Self-Determination under International Law: Validity of Claims to Secede

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INTRODUCTORY ARTICLE

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by Ved P. Nanda*

I. INTRODUCTION

SEVERAL RECENT EVENTS, including the Soviet and the
Vietnamese interventions in Afghanistan¹ and Kampuchea² respectively, and the imminent termination of the Micronesian Trusteeship re-
lationship,³ raise recurrent questions regarding the nature, content, and

¹ See, e.g., Soviet Invasion of Afghanistan, 80 DEP’T STATE BULL. 62-65 (June 1980);
Elliot, Jr., Afghanistan: Fact and Fiction, Wall St. J., Jan. 9, 1980, at 20, col. 3; Soviet
Invasion of Afghanistan, WEEKLY COMP. OF PRES. DOC. 25-27 (Jan. 4, 1980); Afghanistan:
Action and Reaction, 32 CURRENT DIG. SOVIET PRESS, 1-8, (Feb. 6, 1980). For discussion and
action at the United Nations, see Immediate Withdrawal of Foreign Troops from Afghan-
istan Urged, 17 U.N. MONTHLY CHRONICLE, 5-17, 107-09 (March 1980); see also 18 U.N.
MONTHLY CHRONICLE 7 (Jan. 1981) and text accompanying notes 16 and 17 infra.

² See, e.g., Duncanson, ‘Limited sovereignty’ in Indochina, 34 WORLD TODAY 260
(1978); Mendenhall, Communist Vietnam and the Border War: Victim or Aggressor, 6
STRATEGIC REV. 56 (Summer 1978); Simon, Cambodia: Barbarism in a Small State under
Siege, 75 CURRENT HIST. 197 (Dec. 1978). For discussion and action at the United Nations,
see 16 U.N. MONTHLY CHRONICLE 5-19 (Feb. 1979); id. at 5-17, 42-47 (March 1979); id. at 46-
49 (April 1979); 17 U.N. MONTHLY CHRONICLE 39-41, 122 (Jan. 1980); id. at 52 (Nov. 1980);
id. at 13, 59 (Dec. 1980) and text accompanying notes 10-15 infra.

³ Following the termination of the trusteeship relationship, present indications are that
the Trust Territory of the Pacific Islands (which includes the Northern Mariana Islands,
Paku, the Marshall Islands, and the Federated State of Micronesia) will not emerge as an
independent state, but will exist as four separate entities—each with an associate relation-
ship with the United States. See Clark, Self-Determination and Free Association—Should
the United Nations Terminate the Pacific Islands Trust?, 21 HARY. INT'L L.J. 1, 7 (1980).
Considering the arguments raised during the 1960's and 1970's that the United States
should have defused the secessionist movements in the Pacific Islands Trust, Professor
Roger Clark has pointed out that separation has been the express wish of the people:
The United States (and Micronesian) response to these considerations is es-
scope of the "right of peoples to self determination." A principle enshrined in the United Nations Charter, self-determination has been most frequently and vigorously invoked in the post-World War II period to claim the right of independence for colonies. In light of the wide acceptance of the principle, accompanied by its successful application as a legal

entally that, while the principle of territorial integrity is an important one, it must of course give way to the freely expressed wishes of the peoples concerned (another important goal of the Charter) and to the realities of the situation. As the United States Permanent Representative to the United Nations recently put it:

The United States regrets that the exercise of full self-determination by the peoples of the Territory has led to the decision to divide the Territory into more than one entity. However, both the United States and the Trusteeship Council are in agreement that it is ultimately for the Micronesians themselves to decide upon their future political relations with one another. To take any other position, for example, that unity should be imposed upon the people of the Trust Territory, would make a mockery of the concept of self-determination as democratically conceived . . .

In the case of the Northern Mariana Islands, the elected leaders of these islands, including those elected to the Congress of Micronesia, all supported a different political status than that preferred by the leaders of the rest of the Territory. Their desire was supported by popular referenda and legislative positions in the Marianas dating back to 1949. It was on this basis that the United States decided, and then only reluctantly, to conclude a separate political status agreement with the Northern Mariana Islands. After the plebiscite in the Marianas, held in June 1975, the Congress of Micronesia took the position that it did not object to the separation of the Northern Mariana Islands since that was the express wish of their people.

