angola in preceding months, and had occupied positions around the strategic Ruacana Falls in August, *ibid* p.36. Estimates of the numbers of South African troops entering Angola varied from 12,000 to 4,000, *ibid* p.37.

(560) Ibid.

three Angolan movements.⁵⁶¹ Until October 1975, the accepted OAU policy was that a government of national unity combining the MPLA, FNLA and Unita should rule an independent Angola and that there should be no external intervention.⁵⁶² The meeting of Central African Foreign Ministers⁵⁶³ on November 16-19 at Libreville, Gabon, condemned all foreign intervention in Angola from whatever source.^{563a}

On November 10, the departing Portuguese High Commissioner solemnly proclaimed the independence and full sovereignty of Angola as from midnight that day. However, sovereignty was vested in "the Angolan people" as a whole and not in any particular government.⁵⁶⁴ Thus, as of the date of independence no recognised authority was in being in Angola and no legal government. In the centre of the country, the MPLA declared the independence of the People's Republic of Angola, while simultaneously the FNLA and Unita proclaimed the independence of the Popular and Democratic Republic of Angola.⁵⁶⁵ In such circumstances, it was left to the tests of effectiveness and success to assert themselves. Some thirty States, led by Communist bloc countries and the other former Portuguese African territories, recognised the MPLA government. No State recognised the FNLA-Unita government. The majority of African States did not at this stage depart from their policy of recognising neither claimant.⁵⁶⁶ The

(561) However on 16 August 1975, the acting Portuguese High Commissioner announced that he was taking over full executive powers in the country in the absence of any functioning government, *Africa Contemporary Record 1975/6, 1976, p.A68.*

(562) See *ibid* pp.A67-8 and A71-2. See further *supra*, p.348.

(563) Cameroon, Chad, Rwanda, Central African Republic, Sao Tome and Principe, Gabon and Zaire.

(563a) Legum and Hodges *op.cit.* p.30.

(564) *Africa Research Bulletin*, November 1975, p.3819.

(565) *Ibid.*

(566) *Ibid* p.3820, and Legum and Hodges *op.cit.* pp.17 and 56.

discovery of the South African intervention, however, caused some States to reassess this policy. Nigeria reversed its previous policy and, citing the South African involvement, recognised the MPLA regime.⁵⁶⁷

Dahomey and Tanzania followed suit, giving the same reason, as did a number of other African States.^{567a}

The South African intervention caused the USSR to increase its arms supplies and Cuba to send several thousand combat troops to the MPLA,⁵⁶⁸ and this swung the military

balance against the FNLA-Unita coalition and their backers. By

February 1978, the MPLA had effectively defeated the other forces and made considerable territorial gains and South Africa had withdrawn its

troops.⁵⁶⁹ Recognition from a number of countries thereafter followed.

By 10 February, a majority of OAU member-States had recognised

the MPLA government so that the organisation formally admitted the new

State to membership. By late February over 70 countries had recognised

the MPLA government, including the EEC countries and Portugal.⁵⁷⁰

A number of preliminary points can be made about the Angolan situation. From January 1975 to 11 November of that year, the territory was technically ruled by a transitional coalition government comprising Portugal and the three nationalist movements while legally under Portugal's sovereignty. Until the end of 1974, aid and assistance to

(567) Ibid p.3824.

(567a) Ibid and Legum and Hodges op.cit. p.56.

(568) Legum and Hodges op.cit. p.57. It was estimated that by mid-January 1976, the MPLA was supported by 9,000 Cuban troops, 6,500 ex-Katangese gendarmes and 400 Russian advisers with extensive Russian military equipment, including tanks and planes, ibid pp.57-8. The London Institute of Strategic Studies later declared that South African troops had intervened before the Cubans, Africa Research Bulletin May 1976, p.4024.

(569) Ibid p.58.

(570) Ibid, note that in January, the OAU had been unable to adopt a resolution on the Angolan question as a result of a serious split, see Cervenka, op.cit. footnote 437, pp.145-7.

these organisations could be justified on the basis of the self-determination rule;⁵⁷¹ after that time it was more problematic, since Portugal had agreed to withdraw and gave no sign of wishing to remain. Nevertheless, since the policy of Portugal, the OAU and ostensibly, at least, of the MPLA, FNLA and Unita was that a government of national unity of the three movements was to be the recipient of the grant of independence, aid to these movements could perhaps be regarded as legitimate as aid to component parts of a transitional government that was to proceed to full sovereignty.⁵⁷² It would not appear that such assistance could be justified under the self-determination rule, since Portugal had ceased to act forcibly to deprive the people of the territory of their right. The South African intervention in October 1975 was, however, qualitatively different, both as regards the extent of the involvement (in terms of thousands of troops plus supporting equipment) and the identity of the intervening party. President Nyerere noted in November that the USSR had supplied the MPLA in its anti-colonial struggle over the years and had thereby gained a certain legitimacy for its continuing supply.⁵⁷³ The point was also made that whereas the presence of Cuban troops could be deplored, it constituted no threat to black Africa, but the same was not felt about the South African intervention.⁵⁷⁴ The fact that the South African troop

(571) Supra, p.483 et seq.

(572) But the fact that the movements were fighting each other during this time does underline the problems of this approach.

(573) It is interesting to note that where other foreign States have supplied arms in situations of civil strife, US practice has distinguished between traditional and non-traditional suppliers in determining the legality of such actions. See Digest of US Practice in International Law 1976, p.7.

(574) Africa Research Bulletin, November 1975, pp.3824-5.

involvement preceded the entry of large numbers of Cuban soldiers reinforces this argument. It appeared to have implications with regard not only to the character of an eventual government of Angola but also as regards the Namibia situation.⁵⁷⁵

With the Portuguese departure on November 11 and the declaration of two rival governments of Angola, the territory ceased to have an accepted authority structure. While this did not mean that the territory became *res nullius*, it meant that the question of a recognised government was suspended. It also meant that the ultimate test became one of territorial control and effectiveness. The majority of recognitions for the MPLA, including the important recognition by the OAU, came only after this test demonstrated the success of the MPLA side in the war. As far as external intervention in the post-independence era was concerned, both of the rivals in fact satisfied basic territorial control requirements under the belligerency guideline. But it is to be questioned whether that test, which relates to the status of forces rebelling against a legitimate authority, is relevant to a situation where there is no recognised authority. Additionally, of course, no State recognised the parties as belligerents.

In such cases, the basic relevant principle of international law would seem to be the non-intervention norm stipulated in the Declaration on Inadmissibility of Intervention in 1965. This condemned "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements". Other expressions of the prohibition of intervention such as Article 2(4) of the UN Charter and the 1970

(575) Security Council resolution 387 (1976) demanded that South Africa cease using Namibia as a base for provocative or aggressive acts against Angola.

Declaration on Principles of International Law define the object of this rule as the State itself, rather than in terms of a recognised government within the State. However, the absence of detailed analysis of the legitimacy of intervention in authority vacuum States, is noticeable. The point of the non-intervention norm, nevertheless, is to permit political and economic development within a State free from the constraints of external interference. It is in this sense an inherent part of the principle of self-determination, whereby peoples may freely determine their political status and freely pursue their economic, social and cultural development. Outside interventions which may distort that are unlawful. It would thus appear that foreign intervention which would prejudice the outcome of such a civil war runs contrary to one of the fundamental principles of international law. But such intervention may be permissible where prior foreign interference has occurred. In such cases, it may not be necessary for the party concerned in the civil struggle to demonstrate that it fulfils the conditions specified in the law of belligerency, nor would it appear that a presumption in law in favour of any particular party exists.

One should note in this context that both the USSR and the USA appeared to justify their aid to factions in Angola on the ground of prior foreign intervention.⁵⁷⁶

(576) Legum and Hodges op.cit. pp.18-19 and 25-27. Cuba and South Africa both justified their actions in terms of the prior intervention of the other, *ibid*, pp.20-21 and 35-38. It could also be argued that since neither side in the civil war was the established government, neither could act in the name of the State and thus invite foreign aid.

(d) Conclusions

In post-independence situations, the relatively newly established doctrine of self-determination taken together with the traditional rules of international law relating to intervention would seem to have produced a presumption in favour of the established government. Such a government may, in certain circumstances, seek and receive outside aid, even including military equipment and foreign troops. The Zaire and Chad cases demonstrate this. In addition, the OAU Ministerial Council unanimously adopted a resolution emphasising that in the exercise of its sovereignty, each country had the right to call for aid from any other nation if it judged its independence or security to be in danger.⁵⁷⁷ This was reaffirmed by the Assembly of Heads of State and Government of the OAU at Khartoum, which also stressed the principle of territorial integrity.⁵⁷⁸ However, it is less clear where a genuine internal revolt is involved that the government may legitimately request foreign aid.^{578a}

The traditional law states that once rebels have established a degree of control and effectiveness in a determinate piece of territory, with an administrative capacity, then a duty of non-intervention may arise with regard to them.⁵⁷⁹ However, as Higgins notes, "if there is evidence of support of the insurgents from foreign States, the government may call for help from a foreign power itself, even if the fighting on

(577) Ibid July 1978, p.4911.

(578) Ibid p.4913. The Assembly also condemned attempts by non-African States to create instability on the continent, *ibid*. The Conference was characterised by disputes over the relative legitimacy of French and Cuban involvements in Africa, *ibid*. It was estimated that in May 1978, French military personnel stationed in some 23 African States numbered 13,595, while Cuban military personnel numbered about 34,000 in some 12 countries, *ibid*, May, 1978, p.4859.

(578a) See Akehurst, *op.cit.* p.267. In both Zaire and Chad foreign involvement would appear to have been the case.

(579) See eg. Higgins, The Development of International Law Through the Political Organs of the United Nations 1963, p.211.

its territory has reached the dimensions of a civil war".⁵⁸⁰ This proposition is supported in African practice by the case of Chad, whose government in Spring 1978 controlled barely a quarter of the country following a Libyan-supported advance by Frolinat rebels. The rapid despatch of French troops thereupon occurred.⁵⁸¹ Another example of this would be the Soviet and Cuban aid to Ethiopia, following the capture of the Ogaden by the Somali-supported WSLF. However, it is important to distinguish between internal conflicts aimed at replacing authority structures and those where secession is the aim. In the former case and in the absence of foreign support of the insurgents, the legal position would be that success on their part, territorially defined, would prevent intervention against them by foreign States. But where the insurgents are seeking secession, it seems that this rule does not apply and that foreign intervention at the invitation of the accepted government would not be precluded. It is believed that this is demonstrated by the Biafra secession case. Where the secessionists are backed by foreign powers then a right of counter-intervention clearly exists, as shown by the Katanga and Ogaden cases. Of course, should the insurgents succeed in establishing a separate State as a matter of fact and supported by international recognition, international law will accept the situation.⁵⁸²

It is nevertheless believed that in such secessionist conflicts, Lauterpacht's approach that, provided the conditions of belligerency are

(580) Ibid, Moore declares that "assistance to a widely recognised government is permissible to offset impermissible assistance to insurgents" loc.cit. p.281.

(581) Keesings Contemporary Archives p.28977.

(582) See further supra, Chapter 6, p.358 et seq.

fulfilled, "the contesting parties are legally entitled to be treated as if they are engaged in a war waged by two sovereign States",⁵⁸³ is inadequate.

In the case of civil strife, in a State where no established government exists and the parties concerned are struggling to win control over people and territory and secure foreign recognition and support, international law posits, it would seem, a non-intervention rule so as to allow the factual situation in the territory to be resolved by internal elements alone. Where, however, a foreign State does intervene, other States may seek to nullify this by the interposition of financial and military aid. Although such instances of civil war in a recognised State with an authority vacuum are likely to be exceptional, it does appear as if insufficient attention has been paid to the problem from the point of view of international legal doctrine.

The role of the UN and the OAU in situations of internal conflict is worthy of mention. Such organisations may well fulfill a legitimating function with regard to intervention as, for example, the UN in the Katanga crisis, especially where it is uncertain whether particular factual criteria have been satisfied. Conversely, these organisations may serve to establish the illegitimacy of intervention in particular situations as, for example, the OAU in the Biafra case.⁵⁸⁴ This is in addition, of course, to the part played by the UN and the OAU with regard to general discussions of the nature of intervention.

(583) Op.cit. p.175.

(584) See also Security Council resolution 387 (1975) condemning South Africa's "aggression against the People's Republic of Angola" adopted by 9 votes to none with 5 abstentions.

VI - The Use of Force to Acquire Territory

Briggs wrote in 1940 that "for centuries title to territory acquired by conquest has been regarded as valid against the rest of the world".⁵⁸⁵ However, this approach has now been replaced by the concept of the inadmissibility of the acquisition of territory by force. A variety of international instruments proved relevant in the development of this principle.⁵⁸⁶ Article 2(4) of the UN Charter provides that member-States shall refrain from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the organisation. The question, therefore, is that if the use of force against States is prohibited in international law, can title to territory acquired as a result of such illegal activities logically be recognised? The response has clearly to be in the negative, for *ex injuria jus non oritur*.⁵⁸⁷ While illegality cannot in general create legal rights for the offending party, legal rights may arise in certain cases for third States acting in good faith as well as legal obligations with respect to the wrongdoer.⁵⁸⁸ The doctrine of inter-temporal law will operate to protect existing titles based on conquest,⁵⁸⁹ but as from the entry into force of

(585) "Non-Recognition of Title by Conquest and Limitations on the Doctrine" PASIL 1940, p.72.

(586) Eg. the Porter Conventions of 1907 forbidding the use of force to collect debts, the League of Nations Covenant which imposed a cooling-off period if a dispute arose between member-States likely to lead to a rupture in relations and the Kellogg-Briand Pact of 1928, the parties to which renounced recourse to war as an instrument of national policy. See generally Jennings, The Acquisition of Territory in International Law 1963, pp.52-68, and Langer, Seizure of Territory 1946.

(587) This is regarded by Lauterpacht as "one of the fundamental maxims of jurisprudence" op.cit. p.420, but cf. Kelsen Principles of International Law 2nd ed. 1966, pp.316-7

(588) Lauterpacht op.cit. p.421. Note that an illegal possessor of territory will be subject to and benefit from the rules of belligerent occupation.

(589) Jennings op.cit. p.53.

the Charter, if not earlier,⁵⁹⁰ new titles cannot thus be created. Article 11 of the Draft Declaration on Rights and Duties of States declared that "every State has the duty to refrain from recognising any territorial acquisition by another State acting in violation of Article 9",⁵⁹¹ while Security Council resolutions 242 (1967) on the Middle East situation emphasised "the inadmissibility of the acquisition of territory by war".

The 1970 Declaration on Principles of International Law underlined this point, noting that "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal".⁵⁹² The Definition of Aggression adopted by the General Assembly in 1974 provided in paragraph 3 of Article 5 that "no territorial acquisition or special advantage resulting from aggression are or shall be recognised as lawful".⁵⁹³

(590) Note eg. that the Assembly of the League of Nations resolved in 1932 that "it was incumbent upon members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris" LNOJ Sp.Suppl. 101, pp.87, 88. See also Brownlie op.cit. footnote 2, pp.418-9.

(591) Article 8 prohibited resort to war as an instrument of national policy and the threat or use of force contrary to Article 2(4) of the UN Charter.

(592) The Declaration continued by stating that "nothing in the foregoing shall be construed as affecting: (a) provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or (b) the power of the Security Council under the Charter".

(593) The preamble to the Definition reaffirmed that "the territory of a State shall not be violated by being the object even temporarily of military occupation or of any other measures of force taken by another State in contravention of the Charter and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof". The Working Group of the Special Committee on the Question of Defining Aggression declared that paragraph 3 of Article 5 was not to be construed "so as to prejudice the established principles of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force", A/AC.134/L.46.

Egypt and Syria had in fact sought to broaden the prohibition to cover acquisitions arising from any use of force,⁵⁹⁴ but this was not accepted. Ferencz makes the valuable point that in view of the state of international legal doctrine,⁵⁹⁵ the reference to territorial acquisition was redundant and reflected "the overwhelming concern for territory and national borders".⁵⁹⁶

Similarly, it should be noted that territorial acquisition which results from a treaty imposed by coercion will not be valid in law. Article 52 of the Vienna Convention on the Law of Treaties provides that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter.⁵⁹⁷ However, it has to be realised that most peace treaties will reflect the existing balance of power between the parties and a conceptual distinction has to be drawn between coercion and legitimate pressure. Where that line is drawn will depend upon the circumstances of the case, particularly the overt stance of the weaker party and also the perceptions of the international community.

The question arises at this stage as to whether the use of force in lawful circumstances, eg. in self-defence, may found title to territory. Jennings is clear that it cannot and writes that "it would be a curious law of self-defence that permitted the defender in the course of his defence to seize and keep the resources and territory of his attacker".⁵⁹⁸

(594) A/9019, p.23 and A/9619, p.20.

(595) See Waldock, "The Regulation of the Use of Force" 81 HR 1952, pp.455, 481.

(596) Op.cit. p.45.

(597) In the ILC Commentary on this Article, it was stated that the Commission believed that the invalidity of a treaty procured by the illegal threat or use of force was a principle de lege lata in contemporary international law, see the Yearbook of the ILC 1966, pp.246-7.

(598) Op.cit. p.55.

Eli Lauterpacht, however, has declared that to delete the word "unlawful" from the phrase "territorial acquisition by the unlawful use of force" would be to "turn an important safeguard of legal principle into an aggressor's Charter. For if force can never be used to effect lawful territorial change, then if territory has once changed hands as a result of the unlawful use of force the illegitimacy of the position thus established is sterilised by the prohibition upon the use of force to restore the lawful sovereign".⁵⁹⁹ But if the unlawful use of force cannot found title (and this is universally agreed) title cannot then pass to the wrongdoer and the right of self-defence remains in the dispossessed until the situation is either rectified or accepted. Title remains in the lawful owner. Entry onto the territory of an aggressor by the intended victim in pursuance of self-defence is perfectly legitimate and will set in motion the laws relating to belligerent occupation.⁶⁰⁰ Title cannot thereby be transferred in the absence of agreement, but neither can the new occupant be compelled to undertake an immediate withdrawal prior to such agreement.⁶⁰¹ It should be noted that the 1974 Consensus Definition of Aggression expressly reaffirmed that the territory of a State could not be the object of military occupation or of any other measures of force taken by another State in contravention of the Charter.

Jennings has argued that the acquisition of territory by the illicit use of force might be legitimised by the use of the concept of recognition by the international community, since "the traditional

(599) Jerusalem and the Holy Places 1968, p.52.

(600) It is important to distinguish clearly between acquisition of title to territory by force and belligerent occupation. See Wright, "The Middle East Crisis" 64 AJIL, 1970, p.74, and Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" *ibid*, p.7.

(601) See eg. Stone Conflict Through Consensus 1977, pp.58-9.

procedure by which the law is adjusted to fact - by which indeed, the law when occasion requires may seem to embrace illegality - is the procedure of recognition".⁶⁰² It appears, however, that this may now be an arguable proposition since both the 1970 Declaration on Principles and the 1974 Definition of Aggression prohibit recognition of the acquisition of territory by aggression. Probably the better view is to accept that the disposition of territory should follow an agreement between the parties directly concerned.⁶⁰³

African doctrine has consistently stressed the principles of sovereignty of States and territorial integrity. With regard to the Middle East situation, the OAU member-States stressed the inadmissibility of acquiring territory by force.⁶⁰⁴ This was enshrined in the programme of action adopted by the Afro-Arab Summit of March 1977, which underlined respect for the sovereignty, territorial integrity and political independence of all States and affirmed adherence in addition to the principles of non-interference in internal affairs of States, non-aggression, self-determination and the illegality of the forcible occupation and annexation of territory.⁶⁰⁵

Where a State's borders are delimited, demarcated and accepted by the international community, no problems should arise with regard to the practical application of the relevant norms protecting territorial integrity and sovereignty and prohibiting the acquisition of territory by force. However, a number of borders lack this certainty and

(602) Op.cit. p.62.

(603) See eg. Rosenne, "Directions for a Middle East Settlement - Some Underlying Problems", in The Middle East Crisis: Test of International Law (ed. Haldermann) 1969, p.59.

(604) See eg. resolutions CM/Res 134 (X), AHG/Res 53 (V), AHG/Res 56 (VI) AHG/Res 62 (VII), AHG/Res 66 (VIII) and ECM/Res 20 (VIII).

(605) Africa Research Bulletin March 1977, pp.434-6. See also Cervenka The Unfinished Quest for Unity 1977, pp.156-175.

delimitation and demarcation disputes abound, not least in Africa. In such cases, it is submitted, the apposite rules apply to protect the party in peaceful possession of the disputed territory.⁶⁰⁶ The Algerian Moroccan war of 1963 demonstrates the acceptance of this proposition. Large areas of the border were not demarcated and areas were claimed by Morocco which were in the possession of the French administration of Algeria and taken by its successor in title, the government of independent Algeria.⁶⁰⁷ Morocco occupied a series of border posts and a conflict ensued. Following the mediation of the President of Mali and the Ethiopian Emperor, an agreement was signed at Bamako in October 1963. In November, an extraordinary session of the OAU Council of Ministers was held which declared that OAU member-States "scrupulously respect all the principles" enshrined in the OAU Charter.⁶⁰⁸ Ultimately, agreements were signed between the two parties which proposed that the frontier between them was to be the same as during the colonial period.⁶⁰⁹

An example of the unlawful use of force in Africa to acquire territory across internationally accepted borders is provided by the Libyan-Chad dispute.⁶¹⁰ Libya claimed that the border was that drawn by the Laval-Mussolini agreement of 1935 (which never came into force) while Chad maintained that the border was that established by the French in the colonial period and accepted by the Franco-Libyan treaty of 1955. The colonial border was not challenged upon Chad's accession to

(606) See also Higgins *op.cit.* p.187, Brownlie *op.cit.* pp.382-3 and Bowett *op.cit.* p.35.

(607) *Supra*, Chapter 5, p.295.

(608) Article III (3) emphasises the principle of respect for the sovereignty and territorial integrity of each State.

(609) *Supra*, p.297.

(610) *Infra* Chapter 8, p.594.

independence or when the country joined the UN. Western newspapers reported in Spring 1975 that Libya had occupied and annexed a 600 mile strip of northern Chad including the town of Aozou. Libya denied the annexation but stated that its troops were there protecting road engineers working in the area under a bilateral aid agreement. It also accepted that a Libyan administration was operating in the area.⁶¹¹ Libya issued a set of new official maps in 1976 including some 37,000 square miles of northern Chad within Libya's boundaries.⁶¹² Chad protested on a number of occasions, but neither bilateral nor OAU attempts to resolve the problem succeeded. A complaint made by Chad to the UN Security Council was later withdrawn, following an improvement in Chad-Libyan relations. No African State has recognised Libya's claims while France has emphasised that it recognised only those borders which existed upon Chad's independence in 1960.⁶¹³ Any acceptance of Libya's revised border, contrary as it is to the OAU's border policy,⁶¹⁴ by African States is highly improbable. Even if the Libyan claim had more substance, the manner of its enforcement is not likely to be endorsed.

The use of force to acquire territory by a State in order to incorporate it within its own jurisdiction is thus clearly contrary to international law and in particular African doctrine and practice. A further example of such unlawful activity was the Ugandan invasion of Tanzania in November 1978 and purported annexation of a 710 square mile strip of Tanzania territory between the recognised border and the

(611) See Africa Contemporary Record 1975/6, 1976, pp.B70 and B465-6. See also UNMC March 1978, p.8.

(612) Ibid 1976/7, 1977, p.B75.

(613) See further *infra*, p.594. The reticence demonstrated by African States may be attributable partly to Libya's strength and Chad's weakness, and possibly uncertainty as to the facts and merits of the dispute.

(614) *Supra*, p.272 et seq.

Kagera river.⁶¹⁵ Within a short period, Uganda announced its intention to withdraw from the area. This was apparently done following pressure from the OAU.^{615a} But the use of force with the aim of detaching territory from another State for other purposes is equally illicit. In the Somali case, that country has been officially seeking not to annex the claimed areas, inhabited by Somalis, of Djibouti, the Ogaden and north eastern Kenya, but rather to ensure that its kinsmen have the opportunity to exercise the right of self-determination, whatever the result of that may be.⁶¹⁶

In early 1964 fighting broke out between Somali and Ethiopian regular forces on the Ogaden border. Both parties agreed to consider the problem within an African framework.⁶¹⁷ The matter was accordingly discussed at an extraordinary session of the OAU Council of Ministers,⁶¹⁸ where a resolution was adopted calling for a peaceful settlement of the dispute. At a further meeting of the OAU Council of Ministers a few weeks later, resolutions were passed relating to both the Kenyan and Ethiopian situations specifically referring to Article III (3) of the OAU Charter, which calls for respect of the sovereignty and territorial integrity of every State.⁶¹⁹ The Kinshasa declaration in 1967, issued following a Kenya-Somali meeting, stated that both sides had expressed

(615) The Times, 2 November 1978, p.7. Uganda claimed that its action was in retaliation for a prior Tanzanian invasion of Uganda, while the annexation was made in the light of previous Ugandan claims that the Kagera river would constitute a "natural" frontier, *ibid.* See also Africa Research Bulletin, November 1976, p.5052 et seq.

(615a) *Ibid*, pp.5053-4.

(616) *Supra*, p.297.

(617) See Wolfers, Politics in the Organisation of African Unity, 1976, p.134.

(618) The Somali-Kenyan issue was also put on the agenda, following armed clashes in the disputed area, *supra*.