Id. at 81.


Articles 1 and 55 of the U.N. Charter refer specifically to self-determination as a principle. U.N. CHARTER arts. 1, 55. See also U.N. CHARTER arts. 2(2), 56, 73-91 and text accompanying notes 62-65 infra.

For a summary report, see W. Opuaye-Kodjo supra note 4 at 129-47.

One commentator argues "[o]n the basis of the state practice . . . the conclusion can be drawn that there has emerged a general consensus on the meaning of the principle which
prescription in the process of decolonization, self-determination, at least in the specific context of colonialism, has acquired the status of an established rule of customary international law.⁸ Beyond that, however, there seems to have developed little consensus among publicists and politicians alike on the content and scope of the principle.⁹

is shared by all the members of the international community.” W. Opuatey-Kodjoë, supra note 4 at 144.


The recent United Nations deliberations on the conflicts in Kampuchea and Afghanistan illustrate the normative ambiguities associated with the term self-determination. Kampuchea called upon the Security Council to respect "the right of the people of Kampuchea to decide their own destiny." In contrast, the Vietnamese representative replied, terming the issue as that of "the support and assistance of the Vietnamese people for the armed revolutionary struggle of the people of Kampuchea for achievement of their right of self-determination [which] was being provided at the request of that people and on the basis of mutual respect for the independence, sovereignty and territorial integrity of each country." Subsequently, in the General Assembly debate, the Kampuchean representative again declared on October 9, 1979, that "Kampuchea should have its right to self-determination without outside interference. The Kampuchean people should decide on their own representatives through secret ballot and free elections supervised by the United Nations Secretary-General."

A year later, at the thirty-fifth session of the General Assembly, the representative of democratic Kampuchea reiterated this demand: "Any solution to the Kampuchean problem would require the total and unconditional withdrawal of the Vietnamese occupation forces . . . . After the withdrawal of the Vietnamese troops, the Kampuchean people would choose their national government through general and free elections."

On October 22, 1980, the General Assembly decided to convene an international conference on Kampuchea during 1981 for the purpose of reaching agreement on, among other items, the total withdrawal of foreign troops from Kampuchea and the implementation of U.N. supervised free elections there. Earlier, at a meeting of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights held in August-September 1980, the expert from Tunisia recommended that "the right to self-determination of the people of Kampuchea would have to be recognized as an inalienable human right and that the Kampucheans had to be given the possibility of exercising it."

In December 1980, the General Assembly adopted a resolution which

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10 16 U.N. MONTHLY CHRONICLE 12 (March 1979).

11 Id. For a summary report on the debate, see id. at 5-17, 42-47; id. at 5-19 (Feb. 1979); id. at 46-49 (April 1979).


13 Id. at 59 (Dec. 1980).

14 See id. at 13. For the earlier Assembly action, see id. at 39-41 (Jan. 1980); see also N.Y. Times, Oct. 22, 1981, at 5, col. 5.

15 17 U.N. MONTHLY CHRONICLE at 52 (Nov. 1980).
called for "the immediate withdrawal of foreign troops from Afghanistan and reaffirmed the right of the Afghan people to determine their form of government and choose their political, economic and social system free from outside intervention, subversion, coercion or restraint." Earlier in January 1980, the General Assembly had adopted a similar resolution at its sixth emergency special session.

With the settlement in Zimbabwe, the era of colonialism is coming to a close. However, secessionist struggles continue in many parts of the world. Recent demands for territorial separation found expression in violent upheavals with international implications in Bangladesh, Biafra, and Katanga. In addition to the highly volatile situations in the Middle East and South Africa, several recent movements in the Basque region in Spain, East Timor, Eritrea, Formosa, Kurdistan, Micronesia,
Northern Ireland,30 Quebec,31 the Southern Sudan,32 Tibet,33 and the Western Sahara illustrate the global strength of the struggle for self-determination.34 Given the wide ranging political impact of these move-


32 See generally CHINA AND THE TAIWAN ISSUE (H. Chiu ed. 1979); L. Chen & H. Lasswell, FORMOSA, CHINA AND THE UNITED NATIONS: FORMOSA IN THE WORLD COMMUNITY (1967); Chen & Reisman, Who Owns Taiwan: A Search for International Title, 81 YALE L.J. 599, 599 n.2 (1972) and authorities cited therein; Chiu, The Outlook for Taiwan, 7 ASIAN AFF. 137 (Jan./Feb. 1980).