(619) Resolutions CM/Res 16 (II) and CM/Res 17 (II).

the desire to respect each other's sovereignty and territorial integrity in the spirit of Article III (3) of the OAU Charter.⁶²⁰ As far as the Ogaden situation was concerned, an OAU good offices group was set up in 1973 and in a resolution following the upsurge of fighting in 1977 reaffirmed the principles of respect for borders as in existence at the date of independence and territorial integrity. This provoked a Somali walk-out, and demonstrated that State's isolation on the issue of detaching the Ogaden from Ethiopia in order that its inhabitants could exercise self-determination. It was only the threat of an Ethiopian attack across Somalia's accepted border that stimulated support for Somalia.⁶²¹

The attitude of the international community in general and the African continent in particular has been equally clear with regard to Djibouti. Both the UN and the OAU adopted resolutions calling for the territory's independence from France and clearly precluded the possibility of its legitimate annexation by either Ethiopia or Somalia. Both parties, in fact, officially renounced any intentions of wishing to take over the territory.⁶²²

Although in the case of Libya's purported annexation of the Aozou strip in northern Chad, African States for political reasons have demonstrated a disinclination to adopt a forceful stand, it is believed that African practice has strongly endorsed the proposition that the use of force to acquire territory is unlawful and unacceptable and that the basis for the proposition, viz. respect for the sovereignty and territorial integrity of States, is in effect a manifestation of those aspects of the principle of self-determination as applicable in post-independence situations.

(620) Africa Research Bulletin September 1967, p.856.

(621) Supra, p. 514.

(622) Supra, p. 220.

CHAPTER 8 - BOUNDARIES

I - The Nature of Boundaries

Closely connected with the concepts of territory and territorial sovereignty is the notion of a boundary. Huber noted in the Island of Palmas case that "territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries".¹ Thus boundaries mark the limitation of State sovereignties and are themselves marked by acceptance by members of the international community. Unrecognised unilateral determinations of where boundaries lie would therefore remain without international effect in the absence of acquiescence or recognition. The importance of boundaries² is that they demarcate State jurisdictions,³ and thus profoundly influence the regime, nationality and cultural milieu of the inhabitants of such areas. Accordingly, the notion and existence of boundaries is closely allied with the concept of territorial integrity and plays a symbolic as well as a practical role. Actions relating to the establishment of boundaries by States are acts of sovereignty, while the boundaries themselves constitute the limit of the exercise of sovereignty by States concerned. The existence of a boundary, therefore, between two or more States would be conclusive of effective

(1) 2 RIAA, pp.829, 838.

(2) We are here concerned with international boundaries, ie. "all the boundaries between any two national States", Cukwurah, The Settlement of Boundary Disputes in International Law, 1967, p.9, excluding sea coasts, see Boggs, International Boundaries, 1940, p.22. See also Sharma, International Boundary Disputes and International Law, 1976, p.1.

(3) Verzijl, International Law in Historical Perspective, vol.III, 1969, p.513 and Adami, National Frontiers in Relation to International Law, 1927, p.3.

sovereignty and its limits as between such States.⁴ Huber stated in the Island of Palmas case that "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State",⁵

The protection of the inviolability of boundaries has assumed an important role in the international system,⁶ while in the field of boundary determination the need for the harmonious interaction of at least the interested States is pronounced. Indeed, for a boundary to be effective, it has to be accepted by the States concerned. Judge Bebler in his dissenting opinion in the Indo-Pakistan Western Boundary (Rann of Kutch) case, declared that "there is no doubt that an international boundary ranks high among matters which cannot be settled otherwise than by agreement between neighbouring States concerned. One could, in good logic, go so far as to suggest the axiom that a boundary is there where the neighbouring States have agreed it to be. The agreement may have been entered into with more or less of freedom of will, it may have been forced on one side by force of arms, in a war and through the victory of one neighbour over the other, but it must have been accepted, when peace was restored, by both sides, the victorious and the defeated, to be looked upon as the boundary by the community of nations".⁷ The legal force of a boundary may derive therefore either from a treaty or by virtue of acquiescence or recognition by the parties concerned.

(4) Sharma op.cit. p.2.

(5) 2 RIAA, pp.829, 838. Huber also noted that "the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States", *ibid.* p.839.

(6) See *supra*, Chapter 5, p.268.

(7) 50 ILR, p.406.

Since the concept of boundaries is of such crucial importance to the international community, the element of stability in the determination and maintenance of boundaries has been consistently emphasised. The International Court noted in the Temple case that "in general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available protest, be called in question and its rectification claimed".⁸ Jennings has written that "the bias of existing law is toward stability, the status quo, and the present effective possession; the tendency of the International Court is to let sleeping dogs lie. This is right, for the stability of territorial boundaries must always be the ultimate aim. Some other kinds of legal ordering need to be capable of constant change to meet new needs of developing society; but in a properly ordered society, territorial boundaries will be among the most stable institutions".⁹ This aim of "stability and finality" appears clearly with regard to the expressed purposes of boundary treaties in particular cases¹⁰ and agreements providing for arbitration".¹¹ The Permanent Court in the Iraq-Turkey Boundary case noted that "the very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length",¹² while the court in the Beagle Channel Arbitration award

(8) ICJ Reports, 1962, pp.6, 34.

(9) The Acquisition of Territory in International Law, 1963, p.70.

(10) See for example the 1929 Treaty between the Dominican Republic and Haiti, in which the preamble stressed that the parties "must find a final solution of the controversies which have divided them in the past in connection with the delimitation of the frontier separating the respective territories".

(11) See for example the preamble to the 1925 agreement between the USA and Holland leading to the Island of Palmas arbitration, 2 RIAA, p.829; and the Guatemala-Honduras treaty of arbitration of 1930, *ibid*, p.1309.

(12) PCIJ, Series B, no.12, pp.19, 20.

affirmed that it was common ground between the parties (Argentina and Chile) that the Boundary Treaty of 1881 "was intended to provide, and must be taken as constituting, a complete, definitive and final settlement of all territorial questions still outstanding at that time, so that nothing thereafter remained intentionally unallocated".¹³ Further consequences of the supremacy of the stability factor with regard to boundaries may be seen in the treatment of boundary treaties in the context of the *rebus sic stantibus* rule and State succession to treaties.¹⁴

The tenor, therefore, of the discussion of boundaries in international law is characterised by the perceived requirement for certainty. This militates against boundary changes and underlines the role played by acts of sovereignty by the parties with respect to the disputed areas. In other words, the criterion of effectiveness is of crucial importance. The notion of stability, which implies a state of affairs conducive to peaceful enjoyment, may also affect the content of any delimitation whether by joint discussions or by a third party. The Chairman of the tribunal in the Indo-Pakistan Western Boundary (Rann of Kutch) case, in referring to two deep inlets in dispute, noted that "it would be inequitable to recognise these inlets as foreign¹⁵ territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such".¹⁶

(13) The Award, HMSO, 1977, p.4.

(14) *Infra*, p.549 et seq.

(15) *I.e.* Non-Pakistan in this context.

(16) 50 ILR p.520.

An important distinction is usually made between boundaries and frontiers. A boundary is a line separating States, whereas a frontier connotes a zone, having therefore width as well as length.¹⁷ De Lapradelle regards a frontier as a zone of communication bound to a special legal, political and economic regime in municipal and international law,¹⁸ while Holdich noted that "a frontier is but a vague and indefinite term until the boundary sets a hedge between it and the frontier of a neighbouring State".¹⁹ Kristof pointed out that while a boundary is defined and regulated by international and municipal law, the frontier was a phenomenon of history and always unique. It was difficult to pin-point essential features of the frontier which are universally valid.²⁰ Historically, the earliest boundaries were in the form of separate zones, which Cukwurah has described as "the extreme limit of the areas from which the people living within them obtained their necessary supplies of food at any given time".²¹ With the decline of nomadism and the rise of agricultural settlements, partition zones evolved, usually following natural barriers as they were "conspicuous, easily identifiable and physically unmistakable by any potential trespasser".²² In ancient Greece, imperial Rome and during the Middle Ages, the concept of border zones predominated over fixed line boundaries.²³ The notion of a strict, linear boundary is a relatively modern conception, the need for defined boundaries arising as States

(17) Boggs op.cit. p.22, and Cukwurah op.cit. p.11.

(18) La Frontière, 1928, p.14.

(19) "Political Boundaries" 32 Scottish Geographical Magazine, 1916, pp.497, 501, cited in Cukwurah, op.cit. p.11.

(20) "The Nature of Frontiers and Boundaries" 49 Annals of the Association of American Geographers, 1959, pp.269, 273.

(21) Op.cit. p.13.

(22) Ibid, p.14.

(23) Ibid, p.14. See also Reeves, "International Boundaries" 38 AJIL, 1944, p.533.

developed in the post-Westphalian era and populations expanded into border areas and communicated across boundary lines. Exact boundaries, however, could only develop when map-making and geographic techniques were sufficiently advanced to facilitate delimitations and demarcation.²⁴ To some extent, the doctrine of natural frontiers was an attempt to achieve precise boundaries in earlier centuries and was founded upon the assertion that certain natural features such as mountain ranges, forests, water and deserts were preferable to artificial boundaries, which denoted "such signs as have been purposely put up to indicate the way of the imaginary boundary line" and which consisted of "posts, stones, bars, walls, trenches, roads, canals, buoys in the water and the like".²⁵ However, as Boggs pointed out, a line marked by nature did not always imply that it constituted the best line to separate neighbouring peoples. The crest of a mountain range may not be a natural frontier where people of the same language and tradition inhabit both sides of the mountain.²⁶ Fenwick wrote that "if by natural should be meant 'desirable from an economic or social point of view', many present boundaries of States are admittedly unnatural whatever natural landmarks there may be to designate them".²⁷ In other words, what constitutes a natural boundary is a complex of different factors of varying importance depending upon the circumstances of the case.²⁸ In reality, all boundaries are artificial in that they are established by persons, it is just that some coincide with geographic or ethnic divisions and others do not.

(24) Hill, Claims to Territory in International Law and Relations, 1945, p.23.

(25) Oppenheim, International Law, 8th ed. vol.I, 1955, pp.531-2.

(26) Op.cit. p.23.

(27) International Law, 4th ed. 1965, p.438. Emphasis in original.

(28) Verzijl notes that the concept of natural frontiers is highly political, op.cit. p.516. See also generally Schoenborn, "La Nature Juridique du Territoire" 30 HR, 1929, pp.85, 126-35.

A distinction may also be drawn between boundary disputes and territorial disputes. Boundaries are lines defining a territory, marking the limits of territorial sovereignty and jurisdiction, whereas territories are those areas over which such rights are exercised. Boundaries are part of the territory in that sense, of course, but they separate territories of different jurisdictions. While boundary disputes are concerned with either written or verbal or geographic uncertainties, territorial disputes involve large areas of land relatively and claims to title. The latter involve such rules of international law as relate to the acquisition of territorial sovereignty, for instance occupation, prescription, cession and conquest, while assertions of self-determination and historical continuity are frequently made. In the case of boundary disputes, the usual situation relates to ambiguities in the instruments creating the boundaries or to problems in fixing the borderline on the ground. Boundary problems in general concern disputes between adjacent States over the line to be drawn between their areas of sovereignty, whereas territorial disputes involve one State claiming to dislodge another from an area of its sovereignty on the ground of better title. However, there are a number of common elements that render it unwise to pursue this distinction too rigidly. Both boundary and territorial disputes ultimately involve the question of sovereignty over a defined piece of land, while many of the same types of State activity are relevant both to the question of title to territory and to the correct determination of a boundary. Examples would include manifestations of sovereign authority in various ways and geographical and historical factors, as well as any appropriate reactions or views adopted by the other party and third States. Treaties would be relevant in both cases, although more likely to be involved in disputes over boundaries. The best approach, therefore, would be to regard boundary disputes as a particular kind of

territorial dispute, one that has evolved some special rules of its own.²⁹ Prescott distinguishes between territorial disputes, which emerge as a result of some quality of the borderland making it attractive to the claimant State, and positional disputes, which concern the actual location of the boundary.³⁰ While territorial disputes generally arise out of the superimposition of the border upon the cultural or physical landscape, as for example in many cases in the colonial partition of Africa or the granting of German-speaking areas south of the Brenner Pass to Italy,³¹ positional disputes arise, according to Prescott, because of incomplete boundary evolution.³² Such defects in the boundaries become a source of contention when the borderlands become utilised or developed, as for example the boundary delimitation between Northern Nigeria and Niger, at the beginning of the century, unquestioned by France until it was discovered that an important communication route between Niger towns lay partially within British territory.³³

Accordingly, although boundary, or positional, disputes may involve recourse to particular rules, such as the principle for example of the *thalweg*, the fact remains that such disputes concern, as do territorial disputes, both specific, or relatively specific, areas, and the display of sovereignty. Judge Huber, it should be noted, declares that the fact of peaceful and continuous display was one of the most important considerations in establishing boundaries between States³⁴ and that if no

(29) See Jennings *op.cit.* pp.12-3 and Sharma *op.cit.* pp.4-7.

(30) The Geography of Frontiers and Boundaries, 1965, p.109. Prescott also notes the existence of functional disputes and disputes over resource development, which do not involve claims for changes in boundary location, *ibid.*

(31) *Ibid.*, p.113.

(32) *Ibid.*, p.122.

(33) *Ibid.*, p.123.

(34) 2 RIAA, pp.829, 839.

conventional line of sufficient topographical precision exists or if there are gaps in frontiers otherwise established or if a conventional line leaves room for doubt, "the actual continuous and peaceful display of State functions is, in case of dispute, the sound and natural criterion of territorial sovereignty".³⁵ This common reliance on display of sovereignty, depending always on the circumstances of the case, means that the two types of dispute are closer than some analyses would suggest.³⁶

A number of views have been expressed concerning the nature and functions of boundaries. Ratzel regarded the boundary itself as an abstraction and the border area as the reality. The latter zone intimately reflected the power of the State itself and consisted of three zones, two of which were the periphery of the adjoining States and the third a central zone where there was a mingling of the two States. Ratzel held that one could not analyse a boundary separately from the State, since it was an integral element of it and one could not maintain the greater importance of the centre. He also believed that as the relationship between States altered so the boundary would change, as it was an indication of power.³⁷ Curzon talked in terms of natural and artificial boundaries, but distinguished between natural boundaries based on some physical feature and so-called natural boundaries, claimed by nations on grounds of ambition, expediency or sentiment.³⁸ Artificial boundaries were divided into astronomical, mathematical and referential types. Astronomical boundaries followed a parallel of latitude or a

(35) Ibid, p.840. Huber also noted that "international arbitral jurisprudence in disputes on territorial sovereignty....would seem to attribute greater weight to - even isolated - acts of display of sovereignty than to contiguity of territory, even if such contiguity is combined with the existence of natural boundaries", ibid, p.855.

(36) But note that whereas a State must possess territory, it need not possess defined borders as a condition of existence, see *supra* Chapter 6, p.334.

(37) *Politische Geographie*, 1895, as cited in Prescott *op.cit.* pp.10-11.

(38) *Frontiers*, 1907, p.54. Curzon did not distinguish between boundaries and frontiers.

meridian, mathematical boundaries connected two specified points and referential boundaries were defined with regard to some point or points and included arcs of circles and straight lines.³⁹ Curzon also emphasised the strategic role of boundaries, as did Holdich, who remarked that "boundaries must be barriers - if not geographical and natural they must be artificial and strong as military device can make them".⁴⁰ Fawcett criticised the division into natural and artificial boundaries and held that frontiers were distinct regions of transition, whose function was to protect the State.⁴¹ De Lapradelle noted that "le caractère marquant de la notion de frontière est son universalité d'acception".⁴² While peripheral flanking areas between States, ie. frontiers, were governed by municipal law, a central zone or territoire limitrophe was subject to international law. This led into a two-fold division of the whole problem of frontiers into delimitation and voisinage. Delimitation concerned the limits and method of establishment of frontier and voisinage concerned the effects of delimitation on the regime of the territory in question.⁴³ Rousseau, in fact, defined the concept of voisinage in international law as "l'ensemble des problèmes juridiques que pose la proximité existant entre Etats limitrophes et les rapports juridiques d'ordre divers qui en résultent tant pour ces Etats que pour leurs ressortissants".⁴⁴ De Lapradelle held that only artificial frontiers existed. While boundaries drawn with reference to a natural feature,

(39) See also Prescott op.cit. pp.12-14. Rousseau distinguishes between natural and artificial boundaries and sub-divides the latter into astronomical and geometric types, Droit International Public, vol.III, 1977, pp.241-6.

(40) Political Frontiers and Boundary Making, 1916, p.46.

(41) Frontiers, A Study in Political Geography, 1918. See also Prescott op.cit. pp.15-6.

(42) La Frontière, 1928, p.9.

(43) Ibid, p.17.

(44) Op.cit. p.273 and pp.273-88.

such as a river or a mountain, were "derived artificial boundaries", boundaries astronomically, mathematically or referentially calculated were "artificial boundaries properly speaking".⁴⁵ By this classification, it could be seen that all boundary delimitations were accomplished by persons in the light of perceived national interests.⁴⁶ De Lapradelle also referred to three stages in the evolution of a boundary. The preparation stage consists in formulating the principles applicable to the actual delimitation, the decision stage concerns the delimitation itself and the execution stage consists of transcribing the delimitation on to the territory in question.⁴⁷ Boggs emphasised the changing role of boundaries and listed the various functions of boundaries in the light of persons and things.⁴⁸ His belief that one of the principal reasons for studying boundaries was the desire to determine what kinds of boundaries are "good" and what kinds have been found to be bad⁴⁹ was criticised by Jones who noted that "each boundary is almost unique and therefore many generalisations are of doubtful validity".⁵⁰ Prescott concludes that a review of the ideas regarding boundaries suggests that boundaries are of interest to many types of scholars and that most of the studies reflect the preoccupations of the period when written. It has also been generally accepted that one must consider the boundary in its overall territorial context and the dangers of generalising about

(45) Op.cit. p.175.

(46) Prescott points out that it is strange that boundaries related to cultural factors were not considered in this scheme, op.cit. p.18.

(47) Op.cit. p.73.

(48) International Boundaries, 1940, pp.9-12.

(49) Ibid, p.21.

(50) Boundary-Making, 1945, p.vi. He declared that the process of boundary-making is smoothed by considering each boundary as a special case with individuality more pronounced than resemblance to a theoretical type", ibid p.11.

boundaries are being appreciated.⁵¹ One clear distinction that Prescott, following Jones, does draw is between internal and international boundaries, since "the presence or absence of overriding sovereignty is the crucial basis of classifying boundaries."⁵²

It is possible to classify boundaries in a number of ways in addition to the rather simplistic and discredited division into natural and artificial boundaries. Boggs elaborated a four-fold classification. Physical boundaries were those following a natural feature, geometric boundaries involved the use of straight lines, arcs, meridians and so forth, anthropo-geographic boundaries were closely related to human settlement factors, while compounded boundaries comprised elements of the preceding types.⁵³ Pounds, on the other hand, approached the problem historically and categorised boundaries in terms of the cultural development of the area. Boundaries could be antecedent, that is prior to the development of the "cultural landscape"; subsequent, or drawn after such a development; superimposed, that is subsequent to cultural development but without regard to it; or relict, that is boundaries visible in the cultural landscape without any present political function.⁵⁴

Pre-colonial Africa knew frontiers or zones rather than strict linear boundaries,⁵⁵ while colonial boundaries were in many cases originally established on basically geometric lines radiating from the coasts into

(51) Op.cit. pp.26-8.

(52) Ibid, p.30.

(53) Op.cit. pp.25-6. This scheme is followed by Cukwurah, op.cit. p.18.

(54) Political Geography, 1963, pp.61-5. Prescott defines a relict boundary as one which although abandoned is still marked by differences in the landscape which developed during its lifetime, op.cit. pp.30-31. See also Tagil, "The Study of Boundaries and Boundary Disputes", African Boundary Disputes (ed. Widstrand), 1969, p.22 and Kapil, "On the Conflict Potential of Inherited Boundaries in Africa" 4 World Politics, 1966, pp.656, 657-8.

(55) See Anene, The International Boundaries of Nigeria, 1970, pp.5-6, and Person, "L'Afrique Noire et Ses Frontières" 80 Revue Francaise d'Etudes Politiques Africaines, 1972, pp.18, 22-3. See supra, Chapter 1, p.45.

the interior, generally paralleling European power relationships in the nineteenth century. Kapil writes that African international boundaries are irrelevant to the historical-cultural patterns of African development and that except for Ethiopia none of them delimit the outcome of traditional, historical processes. Ethnic factors were generally ignored in boundary making.⁵⁶ Such boundaries therefore were superimposed on established cultural patterns, it was argued, and thus were inherently conflict-generating.

Two stages are particularly important in establishing a boundary.⁵⁷ Delimitation is the determination of the boundary line by treaty or otherwise and its expression in verbal terms, while demarcation is the physical demonstration of the delimitation on the ground by means of boundary posts and the like.⁵⁸ Tribunals have generally followed this distinction⁵⁹ but occasionally the terminology has been confused.⁶⁰ Usually the delimitation is political and established by diplomats, while the demarcation is a technical operation. Delimitation problems are more rare than demarcation disputes, since the latter often reflect the dangers of delimitation without precise geographic knowledge of the areas involved. The vast majority of Africa's borders were delimited by

(56) Loc.cit. p.662.

(57) Jones also refers to allocation, being the political decision on the distribution of territory, and administration, which is concerned with the regulation of activities in relation to the demarcated boundary, op.cit. p.5.

(58) See McMahon, "International Boundaries" 84 Journal of the Royal Society of Arts, 1935, p.4. Curzon wrote that delimitation "signifies all the earlier processes for determining the boundary down to and including its embodiment in a treaty or convention. But when the local commissions get to work it is not delimitation but demarcation on which they are engaged", op.cit. p.51.

(59) For example, the Argentine-Chile Award of 1966, 38 ILR, p.10.

(60) For example, see Judge Spender, ICJ Reports, 1962, pp.6, 103.

agreement between European powers at the end of the nineteenth and beginning of the twentieth centuries when knowledge of the geographic and ethnic conditions of the interior of the continent was limited. This was one reason for the heavy reliance upon geometric lines. Barbour calculated "very approximately" that at the end of the 1950's, something like forty-four per cent of the boundary mileage in Africa was defined according to parallels and meridians, thirty per cent by straight lines, arcs of circles, and so on, and the remaining twenty-six per cent by reference to topographical features such as rivers, streams, watersheds, mountains and valleys.⁶¹ Demarcation commissions were in general severely restricted in their discretions when marking out the actual border, often with absurd results. For instance, the Anglo-German agreement of 1910 dealing with the Uganda-Ruanda border allowed the demarcation commission to depart from some of the delimited straight lines in order to make the boundary coincide with natural features, provided the deviations "shall not, however, exceed five kilometres on either side of the straight lines and neither the total area of British territory nor the total area of German territory shall be altered thereby".⁶²

This has meant that while there are relatively few delimitation disputes in Africa, there are a number of demarcation problems resulting from the difficulties in translating often ambiguous treaty provisions and administrative divisions into geographic reality.

The causes of territorial and boundary disputes are many and range from ethnic or historic irredentism, as in the Moroccan and Somali cases,

(61) "A Geographical Analysis of Boundaries in Inter-Tropical Africa", Essays in African Populations (ed. Barbour and Prothero), 1961, p.305.

(62) 107 BFSP pp.394, 395. A similar provision existed in the Anglo-Belgian agreement of 1910, except that the permitted deviation was restricted to three kilometres, *ibid*, p.348.

to the attraction of natural resources, a factor which has stimulated a number of boundary and territorial disputes, and to the need for a diversion from internal pressures. Other elements may also be involved such as ideological and personal antagonisms as well as political manoeuvrings to gain advantages often unrelated to the border issue itself.⁶³ A large number of African boundary disputes are quiescent and only erupt as a result of some kind of specific stimulus, whether economic or ideological. Occasionally such claims may stimulate a counter-claim as a reaction. This occurred, for instance, in the Algerian-Moroccan dispute when Algeria declared that it too could assert claims. However, African border disputes are in general characterised more by moderation than by excess, particularly when one considers the non-African establishment of many of the borders involved.

Africa possesses the longest total length of land boundaries of any continent, because relative to its area it is the most politically divided continent. Most African States have borders with at least or five other States, while Niger has borders with seven other States, Sudan with eight and Zaire with nine. On the other hand, Africa has the shortest coastline relative to area and the highest number of landlocked States of the continents. Zaire, it should be noted, has an area of over nine hundred and five thousand square miles and a sea front of some thirty miles.⁶⁴ However, the very instability inherent in the domestic and international environment of African boundary and territorial conflicts is a constraining factor, since it ensures that radical change in this area could have widespread and unpredictable consequences.

(63) See Zartman, "The Foreign and Military Politics of African Boundary Problems", African Boundary Problems (ed. Widstrand), 1969, pp.86-9 and Cukwurah op.cit. pp.89-116.

(64) Hamden, "The Political Map of the New Africa" 53 The Geographical Review, 1963, p.418.

II - Boundary Treaties

Judge Bebler in the Indo-Pakistan Western Boundary (Rann of Kutch) case remarked as to the general origins of international boundaries that they "have usually emerged by custom. They have become gradually well determined by mutual acquiescence and/or recognition by the neighbours concerned ... Mutual acquiescence and mutual recognition are therefore the most general origin of existing international boundaries. Very many of them still nowadays have no other legal foundation for their validity".⁶⁵ In the case of Africa, however, it would seem that the role of the international boundary treaty has been somewhat more prominent than Bebler's views would allow. The vast majority of African borders were laid down not as a result of prescription over a period of time, but by European treaties. The question of the validity and determination of such boundaries is therefore connected with the status in law of the particular treaties, specifying such boundaries. This has raised two particular questions. Firstly, whether it could be argued that the demise of colonialism and the establishment of the principle of self-determination have resulted in a fundamental change in circumstances as regards particular boundary treaties, thus terminating the treaty or enabling a party or a successor to a party to the treaty to terminate it, and secondly whether, in view of the dominant "clean slate" principle governing new States and State succession to the treaties of its predecessor, such boundary treaties lapse upon independence.