33 See generally Edmonds, KURDISH NATIONALISM, 6 J. CONTEMP. HIST., no. 1, at 87 (London 1971); Hazen, Minorities in Revolt: The Kurds of Iran, Iraq, Syria, and Turkey in THE POLITICAL ROLE OF MINORITY GROUPS IN THE MIDDLE EAST 49-75 (R. McLaurin ed. 1979).

34 See generally Clark, supra note 3. For a report on the action of the U.N. Special Committee on Decolonization, see 17 U.N. MONTHLY CHRONICLE 23-25 (Nov. 1980).

35 See generally C. O'BRIEN, STATES OF IRELAND (1972); Hume, The Irish Question: A British Problem, 58 FOR. AFF. 300 (1980).


ments, further development of the concept of self-determination is essential for the world community. While the debate continues on the meaning of "self" and the varieties of "determination," the international lawyer must endeavor to clarify the legal issues involved in claims for self-determination, especially those for secession. Standards and criteria should be suggested for determining under international law the validity and permissibility of secession as a valid exercise of the principle or right of self-determination. This paper is an initial attempt to perform that task.

II. POLICY ISSUES REGARDING THE LEGITIMACY OF SECESSION

States share a common interest in denying legitimacy to claims from groups within the body politic either for independence as a separate entity or for association with another state. People, territory and resources constitute the state’s power base and it is inconceivable that a state would willingly part with any one of them. It follows that in the contemporary international arena where states are the most powerful actors, intergovernmental organizations would be justifiably opposed to acknowledging the right of secession. Former Secretary General U Thant reflected this position in a statement he made regarding the Biafran conflict. He contended that the attitude of the United Nations as an international organization is unequivocal, since it "has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its Member State."

Legal norms, as well as political considerations, can be invoked to deny the legitimacy of secessionist claims. These legal norms include pacta sunt servanda, territorial integrity, prohibition on the use of force, and nonintervention. Pacta sunt servanda, for example, could


See, e.g., BUCHHEIT, supra note 4, at 9-11 and authorities cited therein.

See, e.g., BUCHHEIT, supra note 4, at 11-16 and authorities cited therein.

There are divergent views on whether self-determination is a right or even a principle under international law. See authorities cited in notes 8-9 supra.


For an argument that pacta sunt servanda could apply, see, e.g., R. EMERSON, supra note 4, at 28-30.

be invoked to argue that since the various constituent groups comprising a state have exercised their right of self-determination in its formation, they do not possess any residual right to secede, thereby causing disruption and disintegration of the state. Under the complementary norm of *rebus sic stantibus* however, a substantial change in circumstances would allow a group to exercise a continuing right to secede.

Similarly, the principle of territorial integrity lies at the basis of the contemporary international system, which is state oriented. Any measures which tend to encourage territorial separation would be considered disruptive of the system and therefore unacceptable. Paragraph 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, considered by most African and Asian nations “as a document only slightly less sacred than the Charter,” states: “Any attempts 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.” The prohibition on the use of force as contained in Article 2(4) of the U.N. Charter and the doctrine of non-intervention could also be invoked to discourage outside groups from giving assistance to those demanding secession. Nevertheless, as the subsequent discussion will show, there are equally persuasive legal prescriptions under which a qualified right to secede could be considered valid.

Political considerations are frequently cited to deny the legitimacy of secession. They include the fear of balkanization and fragmentation which are likely to promote international instability. Should secession

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46 For the language of this prohibition, *see* note 40 supra.