(a) The Rebus Sic Stantibus Rule

This rule states that a party to a treaty may unilaterally invoke as a ground for terminating or suspending the operation of the treaty the fact that there has been a fundamental change

(65) 50 ILR, pp.2, 466.

of circumstances from those which existed at the time of the conclusion of the treaty.⁶⁶ Fitzmaurice noted that few questions of treaty law were more controversial than the place of this doctrine. One could detect a marked reluctance by international and municipal courts actually to apply it, while not rejecting it in principle and professing to view it with sympathy. Although attractive in theory and possibly necessary in practice within limits, the rule could prove dangerous and could reduce the concept of *pacta sunt servanda* to a mere form of words.⁶⁷ Elias, indeed, referred to the view that the doctrine was somewhat frivolously invoked in the period between the World Wars.⁶⁸ The doctrine has been raised before international courts. In the Nationality Decrees in Tunis and Morocco case,⁶⁹ France argued that the establishment of the French protectorate over Morocco had ipso facto extinguished certain Anglo-French treaties.⁷⁰ France also raised the question of *rebus sic stantibus* in the Free Zones of Upper Savoy and the District of Gex case, stating that the provisions of 1815 establishing the customs free zones had lapsed in view of the alteration of the particular factual situation.⁷¹ Switzerland, however, argued *inter alia* that the doctrine did not apply to

(66) Elias, The Modern Law of Treaties, 1974, p.119. See also McNair, The Law of Treaties, 1961, pp.681-91; Lissitzyn "Treaties and Changed Circumstances (*Rebus Sic Stantibus*)" 61 AJIL, 1967, p.895; Garner, "The Doctrine of *Rebus Sic Stantibus* and the Termination of Treaties" 21 AJIL, 1927, p.509; De Cavièdes, "De La Clause '*Rebus Sic Stantibus*' A La Clause de Revision Dans les Conventions Internationales" 118 HR, 1966, p.109 and Haraszti, Some Fundamental Problems of the Law of Treaties, 1973, pp.327-420.

(67) Second Report on the Law of Treaties, Yearbook of the ILC, 1957, vol.II, p.56.

(68) Op.cit. p.119.

(69) PCIJ, Series B, no.4.

(70) PCIJ, Series C, no.2, pp.187-8 and 208 and 209. The court did not examine the doctrine, because on the facts as found by the court, it was unnecessary to do so. See also the Case Concerning the Denunciation of the Sino-Belgian Treaty of 1865, PCIJ Series C, no.16, vol.I, p.52.

(71) PCIJ Series A/B, no.46, pp.155-8 and *ibid* Series C, no.58, pp.463-76.

treaties creating territorial rights.⁷² The court held that in the light of the particular facts, it was unnecessary to consider the doctrine.⁷³ The rule has not been extensively examined in any other international cases,⁷⁴ although the International Court in the Fisheries Jurisdiction cases noted the existence of the doctrine in customary law.⁷⁵ Its basis may be seen in the desire to prevent an unnecessary burden on one of the parties to a treaty in the event of a fundamental change of circumstances and thus avoid the possibility of unlawful termination. The doctrine has also been seen by the new Afro-Asian States in particular as embodying a rule of crucial concern to them.⁷⁶

In article 44 of the draft articles on the Law of Treaties prepared in 1963, it was provided that the doctrine did not apply "to a treaty fixing a boundary".⁷⁷ This formulation was retained in the 1966 draft articles. Australia suggested that the provision be slightly extended to cover all other determinations of territorial sovereignty in a treaty, while the Netherlands suggested that the exception to the *rebus sic stantibus* rule should apply "to stipulations of a treaty which affect a transfer of territory or the settlement of a boundary, since such treaties often covered other issues as well."⁷⁸ Waldock, the Special Rapporteur,

(72) PCIJ, Series C, no.58, pp.109-46, 405-15 and 578-9. Note that France admitted that one had to distinguish between territorial rights and "personal" rights created on the occasion of a territorial settlement, *ibid*, pp.463-76. Waldock regarded these Swiss and French views as correct, Second Report on the Law of Treaties, Yearbook of the ILC, 1963, vol.II, p.85.

(73) PCIJ, Series A/B, no.46, p.158.

(74) McNair refers to a number of municipal law cases which make reference to *rebus sic stantibus*, *op.cit.* pp.690-1. See also Haraszti, *op.cit.* pp.368-72.

(75) ICJ Reports, 1973, pp.3, 18.

(76) See Yearbook of the ILC, 1963, vol.I, p.139.

(77) Yearbook of the ILC, 1963, vol.II, p.207. This was contained in draft article 44 (3)a.

(78) Yearbook of the ILC, 1966, vol.II, p.39.

agreed with these comments and felt that the provision should be revised to cover transfers of territories.⁷⁹ Canada proposed adding to the provision the phrase "except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which subsequently significantly altered as a result of a natural occurrence".⁸⁰ The Special Rapporteur, however, correctly felt that the Canadian suggestion raised questions regarding the correct interpretation and application of the treaty in the light of changed geographical facts⁸¹ and no more was heard of this proposal. Draft article 44 became draft article 59, paragraph 2 of which provided that: "A fundamental change of circumstances may not be invoked : (a) as a ground for terminating or withdrawing from a treaty establishing a boundary." The ILC commentary with regard to this provision noted that some members of the Commission had suggested that the total exclusion of treaties establishing boundaries might be going too far and might indeed be inconsistent with the principle of self-determination, recognised in the Charter. The Commission, however, concluded that treaties establishing a boundary should be accepted as an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. With regard to self-determination, the Commission felt that it was, as envisaged in the Charter, an independent principle and that it might lead to confusion, if in the context of the law of treaties it were presented as an application of the rule regarding *rebus sic stantibus*. This view must be seen as accurate. To have permitted the revision of nineteenth century territorial arrangements, or those of any other era, on the grounds of the post-1945 principle of

(79) Ibid, p.44.

(80) Ibid, p.39.

(81) Ibid, p.44.

self-determination would have the effect not only of ignoring inter-temporal law but of opening the door to a large number of territorial claims, particularly in Africa. The ILC also made the point by altering the phrase "treaty fixing a boundary" to "treaty establishing a boundary" that not only delimitation treaties but also treaties of cession were to be covered.⁸²

In the UN Conference on the Law of Treaties in 1968, the United States argued that the proposed article 59 (2)a was too restrictive and failed to cover important groups of treaties such as those establishing territorial status or settling territorial disputes, while not establishing boundaries. Examples were given of the US-UK condominium agreement over Canton and Enderbury Islands, agreements where parties agreed not to press claims in the light of mutual concessions and treaties dealing with the aim of settling boundary disputes in the spirit of cooperation such as US-Mexican treaties. If the *rebus sic stantibus* rule were to apply, it was argued, the object of such treaties would be defeated.⁸³ It was suggested that the phrase "or otherwise establishing territorial status" be added to article 59 (2)a.⁸⁴ However, this was rejected by the Committee of the Whole by 43 votes to 14, with 28 abstentions.⁸⁵ It was felt that the American formulation was far too broad. Cuba argued that it would be incompatible with self-determination.⁸⁶ The ILC provision regarding *rebus sic stantibus* and boundary treaties was

(82) Yearbook of the ILC, 1966, vol.II, p.259.

(83) UN Conference on the Law of Treaties, Official Records, First Session, p.367.

(84) A/CONF.39/C.1/L.335.

(85) UN Conference on the Law of Treaties, Official Records, Documents of the Conference, p.184.

(86) UN Conference on the Law of Treaties, Official Records, First Session, p.371.

generally supported at the UN Conference,⁸⁷ the need to preserve peace being particularly noted in this context.⁸⁸ Afghanistan, however, stated that boundary treaties should not be exempted from the general rule as it might be contrary to self-determination and treaties imposed during the colonial era for colonial or military reasons should be subject to the *rebus sic stantibus* doctrine.⁸⁹ Morocco declared that draft article 59 (2)a was open to objection and particularly criticised the view of the ILC that treaties of cession were to be included in the provision.⁹⁰ Syria expressed a similar criticism and noted that stability and finality could not be expected if they were to be achieved at the expense of justice and self-determination or by upholding colonial treaties, under which territory was ceded contrary to the wishes of the inhabitants.⁹¹ Poland argued as against this that unequal colonial treaties were void *ab initio* as they conflicted with norms of *jus cogens* and they had thus no relevance to draft article 59. Paragraph (2)a was essential to the maintenance of international peace and security as provided in the UN

-
- (87) Article 59 was adopted by the Committee of the Whole without formal vote, UN Conference on the Law of Treaties, Official Records, Documents of the Conference, p.184. It had already been decided with regard to the organisation of the work of the Conference, that the Committee of the Whole might adopt draft articles without a formal vote where "there appeared to be very substantial or overwhelming support for the text....on the understanding that the summary records would reflect statements and reservations expressed", *ibid*, p.108.
- (88) See for the example the comments of Poland, UN Conference on the Law of Treaties, Official Records, First Session, pp.371-2, and the USSR, *ibid*, p.374. Kenya noted that territorial boundaries were so inextricably interwoven with the sovereignty and territorial integrity of States that the ILC was wholly justified in excluding treaties establishing boundaries from the *rebus sic stantibus* rule, *ibid*, p.381.
- (89) *Ibid*, p.373 and *ibid*, Second Session, pp.118 and 121.
- (90) *Ibid*, First Session, pp.379-80 and *ibid*, Second Session, pp.120-1.
- (91) *Ibid*, p.117. Sinclair notes that Syria entered a specific reservation not accepting the non-applicability of *rebus sic stantibus* to boundary treaties, The Vienna Convention on the Law of Treaties, 1973, pp.46-9.

Charter and was a direct consequence in the law of treaties of the rule in article 2 of the Charter regarding the territorial integrity of States.⁹² In the event, a proposal to delete paragraph (2)a was not put to the vote⁹³ and article 62(2) of the Convention on the Law of Treaties provides that "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary".

(b) State Succession

The question of State succession to treaties has been the subject of much debate, particularly in the light of the decolonisation process.⁹⁴ Ultimately, the Vienna Convention on Succession of States in Respect of Treaties declared in article 16 that "a newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates".⁹⁵ This marked the victory of the "clean slate" theory as against the view that "succession rather than non-

(92) UN Conference on the Law of Treaties, Official Records, Second Session, p.118.

(93) Sinclair op.cit. p.107.

(94) See, for example, O'Connell, State Succession in Municipal Law and International Law, two vols. 1967; Udokang, Succession of New States to International Treaties, 1972; Castren, "Aspects Récents de la Succession d'Etats" 78 HR, 1951, p.385; Lester "State Succession to Treaties in the Commonwealth" 12 ICLQ, 1963, p.475 and Lekocha, "The Problem of Succession of African States in Respect of Post-Colonial Boundaries in the Light of Practice" 1 Studies in the Developing Countries, 1971, p.131. See also The Effect of Independence on Treaties published under the auspices of the International Law Association, 1965, and the many discussions in the International Law Commission, the relevant elements of which are noted during the course of this sub-section.

(95) "Newly independent States" are defined in article 2(1)f as former dependent territories for the international relations of which the predecessor State was responsible. Note that, by article 7, the Convention provides that it is to apply only as regards a succession of States occurring after the entry into force of the Convention, without prejudice to the application of customary rules which coincide with the Convention.

succession should be the rule".⁹⁶ Accordingly, the question is raised as to boundary treaties.⁹⁷ An acceptance of the clean slate principle here would mean that new States upon gaining independence would be able to denounce treaties establishing boundaries and thus legitimately claim not to be bound by the former borders. It would open the way to claims for further territory. Of relevance also in this discussion are the principles of sovereign equality of States and self-determination of peoples.

Waldock in his first report on Succession of States and Governments in Respect of Treaties declared that "the weight both of opinion and practice seems clearly to be in favour of the view that boundaries established by treaties remain untouched by the mere fact of a succession. The opinion of jurists seems, indeed, to be unanimous on the point even if their reasoning may not always be exactly the same. In State practice the unanimity may not be quite so absolute; but the State practice in favour of the continuance in force of boundaries established by treaty appears to be such as to justify the conclusion that a general rule of international law exists to that effect".⁹⁸

(1) The Opinion of Jurists

Most writers emphasise that boundary treaties devolve upon successor States despite the change of sovereignty.⁹⁹ The basic reason

(96) O'Connell, "Independence and Problems of State Succession", The New Nations in International Law and Diplomacy (ed. O'Brien), 1965, pp.7, 21, 25. See Udokang, op.cit. pp.132-66.

(97) As regards treaties dealing with other territorial regimes, see the following section, *infra*, p.579.

(98) Yearbook of the ILC, 1968, vol.II, pp.92-3. Footnotes omitted. Bedjaoui noted that "in principle the territory devolves upon the successor State on the basis of the pre-existent boundaries. These boundaries will have been established by a treaty, an instrument issuing from an international conference, a Statute or regulation of the predecessor State, or a *de facto* situation sanctioned by the passage of time", *ibid*, p.112.

(99) See, for example, Guggenheim, Traité de Droit International Public, 1953-4, vol.I, p.465; Ross, A Textbook of International Law, 1947, p.127 and McNair, Law of Treaties, 1961, pp.656-7.

for the rule is accepted as that of the necessity to maintain the stability and continuity of boundaries as an essential condition of international life as emphasised in the recognised principle of respect for the territorial integrity of States.¹⁰⁰ A number of authors express the process by which this is accomplished in terms of a transmutation of the provisions of the boundary treaty into a territorial settlement subsisting in its own right. Lester writes that upon ratification the boundary agreement is deemed to be executed and thereafter operates as a kind of conveyance. The successor State thus succeeds "not to the treaty but to the frontiers of its territory as it does to the other facts of its new international life".¹⁰¹ Therefore, upon execution, the boundary terms lose their contractual character and may be severed from non-boundary provisions. This will not prevent, however, the parties from referring to the terms of the treaty in any subsequent dispute as to title.¹⁰² The result is that the boundary terms take on a life of their own, distinct from their conventional origin.¹⁰³ Keith, in discussing the continuity of boundary provisions, emphasised that "the real fact is, of course, that a treaty of this sort is no longer a contract; the contract has passed into a conveyance, and the transaction cannot, therefore, be affected by the fact that one of the parties to the original conveyance has changed".¹⁰⁴ Another possible explanation put forward is that the principle of *nemo dat quod non habet* applies in such

(100) Pereira, La Succession d'Etats en Matière de Traités, 1969, p.III.

(101) *Loc.cit.* p.492.

(102) Cukwurah, *op.cit.* p.106.

(103) Castren notes that "Les traités concernant les frontières ayant été mis en exécution et établissant une situation juridique déterminée, celle-ci doit être respectée par le nouveau souverain du territoire au même titre que tout pouvoir territorial étranger", *loc.cit.* p.437. See also McNair *op.cit.* p.256.

(104) Theory of State Succession, 1907, p.22.

cases. In other words, the predecessor State may transfer to the successor State only the territorial extent of its own competence. O'Connell notes that "since a State can acquire from another only so much territory as that other possessed, the latter's boundary treaties with neighbouring States delimit the extent of the territory absorbed".¹⁰⁵ However, this is linked with the territorial theory, for "if a boundary treaty merely defines a frontier, then it is instantly executed, and what is inherited is not the treaty but the territorial extent of sovereignty".¹⁰⁶ The International Law Association adopted a series of eight resolutions on State succession to treaties in 1968, and the final one provided that "when a treaty which provides for the delimitation of a national boundary between two States has been executed in the sense that the boundary has been delimited and no further action needs to be taken, the treaty has spent its force and what is succeeded to is not the treaty but the extent of national territory so delimited".¹⁰⁷ Where, however, a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, it is considered that the question whether the treaty is or is not succeeded to should be governed by the general presumptions of continuity envisaged by it for all treaties of the predecessor State.¹⁰⁸ Thus, in a sense, one is not considering a question of succession to boundary treaties, but rather succession to the existing and delimited territorial dimensions of the predecessor State.^{108a}

(105) State Succession in Municipal Law and International Law, 1967, vol.II, p.273.

(106) Ibid.

(107) International Law Association, Report of 53rd Conference, 1968, pp.603 and 605. Quoted in Yearbook of the ILC, 1969, vol.II, p.48.

(108) Ibid.

(108a) This approach may be expanded to explain why servitudes are also exempt from the clean slate rule. See further, *infra*, p.579.

Although this exception to the clean slate rule has been virtually universally accepted in doctrine, some authors have tended to be rather cautious. Mochi Onory writes that boundary disputes often concern the maintenance or otherwise of rights guaranteed in connection with, and as a condition of, the settlement of the boundary and that the dispute over these rights tends to provoke the reopening of the boundary itself,¹⁰⁹ while Udina notes that succession occurs only through the tacit agreement of the neighbouring State.¹¹⁰ The latter proposition would appear not to be supported by either international doctrine or State practice. One should also note at this stage that both the ILC and the UN Conference on the Law of Treaties held that boundary treaties constituted a special category forming an exception to the general rule that a fundamental change of circumstances may be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty.

(2) State Practice

The Special Rapporteur of the ILC felt that the attitudes adopted by States with regard to article 62(2)a of the Convention on the Law of Treaties were extremely pertinent in the context of succession to treaties¹¹¹ and that the weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States was "powerfully reinforced" by the decision to exempt treaties establishing boundaries from the *rebus sic stantibus* rule.¹¹² Although certain

(109) La Succession d'états aux Traités, 1968, pp.128-31.

(110) "La Succession des Etats quant aux obligations Internationales autres que les Dettes Publiques" 44 HR, 1933, pp.704, 748-9.

(111) Yearbook of the ILC, 1972, vol.II, p.52.

(112) Ibid, p.54.

differences are evident between the expression of the exception to the *rebus sic stantibus* rule and the provision relating to succession to boundary treaties,¹¹³ the connection between the two reinforces the characterisation of boundary treaties as *sui generis* when compared with other treaties.¹¹⁴

It is also to be noted that in the Temple case,¹¹⁵ the International Court did not appear to doubt that the 1904 treaty between France and Siam (Thailand) establishing the boundary between Cambodia and Thailand was binding as between these two. Indeed, both Cambodia and Thailand seemed to assume that in the case of a newly independent State, there would be a succession not only in respect of a boundary settlement but also of treaty provisions ancillary to such settlement. Thailand felt that succession would be limited to stipulations forming part of the boundary settlement itself, while Cambodia considered that it would extend to provisions in a subsequent treaty directly linked to it.¹¹⁶

Practice reveals that in general States have accepted the principle of succession to boundary settlements embodied in treaties. The United States, while not accepting that it was bound by UK treaties after independence,¹¹⁷ did accept the previously established boundaries. In 1856, the US Secretary of State wrote that "the United States regards

(113) *Infra*, p.570.

(114) As regards other territorial treaties, see *infra* p.579.

(115) ICJ Reports, 1962, p.6.

(116) ICJ, Pleadings, 1959, vol.I, pp.145-6 (Thailand) and 165 (Cambodia). See also Yearbook of the ILC, 1972, vol.II, p.51. Note that in the Right of Passage case, the court held that India had succeeded to the legal situation created by a UK-Portuguese custom "unaffected by the change of regime in respect of the intervening territory which occurred when India became independent", ICJ Reports, 1960, pp.6, 40.

(117) McNair *op.cit.* p.601.

it as an established principle of the public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the present country. That is the doctrine which Great Britain and the United States concurred in adopting in the negotiations of Paris, which terminated this country's war of independence".¹¹⁸ This was followed in US v Texas, where it was held that the Texan boundary with the US was that established in a treaty of 1828 between the US and Mexico.¹¹⁹

As far as African practice is concerned, the OAU has adopted a policy of succession to boundaries. Resolution 16(I) of 1964 proclaimed that "all member States pledge themselves to respect the borders existing on their achievement of national independence".¹²⁰ Only Somalia and Morocco did not accept this. Although Tanzania declared in 1961 that bilateral treaties, concluded by the UK on behalf of the territory of Tanganyika, were to remain in force for a period of two years and thereafter it would regard "such of those treaties which could not, by the application of the rules of customary international law, be considered as otherwise surviving as having terminated",¹²¹ as regards boundary treaties it has adopted a different attitude. Such boundary agreements were deemed to have survived independence, for example those defining the Kenya-Tanzania border, and those regarding the boundaries with

(118) Manning's Diplomatic Correspondence, vol.VII (Great Britain), doc.2767. Cited in Cukwurah op.cit. p.106.

(119) 143 US 621, 633. See also McNair op.cit. p.603 with regard to Belgian independence from the Netherlands in 1830.

(120) See also article 3(3) of the OAU Charter.

(121) UN Materials on Succession of States, ST/LEG/SER.B/14, p.177.

Rwanda and Burundi.¹²² The Tanzania-Malawi border is, however, subject to dispute.¹²³

(1) The Somali Disputes - Somalia has two boundary disputes with Ethiopia and one with Kenya. Its grounds for claiming Ethiopian and Kenyan territory are based primarily on self-determination¹²⁴ and not strictly on a claim that as a successor State it is able to denounce treaties concluded by its predecessor States. However, it did denounce the 1897 treaty between Great Britain and Ethiopia and has stated that it "does not recognise the legal validity of treaties concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people."¹²⁵ Such unrecognised treaties included, in addition to the 1897 one, the 1908 Ethiopian-Italian treaty and the 1924 Anglo-Italian treaty.¹²⁶ The boundary between Ethiopia and the former British Somaliland was defined in the 1897 agreement between the Ethiopian emperor and the U.K. By this treaty, Ethiopia acquired territory inhabited by Somali nomads. An exchange of letters annexed to this treaty provided that tribes on either side of the frontier would be permitted to cross for grazing purposes.¹²⁷

(122) Seaton and Maliti, "Treaties and Succession of States and Governments in Tanzania", African Conference on International Law and African Problems, 1967 pp.76, 81-2.

(123) Ibid. See further infra, p.594. As regards other African practice relating to devolution agreements with the colonial power, see Okoye, International Law and the New African States, 1972, pp.62-8 and Cukwurah op.cit. pp.107-8.

(124) Supra, Chapter 4, p.200 and Chapter 5, p.297.

(125) See Yearbook of the ILC, 1974, vol.II, pt.1, p.79.

(126) Ibid, p.77.

(127) 537 H.C. Debates, 1954-5, cols.1683-4. See also Latham-Brown, "The Ethiopia-Somaliland Frontier Dispute" 5 ICLQ, 1956, pp.245, 249.

However, these grazing rights were not put into effect until 1954 when a new agreement was concluded between Ethiopia and Britain.¹²⁸ In April 1960, the British government announced that upon the independence of British Somaliland, the provisions of the 1897 treaty should be regarded as remaining in force between Ethiopia and the successor State while the terms of the 1954 agreement relating to grazing rights and certain facilities accorded to British Somaliland with regard to Ethiopian territory would lapse.¹²⁹ On June 5 1960, Ethiopia declared that upon British-Somaliland's independence the grazing rights permitted under the 1954 agreement would be regarded as "automatically invalid";¹³⁰ this was followed after Somalia's independence by a statement that Somalia would not acknowledge the validity of the 1897 treaty.¹³¹

The boundary between Ethiopia and the former Italian Somaliland was less clear. By the 1896 treaty between Italy and Ethiopia following the Italian defeat at Adowa, Italy was obliged to cede Somali-inhabited territory to Ethiopia. The definition of the boundary was left to the 1908 treaty between Italy and Ethiopia, but the failure to demarcate it contributed to the Italian attack on Ethiopia in 1936.¹³² In 1941, Britain established a military administration in the area and

(128) See Udokang op.cit. p.384.

(129) 621 H.C. Debates, 1960, 5th series, p.105. See also cmnd.1044, p.481, and UN Materials on Succession of States, p.185.

(130) Latham-Brown, "Recent Developments in the Ethiopia-Somaliland Frontier Dispute", 10 ICLQ, 1961, pp.167, 169.

(131) Ibid, p.171.

(132) See O'Connell op.cit. p.284.

defined a provisional administrative line. This became the de facto boundary during the trusteeship of Somalia¹³³ and constituted the border upon independence. It is Somalia's assertion that its borders with Ethiopia are "provisional administrative boundaries pending final demarcation and solution of the dispute."¹³⁴

The boundary between Kenya and Somalia was defined in the Anglo-Italian treaty of 1924,¹³⁵ by which Jubaland was transferred to Italian Somaliland in pursuance of the treaty of London 1915. The treaty of London had offered Italy territorial gains in Africa if it joined the war against Germany.¹³⁶ This boundary was also disputed by Somalia.¹³⁷ Somalia's view has been that Ethiopia and Kenya are "unlawfully exercising sovereignty over Somali territories to which they are not entitled."¹³⁸ This is because "the de facto Somali-Ethiopian and Somali-Kenyan boundaries are based on the provision of illegal treaties which are in conflict with prior treaties of protection signed between protecting colonial powers and the Somali people,"¹³⁹

(133) Ibid.

(134) Yearbook of the ILC, 1974, vol.II, pt.1, p.80.

(135) Notes defining a section of the boundary were exchanged in June 1925, see 36 LNTS, p.379.

(136) See in particular article 13 of the treaty. See also McEwen, International Boundaries of East Africa, 1971, pp.113-20.

(137) See further supra, Chapter 4, p.200.

(138) Yearbook of the ILC, 1974, vol.II, pt.1, p.80.

(139) Ibid. See also the 1884 and 1885 agreements giving Britain access to Somali territories and providing that Somalis would not alienate territory except to Britain, 76 BFSP pp.99-106, and the 1886 agreements by which the UK government extended protection to the Somali tribes and their territories, 77 BFSP, pp.1263-9. However, the exact area of the territories covered by the agreements was never defined, see 537 H.C. Debates, 5th series, 1954-5, col.1683. See also O'Connell op.cit. p.284.

Ethiopia and Kenya argue on the other hand that the treaties defining the respective boundaries are valid and binding as determining the limits of sovereignty of the States concerned.¹⁴⁰ Although it was open to Somalia to argue, at least, on the basis of the non-succession of new States to boundary treaties, it does not appear to have actually done so. Its basic argument has related to the supremacy of the principle of self-determination, which it has defined to refer to the free choice of inhabitants of both colonial and independent States. It declared that "the Charter recognition of the right to self-determination therefore prevails over rights which Somalia's neighbours claim under earlier treaties."¹⁴¹ The fact that Somalia seems to have refrained from expressing the view that as a successor State it is not bound by the boundary agreements entered into by its predecessor States of British Somaliland and Italian Somaliland is particularly interesting. It appears not to have wished to establish such a precedent. On the other hand, to have accepted unreservedly the opposite proposition, namely that boundary agreements constitute an exception to the clean slate doctrine of succession to treaties would have had the effect of undermining its own position. Accordingly, it declared that "no rigid universal principle could be laid down to govern all treaties on boundaries and territorial regimes unless saving clauses were incorporated to provide for special situations."¹⁴² Somalia proposed that

(140) Yearbook of the ILC, 1974, vol.II, pt.1, p.78.

(141) Ibid, p.80.

(142) UN Conference on Succession of States in Respect of Treaties, 1977, Comments of Governments, (A/CONF.80/5), p.168.

the draft articles relating to boundaries and territorial regimes should be deleted as "international boundaries and territorial arrangements were matters which fell essentially within the domain of bilateral negotiations, conciliation and arbitration."¹⁴³ Needless to say, Ethiopia and Kenya took the position that boundary treaties were an exception to the clean slate rule and therefore bound successor States.¹⁴⁴

(ii) The Algerian-Moroccan Boundary¹⁴⁵ - In 1845 France and Morocco signed the treaty of Lalla-Marnia, which defined in detail the Morocco-Algerian¹⁴⁶ boundary from the coast to some eighty miles inland. Article IV provided, however, that in the Sahara, "there is no territorial limit to establish between the two countries as the land cannot be ploughed but is used only as grazing land." Each sovereign was to exercise full rights over their respective subjects in the Sahara. It was also provided that a number of named villages were accepted as belonging to the parties, but that "the territory which is located south of the villages in uninhabitable and delimitation thereof would be superfluous." These grazing grounds could be used by a list of nomad cattle-herding groups, including those from Morocco and Algeria.¹⁴⁷ French forces, however, gradually moved into the area. Although an

(143) Ibid, p.169. Somalia argued that "problems arising from boundary treaties could not be satisfactorily solved by universal rigid rules which were in contradiction with the right of self-determination and independence" *ibid*.

(144) Ibid, p.148-9 and 156.

(145) See *supra*, Chapter 5, p.295.

(146) France acquired sovereignty over Algeria in 1830, see Cukwurah, "The Organisation of African Unity and African Territorial and Boundary Problems: 1963-1973" 13 *IJIL*, 1973, pp.176, 184.

(147) Keesings Contemporary Archives, p.19939; Cukwurah *loc.cit.* p.185 and Udokang *op.cit.* pp.395-6.

official French map of 1848 placed the oases of Tuat in Morocco, France claimed in the 1880's they were in Algeria and militarily occupied them in 1899-1900.¹⁴⁸ The treaty of 1901 included the Colomb-Bechar area as part of Algeria and in 1912 the frontier was demarcated by the so-called Varnier line between Colomb-Bechar and Morocco, which was recognised by the Sultan of Morocco in 1928 as an administrative and fiscal frontier.¹⁴⁹ In 1912, Morocco became a French protectorate. French maps throughout the administration period conflicted as to whether particular areas were in Algeria or Morocco and the precise outline of the Varnier line was subject to various interpretations. In 1938, Colonel Trinquet, a French administrator in Morocco, proposed a new boundary which would have placed most of the desert region in Morocco, but it was rejected by the French government. However, the Tindouf area (placed within Algeria) remained under Franco-Moroccan administration until 1952.¹⁵⁰

Morocco recognised the treaty of Lalla-Marnia, but not subsequent agreements and contended that French encroachments upon her territory had violated her sovereignty and could not therefore act as a ground for claims by Algeria as successor to France.¹⁵¹ In its comments on

(148) O'Connell op.cit. p.290. The Tindouf area was occupied by France in 1934, see Keesings Contemporary Archives, p.19939.

(149) Ibid.

(150) Ibid.

(151) Ibid. Cukwurah loc.cit. pp.186-7; Okoye op.cit. p.100 and Wild, "The OAU and the Algerian-Moroccan Border Conflict" 20 International Organisation, 1966, pp.19-22. See also Boutros-Ghali, Les Conflits de Frontière en Afrique, 1972, pp.33-45, and Africa Research Bulletin, October 1966, pp.631-3.

the draft articles dealing with succession to treaties, Morocco declared that to take account only of treaties, many of which had been concluded to the disadvantage of the decolonised States, was tantamount to perpetuating the effects of colonisation.¹⁵² It could be argued that Morocco in accepting the 1845 treaty as the starting point for the definition of its frontier line with Algeria is merely disputing the interpretation of that agreement.¹⁵³ However, the Sahara area in question was not even delimited in this treaty and subsequent agreements contain an element of ambiguity, unless one considers them in the light of the actual boundary in the sense of de facto possession at the time of Algerian and Moroccan independence.¹⁵⁴ Therefore, the principle of territorial integrity in the light of de facto possession pending independence becomes crucial with regard to the definition of the boundary, while the narrower question of succession to boundary treaties does assume in the circumstances of the case a lesser role. Again, it is interesting to note that Morocco does not appear to have argued that as a successor State it may repudiate the boundary agreements of the predecessor State, it has argued rather that issues of historical rights and territorial integrity of its pre-colonial empire override the general principle of the inviolability of the colonial borders.¹⁵⁵

(iii) Other Cases - A number of other cases may be cited with regard to the practice of States relating to succession to boundary treaties.

(152) UN Conference on Succession of States in Respect of Treaties, 1977, Comments of Government, (A/CONF.80/5), p.163.

(153) O'Connell op.cit. p.291.

(154) See Journal Official, Debates C.R., p.2025, 3 October, 1956.

(155) See, for example, UN Conference on Succession of States in Respect of Treaties, 1977, Comments of Governments (A/CONF.80/5), pp.162-3.

In the convention of 1930 between the US and Great Britain for the delimitation of the boundary between the Philippine archipelago and the State of North Borneo, certain rights and obligations were assumed by the United States. Upon the independence of the Philippines in 1946, the UK recognised that the former had succeeded to the US rights and obligations under the 1930 agreement.¹⁵⁶ Following the independence of India and Pakistan, the UK made a statement with regard to the continuing in force of the treaty of Kabul of 1921 defining the boundary between British India and Afghanistan. The UK noted that whereas certain provisions, being political in nature or relating to continuous exchange of diplomatic missions, did not devolve to the successor State (Pakistan) "any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the treaty, could not be affected whatever the position about the treaty itself might be."¹⁵⁷ Other cases of disputed borders really appear to concern treaties not fully delimiting boundaries or where the validity of such treaties is questioned. The issue of succession therefore merely provides an opportunity for the raising of the problems.¹⁵⁸ The conclusion, therefore, that State practice has recognised that boundary treaties constitute an exception to the clean slate principle of succession to treaties appears incontestable.¹⁵⁹

(156) UN Materials on Succession of States, p.190.

(157) Ibid, p.187. Afghanistan argues that the treaty itself was illegal and that Pakistan as a new State does not succeed to the agreements of the predecessor State, *ibid* pp.2-3. Afghanistan in general strongly argued that the clean slate principle applied to boundary treaties, see *ibid* and UN Conference on Succession of States in Respect of Treaties, 1977, Comments of Governments (A/CONF.80/5), pp.139-42.

(158) Yearbook of the ILC, 1972, vol.II p.54. Examples would include the Surinam-Guyana and Venezuela-Guyana borders and Chinese claims with regard to Burma, India and Pakistan, see O'Connell *op.cit.* pp.274-5 and 277-82.

(159) Yearbook of the ILC, 1972, vol.II, p.54.

(3) The International Law Commission and the Vienna Convention
on Succession of States In Respect of Treaties

Article 4 of Waldock's draft articles on succession to treaties declared that "nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succession."¹⁶⁰ The point was made that the provision meant only that the other articles dealing with the application or cessation of treaties did not affect established boundaries.¹⁶¹ In the draft articles prepared by the Special Rapporteur in 1972, two alternatives were posited with regard to the question of succession to boundary treaties. Alternative A noted that:

"1. The continuance in force of a treaty which established a boundary is not affected by reason only of the occurrence of a succession of States in respect of a party.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State."

Alternative B stated that:

"1. A Succession of States shall not by reason only of its occurrence affect the continuance in force of a boundary settlement which has been established by a treaty.

2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary."¹⁶²

(160) Ibid, 1968 vol.II, p.92.

(161) Ibid, p.93.

(162) Ibid, 1972, vol.II, p.44.

The difference between the two formulations relates essentially as to whether it is the treaty itself or the boundary situation established by a treaty which devolves upon the successor State. In favour of the former, it could be said that treaty interpretation may be required in order to define the boundary properly and that certain ancillary provisions may be stipulated as part of the boundary regime created by the treaty which if held not to devolve on a succession of States might be said to change materially the boundary settlement. To support the latter, it could be argued that a boundary treaty has constitutive effects and it is the legal and factual situation thus created which passes to the successor State rather than the treaty.¹⁶³ In the event, the latter approach was adopted.¹⁶⁴ Draft article 29 on boundary regimes provided thus that "A Succession of States shall not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."¹⁶⁵ This is in accordance with practice and doctrine, it is believed, since the succession ipso facto of a boundary treaty might involve the continuance of provisions not directly related to the creation of the boundary that might prove unacceptable to the successor State. More importantly, it is believed that the essence of the exception to the clean slate rule of succession is due to the centrality of the concept and consequences of territorial sovereignty in international law, with regard to stability and certainty in international relations and the maintenance of international peace and security. It is, of

(163) Ibid, pp.54-5.

(164) In accordance also with Waldock's formulation, *ibid* 1968, vol.II, p.92 and the views of the International Law Association, *ibid* 1969, vol.II, p.48.

(165) *Ibid* 1974, vol.I, p.203. See also A/CN.4/L.183/Add.6.

course, also true that international society in its present form is firmly based upon the notion of State sovereignty, territorially defined, therefore, one can accept that boundary treaties in establishing a particular regime give birth to an objective situation which constitutes a legal fact for the international community.¹⁶⁶

Draft article 29 as finally adopted¹⁶⁷ was accepted by the Vienna Conference on Succession of States In Respect of Treaties as article 11. It was approved by the Committee of the Whole without a vote,¹⁶⁸ and the Convention on Succession of States In Respect of Treaties was adopted on 23 August 1978 by 82 votes to none, with two abstentions (France and Switzerland).¹⁶⁹ A few further points remain to be considered, however, regarding the doctrine of the boundary exception to the general rule, embodied in article 16 of the Convention.

(a) The basis of the exception to the clean slate rule was generally accepted to lie in the requirements of the international community with regard to the maintenance of international peace and security. The Special Rapporteur in 1974, Sir Francis Vallat, declared that acceptance of the idea that a bilateral boundary treaty could be

(166) The Egyptian representative in the 6th Committee asked how in legal theory the rights and obligations of parties under a treaty could be separated from the international instrument creating them, A/CN.4/278/Add.6, para.417. The Special Rapporteur noted that as a matter of principle, it is the nature of the effects of the treaty which gives rise to the element of permanence rather than the general character of the treaty as such. The formulation of the ILC would also avoid providing a ground for saying that an unlawful treaty would be perpetuated by the articles, Yearbook of the ILC, 1974, vol.II, pt.1, p.85.

(167) The Drafting Committee substituted "shall" for "does" in the first line of the text in order to emphasise that the article "was in the nature of what the French called une constatation de fait", *ibid* 1974, vol.I, p.261.

(168) Report of the UN Conference on Succession of States In Respect of Treaties, 1977, (A/CONF.80/15), Annex.II, p.21.

(169) A/CONF.80/31.

swept aside by a succession of States "would result in chaos. It was unthinkable that it should become necessary to renegotiate a boundary whenever a succession of States occurred."¹⁷⁰ It was pointed out that "the disturbance of existing boundaries is much more likely to create chaos than their maintenance."¹⁷¹ This view was also put by a number of the members of the ILC,¹⁷² and by a number of governments.¹⁷³ A number of members¹⁷⁴ and governments¹⁷⁵ expressed the view that the exception was already part of customary international law. Zambia was gratified that the ILC was giving effect to the OAU border resolution of 1964.¹⁷⁶

(b) The limits of the exception to the general rule were fairly clearly expressed. The Special Rapporteur noted that the article was a saving clause of limited character, dealing only with the effects of succession qua succession and not touching upon questions pertaining to the international law of treaties. The article was (as indeed was

(170) Yearbook of the ILC, 1974, vol.I, p.204. The first Special Rapporteur, Sir Humphrey Waldock, referred to the Commentary of the ILC with regard to the exception to the *rebus sic stantibus* rule constituted by treaties establishing a boundary, which pointed to the need to avoid the rule becoming a source of dangerous frictions, *ibid*, 1968, vol.II, p.92.

(171) *Ibid*, 1974, vol.II, pt.1, p.83.

(172) For example, Moreno, *ibid*, 1974, vol.I, p.210; Ago *ibid*, p.213; Tsuruoka *ibid*, p.216; Yasseen *ibid*, p.219; Ustor *ibid*, p.221.

(173) For example, Australia, UN Conference on Succession of States In Respect of Treaties, 1977, Comments of Governments (A/CONF.8/5), pp.143-4; the German Democratic Republic *ibid*, p.150; Indonesia, *ibid*, pp.152-3; and the Philippines *ibid*, p.166.

(174) For example, Sette Camara, Yearbook of the ILC, 1974, vol.I, p.206; Ushakov *ibid*, p.210; Ago *ibid* p.213. The Special Rapporteur stressed that the basis of his proposal was to be found in long-established customary law, *ibid*, p.222. Cf. Tabibi *ibid*, pp.206-8.

(175) For example, the German Democratic Republic, UN Conference on Succession of States In Respect of Treaties, 1977, Comments of Governments, (A/CONF.80/5), p.150; USSR *ibid*, p.172 and USA *ibid*, p.175.

(176) *Ibid*, p.176.

the article concerning other territorial regimes) concerned with the results of certain treaties and not with the treaties themselves. The words "established by a treaty" meant therefore, "validly established by a valid treaty". The intention was to refer to situations lawfully and validly created.¹⁷⁷ In other words, the article could not operate to legalise a boundary founded upon an unlawful treaty.¹⁷⁸ Nor was the provision concerned with a situation created otherwise than by a treaty.¹⁷⁹ Hambro, as a member of the ILC, made the point that draft article 29 did not state or imply that boundary treaties were sacrosanct and would last forever, it simply stated that succession of States as such would not affect those treaties.¹⁸⁰ The article did not prevent the settlement of boundary disputes by accepted methods, such as negotiation and arbitration.¹⁸¹ Nor could it affect boundary situations, which could be lawfully challenged. Thus, where a boundary treaty failed to delimit adequately and clearly the proposed boundary or where its validity could be challenged on any of a series of grounds, the article was of little influence one way or the other. The article would be of no direct value where the boundary was contested in the light of other principles, such as territorial integrity or self-determination. The Special Rapporteur stressed that "the mere occurrence of a succession of States would be considered neither to consecrate the existing boundary if it is open to challenge nor deprive it of its

(177) This point was emphasised in article 14 of the Convention, which provides that "nothing in the present Convention shall be considered as prejudging in any respect any question relating to the validity of a treaty."

(178) Yearbook of the ILC, 1974, vol.I, p.204.

(179) Ibid, p.222.

(180) Ibid, p.213.

(181) Ibid, p.204.

character as a legally established boundary, if such it was at the date of the succession of States."¹⁸²

(c) The principle of self-determination was clearly of concern with regard to the topic of State succession in general and the question of boundary agreements in particular. The Special Rapporteur noted in 1969 that the traditional principle of State succession whereby a new State begins its treaty relations with a clean slate was certainly consistent with self-determination, while the approach of the International Law Association¹⁸³ formulated in terms of a presumption in favour of the transmission of the treaties of the predecessor State to the successor State may raise questions with regard to self-determination.¹⁸⁴ The comments made by governments in 1974 demonstrated "overwhelming support for the clean slate doctrine",¹⁸⁵ which it was felt was the main implication of the principle of self-determination.¹⁸⁶ The clean slate principle was chosen by the ILC as the basic provision of the draft articles relating to newly independent States and incorporated in article 16 of the Vienna Convention. With regard to the exception to the rule in the case of boundary treaties, it was possible to argue that self-determination was being overridden by the continuity principle. Zambia, in particular, stated

(182) Ibid, 1972, vol.II, p54.

(183) International Law Association, Report of the 53rd Conference, 1968, pp.603-5.

(184) Yearbook of the ILC, 1969, vol.II, p.50.

(185) Ibid, 1974, vol.II, pt.1, p.9.

(186) Ibid, p.7. See, for example, the comments of Denmark *ibid*. Sweden and the UK expressed some reservations over this, *ibid*, pp.8 and 9.

that in its draft articles relating to boundary and other territorial regimes, the ILC had appeared to cut across the principles of self-determination, equal rights and the sovereign equality of States. Under both the Vienna Convention on Treaties and customary law, a State could only be bound by a treaty through an act of will establishing consent to be bound and this also applied to boundary regimes.¹⁸⁷ The Special Rapporteur, however, correctly pointed out that in the case of a newly independent State, which has acquired independence by the exercise of self-determination, "it may well be said that it can only acquire the territory in respect of which self-determination has been exercised and not part of the territory of a neighbouring State." Reference was also made to the need to consider the principle of respect for the territorial integrity of States.¹⁸⁸

This approach, which is consistent with the accepted definition of the right to self-determination, was to some extent endorsed by Kenya, which stressed that "in the event of a succession, the successor State replaced the predecessor State as far as boundaries were concerned not because of the boundary treaty, but because of the mere fact

-
- (187) Ibid, p.76. See also the comments of Romania, *ibid*, p.75. Afghanistan, Swaziland and Syria made similar criticisms, UN Conference on Succession of States In Respect of Treaties, 1977, Comments of Governments, (A/CONF.80/5), pp.139, 170 and 171.
- (188) Yearbook of the ILC, 1974, vol.II, pt.1, p.84. Guyana noted that the principle of self-determination could not be extended to the point of removing the very foundation of the existence of the new State from the moment of its creation, otherwise "the old colonial world would become an unbounded chaos", *ibid*, p.76. See also the comments of Algeria and Ethiopia, UN Conference on Succession of States In Respect of Treaties, 1977, comments of governments, (A/CONF.80/5), pp.143 and 149.

of the existence of such boundaries. In such a case it was irrelevant and confusing to raise the issue of self-determination."¹⁸⁹ It may also be noted, that the treatment of the principle of self-determination as an independent principle, which should not be imported ambiguously into other branches of the law, was adopted also with regard to the law of treaties.¹⁹⁰

(c) Conclusions

The accepted approach that neither the *rebus sic stantibus* rule nor the clean slate doctrine is based in law upon the principle of self-determination,¹⁹¹ in addition to preventing some confusion, obviated the need to posit exceptions to the legal right of self-determination with regard to treaties establishing boundaries and boundary regimes. The centrality of the concept of territory in international law, coupled with the need to ensure the stability and finality of boundaries in the interests of international peace and security, has produced a situation in which the delimitation of sovereignty by an international agreement remains binding despite State succession or a fundamental change of circumstances. Such an approach refers only to boundary treaties. Whether or not a legitimate territorial claim on

(189) Ibid, p.157.

(190) Yearbook of the ILC, 1966, vol.II, p.259. Waldock pointed out that "by excepting from succession in respect of treaties boundaries established through treaties, the present article in no way excludes the independent operation of the principle of self-determination in any case where the conditions for its application exist", *ibid*, 1968, vol.II, p.93.

(191) As distinct from being merely "confirmed" by it, see Yearbook of the ILC, 1974, vol.II, pt.1, p.8.

other grounds may or may not be made is another question, as is the challenging of the validity of the treaty itself. But the fact that a treaty is the most convenient and most utilised method of resolving territorial and boundary issues means that the exceptions to the *rebus sic stantibus* and clean slate rules are of considerable importance. Their acceptance by African States, despite some reservations by a couple of African countries, reinforces the legal validity of colonial territorial adjustments and thus underlines the requirement to respect the colonial borders as at the date of independence. It is also noteworthy that the opposition by for example Somalia and Morocco to the principles examined above has been carefully formulated and has by no means consisted of outright hostility. It is Afghanistan that has appeared to reject most strongly the relevance and applicability of such principles. These principles may also be seen as reinforcing the accepted definition of the right to self-determination in international law, that is in terms of the pre-independent entity territorially defined by the administering power exercising its right to sovereignty so delimited in space.

The fact that boundary agreements may establish objective legal circumstances which may subsist independently of the particular treaty itself means that provisions in such agreements are severable when dealing with the creation of a boundary. This was the view adopted by the UK with regard to the Ethiopia-British Somaliland boundary and is to be regarded as correct.¹⁹²

(192) See Cukwurah *op.cit.* p.111, and O'Connell *op.cit.* pp.302-4.

III - Other Territorial Regimes

More controversial than the question of treaties establishing boundaries is the problem of treaties creating other territorial regimes. Such treaties have been termed "dispositive", or "real" or "localised".¹⁹³ Agreements may be "localised" if they:

(a) are in the nature of objective territorial regimes created in the interests of one nation or the community of nations; (b) are applied locally in virtue of territorial application clauses;

(c) touch or concern a particular area of land."¹⁹⁴ In such cases, it is argued, these territorial provisions devolve upon a successor State.¹⁹⁵ Boundary treaties have been treated as a species of such dispositive treaties.¹⁹⁶ However, there is an important difference. As Waldock noted, in the case of a boundary established by a treaty one is concerned with a legal situation resulting from the execution of the treaty, whereas localised treaty stipulations involve executory obligations and therefore may appear to raise a question of succession in respect of treaty obligation as well as one of the continuance of a legal situation.¹⁹⁷ In addition, of course, whereas a State may accept that it must exercise its sovereignty within territorial limits established by its predecessor, it may be reluctant

(193) See O'Connell op.cit. p.231; Udokang op.cit. p.327; McNair op.cit. p.656 and Lester loc.cit., p.498. Sometimes the term "servitude" has been used, but this can cause confusion, see O'Connell op.cit. p.231 and International Law Association, The Effect of Independence on Treaties, 1965, p.352.

(194) Ibid.

(195) See Oppenheim, International Law, 8th ed., 1955, p.159. Brownlie argues that "there is insufficient evidence in either principle or practice for the existence of this exception to the general rule", Principles of Public International Law, 2nd ed., 1973, p.646. See also Castren loc.cit., pp.448-9 and Brierly, The Law of Nations, 6th ed., 1963, p.154.

(196) Udokang, op.cit., pp.328-9 and The Effect of Independence on Treaties, p.361.

(197) Yearbook of the ILC, 1968, vol.II, p.93.

to accept the limitations upon its sovereignty by restrictions imposed by a previous authority which continue in an open and apparent fashion. In a sense, the principles of self-determination and the sovereign equality of States may appear more offended in the instance of dispositive treaties than with regard to boundary agreements.¹⁹⁸

The International Court in the Free Zones case appeared to endorse the principle that certain treaties of a territorial character are binding ipso jure upon a successor State,¹⁹⁹ although the extent of the principle was in doubt.²⁰⁰ The Committee of Jurists dealing with the Aaland Islands question felt that Finland was bound to respect the provisions of the 1856 treaty between France, the UK and Russia, according to which the latter agreed to the demilitarisation of the Aaland Islands. These provisions "constituted a special international status relating to military considerations, for the Aaland Islands." Finland, by declaring itself independent and claiming recognition could not escape from "the obligations imposed on it by such a settlement of European interests."²⁰¹

(a) African Practice

(1) US Military Bases in Morocco - In 1950, France and the United States signed an agreement, providing for five US military bases in

(198) It is also to be noted that the exception in article 62(2) of the Vienna Convention on the Law of Treaties applies only with regard to treaties establishing boundaries and not to other territorial treaties.

(199) PCIJ, Series A, no.24, p.17, and *ibid*, Series A/B, no.46, p.145.

(200) See Yearbook of the ILC, 1972, vol.II, p.50. See also Brownlie *op.cit.*, p.646.

(201) LNOJ, Special Supplement no.3, 1920, p.18. The Committee of Jurists also held that "the recognition of any State must always be subject to the reservation that the State recognised will respect the obligations imposed upon it either by general international law or by definite international settlements relating to territory" *ibid*. See also the Temple case, ICJ Reports, 1962, p.6, and the Right to Passage case, *ibid*, 1960, p.6. The latter case, however, dealt with the succession of customary rights over territory.