47 For the language of this doctrine, *see* note 41 supra.

48 This topic is dealt with in section III(A) and IV of text infra.

49 *See generally* BUCHHEIT, supra note 4, at 27-31 and the authorities cited therein. For
be perceived by other states as creating a nonviable economic or political unit likely to provide a fertile ground for external interventions (especially in the case of revolutionary adventurist governments), many states would be apprehensive of the chaotic impact the right of secession could have in the international arena. It has been noted that had the United States accepted a right to secede in the mid-nineteenth century, its character would have been drastically altered and its existence seriously threatened. Furthermore, since the concept is imprecise and there exist neither objective standards nor viable machinery to apply those standards even if a consensus could be reached, it could be argued that ethnic and cultural groups which spill over state boundaries or groups within a state do not have a right to secede.

A blanket rejection of the right to secede, however, is not likely to repress the existing or potential demands for group identification and for the expression of such identification in claims to secede. Frequently the group or subgroup perceives separation as the only viable remedy for the manifest abuse of its human rights within the body politic. Therefore, a useful and desirable approach is to suggest circumstances under which secession might be considered justifiable and to investigate the process and the machinery under which it could be effectuated.

III. PRESCRIPTIONS AND STATE PRACTICES

A. Prescriptions

Although the historical antecedents of self-determination are not pertinent to the present discussion, a recollection of President Woodrow Wilson's enunciation of the doctrine of national self-determination, and the League of Nations' rather limited application of the doctrine to insure the protection of minorities provides a useful perspective of concept's le-


For a case study of the dispute between Somalia and Ethiopia over Western Somaliland, see Note, supra note 9 at 820-24. See Section III(B) of the text infra.

Bangladesh provides an apt illustration. See generally Nanda, supra note 19, at 328-33.

See generally W. OFUATEY-KODJOE, supra note 4, at 21-38.

For an incisive commentary, see Pomerance, The United States and Self-Determination: Perspectives on the Wilsonian Conception, 70 AM. J. INT'L L. 1 (1976).
gal status. In the words of a commentator, the League's approach was in many respects "a profound disappointment to minorities that had staked their hopes on the principle of self-determination. Not only were they refused national autonomy but, in return for the minimal protection offered by the treaties, they were required to act as loyal subjects" of their alien masters.

In the Aaland Islands controversy, the League of Nations rejected a request by the representatives of the Island for annexation to Sweden as an exercise of their right of self-determination. Instead, the League favored Finland's asserted sovereignty over the Islands, pursuant to an advisory opinion of a specially appointed International Commission of Jurists. In the words of the Commission: “Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.” Subsequently, in a report to the League on the Aaland Islands question, a Commission of Rapporteurs concluded that to concede the right of territorial separation “would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity.”

Although the Dumbarton Oaks proposal did not mention self-determination, the United Nations Charter makes specific reference to the principle in Articles 1 and 55. According to Article 1(2) of the Charter, one of the purposes of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .” Article 55 explicitly states the relationship between equal rights and self-determination of peoples on the one hand, and respect for human rights and fundamental freedoms on the other:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination

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56 See generally W. Ofuatey-Kodjo, supra note 4, at 67-96.
57 See Buchheit, supra note 4, at 69-70.
59 See id., at 3.
60 Id. at 5.
61 For the report, see League of Nations, Report of the Commission of Rapporteurs on the Aaland Islands, L.N. Doc. B.7 21/68/106 (1921). The rejection of the principle of self-determination has been applauded on the ground that in its unlimited and unrestrained form it “threatened the integrity and menaced the welfare of all nations, and thus of all men.” Gregory, The Neutralization of the Aaland Island, 17 Am. J. Int'l L. 63, 76 (1923).
of peoples, the United Nations shall promote . . . universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Among other provisions, Articles 26 and 56 create direct obligations of member States pertaining to the implementation of the provisions of Articles 1 and 55. Additionally, Chapters XI, XII and XIII, which deal with non-self-governing and trust territories, implicitly proclaim the principle by imposing obligations on member States to effectuate the principle. Specifically, Article 73 obliges those States responsible for the administration of non-self-governing territories “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 . . . .”