Morocco.²⁰² This was deemed to be pursuant to the treaty of Fez of 1912 by which Morocco became a French protectorate, permitting it "to proceed to such military occupation of the Moroccan territory as it might deem necessary for the maintenance of good order and the security of commercial transactions."²⁰³ Upon Moroccan independence in 1956, the government declared that it did not recognise the 1950 agreement, which constituted a violation of its sovereignty.²⁰⁴ The Franco-Moroccan Declaration of 1956 terminated the treaty of Fez, while the protocol annexed to it provided that pending the conclusion of new agreements the "present status of the French army in Morocco shall remain unchanged."²⁰⁵ It was accepted that the continued rights of the US forces were dependent upon the status of the French army.²⁰⁶ In the Franco-Moroccan accord of May 1956, it was suggested that Morocco would not maintain those treaties concluded by France on its behalf which had been the subject of Moroccan comment,²⁰⁷ while in a note to France, Morocco reserved its position with regard to the 1950 agreement.²⁰⁸ The United States recognised Moroccan sovereignty over the US bases in 1957 and 1959²⁰⁹ and agreed to withdraw all its forces

(202) This agreement was not published, see Udokang op.cit. p.353; O'Connell op.cit. p.257 and Esgain, "Military Servitudes and the New Nations", The New Nations in International Law and Diplomacy (ed. O'Brien), 1965, pp.72-6.

(203) Article II.

(204) Udokang, op.cit. p.355, and O'Connell op.cit. p.257.

(205) See 51 AJIL, 1957, p.676.

(206) O'Connell, op.cit. p.258.

(207) 51 AJIL, 1957, p.679-81.

(208) Ibid, p.682. The French admitted that the 1950 agreement was made on behalf of France and not in the name of Morocco, O'Connell op.cit. p.258.

(209) 37 Department of State Bulletin, 1957, p.956 and 41 Department of State Bulletin, 1959, p.723.

by the end of 1963.²¹⁰ The US did not seek to recover the 410 million dollars invested in the base.²¹¹ However, as Udokang rightly notes, neither France, Morocco nor the United States seemed to hold that the 1950 agreement had created a "real" or "localised" right on Moroccan territory in favour of the US, which would be binding upon Morocco.²¹² It may be suggested that the personal and political nature of military agreements is such as to override any territorial aspects and thus prevent the operation of any principle of devolution to a successor State.²¹³

(11) The Belbase Agreements of 1921 and 1951 - Following the First World War, the former German East African territories were given to Britain and Belgium as mandated territories. The fact that the eastern region, Tanganyika, was awarded to Britain meant that the Belgian-administered territories of Ruanda and Urundi, as well as the Congo, were cut off from their natural port of Dar-es-Salaam. In 1921, Britain and Belgium concluded an agreement whereby the latter was granted a lease in perpetuity of port sites in Dar-es-Salaam and Kigoma (on Lake Tanganyika). Various transit facilities and customs exemptions were also provided for.²¹⁴ In 1951, a further agreement was

(210) 45 Department of State Bulletin, 1961, p.973.

(211) O'Connell op.cit. p.258.

(212) Op.cit. p.357. As regards the US military bases in the West Indies acquired under an agreement in 1941 with the UK, both the US and the West Indies appeared to accept that their future status on independence would depend upon an agreement by the parties, see Esgain loc.cit. pp.78-9 and O'Connell op.cit. pp.259-62.

(213) See Yearbook of the ILC, 1972, vol.II, p.56.

(214) O'Connell op.cit. pp.241-2; Udokang op.cit. pp.357-60 and Seaton and Maliti loc.cit. pp.93-4. See also 5 LNTS pp.319-27.

entered into which provided for a change in the site at Dar-es-Salaam, but otherwise the 1921 treaty was continued.²¹⁵ Belgium spent a considerable sum in developing the port facilities at the leased sites. Nine days before independence, the Prime Minister of Tanganyika declared that it intended to treat both agreements as void and to resume possession of the sites.²¹⁶ However, Tanganyika's objection was not with regard to all pre-independence agreements dealing with territorial rights. It noted that it had no objection to the enjoyment by foreign States of special facilities in its territory, if such facilities "had been granted in a manner fully compatible with our sovereign rights and our new status of complete independence."²¹⁷ The problem with regard to the Belbase agreements was that they had been granted "in perpetuity" by a mandatory authority that did not have the competence to bind the territory in perpetuity. The Prime Minister stated that "in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do."²¹⁸ In 1962, Tanganyika gave notice of its request for the evacuation of the sites, but the now independent States of Congo (Leopoldville), Rwanda and Burundi claimed to have succeeded to Belgium's rights under the 1921 and 1951 agreements.²¹⁹ Discussions were held between the parties as regards the use of the port facilities, but it does not appear that new arrangements have been concluded and

(215) 110 UNTS, p.3.

(216) UN Materials on Succession of States, pp.187-8.

(217) Seaton and Maliti loc.cit. p.93.

(218) Ibid.

(219) O'Connell op.cit. p.243 and Yearbook of the ILC, 1972, vol.II, p.56.

de facto the port facilities are being operated as before.²²⁰ In the event, the fact that Tanganyika rested its argument on the limited competence of the mandatory power to bind the territory might appear to mean that it accepted that binding territorial provisions could devolve upon successor States in other circumstances.

(iii) The Nile Waters Agreement of 1929 - This agreement between Britain and Egypt provided that save with the previous agreement of the Egyptian government no works were to be undertaken by Britain in its territories which would affect adversely the quantity of water arriving in Egypt from the Nile.²²¹ Egypt was given the right to construct in the Sudan works on the Nile, subject to prior agreements with the local authorities to safeguard local interests. Such works would, however, remain under the direct control of the Egyptian government. Upon independence, the Sudan denied the continued validity of the 1929 agreement.²²² Sudan did not dispute Egypt's rights in the Nile Waters, but denied that it was bound after independence with regard to the burdensome incidences of the agreement.²²³ In 1959, Sudan and Egypt concluded an agreement providing for additional regulation of the Nile waters on the basis of existing rights.²²⁴

(220) Ibid.

(221) 93 LNTS pp.43, 46.

(222) The Nile Waters Question (Ministry of Irrigation, Sudan), 1955, pp.2-3, and 596 H.C. Debates, 5th Series, col.342. Egypt upheld the validity of the 1929 agreement, *ibid*.

(223) O'Connell *op.cit.* p.246. In 1958, Sudan formally repudiated the agreement, *ibid*.

(224) Udokang *op.cit.* pp.365-6. See as regards neighbouring States' attitudes, O'Connell *op.cit.* pp.246-7 and with regard to Tanzania, Seaton and Maliti *loc.cit.* p.95.

(b) The Vienna Convention on Succession of States In Respect of Treaties, 1978

Practice would appear to accept that territorial treaties may devolve upon successor States although the precise definition of such treaties remains the problem.²²⁵ The ILC took the view that such treaties constituted another exception to the clean slate rule. Despite some reservations by ILC members²²⁶ and some governments,²²⁷ the Vienna Convention accepted the concept. Article 12 provides that:

"1. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of

(225) See, for example, Zemanek, "State Succession After Decolonisation" 116 HR, 1965, pp.180, 242-3.

(226) Particularly by Tabibi, who felt the draft article was politically oriented and insufficiently supported by State practice, Yearbook of the ILC, 1974, vol.I, pp.206-7. But cf. Sette Camara *ibid*, pp.205-6.

(227) For example, Botswana, UN Conference on Succession of States in Respect of Treaties, 1977, comments of governments (A/CONF.80/5), p.145; Iran, *ibid* p.153; Mexico, *ibid* p.161; Romania, *ibid* p.167; Swaziland, *ibid* p.170; Syria, *ibid* p.171 and Cameroon, *ibid* p.173. Kenya declared that in cases of localised treaties, a newly independent State did not inherit the territorial regime created, but it did inherit an obligation where necessary to renegotiate the provisions of such a treaty so as to achieve the protection of the vital interests of a beneficiary State while not jeopardising the successor State's independence, *ibid*, p.157.

a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates."

IV - The Delimitation and Demarcation of African Boundaries ²²⁸

In the definition and recognition of international boundaries in the interests of stability and finality, a number of factors are or may be crucial. Where a boundary has been delimited by treaty and demarcated on the ground, a State may yet seek to maintain that it is not bound by that arrangement on the grounds of, for example, ethnic or historical claims. Where a boundary has been delimited but not demarcated, problem may arise as to the application in practice of the treaty provisions. Thus issues of treaty interpretation, acquiescence and estoppel and the relevance of particular administrative acts will be of relevance. But where a boundary has not been delimited, the question of its positioning will basically depend upon either mutual agreement or actual practice on the ground. In all cases, the value of acts of sovereignty is high, although the role played by such acts will depend upon all the circumstances of the case in question.

(228) Supra, p.546.

(a) Delimitation Disputes

In some cases, there may be no delimitation of the boundary at all or a disputed delimitation.

(i) The Ethiopian-Somali Dispute - In 1884 and 1886, the British government concluded a series of agreements with the leaders of the five tribes inhabiting the Somali coast region. One group of agreements involved a pledge by the Somalis not to cede or otherwise alienate any portion of the tribal lands to anyone except the British government,²²⁹ while a second group of agreements provided for the protection of such tribes by the British Crown. The tribes also pledged not to enter into relations with foreign powers without the knowledge and approval of the British government.²³⁰ However, the extent of the land owned by the Somali tribes was unclear since written records of tribal limits apparently did not exist.²³¹ This resulted in border disputes with Ethiopia. Certain of the claims made by the parties overlapped. Accordingly, the UK-Ethiopia treaty of 1897 was concluded, and the boundary delimited by notes exchanged between a British representative and an Ethiopian representative in accordance with article 2 of the treaty.²³² The Haud, one of the main grazing areas of the Somali tribes, was divided between the protectorate and Ethiopia and the so-called "reserved area" to the north-west also incorporating grazing grounds was given to Ethiopia.²³³

(229) These agreements also provided for free access for British shipping to the Somali coast and the suppression of the slave trade, see eg. 76/BFSP pp.101-6 for a series of such agreements. See also 537 H.C. Debates, 5th Series 1954-5, col.1683 and Sharma op.cit. p.97.

(230) See, for example, 77BFSP pp.1263-9.

(231) But tribal tradition defined such areas reasonably clearly, see Latham-Brown, "The Ethiopia-Somaliland Frontier Dispute" 5 ICLQ, 1956, pp.245, 249. See also 537 H.C. Debates, 5th Series, 1954-5, col.1683.

(232) 89/BFSP pp.31 and 36-7.

(233) Britain was negotiating under a military disadvantage in the light of the situation at that time in the Sudan, see Sharma op.cit. p.98.

Somalia declared that the 1897 treaty was invalid as it was *inter alia* inconsistent with the earlier agreements. It was contended that the UK could not cede in 1897 what by the 1884-6 agreements it did not have.²³⁴ However, the UK had general authority under the protectorate agreements to determine borders, it would appear, and it may be possible to infer Somali consent from those earlier agreements. In addition, the status of the 1884-6 agreements is subject to doubt. Sharma declares that they were of a lower status than international agreements,²³⁵ but one has to be careful of this type of approach of grading treaties. Certainly the type and level of control exercised by the UK over the area subsequent to the 1884-6 agreements would appear to suggest quite strongly that the UK did possess the competence to define the boundaries of the region. The 1897 treaty was a binding and valid treaty in law and was acted upon by the parties in the decades that followed. Subsequent conduct may be taken as confirmation of the treaty.

In 1935 as a consequence of the Italian invasion of Ethiopia, the Haud was incorporated into Italian Somaliland. An agreement between the Italian government and the authorities of British Somaliland provided for the protection of grazing and watering rights "on either side of the frontier of British Somaliland."²³⁶ This presupposed that the 1897 delimitation was both valid and operative. An Ethiopian-UK agreement in 1942 provided that those parts of Ethiopia included in the

(234) See 537 H.C. Debates, 5th Series, 1954-5, col.1679 and Latham-Brown *loc.cit.* p.255. See also Somalia's comments to the ILC to this effect, Yearbook of the ILC, 1974, vol.II, pt.1, p.77.

(235) *Op.cit.* p.101.

(236) *Cmd.* 5775.

Italian Somaliland region would be temporarily administered as part of British Somaliland, following the defeat of the Italian forces.²³⁷ By the 1944 Ethiopian-UK agreement, this arrangement was confirmed "without prejudice to their [i.e. the Ethiopians'] underlying sovereignty."²³⁸ Negotiations for the return of the areas commenced in 1946 and the treaty concluded in 1954 provided for the resumption of Ethiopian control and the legal regime created by the 1897 agreement was officially acknowledged.²³⁹ The Secretary of State for the Colonies declared that "although these areas are used predominantly by members of British protected tribes from the Somaliland protectorate they have been Ethiopian territory in international law since the Anglo-Ethiopian treaty of 1897."²⁴⁰

A difference in the interpretation of the 1908 Ethiopian-Italian treaty concerning the delimitation of the Ethiopian-Italian Somaliland boundary has also manifested itself. The treaty delimited the boundary in the light of the territorial extent of particular tribes.²⁴¹ However, the extent of such tribal areas was in doubt. Accordingly, an Italian-Ethiopian demarcation commission in 1910 was unable to complete its task.²⁴² The details of the 1897 Ethiopian-Italian agreement were ambiguous and thus of no help.²⁴³ The conclusion with relation to this boundary must be that no clear delimitation was laid down. Thus, the boundary has to be inferred from practice and acts of administration and any acts of acquiescence.

(237) Cmnd. 6334.

(238) 145/BFSP, pp.460, 462.

(239) Cmnd. 9348. See also Latham-Brown loc.cit. p.259.

(240) 537 H.C. Debates, 1955, col.1281.

(241) See Mariam "The Background of the Ethio-Somalian Boundary Dispute" 2 JMAS, 1964, pp.189, 203-6. See also Africa Research Bulletin, May 1966, pp.531-2.

(242) Sharma, op.cit. p.105.

(243) Mariam loc.cit. p.200. See also Sharma op.cit. pp.106-9.

(ii) The Algerian-Moroccan Dispute - As noted above,²⁴⁴ the 1845 treaty between France and Morocco did not delimit the area beyond Teniet-El-Sassi, some eighty miles from the coast, since the delimitation of uninhabited territory was deemed to be superfluous.²⁴⁵ In 1901, a protocol signed in Paris extended the border between Algeria and Morocco from Teniet-El-Sassi (or Teniet-ess-Assi) to the Hammada du Guir. The delimitation in this area was by tribal lands rather than geographical features. Provision was made for military and customs posts along the border to be controlled by both powers.²⁴⁶ In 1902, by the agreement of Algiers, the 1901 provisions regarding these posts were abrogated except at Figuig, and instead areas of joint authority were created along the border.²⁴⁷ France occupied further areas, but these were returned to Morocco by an arrangement in 1910. Varnier, a French High Commissioner was deputed to execute this arrangement and his line (the Varnier line) coincided with the 1901 Protocol boundary between Teniet-El-Sassi and Figuig, however to the south-west of Figuig the line running north and west of the former boundary enlarged Algeria by several hundred square miles. The Varnier line was adopted by a French ministerial decree of 1912.²⁴⁸ In 1912, Morocco became a French protectorate. In 1938, the Trinquet line was proposed which would have enlarged Morocco, but it was not accepted.

(244) Supra, p.530.

(245) See Reyner, "Morocco's International Boundaries: A Factual Background" 1 JMAS, 1963, p.315.

(246) Sharma op.cit. p.110, and Reyner loc.cit. p.317.

(247) Ibid.

(248) Ibid.

It became, however, the basis of Moroccan claims over Algerian territory in the 1960's.²⁴⁹ French maps were inconsistent throughout this period and the precise outline of the Varnier line was subject to various interpretations. Since the Varnier line was based on the 1910 agreement, it must be accepted as the correct delimitation of the boundary in the region in question. But since there were different French views as to the placement of this line,²⁵⁰ the presumption must lie in favour of the line deemed by France to constitute the boundary on Algeria's independence. This would appear to be in accord with French acts of administration during the period pending independence. In the event, Morocco accepted the boundary as colonially defined (ie. during the latter stages).²⁵¹

(iii) The Sudanese-Egyptian Dispute - In the agreement of 1899 between Egypt and the UK, it was provided that Sudan included all territories to the south of the 22nd parallel of latitude which had never been evacuated by Egyptian troops, which had been lost as a result of the Sudan rebellion and reconquered or "which may hereafter be conquered by the two governments acting in concert."²⁵² It was also provided that Wadi Halfa and Suakin could be most effectively administered in conjunction with the reconquered provinces (of Egypt) to which they were respectively adjacent. Suakin was later excepted from the regime of martial law proclaimed over Sudan.²⁵³ The distinction

(249) Ibid, p.318.

(250) See Sharma op.cit. p.112.

(251) Supra, p.530.

(252) See Abdalla, "The Sudanese Boundary Conflict" 14 Revue Egyptienne de Droit International, 1958, pp.1, 3.

(253) Ibid. This area was kept for some time under the jurisdiction of the Egyptian courts, ibid, p.4.

here between the establishment of a political boundary and administrative control is particularly to be noted. In the years that followed, a number of other administrative arrangements were entered into which resulted in Sudanese administration of Egyptian areas to the north of the 22nd parallel and Egyptian administration of some Sudanese territory to the south of this latitude.²⁵⁴ On 1 February 1958, Egypt sent a note to Sudan requesting the return of all territory north of the 22nd parallel being administered by Sudan. In return, Egypt would transfer the territory it was administering south of the parallel to Sudan.²⁵⁵

Egypt claimed that the territories north of the parallel were under its sovereignty being merely administered by Sudan under a bilateral arrangement, "on a strictly local level, confined to administrative agents on either side of the frontier"²⁵⁶ or through unilateral Egyptian acts, such as the arrêtés of 1899 and 1902.²⁵⁷ Sovereignty could not be transferred either by such local acts or by unilateral actions. It was also noted that no actual delimitation had taken place to give effect to the administrative arrangements, and that the outcome of discussions between the Survey Administration of Egypt and the Sudanese authorities in 1909 was a line on the map showing the political international boundary based on the 22nd parallel and a separate line showing

-
- (254) For example, the arrêté of the Egyptian Ministry of the Interior of 1902 implemented by a decree that year aimed at facilitating the administration of nomadic tribes along the boundary and retaining the continuity of certain tribal areas, see Sharma op.cit. p.192, and Abdalla loc.cit. pp.13-14. See also the arrêté of 1899, *ibid*, p.11.
- (255) Sharma op.cit. p.192 and Touval, The Boundary Politics of Independent Africa, 1972, p.194. Egypt wished the inhabitants of the area it was claiming to vote in the plebiscite scheduled for February 21, 1958, *ibid*.
- (256) Abdalla, loc.cit. p.4.
- (257) *Ibid*.
- (258) Abdalla notes that "the renunciation of any right must be so manifest as to exclude any other interpretation", *ibid* p.5.

the administrative boundaries.²⁵⁹

The Sudanese argument was based on effective possession, and Egyptian acquiescence in it for some fifty years, of the areas it was administering. The sovereign acts it had performed in the territory had gone unchallenged by Egypt until 1958, while Egypt had denounced the 1899 agreement and recognised the independence of Sudan without comment. In addition, Egypt had received a note from Sudan in January 1956 dealing with the Sudanese position relative to existing agreements and had not formally protested.²⁶⁰ It does seem as if Egypt had clearly acquiesced in Sudanese control of the area in question and that this administrative line had altered the international boundary having ripened into sovereignty. Sudan's case is also strengthened by the border principle adopted by the OAU, whereby all States in the organisation were to accept and respect the colonial borders. Sudan, which had existed as a distinct entity prior to independence, thus inherited the borders from its Anglo-Egyptian predecessor including the administered area.

Egypt sent in troops to the area in February 1958 and Sudan complained to the UN Security Council. However, Egypt declared its readiness to postpone the settlement of the issue until after Sudan's elections at the end of February.²⁶¹ The boundary issue had really been precipitated as a result of a deadlock in the negotiations on Sudanese claims resulting from the construction of the Aswan Dam (which particularly

(259) Ibid pp.4 and 17-18. The map demonstrating these lines appears on *ibid*, p.8.

(260) Sharma *op.cit.* p.193.

(261) Touval *op.cit.* p.194. See also 12 International Organisation, 1958, pp.333-5.

affected the Wadi Halfa area). Touval regards the raising of the border issue at that time as an attempt to pressure Sudan into accepting Egyptian proposals for a settlement.²⁶² In the event, the countries agreed in 1959 on questions related to the Nile waters and Aswan dam issues²⁶³ and the boundary problem does not appear to have been raised again. In the light of all these factors, it is clear that Sudan has title to the disputed territory on the basis of the modification of the delimitation line by the accepted administrative arrangements and Egypt's acquiescence in the same,²⁶⁴ coupled with the succession of Sudan and Egypt to the borders as colonially administered.

(iv) The Libya-Chad Dispute²⁶⁵ - As from June 1973, Libya began occupying a strip of Chad, called the Aozou strip, parallel to the Libyan border. The area occupied was within a short time, some 800 kilometres long by 100 kilometres wide.²⁶⁶ In September 1976, Libya issued new official maps showing inter alia that it included some 37,000 square miles of Chadian territory.²⁶⁷ Libya claimed that the correct boundary between it and Chad was that as delimited by the Italian-French (Laval-Mussolini) treaty of January 1935.²⁶⁸ However, this treaty

(262) Op.cit. p.195.

(263) Ibid.

(264) See the Temple of Preah Vihear case, ICJ Reports, 1962, p.6. See also the Venezuelan Preferential Claims case (1904), In Scott, p.56, the Anglo-Norwegian Fisheries case, ICJ Reports, 1951, p.116 and the Indo-Pakistan Western Boundary (Rann of Kutch) case, 50 ILR, p.2.

(265) Supra, Chapter 7, pp.506 and 530-1.

(266) Rousseau, *Revue Générale de Droit International Public*, 1978, p.298. See also *Africa Contemporary Record* 1975/6, 1976, pp.B70 and B465-6.

(267) Ibid 1976/7, 1977, p.B75 and Rousseau, *Revue Générale de Droit International Public*, 1977, p.564.

(268) Ibid, 1978, p.298; *Africa Contemporary Record* 1975/6, 1976, B465-6 and *Africa Research Bulletin*, October 1975, p.3784 and ibid August 1977, pp.4524-5.

although in fact ratified by France on 26 March 1935 was never ratified by Italy and indeed the instruments of ratification were never exchanged.²⁶⁹ In other words, the agreement never came into force. France maintained that it recognised only those borders existing upon Chad's independence in 1960, which were not challenged upon the latter's entry into the United Nations.²⁷⁰ Chad points to the OAU border principle as supporting its case. The Libyan claim to an alternative delimitation of the boundary with Chad based upon an agreement that never came into force is clearly untenable in law and the colonial border as at 1960 is the valid one.

(v) The Tanzanian-Malawi Dispute over Lake Malawi - The lake forms about three-quarters of the length of the boundary between the two States and extends some 180 miles. The Anglo-German agreement of July 1890 defined the British and German spheres of influence in East Africa and clearly placed the lake within the British protectorate of Nyasaland, by describing the border as running along "the eastern, northern and western shores of the lake to the northern bank of the River Songwe."²⁷¹ McEwen notes that the shoreline boundary was due to a number of factors, including Britain's determination to control the lake as a means of protecting its missionary and commercial interests and to eliminate the slave trade and Germany's concentration upon the Indian

(269) Rousseau, *Revue Générale de Droit International Public*, 1978, pp.299-300.

(270) *Africa Research Bulletin*, August 1977, pp.4524-5. See also *ibid*, October, 1975, p.3784.

(271) Hertslet, Map of Africa by Treaty, 3rd ed. 1909, vol.II, p.899. The shoreline part of the boundary was not the subject of a further agreement, but "this fact may have little significance since a shoreline may not have been considered susceptible to further delimitation," Brownlie, "A Provisional View of the Dispute Concerning Sovereignty over Lake Malawi/Nyasa" 1 *East African Law Review*, 1968, pp.258, 259.

Ocean coast. It is also to be noted that Germany was given access to and right of transit upon the lake.²⁷²

The border was not modified by any subsequent agreement but in later years official maps and documents demonstrated considerable uncertainty as to whether the boundary line was in fact on the eastern shoreline or a median line. The British Central Africa Order in Council of 1902 described the Protectorate of Central Africa (renamed the Nyasaland Protectorate in 1907) as bounded by German East Africa and, although no boundary was defined, taken in conjunction with the 1890 treaty, it would clearly appear to refer to the shoreline boundary. However, as Brownlie notes, in the years before 1914, "the British authorities appeared to have acquiesced in a continuing pattern of public and official German activity on the waters of the lake."²⁷³ British assistance was given to transport German steamers to the lake, which were used for administrative purposes and travel between the German and British ports on the lake. German activity occasioned no British protest until the outbreak of war in 1914.²⁷⁴ It is to be noted however that the 1890 treaty provided for freedom of trade and navigation with respect inter alia to the lake.

German maps prior to 1920, the date at which Britain established civil government in Tanganyika, showed either a shoreline boundary or a middle line, while British maps of the period demonstrated a similar uncertainty.²⁷⁵ German East Africa was occupied towards the end

(272) International Boundaries of East Africa, 1971, p.179.

(273) Loc.cit. p.261.

(274) Ibid.

(275) Ibid p.262 and McEwen op.cit. pp.184-9. The Handbook of German East Africa produced by the Admiralty War Staff Intelligence Division, 1916, contained a map showing a middle line boundary, ibid, p.185, while a British War Office map of 1918, showed a shoreline boundary, Brownlie loc.cit. p.262.

of the First World War and until 1922, when the mandates were created, annual reports on the territory were published. The first report covering the period from the conclusion of the armistice to the end of 1920 was ambiguous as to the placement of the boundary.²⁷⁶ A map appended to the report seemed to show a middle line.²⁷⁷ The reports for 1921 and 1922 are similarly ambiguous. On July 20, 1922 the mandate agreement was concluded. Article 1 of the British mandate defined the territory in terms of German East Africa east of the line dividing Tanganyika from Ruanda-Urundi, but contained no detailed description of the borders.²⁷⁸ With the establishment of the mandate, the boundary crystallised for no alteration of the limits could occur without the consent of the League of Nations.²⁷⁹ The vital period is, therefore, from 1890 to 1922. The Tanganyika annual reports to the League from 1924 to 1934 all refer to a middle line boundary in the lake and accompanying maps illustrate this. However, from 1935 onwards a shoreline boundary was presented.²⁸⁰ On 13 December 1946, the UN General Assembly approved the trusteeship agreement for Tanganyika within the bounds of the former

-
- (276) It noted that the western boundary of the former German territory ran "south-east to the northern end of Lake Nyasa. Rather less than halfway down the lake it turns east and joins the Ruvuma river, whose course it follows to the sea", cmnd.1428. See also Brownlie loc.cit. p.263.
- (277) However, McEwan's view is that the map appears to show an eastern shoreline boundary on the lake. He also notes that the eastern shore of Lake Tanganyika is incorrectly shown as the international boundary, op.cit. pp.187-8.
- (278) See Hudson, International Legislation, vol.I, 1931, pp.84-99. That line was in fact amended, see 54 LNTS p.239 and 190 LNTS p.95. The Tanganyika Order in Council, 1920, was similarly imprecise as to the boundary.
- (279) Article 12 of the mandate agreements.
- (280) Nyasaland sources during this period were ambiguous, but a number of reports and handbooks did refer to a middle line, see Brownlie loc.cit. p.265.

British mandate.²⁸¹ UK reports to the General Assembly, submitted annually from 1947-1961, all included maps showing the boundary on the eastern shoreline. The texts of the reports for 1947 to 1952 specifically noted a shoreline boundary, while later reports omitted such textual references.²⁸²

In 1959, the Minister of Lands and Surveys reported to the Tanganyikan Legislative Council that the opinion of legal advisers was that no part of the lake was within the bounds of Tanganyika.²⁸³ Six months after independence, the Tanganyikan Prime Minister declared that no part of the lake was within the boundaries of German East Africa and accordingly no part of the lake was within Tanganyika. He noted that there was no question of any change in the boundaries by agreement after the assumption of the mandate by the UK in 1922.²⁸⁴

With increasing tension between Malawi (formerly Nyasaland) and Tanzania (ie. the union of Tanganyika and Zanzibar) particularly over South Africa, the lake issue was raised.²⁸⁵ The period of maximum Tanzanian agitation occurred between May 1967 and September 1968 after which time the issue became relatively quiescent.²⁸⁶ Tanzanian arguments

(281) 8 UNTS p.116.

(282) Nyasaland sources during the 1940's and 1950's show a shoreline boundary, see Brownlie loc.cit. pp.267-7.

(283) McEwan op.cit. p.189. See also Mayall, "The Malawi-Tanzanian Boundary Dispute" 11 JMAS, 1973, pp.611, 612.

(284) Tanganyikan Parliamentary Debates, National Assembly, Official Report, 1st Session, June 11, 1962, col.264.

(285) See Mayall loc.cit. p.611.

(286) Ibid p.612.

centred around British acquiescence in German use of the lake before 1914 and the consequent modification of the boundary as delimited by the 1890 agreement. It was also noted that in the absence of treaty provisions and presumably in cases of ambiguity the principles of customary international law would apply and these would provide for a middle line boundary.²⁸⁷

Brownlie's view is that by the time the mandate came into being, the boundary was the middle line of the lake by virtue of British acquiescence in German use of the lake and in the light of those publications which before and after the establishment of the mandate referred to a middle line. Since this was so, Britain could not unilaterally modify the boundary and accordingly, Tanzania was entitled to a median line boundary on the lake.²⁸⁸ However, it is to be doubted whether the issue is this clear. The 1890 treaty provided for freedom of trade, navigation and passage of goods within the free zone area as defined by the Berlin Act of 1885, which included Lake Nyasa/Malawi. The ensuing confusion as to the border on the lake may be attributed to a number of causes ranging from genuine uncertainty resulting from growing German usage to the fact that the treaty was only dealing with spheres of interest. Other factors such as colonial unconcern and paucity of geographic knowledge may also have been of relevance. German activity on the lake and the British attitude thereto may be explained in law in terms of a comprehensive and growing exploitation of the freedom of navigation and trade clauses in the 1890 agreement. As far as the maps are concerned, the long list of equivocal maps should militate

(287) Seaton and Maliti, loc.cit. p.82.

(288) Loc.cit. p.267. See also Okoye, International Law and the New African States, 1972, pp.102-3.

against a definitive judgement either way. Wartime maps should be treated in particular with great circumspection. Excluding these from consideration, the weight of evidence would appear to veer towards the shoreline boundary, although many inconsistencies remain. British maps showing a middle line up to July 1922 are especially important since they are evidence against interest.²⁸⁹ The maps published in the Nyasaland and Tanganyikan annual reports of the inter-war years showing a middle line boundary are particularly to be noted.

The statements of the Tanganyikan Prime Minister in 1962 coupled with the fact that until 1965 Tanzanian maps showed a shoreline boundary might be treated as creating an estoppel since they marked acceptance of a particular boundary.²⁹⁰ Brownlie's argument that independent States should be treated differently in the early years of their independence in respect of such statements²⁹¹ must be regarded with some caution. Statements against interest are particularly important as evidence and should not be minimised on the grounds that the State in question has only recently acquired its sovereignty. It is believed that in the light of the ambiguity that clearly exists in relation to the lake boundary, the presumption in favour of the delimitation of 1890 is to be supported and that British acquiescence in German activities on the lake cannot be unequivocally seen as altering that boundary. The Tanganyikan government statements of 1962 are of especial

(289) See Huber in Island of Palmas case, 2 RIAA, pp.829, 852. See also the Labrador Boundary (1927) 43 TLR 289, 298-9.

(290) See the Temple case, ICJ Reports, 1962, p.6.

(291) The OAU border resolution of 1964 is not really of any help in circumstances of genuine doubt as the existence of a boundary, but in this case it could indeed be argued that the resolution supports the shoreline boundary, since the Tanganyikan government soon after independence made its view known as to the placement of the colonial border, which it was bound to accept upon independence.

importance in this context. The fact that the Tanzanian claim has been suspended since 1968 would appear to support the proposition put forward.²⁹²

(vi) The Dahomey²⁹³ - Niger Dispute - This dispute over the interpretation of the administrative delimitation by France concerned the island of Lété in the river Niger with both sides claiming exclusive jurisdiction over it. On 1 January 1964, the Head of the provisional Dahomey government cabled the UN Secretary-General over the "inhuman treatment" of its nationals in Niger and the occupation by the latter of the island of Lété, "an integral part of Dahomian territory."²⁹⁴ The problem was exacerbated by the overthrow of the previous Dahomey president, with whom the Niger authorities had established warm relations. Suspicions of Niger's involvement in a suspected counter-coup led to the killing and arrest of Niger nationals living in northern Dahomey.²⁹⁵ Both sides accused the other of preparing to seize the island of Lété and mobilised. The problem was discussed at a conference of Heads of State of the Union Africaine et Malgache in Dakar and a reconciliation agreement was initialled. This provided for the protection of the nationals of the parties and for the reference of the Lété dispute to a commission for re-examination.²⁹⁶ Following the growth of internal political instability,

(292) In the case of the Tanzanian-Zambian boundary on Lake Tanganyika some doubt has existed as to its exact position. Only the boundary terminal points were defined by agreement and the point at which Zaire reaches the western shore of the lake is open to dispute. In the event, a median line boundary between Tanzania and Zambia on the lake has been accepted, it appears, de facto by the parties and this is shown on maps. The line takes the form of a curve down the centre of the lake from the Kalambo river to the Zaire tripoint, see McEwen op.cit. pp.225-7.

(293) Later renamed Benin.

(294) Africa Research Bulletin, January 1964, p.4.

(295) Zartman, International Relations in the New Africa, 1966, p.114. See also Touval op.cit. pp.198-9.

(296) Africa Research Bulletin, March 1964, pp.36-7 and ibid April 1964 p.53.

talks were suspended, with Dahomey complaining of the expulsion of its nationals and Niger emphasising the Lété issue.²⁹⁷ A settlement of the dispute, however, was proclaimed at a joint meeting of the parties in June 1965,²⁹⁸ following a meeting of the Conseil de l'Entente at Cotonou the previous January,²⁹⁹ which included a provision for dual citizenship for the inhabitants of Lété.³⁰⁰ The problem of sovereignty over the island was not settled but the de facto situation was, as it were, formalised.³⁰¹

(vii) The Ghana-Upper Volta Dispute - This issue also turned on the interpretation of documents from the colonial era, compounded by the fact that Upper Volta's border had never been demarcated. Political antagonisms exacerbated this relatively minor dispute, which concerned an area regarded by Upper Volta as within its territory, in which Ghana had built a school in 1963 and a road leading to it.³⁰² After a number of meetings over the problem, Ghana proceeded to raise its flag in the area and establish a police post. At Upper Volta's request, the issue came before the OAU Council of Ministers. Ghana expressed its willingness to withdraw and called for the border to be demarcated,³⁰³ and this was

(297) Ibid July 1964, p.110.

(298) Ibid, June 1965, p.313.

(299) Rousseau, *Revue Générale de Droit International Public*, 1965, pp.465-6.

(300) Zartman op.cit. p.115.

(301) Touval op.cit. p.201. The island dispute was never important in itself, it was a symptom of the crisis in relations between the States generated by internal political instability rather than its cause, ibid, p.198.

(302) Touval, "The Organisation of African Unity and African Borders" 21 *International Organisation*, 1967, pp.102, 120.

(303) Ibid, p.121.

duly noted by the Assembly of Heads of State and Government.³⁰⁴

However, subsequent meetings of Ghanaian and Upper Voltan commissioners, appointed in 1963 to study the problem, failed to reach agreement on the demarcation of the border.³⁰⁵ At the Fifth Extraordinary Session of the OAU Council of Ministers in 1965, Ghana noted that its nationals had lived for many years in the disputed area, but reaffirmed its willingness to withdraw after criticising the methods of demarcation adopted by Upper Volta.³⁰⁶ Ghana, in fact, withdrew, but challenged the interpretation of the Anglo-French treaty of 1893 delimiting the border. In June 1966, following the overthrow of President Nkrumah of Ghana, agreement was reached on the 1893 delimitation³⁰⁷ and in 1970 the final report of the border demarcation commission was signed by both States.³⁰⁸ In April 1977, a treaty was signed formally demarcating 135 miles of the joint border. Since 1975, some 230 miles had been surveyed by the joint border commission.³⁰⁹ The 1893 delimitation, was therefore accepted by the parties, once the political antagonisms between them had died down and speedy progress made on actually demarcating the border.

(viii) The Mali-Upper Volta Dispute - This dispute concerned the Oudalen region, some 150 kilometres long and 15-20 kilometres wide claimed by Mali. The issue had been in existence, though quiescent, since

(304) AMG/Res.19(I).

(305) Touval loc.cit. p.121.

(306) Ibid pp.121-2.

(307) Africa Research Bulletin, June 1966, p.549.

(308) Ibid, February 1970, p.1665.

(309) Ibid, April 1977 p.4384.

the independence of the two countries, but reports of the presence of minerals, oil and gas caused the problem to become acute. Upper Volta had first been created by France from the Soudan territory in 1919, divided between Mali, Niger and the Ivory Coast in 1932 and re-established in 1947.³¹⁰ Mali's claim was based on an arrêté of the governor of Soudan in 1935 putting the disputed area in Mali, but Upper Volta argued that the French National Assembly law of 1949 reconstituting the territory of Upper Volta put the region within its borders.³¹¹ A series of clashes on the border occurred at the end of 1974,³¹² followed by talks in Lome with the Presidents of Niger and Togo as mediators. A mediation commission was established consisting of Togo, Niger, Guinea and Senegal, and it was agreed that the dispute was to be resolved on the basis of existing documents, the withdrawal of troops from the border zone and the guaranteeing of the safety of the nationals of both parties.³¹³ A series of documents were sent from France³¹⁴ and a military disengagement agreement was announced.³¹⁵ In June 1975, a neutral technical committee was set up consisting of cartographers, an ethnologist, an army officer and a jurist to determine the nationality of five border villages and define the border³¹⁶ and a peace agreement was signed at Conakry on 11 July 1975.³¹⁷ In other words, the validity

(310) Rousseau, *Revue Générale de Droit International Public*, 1975, p.835.

(311) *Ibid*, pp.835-6. A series of maps in 1923, 1925, 1926 and 1960 by the French National Geographical Institute supported the Upper Voltan case, *ibid*.

(312) *Africa Research Bulletin*, December 1964, pp.3452-4.

(313) *Ibid*, p.3454.

(314) *Ibid*, January, 1975, p.3487.

(315) *Ibid*, February 1975, p.3525.

(316) *Ibid*, June 1975, p.3650.

(317) *Ibid*, July 1975, p.3687.

of the colonial delimitation was reaffirmed upon the basis of the superiority of a National Assembly law over a governor's ordinance, reinforced by French maps. The possibility of minor adjustments was raised in the light of the composition of the committee.

(ix) The Gabon-Equatorial Guinea Dispute - In August 1972, Gabon extended its territorial waters to 100 nautical miles distance from its coasts and occupied a series of islands off the Equatorial Guinea coast. Equatorial Guinea sent a series of messages to countries participating at the Dar-es-Salaam meeting of Eastern and Central African States, declaring that it had been invaded by Gabon, while Gabon sent a letter to the UN Secretary-General on 8 September stating that fishing camps on the uninhabited islands of Mbanie and Cocotiers had been attacked by a force from Equatorial Guinea.³¹⁸ The dispute was concerned with conflicting interpretations of the Franco-Spanish treaty of June 1900 delimiting the boundary between Gabon and Spanish Guinea. According to Equatorial Guinea, this implicitly recognised Spanish sovereignty over the coastal islands, while Gabon declared that it had referred only to the islands of Corisco and Eloby as Spanish and that it had therefore recognised French sovereignty over the uninhabited islands of Mbanie and Cocotiers. France and Spain were asked to help clarify the treaty.³¹⁹

At a meeting in Kinshasa between the parties, with Congo and Zaire, an agreement was reached on the establishment of a commission of representatives of the four States to draw up a set of measures to ease the

(318) Ibid, September 1972, p.2596. See also Cukwurah, "The Organisation of African Unity and Boundary Problems: 1963-73" 13 IJIL, 1973, pp.176, 201-2.

(319) Africa Research Bulletin, September 1972, p.2597.

situation.³²⁰ However, Equatorial Guinea declared that it would not accept the unilateral extension of Gabonese territorial waters to 100 miles³²¹ and delivered an ultimatum that Gabon was to be removed from the islands by October 17. Another meeting was thereupon arranged by representatives of the Congo and the OAU assistant secretary-general at Brazzaville, at which neutralisation of the Bay of Corisco was agreed upon as well as the establishment of an OAU commission to delimit the boundary between the two States.³²² In April 1974, Gabon declared Mbanie island a Gabonese military zone³²³ and in July the President of Equatorial Guinea announced that he accepted the present boundaries as legitimate and the dispute subsided.³²⁴

Conclusions

Where a boundary has been delimited³²⁵ by the colonial powers by international treaty, the doctrine of State succession, coupled with the African uti possidetis principle as laid down in the OAU border resolution of 1964, will ensure that this boundary will be binding upon the post-colonial independent African successor States. The only exception to this is where the colonial power has acquiesced in a modification of

(320) West Africa, 29 September 1972, p.1302 and *ibid* 13 November 1972, p.1542.

(321) *Ibid*, 29 September 1972, p.1302.

(322) Africa Research Bulletin, November 1972, p.2658. See also Cukwurah, *loc.cit.* p.204.

(323) Africa Research Bulletin, April 1974, p.3193.

(324) *Ibid*, July 1974, p.3294. Nigeria and Cameroon were involved in a dispute over territorial waters in the Calabar estuary, which was apparently settled, see *ibid* July 1970, p.1805; *ibid*, February 1971, p.2070 and *ibid* June 1975, p.3650. Parts of the land boundary between the two were also in dispute because of incomplete maps see *ibid* May 1972, p.2467; *ibid* July 1973 p.2916 and *ibid* August 1973, p.2951.

(325) As De Visscher notes, delimitation is a juridical and political operation, Problèmes de Confins en Droit International Public, 1969, p.28. A series of delimitation techniques have been developed, see Cukwurah, The Settlement of Boundary Disputes in International Law, 1967, pp.40-78.

the delimited boundary. This is shown in the Egypt-Sudan border case and was argued with regard to Lake Malawi where the evidence would not appear to have supported the claim. Assertions by for example, Libya and Mali of sovereignty over areas beyond the former colonial borders and thus in neighbouring States supported only by ethnic affiliation or inferior documentary material, such as an unratified treaty or a governor's ordinance, faced with clear delimitations by the colonial powers concerned, are clearly not valid in law and are extremely hazardous and destabilising in practice. However, where there has either been no delimitation of the area in question or it is ambiguous and thus disputed, other factors necessarily intrude in an attempt to achieve that stability and finality of boundaries that is of such significance in international law and relations. Of importance will be any acts of sovereignty, governmental activities or administrative actions in the disputed area. Should these be proved and accompanied by the absence of protests from the other party, this should suffice to establish a boundary on a disputed territory. Where the other party has objected to the activities in the area, the issue will not be resolved, but in such cases a presumption will be in favour of the limits of de facto possession transmitted by the colonial power to the successor State. This is demonstrated by the Algerian-Moroccan dispute. The intentions, if ascertainable, of the colonial parties to the treaty in dispute will provide valuable evidence as to the interpretation of the problematic delimitation, as will any subsequent practice of the parties relative to it, while in the absence of any delimitation the issue will rest upon sovereign activities and acquiescence. In these instances, the principles of recognition and estoppel will also be relevant in attempting to define an acceptable boundary line. In the absence of any clear indications as to the placement of the boundary in colonial times, the issue will fall

to be resolved by the States concerned, for the consent of the parties is the most important element in the achievement of a stable and final boundary.³²⁶

A number of the cases surveyed briefly in this section also demonstrate that territorial issues are a keen indicator of political relations. A boundary dispute may be seized upon or may provide the opportunity for the expression of personal, political or ideological hostility by the parties concerned and may just as easily be resolved or suspended in the face of reconciliation, however brought about. It is also clear that a number of quiescent boundary differences have become acute as a result of a re-evaluation of the value of the disputed region itself. Discoveries of, or indications of the existence of minerals, oil, gas, water and so forth will stimulate a desire to resolve the border issue and settle the question of the sovereignty of the territories involved, one way or the other.

The fact that the initial delimitation of many of Africa's present day borders took place upon the background of poor geographical knowledge has meant that the task of interpreting such delimitation provisions is that much more difficult and renders the demarcation of the agreed boundary both crucial and complex.

(326) See as regards the value of maps in such cases; Weissberg, "Maps as Evidence in International Boundary Disputes: A Reappraisal" 57 AJIL, p.781 and Hyde, "Maps as Evidence in International Boundary Disputes" 27 AJIL, p.311. See also the Island of Palmas case, 2 RIAA, pp.829, 853; the Guatemala-Honduras case, 2 RIAA, p.1307; the Temple case, ICJ Reports, 1962, p.6; the Argentine-Chile case, 38 ILR pp.10, 94-5; the Indo-Pakistan Western Boundary (Rann of Kutch) case 50 ILR, pp.2, 423 and 514-5; the Frontier Lands case, ICJ Reports, 1959, pp.209, 220, 216 and 225-6 and the Beagle Channel case, HMSO, pp.81-100.

(b) Demarcation Problems

Cukwurah has called demarcation, the physical marking out of the delimited boundary line, the "crux of all boundary making"³²⁷ and while this is perhaps something of an exaggeration within the context of title to territory in African States, it is clear that it is during the process of transcribing the boundary onto the ground that many issues not apparent during delimitation arise. A number of African boundaries were not demarcated for reasons of expense or lack of trained personnel, while in the case of boundaries between two colonies (or two parts of one colony) belonging to the same State, demarcation was often deemed unnecessary.³²⁸

Another problem has been that once a boundary is demarcated, usually by means of posts, poor maintenance has led to uncertainty as to where the line runs. This occurred with regard to the Kenya-Somali border demarcation referred to in the 1927 agreement. The demarcation was accomplished by means of principal boundary beacons supplemented by a number of secondary cairns. After only a short time, it was noticed that of the 29 beacons only 4 were in good condition, while the cairns had disappeared and that lines cut through vegetation were no longer traceable due to new growth.³²⁹ The problem also arose in the case of the Nigerian-Dahomey demarcation of 1911-2, following an agreement in 1906. The line was marked by a series of low concrete pillars, which, as Anene has noted, were to be found being used by the local

(327) Op.cit. p.78.

(328) This was particularly so with regard to the former French possessions in west and equatorial Africa. The boundaries of Upper Volta, for example, were never demarcated, see Zartman op.cit. p.115.

(329) McEwen op.cit. pp.121-2.

inhabitants for the sharpening of cutlasses.³³⁰

An ambiguous delimitation can cause great problems when it comes to executing the demarcation process. This was illustrated in the Kenya-Sudan border situation. By an order of 1914, following a boundary commission report two years earlier, the Uganda-Sudan border was delimited. The delimitation defined the eastern limit of the boundary by utilising an imaginary line drawn "due east of the northern most point of the northern most crest of the long spur running north from Mount Lubur."³³¹ However, that description could be interpreted in a number of different ways, while the boundary continued by reference to what proved to be a false assumption as to the relative position of certain grazing lands. Problems arose after the transfer of land from Uganda to Kenya in 1926 and this boundary formed the Kenya-Sudan border. In 1931 agreement was reached between the provincial commissioner of Kenya's Turkana province and the district commissioner of the eastern district of Mongolla province of Sudan on the basis of the northern limits of the relevant grazing area and this became known as the Red Line. The delimitation was altered northwards a number of times in subsequent years. In 1938, the demarcation of the line was commenced. To this day, there is no finally agreed line, but Kenya has maintained police posts up to and beyond the Red Line with Sudanese consent. The 1914 order contains the only valid delimitation, but the two States have apparently accepted the Red Line de facto as the basis of the boundary.³³²

(330) The International Boundaries of Nigeria, 1970, p.189. The final report of the Ghana-Upper Volta demarcation commission noted in 1970 that many of the border pillars were frequently removed, Africa Research Bulletin, February 1970, p.1665.

(331) The Uganda Official Gazette, 30 May 1914, p.256.

(332) See McEwen op.cit. pp.132-4.

Many of the demarcations took place in Africa many years after the original delimitation agreements. The Ethiopian-British Somaliland boundary was delimited in 1897, but demarcated only in the years between 1933 and 1935, while the Kenya-Ethiopian border was delimited in 1907 and demarcated in the 1950's. In the latter case, what occurred was that the 1907 delimitation was not demarcated for a number of decades, until a new delimitation was proposed in 1947.³³³ A mixed demarcation commission was established in 1950³³⁴ and it finally reported in 1955. However, the Ethiopian government refused to ratify the work of the commission and the agreement failed to come into operation. Further discussions followed after Kenya's independence and the dispute, centring upon the Gaddaduma and Godama Wells was resolved in 1970, with the former being allocated to Ethiopia and the latter to Kenya. The agreement also provided for the nationals of both parties to use the wells and the surrounding areas for watering and grazing.³³⁵

The Ethiopian-Sudan Dispute - The Sudan-Eritrean border was defined by a series of Anglo-Italian agreements in December 1898, June 1899, April 1901 and November 1901 and by the Anglo-Italian-Ethiopian agreement of May 1902. The Ethiopian-Sudan border was delimited in the Anglo-Ethiopian treaty of May 1902, which declared that a red line drawn on two maps was to constitute the boundary. This was to run from Khot Um Hagar to Galbar, to the Blue Nile and thence, via the Baro, Pibar and Akoho rivers to Melile. From there, the border was to reach to the point where 6 degrees north crosses 35 degrees east. Persons were appointed to demarcate the border; however, no Ethiopian boundary commission was appointed, nor was the treaty ratified by either side. A

(333) 82 UNTS, p.191.

(334) 99 UNTS, pp.338,348.

(335) Africa Research Bulletin, June 1970, p.1775.

Major Gwynne was sent by the British to survey the border and his line has operated as the boundary.

A series of issues led to strained relations between the two States³³⁶ and a number of meetings were held in the 1960's, during which the Eritrean-Sudan border line was reaffirmed and it was agreed to accept the 1902 treaty as the basis of the boundary further inland, particularly with regard to the 6 degrees north, 35 degrees east point.³³⁷ In July 1972, the border dispute regarding the undemarcated areas was declared resolved and Major Gwynne's demarcation line was in fact to be followed. North of Mount Takle the border was to be redemarcated in order to pass along the peaks of certain mountains. A joint special committee was also to be set up to deal with settlement and agricultural questions.³³⁸ Thus, agreement confirmed a previous unilateral demarcation, with certain minor alterations, and provided for the cases where the populations of the two States intermingled.³³⁹

The Mali-Mauritanian Dispute - In this case, the mixture of nomadic and semi-nomadic populations in the desert and savannah border region caused problems as to the exact line of the boundary between the two States. In 1944, France transferred the Hodh region from Mali (then known as Soudan) to Mauritania, but the demarcation was haphazard. Between 1958 and 1960 representatives of the two autonomous territories

(336) Primarily, the Eritrean and Southern Sudanese rebellions.

(337) Africa Research Bulletin, February 1968, pp.975-7 and ibid March 1971, p.2036.