The General Assembly took the initiative in 1950 to call upon the Economic and Social Council and request that the Commission on Human Rights “study ways and means which would insure the right of peoples and nations to self-determination.” It was subsequently decided that the International Covenants on Human Rights should include an article on “the right of all peoples and nations to self-determination.” An article drafted by the Commission and adopted by the General Assembly in December, 1966, gives the right of self-determination a prominent place in the International Covenant on Economic, Social and Cultural Rights. Article 1, which is common to both Covenants, reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue

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62 Article 2(2) reads: “All Members, in order to insure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.” U.N. CHARTER art. 2, para. 2.
63 Article 56 reads: “All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” U.N. CHARTER art. 56.
64 See U.N. CHARTER arts. 73-91.
65 The goal of this Article is “to ensure, within due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses [and] 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, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.” U.N. CHARTER art. 73.
their economic, social and cultural development;

3. The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Earlier, in 1960, the General Assembly had, by a vote of 89 to 0 with 9 abstentions, adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples68 which acknowledges 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."70 Although the document stated that inadequacy of political, economic, social or educational preparedness "should never serve as a pretext for delayed independence,"71 it prohibited all attempts aimed at "the partial or total disruption of the national unity and the territorial integrity" of any state.72

Subsequently, the General Assembly at its twenty-fifth session unanimously adopted the Declaration on Principles of International Law concerning Friendly Relations (hereinafter cited as the Declaration).73 The Declaration was drafted by a special committee established by the General Assembly in 1963 and instructed to consider the "principle of equal rights and self-determination of peoples."74 It explicitly recognizes the right of all peoples to determine their political, economic, social, and cultural destiny without any external interference. The Preamble of the Declaration states:

[T]he subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security, [and] the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and . . . its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality. . . .75

One of seven principles proclaimed by the Declaration is the principle of equal rights and self-determination of peoples, by virtue of which "all

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68 G.A. Res. 1514, supra note 43.
70 G.A. Res. 1514, supra note 43.
71 G.A. Res. 1514, supra note 43.
72 G.A. Res. 1514, supra note 43.
73 Declaration Concerning Friendly Relations, supra note 41. See generally Rosenstock, supra note 44; Note, Toward Self-Determination—A Reappraisal as Reflected in the Declaration on Friendly Relations, 3 GA. J. INT'L & COMP. L. 145 (1973).
75 Declaration Concerning Friendly Relations, supra note 41, at Preamble.
peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.\textsuperscript{76}

The Declaration also acknowledges that the right of self-determination could be implemented in any of the following forms: "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other [freely determined] political status . . . ."\textsuperscript{77} According to the Declaration, however, a state's duty towards a people claiming the right to self-determination is:

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to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter. . . .\textsuperscript{78}
\end{quote}

Moreover, the Declaration addresses the issue of the territorial integrity of states:

\begin{quote}

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.\textsuperscript{79}
\end{quote}

The Declaration's pronouncement regarding the scope of a people's right to self-determination is arguably imprecise, for it grants several options, such as full independence, or freely determined federal structure or any other political status. It enunciates a significant standard, however, to satisfy the requirement of conducting itself "in compliance with the principle of equal rights and self-determination of peoples."\textsuperscript{80} A state must be possessed of a "government representing the whole people belonging to the territory without distinction as to race, creed or colour."\textsuperscript{81}

Consequently, a state has to meet the requirement of possessing a

\textsuperscript{76} Declaration Concerning Friendly Relations, supra note 41, at Principle (e).
\textsuperscript{77} Declaration Concerning Friendly Relations, supra note 41, at Principle (e), para. 4.
\textsuperscript{78} Declaration Concerning Friendly Relations, supra note 41, at Principle (e), para. 5.
\textsuperscript{79} Declaration Concerning Friendly Relations, supra note 41, at Principle (e), para. 7.
\textsuperscript{80} Declaration Concerning Friendly Relations, supra note 41, at Principle (e), para. 7.
\textsuperscript{81} Declaration Concerning Friendly Relations, supra note 41, at Principle (e) para. 7.
"government representing the whole people," before it is entitled to protection from "any action which would dismember or impair . . . [its] territorial integrity or political unity . . . ." Thus, under special circumstances, the principle of self-determination is to be accorded priority over the opposing principle of territorial integrity. The statement in the Preamble of the Declaration that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security," lends support to this interpretation of the document.