(338) Ibid, July 1972, p.2530.

(339) A joint Sudan-Chad committee was established in 1962 to demarcate the border, but problems arose because of disputes among the tribes over water, pasture and cultivation issues, see ibid March 1964, p.38. There was agreement regarding the demarcation of the Sudan-Uganda border following a series of incidents in the undemarcated border areas, see McEwen op.cit. pp.257-64.

sought to demarcate the boundary but unsuccessfully. From the date of independence until 1962, a series of minor incidents occurred, while until 1963, official maps showed the border in two different places. In 1963, however, the two sides came to an agreement and an exchange of territory took place. The new border was purely political, being based on no natural geographic or ethnic line.³⁴⁰

The usual method of demarcating a boundary is by means of a joint commission and in most cases the degree of discretion possessed by those marking out the delimited line is very limited. Demarcation involves a number of specific techniques that will be employed in the process of transferring a line from a map onto the ground. Where no agreed demarcation takes place, the parties may acquiesce in a de facto line pending final agreement. If they fail to do so, incidents are likely to occur, depending always on the value of the land concerned and the state of relations between the parties.

(340) Zartman op.cit. p.115 and ibid, "A Disputed Frontier is Settled", 8 Africa Report, 1963, pp.13-4. See also Touval, op.cit. pp.249-51 and Africa Research Bulletin, June 1969, p.1434.

BIBLIOGRAPHYBOOKS

- ABI-SAAB The United Nations Operation in the Congo
1960-4, 1978.
- ADAMI National Frontiers in Relation to International
Law, 1927.
- AKEHURST A Modern Introduction to International Law,
3rd ed. 1977.
- ALEXANDROWICZ The European-African Confrontation, 1973.
- ANAND New States and International Law, 1972.
- ANDEMICAEL The OAU and the UN, 1976.
- ANENE The International Boundaries of Nigeria, 1970.
- ANZILOTTI Cours de Droit International, 3rd ed. 1929.
- ARNOLD, G. The Last Bunker, 1976.
- ASAMOAH The Legal Significance of the Declarations of
the General Assembly of the United Nations, 1966.
- BARDEN Awakening Africa: The Conference of Independent
African States, 1962.
- BARNET Intervention and Revolution, 1968.
- BARROS The Aaland Islands Question: Its Settlement
by the League of Nations, 1968.
- BEAUTÉ Le Droit de Pétitions dans les Territoires
sous Tutelle, 1958.
- BENTWICH AND MARTIN Commentary on the Charter of the United Nations,
1950.
- BLACKSTONE Commentaries on the Laws of England, vol.1,
1765.
- BLUM Historic Titles in International Law, 1965.
- BLUM Secure Boundaries and Middle East Peace, 1971.
- BOGGS International Boundaries, 1940.
- BOKOR-SZEGO New States and International Law, 1970.
- BOUTROS-GHALI Les Conflits de Frontière en Afrique, 1972.
- BOUTROS-GHALI L'Organisation de l'Unité Africaine, 1968.
- BOWETT The Law of International Institutions, 3rd ed.
1975.

- BOWETT Self-Defence in International Law, 1958.
- BOZEMAN Conflict in Africa, 1976.
- BRIERLY The Law of Nations, 6th ed. 1963.
- BRIGGS, H.W. The Law of Nations, 1953.
- BROWNLIE Basic Documents in International Law, 2nd ed. 1972.
- BROWNLIE Basic Documents on African Affairs, 1971.
- BROWNLIE International Law and the Use of Force by State, 1963.
- BROWNLIE Principles of Public International Law, 2nd ed. 1973.
- BRUCE, N. Portugal: The Last Empire, 1975.
- BRUGIERO Les Pouvoirs de l'Assemblée Générale des Nations Unies en Matière Politique et de Sécurité, 1955.
- CALEGEROPOULOS-STRATIS Le Droit des Peuples à Disposer d'eux-mêmes, 1973.
- CARR, E.H. The Conditions of Peace, 1942.
- CASTANEDA The Legal Effects of United Nations Resolutions, 1969.
- CASTREN Civil War, 1966.
- CATY Le Statut Juridique des Etats Divisés, 1969.
- CERVENKA The Organisation of African Unity and Its Charter, 1968.
- CERVENKA The Unfinished Quest for Unity, 1977.
- CHARPENTIER La Reconnaissance Internationale et l'Evolution du Droit des Gens, 1956.
- CHEN The International Law of Recognition, 1951.
- CLAUDE, I. National Minorities: An International Problem, 1955.
- COBBAN, A. The Nation-State and National Self-Determination, 1969.
- COLEMAN, J.S. Togoland, 1956.
- COLLINS, J.F. The United Nations and Indonesia, 1950.
- CORBETT, P. Law and Society in the Relations of States, 1951.

- CROSS, R. Statutory Interpretation, 1976.
- CROWE The Berlin West African Conference 1884-5, 1942.
- CUKWURAH The Settlement of Boundary Disputes in International Law, 1967.
- CURZON Frontiers, 1907.
- D'AMATO The Concept of Custom in International Law, 1971.
- DAVIDSON, B. Africa in History, 1974.
- DE AZCARATE The League of Nations and National Minorities: An Experiment, 1945.
- DE LAPRADELLE La Frontière, 1928.
- DE LOUTER Le Droit International Public Positif, 1920.
- DEUTSCH Nationalism and Social Communication, 1952.
- DE VISSCHER, C. Problèmes de Confins en Droit International Public, 1969.
- DE VISSCHER, C. Theory and Reality in Public International Law, 3rd ed. 1968.
- DIAS Jurisprudence, 4th ed. 1976.
- DONATI Stato e Territorio, 1924.
- DRAPER, G.I.A. The Red Cross Conventions of 1949, 1958.
- DRYSDALE The Somali Dispute, 1964.
- DUGARD The South West Africa/Namibia Dispute, 1973.
- EAGLETON, C. Responsibility of States in International Law, 1928.
- ELIAS Africa and the Development of International Law, 1972.
- ELIAS The Modern Law of Treaties, 1974.
- EMERSON From Empire to Nation, 1960.
- EMERSON Self-Determination Revisited in the Era of Decolonisation, 1964.
- EPRILE War and Peace in the Sudan 1955-72, 1974.
- FALK Legal Order in a Violent World, 1968.
- FALK (ed.) The International Law of Civil War, 1971.
- FAUCHILLE Traité de Droit International Public, vol.1, 1925.

- FAWCETT Frontier: A Study in Political Geography, 1918.
- FAWCETT International Law and the Use of Outer Space, 1968.
- FAWCETT The Law of Nations, 2nd ed. 1971.
- FEINBERG, N. The Arab-Israel Conflict in International Law, 1970.
- FENWICK International Law, 4th ed. 1965.
- FERENCZ Defining International Aggression, 2 vols., 1975.
- FORTES AND EVANS-PRITCHARD (eds.) African Political Systems, 1940.
- FRIEDMANN, W.G. The Changing Structure of International Law, 1964.
- GALLAGHER Morocco and Its Neighbours, Part 3: Morocco and Mauritania, 1967.
- GANJI International Protection of Human Rights, 1962.
- GÉNY Methode d'Interprétation et Sources en Droit Privé Positif, 1899.
- GIBSON African Liberation Movements, 1972.
- GOODRICH The United Nations, 1959.
- GOODRICH, HAMBRO AND SIMONS The Charter of the United Nations: Commentary and Documents, 3rd ed. 1969.
- GOTTMANN The Significance of Territory, 1973.
- GREIG, D.W. International Law, 2nd ed. 1976.
- GRETTON Western Sahara: The Fight for Self-Determination, 1976.
- GROTIUS De Jure Belli ac Pacis, 1625.
- GUGGENHEIM, P. Traité de Droit International Public, 1953.
- HALL, W.E. A Treatise on International Law, 8th ed. 1924.
- HALL Mandates, Dependencies and Trusteeship, 1948.
- HARASZTI Some Fundamental Problems of the Law of Treaties, 1973.
- HARGREAVES, J. Prelude to the Partition of Africa, 1963.
- HARGREAVES, J. West Africa Partitioned, vol.1, The Loaded Pause 1885-9, 1974.

- HARRISON Environment and Policies in West Africa, 1963.
- HENDERSON The Making of the Modern Suda, 1953.
- HERTSLET Map of Africa by Treaty, 3 vols., 3rd ed. 1909.
- HIGGINS, R. The Development of International Law Through the Political Organs of the United Nations, 1963.
- HILL, N. Claims to Territory in International Law and Relations, 1945.
- HOLDICH Political Frontiers and Boundary Making, 1916.
- HOSKYNS The Congo Since Independence, 1965.
- HOSKYNS The Ethiopia-Somali-Kenya Dispute 1960-7, 1969.
- HUDSON, M.D. International Legislation, 1931.
- HYDE, C.C. International Law Chiefly as Interpreted and Applied by the United States, 2nd revised ed. 1947.
- INTERNATIONAL LAW ASSOCIATION The Effect of Independence on Treaties, 1965.
- JENKS, C.W. Space Law, 1965.
- JENKS, C.W. The Common Law of Mankind, 1958.
- JENNINGS, R.Y. The Acquisition of Territory in International Law, 1963.
- JENTGEN Les Frontières du Ruanda-Urundi et le Régime International de Tutelle, 1957.
- JESSUP A Modern Law of Nations, 1948.
- JEZE Etude Théorique et Pratique sur l'Occupation comme Mode d'Acquérir les Territoires en Droit International, 1896.
- JOHNSON H.S. Self-Determination Within the Community of Nations, 1967.
- JOLOWICZ Historical Introduction to Roman Law, 1954.
- JONES, G.B. Boundary Making, 1945.
- KAY The New Nations in the United Nations, 1970.
- KEITH Theory of State Succession, 1907.
- KELSEN General Theory of Law and State, 1949.
- KELSEN Law of the United Nations, 1950.

- KELSEN Principles of International Law, 2nd ed. 1966.
- KENT Commentary on International Law, 2nd ed. 1878.
- KIRK-GREENE Crisis and Conflict in Nigeria: A Documentary Sourcebook 1966-70, 2 vols., 1971.
- KOTZSCH The Concept of War in Contemporary History and International Law, 1956.
- KRENZ International Enclaves and Rights of Passage, 1961.
- LADOR-LEDERER International Group Protection, 1968.
- LANGER Seizure of Territory, 1947.
- LANSING The Peace Negotiations: A Personal Narrative, 1921.
- LARSON (ed.) Sovereignty Within the Law, 1965.
- LAUTERPACHT, E. Contemporary Practice of the UK, 1962 and 1963.
- LAUTERPACHT, E. Jerusalem and the Holy Places, 1968.
- LAUTERPACHT, H. International Law (Collected Papers) vol.1, 1970.
- LAUTERPACHT, H. International Law and Human Rights, 1950.
- LAUTERPACHT, H. The Development of International Law by the International Court, 1958.
- LAUTERPACHT, H. Recognition in International Law, 1948.
- LAWRENCE, T. The Principles of International Law, 7th ed. 1929.
- LEGUM Congo Disaster, 1961.
- LEGUM Pan-Africanism, 1962.
- LEGUM Southern Africa - The Year of the Whirlwind, 1977.
- LEGUM AND HODGES After Angola, 1976.
- LEGUM AND LEE Conflict in the Horn of Africa, 1977.
- LEMARCHAND Rwanda and Burundi, 1970.
- LEMARCHAND AND MARTIN Selective Genocide in Burundi, 1974.
- LEISS (ed.) Apartheid and United Nations Collective Measures, 1965.
- LENIN Marx, Engels, Marxism, 1934.
- LENIN The Right of Nations to Self-Determination, 1951.

- LEWIS The Modern History of Somaliland, 1965.
- LILLICH (ed.) Humanitarian Intervention and the United Nations, 1973.
- LINDLEY The Acquisition and Government of Backward Territory in International Law, 1926.
- LLOYD, P.C. Yoruba Land Law, 1962.
- LONGRIGG A Short History of Eritrea, 1945.
- LORIMER The Institutes of the Law of Nations, vol.1, 1883.
- LUGARD The Rise of an East African Empire, vol.2, 1893.
- McCARTNEY National States and National Minorities, 1934.
- McDOUGAL AND FELICIANO Law and Minimum World Public Order, 1961.
- McDOUGAL, LASSWELL AND VLASIC Law and Public Order in Space, 1963.
- McEWAN International Boundaries of East Africa, 1971.
- McNAIR International Law Opinions, 1956.
- McNAIR The Law of Treaties, 1961.
- MAINE, H. Ancient Law, 1861.
- MAIR African Kingdoms, 1977.
- MAIR Primitive Government, 1962.
- de MARTENS Nouveau Recueil Général de Traités, 3rd Series, XI.
- MAZRUI Towards a Pan-Africana: A Study of Ideology and Ambition, 1967.
- MILLER The Drafting of the Covenant, 1928.
- MINOGUE Nationalism 1967.
- MOCHI ONORY Le Succession d'Etats aux Traités, 1968.
- MOORE (ed.), J.N. Law and Civil War in the Modern World, 1974.
- MOORE (ed.), J.N. The Arab-Israeli Conflict, 3 vols., 1974.
- NINCIC The Problem of Sovereignty in the Charter and in the Practice of States, 1970.
- NOGUEIRA The United Nations and Portugal, 1963.
- NUSSBAUM, A. A Concise History of the Law of Nations, 1954.

- O'CONNELL, D.P. International Law, 2 vols., 2nd ed., 1970.
- O'CONNELL, D.P. State Succession in Municipal Law and International Law, 2 vols., 1967.
- OKEKE Controversial Subjects of Contemporary International Law, 1974.
- OKOYE International Law and the New African States, 1972.
- OLIVER AND FAGE A Short History of Africa, 3rd ed., 1970.
- OPPENHEIM, L. International Law, 8th ed., 1955.
- PADMORE (ed.) History of the Pan-African Congress, 1963.
- PARRY, C. The Sources and Evidences of International Law, 1965.
- PEREIRA Le Succession d'Etats en Matière de Traité, 1969.
- PHILLIMORE Commentaries Upon International Law, 3rd ed. vol.1, 1879.
- PICTET (ed.) Commentary on the Geneva Conventions of 1949, vol.3, 1960.
- PRESCOTT The Geography of Frontiers and Boundaries, 1965.
- PRINSLOO Walvis Bay and the Penguin Islands: Background and Status, 1977.
- POUNDS Political Geography, 1963.
- RAJAN United Nations and Domestic Jurisdiction, 2nd ed., 1961.
- REZETTE The Western Sahara and the Frontiers of Morocco, 1975.
- RIGO SUREDA The Evolution of the Right of Self-Determination, 1973.
- RIVIER Principes du Droit des Gens, vol.1, 1896.
- ROBINSON, N. Human Rights and Fundamental Freedoms in the Charter of the United Nations: A Commentary, 1946.
- ROBINSON, R. AND GALLAGHER, J. Africa and the Victorians, 1961.
- ROSS, A. A Textbook of International Law, 1947.
- ROUSSEAU, C. Droit International Public, 1953.
- ROUSSEAU, C. Droit International Public, 1970-7.

- SALMOND On Jurisprudence, 12th ed. 1966.
- SALOMON De l'Occupation des Territoires sans Maîtres, 1889.
- SCELLE Introduction à l'Etude du Droit, 1951.
- SCHUMAN International Politics, 5th ed., 1953.
- SCHWARZENBERGER, G. Dynamics of International Law, 1976.
- SCHWARZENBERGER, G. International Constitutional Law, 1976.
- SCHWARZENBERGER, G. International Law, 3rd ed. 1957.
- SCHWARZENBERGER, G. International Law and Order, 1971.
- SCHWARZENBERGER AND BROWN Manual of International Law, 6th ed. 1976.
- SCOTT The Rise and Fall of the League of Nations, 1973.
- SHAPIRO (ed.) Soviet Treaty Series, vol.1, 1950.
- SHARMA International Boundary Disputes and International Law, 1976.
- SHUKRI The Concept of Self-Determination in the United Nations, 1965.
- SINCLAIR, I. The Vienna Convention on the Law of Treaties, 1973.
- SIOTIS Le Droit de la Guerre et les Conflits Armés d'un Caractère Non-International, 1958.
- SLONIM South West Africa and the United Nations: An International Mandate in Dispute, 1973.
- SMITH, H.A. Great Britain and the Law of Nations, vol.1, 1932.
- SMITH International Law, 5th ed. 1918.
- SOHN AND BUERGENTHAL The International Protection of Human Rights, 1973.
- SØRENSEN (ed.) Manual of Public International Law, 1968.
- STANKIEWICZ (ed.) In Defence of Sovereignty, 1969.
- STARKE, J.G. Introduction to International Law, 8th ed. 1977.
- STONE, J. Aggression and World Order, 1958.
- STONE, J. Conflict Through Consensus, 1977.
- STONE, J. Legal Controls of International Conflict, 1959.

- STREMLAU The International Politics of the Nigerian Civil War 1966-70, 1977.
- SUY The Concept of Jus Cogens in International Law, 1967.
- TECHOFF AND
UTTON (eds.) International Environmental Law, 1974.
- TEMPERLY A History of the Peace Conference of Paris, 1920-4.
- THIAM La Politique Etrangère des Etats Africains, 1963.
- THIRLWAY International Customary Law and Codification, 1972.
- THOMAS, A. AND
THOMAS, A. Non-intervention, 1956.
- TOUVAL Somali Nationalism, 1963.
- TOUVAL The Boundary Politics of Independent Africa, 1972.
- TREVASKIS Eritrea, A Colony in Transition: 1941-52, 1960.
- TUNKIN Droit International Public, 1965.
- TUNKIN Theory of International Law, 1974.
- UDOKANG Succession of New States to International Treaties, 1972.
- UMOZURIKE Self-Determination in International Law, 1972.
- UNITED NATIONS MATERIALS ON SUCCESSION OF STATES, 1967.
- VATTEL The Law of Nations or the Principles of Natural Law, 1758.
- VENTES Portugal's War in Guinea-Bissau, 1973.
- VERZIJJL International Law in Historical Perspective, vol.1 1968 and vol.3 1970.
- WALDOCK Human Rights in Contemporary International Law and the Significance of the European Convention, 1963.
- WAMBAUGH Plebiscites Since the World War, 1933.
- WARD, B. The Great International Share-Out, 1958.
- WELLINGTON South West Africa and Its Human Issues, 1967.
- WESTLAKE Collected Papers on Public International Law, 1914.

WESTLAKE	International Law, Part I Peace, 1904.
WHEATON	Elements of International Law, 1866 (ed. Dara).
WHEATON	Elements of International Law, 1929 (ed. Keith).
WHITEMAN, M.M.	Digest of International Law, vol.4, 1965.
WIDSTRAND (ed.)	African Boundary Problems, 1969.
WOLFERS	Politics in the Organisation of African Unity, 1976.
WRIGHT, Q.	A Study of War, 1942.
WRIGHT, Q.	Mandates Under the League of Nations, 1930.
YAKEMTCHOUK	L'Afrique en Droit International, 1971.
ZARTMAN	International Relations in the New Africa, 1966.
ZIMMERN	Nationality and Government, 1918.

ARTICLES

ABDALLA	"The Sudanese Boundary Conflict" 14 Revue Egyptienne de Droit International, 1958, p.1.
ABI-SAAB	"Wars of National Liberation and the Development of Humanitarian Law", <u>Declaration on Principles</u> (ed. Akkerman, Van Kreiken and Pannenberg) 1977, p.43.
ABI-SAAB	"Wars of National Liberation and the Laws of War" 3 Annals of International Studies, 1972, p.93.
ABUETAN	"Eritrea: UN Problem and Solution" 2 Middle Eastern Affairs, 1951, p.35.
AKEHURST	"Custom as a Source of International Law" 47BYIL, 1974-5, p.1.
AKEHURST	"Enforcement Action by Regional Agencies" 42BYIL, 1967, p.175.
AKEHURST	"The Hierarchy of the Sources of International Law" 47BYIL, 1974-5, p.273.
AKEHURST	"The Use of Force to Protect Nationals Abroad" 5 International Relations, 1977, p.3.
ALEXANDROWICZ	"New and Original States" 45 International Affairs, 1969, p.465.
ALEXANDROWICZ	"The Juridical Expression of the Sacred Trust of Civilisation" 65 AJIL, 1971, p.149.

- ALEXANDROWICZ "The New States and International Law" 3 Millenium-Journal of International Studies, 1974-5, p.226.
- ALEXANDROWICZ "The Role of Treaties in the European-African Confrontation in the Nineteenth Century", African International Legal History (ed. Mensah-Brown), 1975, p.27.
- ALLOTT "Boundaries and the Law in Africa", African Boundary Problems (ed. Widstrand), 1969, p.10.
- ANDREWS "The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century" 94 LQR, 1978, p.408.
- ARDENER "The Nature of the Reunification of Cameroon", African Integration and Disintegration (ed. Hazlewood), 1967, p.285.
- ARANGIO-RUIZ "The Normative Role of the General Assembly of the United Nations and the Declaration on Principles of Friendly Relations" 137 HR, 1972, p.517.
- ASHFORD "The Irredentist Appeal in Morocco and Mauritania" 15 Western Political Quarterly, 1962, p.641.
- AUMO-OSOLO "A Retrospective Analysis of United Nations Activity in the Congo and its Significance for Contemporary Africa" 8 Vanderbilt Journal of Transnational Law, 1975, p.458.
- AUSTIN "The Uncertain Frontier: Ghana-Togo" 1 JMAS, 1963, p.139.
- BARBOUR "A Geographical Analysis of Boundaries in Inter-Tropical Africa", Essays in African Populations (ed. Barbour and Prothero), 1961, p.305.
- BASTID "Les Problèmes Territoriaux dans la Jurisprudence de la Cour Internationale de Justice", 107 HR, 1962, p.360.
- BECKET "Les Questions d'Intérêt Général au Point de Vue Juridique dans la Jurisprudence de la Cour Permanente de Justice Internationale", 50 HR, 1934, p.189.
- BELL "Endemic Insurgency and International Order: The Eritrean Experience" 18 Orbis, 1974, p.427.
- BIN CHENG "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 IJIL, 1965, p.23.
- BLISHCHENKO AND SOLNTSEVA "The Struggle Against Portuguese Colonialism in the Light of International Law" 8 International Affairs (Moscow) 1971, p.60.

- BOALS "The Relevance of International Law to the Internal War in Yemen", The International Law of Civil War (ed. Falk), 1971, p.303.
- BOWETT "Problems of Self-Determination and Political Rights in Developing Countries" PASIL, 1966, p.134.
- BOWETT "The Inter-Relation of Theories of Intervention and Self-Defence", Law and Civil War in the Modern World (ed. Moore), 1974, p.38.
- BOYCE "The Internationalising of Internal War: Ethiopia, the Arabs and the Case of Eritrea" 5 Journal of International and Comparative Studies, 1972, p.51.
- BRIGGS "Non-Recognition of Title by Conquest and Limitations on the Doctrine" PASIL, 1940, p.72.
- BROOKS "The Legal Status of Walvis Bay" 2 South African Yearbook of International Law, 1976, p.187.
- BROWN "Self-Determination in Central Europe" 14 AJIL, 1920, p.235.
- BROWNLIE "A Provisional View of the Dispute Concerning Sovereignty over Lake Malawi/Nyasa" East Africa Law Review, 1968, p.258.
- BROWNLIE "History of the Principle of Self-Determination" Grotian Society Papers, 1968, p.96.
- BROWNLIE "Humanitarian Intervention", Law and Civil War in the Modern World (ed. Moore), 1974, p.217.
- CASTAGNO "The Somali-Kenyan Controversy" 2 JMAS, 1964, p.165.
- CASTREN "Aspects Récents de la Succession d'Etats" 78 HR, 1951, p.385.
- CAVAGLIERI "Règles Générales du Droit de la Paix" 26 HR, 1929, p.315.
- CERVENKA "Eritrea: Struggle for Self-Determination or Secession" 12 Afrika Spectrum, 1977, p.37.
- CERVENKA "Major Policy Shifts in the Organisation of African Unity 1963-73", Foreign Relations of African States (ed. Ingham), 1974, p.323.
- CHILSTROM "Humanitarian Intervention Under Contemporary International Law: A Policy Oriented Approach" 1 Yale Studies in World Public Order, 1974, p.93.
- CHIME "The Organisation of African Unity and African Boundaries", African Boundary Problems (ed. Widstrand) 1969, p.74.

- COHEN "Legal Problems Arising out of the Dissolution of the Mali Federation" 36 BYIL, 1960, p.375.
- COLEMAN "Tradition and Nationalism in Tropical Africa", New States in the Modern World (ed. Kilson), 1975, p.12.
- COLSON "African Society at the Time of the Scramble", Colonialism in Africa 1870-1960 (eds. Gann and Duignan) vol.1, 1969, p.31.
- CRAWFORD "South West Africa: Mandate Termination in Historical Perspective" 6 Columbia Journal of Transnational Law, 1967, p.91.
- CRAWFORD "The Criteria for Statehood in International Law" 48 BYIL, 1976-7, p.93.
- CUKWURAH "The Organisation of African Unity and African Territorial and Boundary Problems: 1963-73" 13 IJIL, 1973, p.176.
- CUMMING "The Disposal of Eritrea" 7 Middle East Journal, 1953, p.18.
- D'AMATO "On Consensus" 8 Canadian Yearbook of International Law, 1970, p.104.
- D'AMATO "The Bantustan Proposals for South West Africa" 4 JMAS, 1966, p.177.
- DARWIN "The Outer Space Treaty" 42 BYIL, 1967, p.280.
- DE CAVIEDES "De La Clause 'Rebus Sic Stantibus' à la Clause de Révision dans les Conventions Internationales" 188 HR, 1966, p.109.
- DELBEZ "Du Territoire dans ses Rapports avec l'Etat" 39 Revue Générale de Droit International Public, 1932, p.46.
- DEMBINSKI "Le Territoire et le Développement du Droit International Public" Annuaire Suisse de Droit International 1975, p.121.
- DEVINE "The Requirements of Statehood Re-examined" 34 MLR 1971, p.410.
- DUGARD "The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism", 16 ICLQ, 1967, p.157.
- DUGARD "The Revocation of the Mandate for South West Africa" 62 AJIL, 1968, p.78.
- DUPUIS "Règles Générales du Droit de la Paix" 32 HR 1931, p.37.

- EL ERIAN "The Legal Order of International Society", Manual of Public International Law (ed. Sørensen), 1968, p.55.
- EMERSON "Pan-Africanism" 16 International Organisation 1962, p.278.
- EMERSON "Self-Determination" 65 AJIL, 1971, p.461.
- ESGAIN "Military Servitudes and the New Nations", The New Nations in International Law and Diplomacy (ed. O'Brien), 1965, p.42.
- EVATT "The Acquisition of Territory in Australia and New Zealand" Grotien Society Papers, 1968, p.16.
- FALK "A New Paradigm for International Legal Studies: Prospects and Proposals" 84 Yale Law Journal, 1975, p.969.
- FALK "Janus Tormented: The International Law of Internal War", International Aspects of Civil Strife (ed. Rosenan), 1964, p.185.
- FALK "The South West Africa Cases: An Appraisal" 21 International Organisation, 1967, p.7.
- FALL "La Reconnaissance de la Guinée-Bissau et le Droit International" Annales Africaines, 1973, p.153.
- FARAH "South Africa's Apartheid Policy: An Assessment", Africa and International Organisation (ed. El-Ayonty and Brooks), 1974, p.71.
- FARER "Intervention in Civil Wars: A Modest Proposal" 67 Columbia Law Review, 1967, p.266.
- FARER "The Regulation of Foreign Intervention in Civil Armed Conflict" 142 HR, 1974, p.291.
- FAWCETT "Security Council Resolutions on Rhodesia" 41 BYIL 1965-6, p.103.
- FAWCETT "The Role of the United Nations in Relation to Human Rights - Is It Misconceived?" Nobel Symposium 7, 1968, p.95.
- FISCHER "La Non-Reconnaissance du Transkei" AFDI 1976, p.63.
- FITZMAURICE "The Law and Procedure of the International Court of Justice" 28 BYIL, 1951, p.1.
- FITZMAURICE "The Law and Procedure of the International Court of Justice, 1951-4" 33 BYIL, 1957, p.209.
- FLORY "La Notion de Territoire Arabe et Son Application au Problèmes du Sahara" AFDI 1957, p.73.

- FONTEYNE "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the United Nations Charter" 4 California Western International Law Journal, 1974, p.203.
- FRALEIGH "The Algerian Revolution as a Case Study in International Law", The International Law of Civil War (ed. Falk), 1971, p.179.
- FRANCK "The Stealing of the Sahara" 70 AJIL, 1976, p.694.
- FRANCK AND HOFFMAN "The Right of Self-Determination in Very Small Places" 8 New York Journal of International Law and Politics, 1976, p.331.
- FRANCK AND RODLEY "After Bangladesh: The Law of Humanitarian Intervention by Military Force" 67 AJIL, 1973, p.275.
- FRIEDMANN "General Course in Public International Law" 127 HR, 1969, p.142.
- FRIEDMANN "Intervention, Civil War and the Rule of International Law" PASIL, 1965, p.67.
- GANDOLFI "Naissance et Mort sur le Plan International d'un Etat Ephémère: La Fédération du Mali" AFDI 1960, p.904.
- GARNER "The Doctrine of Rebus Sic Stantibus and the Termination of Treaties" 21 AJIL, p.509.
- GIRAUD "Le Droit International Public et al Politique" 110 HR, 1966, p.744.
- GINSBURGS "Wars of National Liberation and the Modern Law of Nations - The Soviet Thesis", The Soviet Impact on International Law (ed. Baade), 1965, p.66.
- GRAHAM "The 1974 Diplomatic Conference on the Law of War" 32 Washington and Lee Law Review, 1975, p.25.
- GRAY "The Southern Sudan" 6 Journal of Contemporary History, 1971, p.108.
- GREEN "The United Nations, South West Africa and the World Court" 7 IJIL, 1967, p.491.
- GROS "The International Court of Justice and the United Nations" 120 HR, 1967, p.370.
- GROSS "The Peace of Westphalia, 1648-1948", International Law in the Twentieth Century (ed. Gross), 1969, p.25.
- GROSS "The Right of Self-Determination in International Law", New States in the Modern World (ed. Kilson), 1975, p.136.

- HAAS "The Reconciliation of Conflicting Policy Aims: The Acceptance of the League of Nations Mandate System" 6 International Organisation, 1952, p.521.
- HAMDAN "The Political Map of the New Africa" 53 The Geographical Review, 1963, p.418.
- HARGREAVES "Towards a History of the Partition of Africa" 1 Journal of African History, 1960, p.97.
- HARKABI The Position of the Palestinians in the Israel-Arab Conflict and their National Covenant (1968)" 3 New York University Journal of International Law and Politics, 1970, p.209.
- HENKIN "The United Nations and Human Rights" 19 International Organisation, 1965, p.512.
- HERMAN "The Legal Status of Namibia and of the United Nations Council for Namibia" 13 Canadian Yearbook of International Law, 1975, p.306.
- HEVENER "The 1971 South West Africa Opinion: A New International Judicial Philosophy" 24 ICLQ, 1975, p.791.
- HIGGINS "Internal War and International Law", The Future of the International Legal Order (ed. Black and Falk) vol.3, 1971, p.81.
- HIGGINS "International Law and Civil Conflict", The International Regulation of Civil Wars (ed. Luard), 1972, p.169.
- HIGGINS "International Law, Rhodesia and the United Nations" The World Today, March 1967, p.94.
- HIGGINS "The Advisory Opinion on Namibia: Which United Nations Resolutions are Binding under Article 25 of the Charter?" 21 ICLQ, 1972, p.27.
- HIGGINS "The Development of International Law By the Political Organs of the United Nations" PASIL 1965, p.116.
- HIGGINS "The International Court of Justice and South West Africa" 42 International Affairs, 1966, p.573.
- HIGGINS "The International Court and South West Africa: The Implications of the Judgement" 8 Journal of the International Commission of Jurists, 1967, p.3.
- HIGGINS "The Place of International Law in the Settlement of Disputes by the Security Council" 64 AJIL, 1970, p.7.

- HOFFMAN "International Systems and International Law" 14 World Politics 1961, p.230.
- HOLDICH "Political Boundaries" 32 Scottish Geographer Magazine, 1916, p.497.
- HOLLICK "French Intervention in Africa in 1978", The World Today, February 1979.
- HOWBEN "Principles of International Law Concerning Friendly Relations and Co-operation Among States" 61 AJIL, 1967, p.703.
- HUBER "National Self-Determination" Social Research X, 1943, p.1.
- HUDSON "Integrity of International Instruments" 42 AJIL, 1948, p.105.
- IJALAYE "Was 'Biafra' At Any Time a State in International Law?" 65 AJIL, 1971, p.551.
- JENNINGS "The Progress of International Law" 34 BYIL, 1958, p.334.
- JESSUP "The Palmas Island Arbitration" 22 AJIL, 1928, p.735.
- JOHNSON "Acquisitive Prescription in International Law" 27 BYIL, 1950, p.332.
- JOHNSON "Consolidation as a Root of Title in International Law" CLJ, 1955, p.215.
- KAECKENBEEK "La Charte de San Francisco dans ses Rapports avec le Droit International" 70 HR, 1947, p.113.
- KAMANU "Secession and the Right of Self-Determination: An OAU Dilemma" 12 JMAS, 1974, p.355.
- KAPIL "On the Conflict Potential of Inherited Boundaries in Africa" 4 World Politics, 1966, p.656.
- KAUR "Self-Determination in International Law" 10 IJIL, 1970, p.479.
- KELSEN "Recognition in International Law" 35 AJIL, 1941, p.405.
- KELSEN "Sovereignty and International Law", In Defence of Sovereignty (ed. Stankiewicz), 1969, p.115.
- KELSEN "The Quasi-Judicial Role of the Security Council and the General Assembly" 58 AJIL, 1964, p.964.
- KELSEN "Théorie du Droit International Coutumier" Revue Internationale de la Théorie du Droit, 1939, p.253.
- KOVAR "La Participation des Territoires Non-Autonomes aux Organisations Internationales" AFDI 1969, p.522.
- KRISTOFF "The Nature of Frontiers and Boundaries" 49 Annals of the Association of American Geographers, 1959, p.269.

- KUNZ "Chapter XI of the United Nations Charter in Action" 48 AJIL, 1954, p.109.
- KUNZ "Critical Remarks on Lauterpacht's Recognition in International Law" 44 AJIL, 1950, p.713.
- KUNZ "The Present Status of International Law for the Protection of Minorities" 48 AJIL, 1954, p.282.
- KYLE "The Southern Problem in the Sudan" The World Today, December 1966, p.512.
- LACHS "Law In and of the UN" 1 IJIL, 1960, p.432.
- LATHAM-BROWN "Recent Developments in the Ethiopian-Somaliland Frontier Dispute" 10 ICLQ, 1961, p.167.
- LATHAM-BROWN "The Ethiopian-Somaliland Frontier Dispute" 5 ICLQ, 1956, p.245.
- LAUTERPACHT "The Subjects of International Law", International Law (Collected Papers), vol.2, pt.1, 1975, p.489.
- LAZARUS "Le Statut des Mouvements de Libération Nationale à l'Organisation des Nations Unies" AFDI 1974, p.173.
- LEE "The Mexico City Conference of the UN Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States" 14 ICLQ, 1965, p.1296.
- LESTER "State Succession to Treaties in the Commonwealth" 12 ICLQ 1963, p.475.
- LETOCHA "The Problem of Succession of African States in Respect of Post-Colonial Boundaries in the Light of Practice" 1 Studies in the Developing Countries, 1971, p.131.
- LEWIS "The Problem of the Northern Frontier District of Kenya" 5 Race, 1963, p.48.
- LEWIS "The Referendum in French Somaliland: Aftermath and Prospects in the Somali Dispute", The World Today, July 1967, p.308.
- LEWIS "The Somali Conquest of the Horn of Africa" 1 Journal of African History, 1960, p.213.
- LILLICH "Forcible Self-Help by States to Protect Human Rights" 53 Iowa Law Review, 1967, p.325.
- LILLICH "Intervention to Protect Human Rights" 15 McGill Law Journal, 1969, p.205.
- LISSITZYN "Treaties and Changed Circumstances (Rebus Sic Stantibus)" 61 AJIL, 1967, p.895.
- LUARD "The Origins of International Concern over Human Rights", The International Protection of Human Rights (ed. Luard), 1967, p.10.

- McDOUGAL, LASSWELL
AND CHEN "The Protection of Respect and Human Rights"
24 American University Law Review, 1974, p.919.
- McDOUGAL AND REISMAN "Rhodesia and the UN: The Lawfulness of
International Concern" 62 AJIL, 1968, p.1.
- MacGIBBON "The Scope of Acquiescence in International
Law" 31 BYIL, 1954, p.143.
- McMAHON "International Boundaries", 84 Journal of the
Royal Society of Arts, 1935, p.4.
- McWHINNEY "The 'New' Countries and the 'New' International
Law: The UN Special Conference on Friendly
Relations and Co-Operation among States" 60
AJIL, 1966, p.1.
- MANGOGO-NZAMBIE "La Delimitation des Frontières du Gabon
(1885-1911)" 9 Cahiers d'Etudes Africaines,
1965, p.5.
- MARIAM "The Background of the Ethio-Somalian Boundary
Dispute" 2 JMAS, 1964, p.189.
- MARSHALL "Namibia and Walvis Bay" 27 ICLQ, 1978, p.683.
- MARTINE "Le Comité de Décolonisation et le Droit
International" Revue Générale de Droit
International Public, 1970, p.402.
- MATHY "L'Autodétermination de Petits Territoires
Revendiqués par Etats Tiers (Première Partie)"
Revue Belge de Droit International, 1974, p.167.
- MATHY "L'Autodétermination de Petits Territoires
Revendiqués par Etats Tiers (Deuxième Partie)"
Revue Belge de Droit International, 1975, p.129.
- MAYALL "The Battle for the Horn: Somali Irredentism
and International Diplomacy", The World Today,
September 1978, p.336.
- MAYALL "The Malawi-Tanzanian Boundary Dispute" 11 JMAS,
1973, p.611.
- MAYA KRISHNAN "African State Practice Relating to Certain Issues
of International Law" 14 Indian Journal of
International Affairs, 1965, p.196.
- MAZRUI "Consent, Colonialism and Sovereignty" 11
Political Studies 1963, p.48.
- MENDELSON "Diminutive States in the United Nations" 21 ICLQ,
1972, p.609.
- MERCER "Confrontation in the Western Sahara" The World
Today, June 1976, p.230.
- MERLE "Plebiscites Organisés Par les Nations Unies"
AFDI 1961, p.425.

- MILLER "Legal Aspects of the United Nations Action in the Congo" 55 AJIL, 1961, p.10.
- MINH "Remarques Sur le Principe de l'Intangibilité des Frontières", Peuples et Etats du Tiers Monde Face à l'Ordre International (ed. Fenet), 1978, p.51.
- MITTELMAN "Collective Decolonisation and the United Nations Committee of 24" 14 JMAS, 1976, p.41.
- MODEEN "The International Protection of the National Identity of the Aaland Islands" Scandinavian Studies in Law, 1973, p.177.
- MOORE "The Control of Foreign Intervention in Internal Conflict", Law and the Indo-China War (ed. Moore), 1972, p.115.
- MOUSHKELY "La Naissance des Etats en Droit International Public" 66 Revue Générale de Droit International Public, 1962, p.469.
- MURTY "Evidence on Traditional Boundaries and Some Problems in its Interpretation" 8 IJIL, 1968, p.479.
- MUSTAFA "The Principle of Self-Determination in International Law" 5 International Lawyer, 1971, p.482.
- NANDA "The United States' Action in the 1965 Dominican Crisis: Impact on World Order - Part I" 43 Denver Law Journal, p.437.
- NAWAZ "Colonies, Self-Government and the United Nations" 1 Indian Yearbook of World Affairs, 1962, p.3.
- NAYAR "Self-Determination Beyond the Colonial Context: Biafra In Retrospect" 10 Texas International Law Journal, 1975, p.321.
- OBOZUWA "Some Legal Aspects of the Rhodesian Situation" 5 Nigerian Journal of Contemporary Law, 1974, p.1.
- O'CONNELL "Independence and Problems of State Succession", The New Nations in International Law and Diplomacy (ed. O'Brien), 1965, p.7.
- O'CONNELL "State Succession and the Effect Upon Treaties of Entry into a Composite Relationship" 39 BYIL, 1963, p.54.
- PANTER-BRICK "The Right of Self-Determination: Its Application to Nigeria" 44 International Affairs, 1968, p.254.
- PERSON "L'Afrique Noire et Ses Frontières" 80 Revue Française d'Etudes Politiques Africaines, 1972, p.18.
- PETKOVIC "Intégrité Territoriale et Droit à l'Autodétermination en Afrique" Revue de la Politique Internationale, 1969, p.20.

- PHILLIPS "The Exclusive Economic Zone as a Concept in International Law" 26 ICLQ, 1977, p.5.
- PIERSON-MATHY "L'Action des Nations Unies Contre l'Apartheid" 6 Revue Belge de Droit International, 1970, p.203.
- POMERANCE "The United States and Self-Determination: Perspectives on the Wilsonian Conception" 70 AJIL, 1976, p.1.
- POST "Is There a Case for Biafra?" 44 International Affairs, 1968, p.28.
- RAO "Right of Self-Determination: Its Status and Role in International Law" Internationales Recht und Diplomatie, 1968, p.28.
- RATON "Les Enclaves" AFDI 1958, p.186.
- REDSLOB "LePrincipe des Nationalities" 37 HR, 1931, p.5.
- REEVES "International Boundaries" 38 AJIL, 1944, p.533.
- REJAI AND ENLOE "Nation-States and States-Nations" 13 International Studies Quarterly, 1969, p.143.
- RESULOVIC "Ten Years of the Organisation of African Unity" 24 Review of International Affairs, 1973, p.34.
- REYNER "Morocco's International Boundaries: A Factual Background" 1 JMAS, 1963, p.324.
- RICHARDSON "Self-Determination, International Law and the South African Bantustan Policy" 17 Columbia Journal of Transnational Law, 1978, p.185.
- RIESENFIELD "Jus Dispositivum and Jus Cogens in International Law in the Light of a Recent Decision of the German Supreme Constitutional Court" 60 AJIL, 1966, p.511.
- RIVLIN "The Italian Colonies at the General Assembly" 3 International Organisation, 1949, p.469.
- ROBINSON "From Protection of Minorities to Promotion of Human Rights" Jewish Yearbook of International Law, 1949, p.115.
- ROHLIK "Some Remarks on Self-Defence and Intervention" 6 Georgian Journal of International and Comparative Law, 1976, p.395.
- RONZITTI "Resort to Force in Wars of National Liberation", Current Problems of International Law (ed. Cassese), 1975, p.319.
- RONZITTI "Wars of National Liberation - A Legal Definition" 1 Italian Yearbook of International Law, 1975, p.192.
- ROSENNE "Directions for a Middle East Settlement - Some Underlying Problems", The Middle East Crisis: Test of International Law (ed. Halderman), 1969, p.59.

- ROSENNE "Is the Constitution of an International Organisation an International Treaty?" *Comunicazioni e Studi*, XII, 1966, p.21.
- ROSENSTOCK "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey" 65 *AJIL*, 1971, p.713.
- SAGAY "Non-Recognition of the Illegal Occupation of Territory" 16 *IJIL*, 1976, p.219.
- SAGAY "The Legal Status of Freedom Fighters in Africa" 6 *East Africa Law Review*, 1975, p.15.
- SAHOVIC AND BISHOP "The Authority of the State: Its Range with Respect to Persons and Places", Manual of Public International Law (ed. Sorensen) 1968, p.31..
- SALMON "La Conference Diplomatique sur le Réaffirmation et le Développement du Droit International Humanitaire et les Guerres de Libération Nationale" 12 *Revue Belge de Droit International*, 1976, p.27.
- SANBORN "Standing Before the International Court of Justice: The Question of Palestinian Statehood Exemplifies the Inconsistencies of the Requirement of Statehood" 7 *California Western International Law Journal*, 1977, p.454.
- SCHACHTER "Interpretation of the Charter in the Political Organs of the United Nations", Law, State and International Order: Essays in Honour of Hans Kelsen, 1964, p.269.
- SCHACHTER "The Relations of Law, Politics and Action in the United Nations" 109 *HR*, 1963, p.169.
- SCHOENBORN "La Nature Juridique du Territoire" 30 *HR* 1929, p.85.
- SCHOU "Le Rôle du Territoire dans le Droit International" *Nordisk Tidsskrift for International Ret (Acta Scandinavia Juris Gentium 10)*, 1939, p.17.
- SCHWARZENBERGER "Fundamental Principles of International Law" 87 *HR*, 1955, p.195.
- SCHWARZENBERGER "International Jus Cogens" 43 *Texas Law Review*, 1965, p.455.
- SCHWARZENBERGER "Title to Territory: Response to a Challenge", International Law in the Twentieth Century (ed. Gross), 1969, p.287.
- SCHWEBEL "Aggression, Intervention and Self-Defence in Modern International Law" 136 *HR*, 1972, p.411.
- SCHWEBEL "Wars of Liberation as Fought in UN Organs", Law and Civil War in the Modern World (ed. Moore), 1974, p.446.

- SCHWELB "Neue Etappen der Fortentwicklung des Völkerrechts durch die Vereinten Nationen", Archiv des Völkerrechts, XIII, 1966, p.25.
- SCHWELB "Some Aspects of the International Covenants on Human Rights of December 1966" Proceedings of the Nobel Symposium 7, 1967, p.111.
- SCHWELB "The International Court of Justice and Human Rights Clauses of the Charter" 66 AJIL, 1972, p.337.
- SCHWELB "The Nuclear Test Ban Treaty and International Law" 58 AJIL, 1964, p.645.
- SEATON AND MALITI "Treaties and Succession of States and Governments in Tanzania", African Conference on International Law and African Problems, 1967, p.76.
- SEYERSTED "International Personality of Inter-Governmental Organisations" 4 IJIL, 1964, p.55.
- SHEPHERD "National Integration and the Southern Sudan" 4 JMAS 1966, p.193.
- SILVERBURG "The Palestine Liberation Organisation in the United Nations: Some Implications for International Law and Relations" 12 Israel Law Review, 1977, p.365.
- SINCLAIR "Principles of International Law Concerning Friendly Relations and Co-operation among States", Essays on International Law in Honour of Krishna Rao, 1976, p.107.
- SKUBISZEWSKI "Enactment of Law by International Organisations" 41 BYIL, 1965-6, p.198.
- SKUBISZEWSKI "Use of Force by States", Manual of Public International Law (ed. Sørensen), 1968, p.739.
- SLOAN "Human Rights, the United Nations and International Law" Nordisk Tidsskrift for International Ret (Acta Scandinavica Juris Gentium 20), 1950, p.30.
- SOHN "The Stockholm Declaration on the Human Environment" 14 Harvard International Law Journal, 1973, p.423.
- STAMSHENKO "Principle of National Self-Determination", Soviet Foreign Policy, 1963, p.162.
- STARKE "The Acquisition of Title to Territory by Newly Emerged States" 41 BYIL, 1965-6, p.411.
- STRUPP "Les Règles Générales du Droit de la Paix" 47 HR, 1934, p.264.

- SUZUKI "Self-Determination and World Public Order: Community Response to Territorial Separation" 16 Virginia Journal of International Law, 1976, p.779.
- TAGIL "The Study of Boundaries and Boundary Disputes", African Boundary Disputes (ed. Widstrand), 1969, p.22.
- TOLEN "Les Implications Internationales de la Politique d'Apartheid" 69 Présence Africaine, 1969, p.164.
- TOUSSAINT "The Colonial Controversy in the United Nations" 10 YBWA, 1956, p.177.
- TOUVAL "African Frontiers" 42 International Affairs, 1966, p.641.
- TOUVAL "The Organisation of African Unity and African Borders" 21 International Organisation, 1967, p.102.
- TOUVAL "The Sources of Status Quo and Irredentist Policies", African Boundary Problems (ed. Widstrand), 1969, p.111.
- TOUVAL "Treaties, Borders and the Partition of Africa" 7 Journal of African History, 1966, p.279.
- TUNKIN "Remarks on the Juridical Nature of Customary Norms of International Law" 49 California Law Review, 1961, p.419.
- UDINA "La Succession des Etats quant aux Obligations Internationales, autres que les Dettes Publiques" 44 HR, 1933, p.704.
- UMOZURIKE "International Law and Self-Determination in Namibia" 8 JMAS, 1970, p.585.
- UZOIGWE "Spheres of Influence and the Doctrine of the Hinterland in the Partition of Africa" 3 Journal of African Studies, 1976, p.183.
- VALLAT "The Competence of the United Nations General Assembly" 97 HR, 1959, p.211.
- VALLAT "The General Assembly and the Security Council of the United Nations" 29 BYIL, 1952, p.63.
- VAN ASBECK "International Law and Colonial Administration", Transactions of the Grotius Society, 1953, p.5.
- VERDROSS "Jus Dispositivum and Jus Cogens in International Law" 60 AJIL, 1966, p.55.
- VIRALLY "Droit International et Décolonisation" AFDI 1963, p.563.

- VON DER HEYDTE "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" 29 AJIL, 1935, p.448.
- WALDOCK "Disputed Sovereignty in the Falkland Island Dependencies" 25 BYIL, 1948, p.342.
- WALDOCK "The Plea of Domestic Jurisdiction before International Legal Tribunals" 31 BYIL, 1954, p.96.
- WALDOCK "The Regulation of the Use of Force by Individual States in International Law" 81 HR, 1952, p.455.
- WENGLER "L'Interdiction de Recourir a la Force" Revue Belge de Droit International, 1971, p.401.
- WILD "The Organisation of African Unity and the Algerian-Moroccan Border Conflict" 20 International Organisation, 1966, p.18.
- WITTENS "The Friendly Relations Declaration" 12 Harvard International Law Journal, 1971, p.517.
- WODIE "La Secession du Biafra et le Droit International Public" 73 Revue Generale de Droit International Public, 1969, p.1021.
- WRIGHT "National Courts and Human Rights - The Fujil Case" 45 AJIL, 1951, p.73.
- WRIGHT "Recognition and Self-Determination" PASIL 1954, p.23.
- WRIGHT "Some Thoughts about Recognition" 44 AJIL 1950, p.549.
- WRIGHT "The Goa Incident" 56 AJIL 1962, p.617.
- WRIGHT "The Middle East Crisis" 64 AJIL, 1970, p.74.
- WRIGHT "The Strengthening of International Law" 98 HR 1959, p.182.
- WRIGHT "United States Intervention in the Lebanon" 53 AJIL, 1959, p.112.
- ZARTMAN "A Disputed Frontier is Settled" 8 Africa Report, 1963, p.13.
- ZARTMAN "The Foreign and Military Politics of African Boundary Problems", African Boundary Problems (ed. Widstrand), 1969, p.81.
- ZARTMAN "The Politics of Boundaries in North and West Africa" 3 JMAS, 1965, p.155.
- ZEMANEK "State Succession After Decolonisation" 116 HR, 1965, p.180.