In December 1974, the General Assembly adopted a definition of aggression which refers to the right of self-determination:

[N]othing in this Definition . . . 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 of 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 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 above-mentioned Declaration.

The discussion in the Special Committee on the Question of Defining Aggression, however, showed a lack of consensus on whether Article 7 could be construed to legitimize the use of force by people in their struggle for self-determination.

Among many other declarations and resolutions of the General Assembly asserting the importance of the right to self-determination are the Declaration on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States. During the thirty-fifth session, on November 14, 1980, the General Assembly

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82 Declaration Concerning Friendly Relations, supra note 41, at Principle (e), para. 7.
83 Declaration Concerning Friendly Relations, supra note 41, at Principle (e), para. 7.
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adopted a resolution which "strongly condemned all Governments which did not recognize the right to self-determination and independence of all peoples still under colonial and foreign domination and alien subjugation."

As this brief survey indicates, the right to self-determination had its roots in the foregoing instruments of the League of Nations and the United Nations. Its acceptance under international law is further evidenced by two recent advisory opinions delivered by the International Court of Justice. The Court affirmed the right to self-determination in its Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970): [1971] I.C.J. 16. "[T]he 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." Subsequently, in the Western Sahara case, the Court approvingly spoke of "the right of the population of the Western Sahara to determine their future political status by their own freely expressed will." Thus, since the termination of World War I there has been an evolving, albeit limited, acceptance of the legitimacy of secession within international law norms. At least in the colonial context, the principle of self-determination has acquired the status of an enforceable legal right.

B. State Practices

The reluctance of states to accept a principle which might allow, and perhaps even encourage, groups within their own population to secede is understandable. Thus, most states have not accepted claims for territorial separation in a non-colonial setting. Leaders of newly independent states have been consistently vocal in asserting that the right to self-determination does not include the right to secession. Examples of peaceful

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92 Id. at 31. See also Judge Fouad Aminoun's Separate Opinion in the Barcelona Traction case, [1970] I.C.J. 3, 287, describing self-determination as a norm "profoundly imbued with the sense of natural justice, morality, and humane ideals." Id. at 311.
94 See id. at 35-36.
95 See notes 49-52 supra and accompanying text.
96 See, e.g., BUCHHEIT, supra note 4, at 105:
"It . . . seems probable that an accurate survey of international opinion would reveal less support for the legitimacy of secessionist self-determination, both in terms of the number of States willing to countenance, the suggestion of such legitimacy and the intensity of feeling over the issue, than would have been the case fifty years ago."
secession such as Senegal from the Mali Federation, Syria from the United Arab Republic, and Singapore from the Malaysian Federation are rare and because of the special circumstances in each situation, do not offer sufficient guidance to allow an observer to draw broad conclusions. Consequently, it should come as no surprise that a state’s rejection of a claim to secede is foreshadowed by the attitude reflected in the record of their deliberations at the United Nations and regional intergovernmental organizations and the decisions made there.

The Biafran conflict provides an apt illustration. While the Biafran claim for self-determination was acknowledged neither by the United Nations nor the Organization of African Unity (OAU), five states recognized an independent Biafra. The OAU strongly favored a unified Nigeria. While the OAU charter specifically requires adherence to the principle of respect for the sovereignty and territorial integrity of each state, the OAU position was reflected in the assertion by then Emperor Haile Selassie of Ethiopia (one of the six members of the OAU consultative mission on Nigeria) that the national unity of individual African states was an “essential ingredient for the realization of the larger and greater objective of African unity.” Earlier at a meeting of the supreme organ of OAU, the Assembly of Heads of State and Government, secession was generally condemned, reaffirmed “adherence to the principle of respect for the sovereignty and territorial integrity” of Nigeria, and resolved to send the six-member consultative mission “to the Head of the Federal Government of Nigeria to assure him of the Assembly’s desire for the territorial integrity, unity and peace of Nigeria.” The fear of potential conflicts in Africa, such as the Eritrean conflict, has a powerful

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96 For a commentary, see Cohen, Legal Problems Arising from the Dissolution of the Mali Federation, [1960] BRIT. Y.B. INT’L L. 375.
97 For a discussion, see Yodfat, The End of Syria’s Isolation?, 27 WORLD TODAY 329 (1971).
101 Ijalaye, supra note 20, at 551-54.
105 See authorities cited in note 26 supra.
influence on the OAU decisionmaking process. Likewise, the United Nations never even discussed the conflict despite Biafra’s appeals to the United Nations in December, 1967, charging the Federal Government of Nigeria with genocide and “deliberate and continuous” contraventions of the U.N. Charter provisions on human rights.106 Three years later the U.N. Secretary General observed that the Security Council could not have acted because no member state had brought the question before the council. He said: “The reason is obvious . . . . the Nigerian Government strongly maintained that the war was an ‘internal matter’ in which no other State or outside agency has a right to interfere, a view shared by the Organization of African Unity.”107 Commenting on his role he said, “I have been accused in some circles of ‘passivity,’ and even of indifference to the sufferings of Nigerian people, as if the sovereign independence of its States Members was not, for better or for worse, a basic principle of the United Nations which is especially binding on its Secretary-General.”108

Earlier, during the Congo crisis, there was a strong and organized opposition to Katanga’s claim to secede.109 Initially, there was considerable hesitation on the part of then Secretary General Dag Hammarskjold to use the United Nations forces in suppressing the Katanga secession. he argued that the United Nations forces which were sent to the Congo in response to a call for help by the Lumumba government to restore order, should not intervene in the internal affairs of the host country.110 The situation, however, changed because of a combination of the following factors: 1) repeated allegations by Afro-Asian and the Soviet-bloc states that Belgium and its allies were supporting secession; 2) Lumumba’s call for U.N. help in regaining control of the Congo; 3) the Soviet military and economic assistance to Lumumba; and 4) Lumumba’s assassination followed by Hammarskjold’s death.111 Consequently, on November 24, 1961, the Security Council adopted a resolution completely rejecting the claim that Katanga is a “sovereign independent nation,” and reaffirming one of the purposes of the United Nations action in the Congo, that of maintain-

108 Id. at 100-01.
110 For an observation that perhaps Hammarskjold’s European antecedents were responsible for his hesitation to take active measures to suppress the Katanga secession, see Auma-Osolo, supra note 21, at 469-70.
111 See generally Buchheit, supra note 4, at 148-50.
ing "the territorial integrity and political independence of the Congo." The resolution demanded that the deplorable "secessionist activities and armed action" taking place in Katanga "shall cease forthwith." By the end of January 1963 the secession had ended. It appears that allegations of Belgian intervention in support of these secessionist movements provided the major impetus for the United Nations action in maintaining the territorial integrity of the Congo. The fear of intervention by external adventurous elements is likely to be one of the policy reasons underlying the opposition many states posed for secessionist claims.

Subsequently, in the Bangladesh crisis the United Nations was conspicuously inactive. The subject was brought to the attention of the Subcommission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights at the initiative of several nongovernmental organizations in consultative status with the Economic and Social Council. The Subcommission even briefly discussed the matter, but no action was taken. Similarly, although the U.N. Secretary General took the initiative to apprise the Security Council of the gravity of the situation, neither the Security Council nor the General Assembly even discussed the matter until India and Pakistan were locked in a military confrontation.

In 1971, in an incisive commentary by Professor Van Dyke on the United Nations practice, it was observed that the U.N. "would be in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members." A year later, Professor Rupert Emerson suggested that "the room left for self-determination in the sense of the attainment of independent statehood is very slight, with the great current exception of decolonization." Emerson's prediction was accurate, for during the last decade, the concerns and practices of the United Nations regarding self-determination have centered primarily on colonial situations.

\[\text{\textsuperscript{113}} \text{N.Y. Times, Jan. 23, 1963, at 3, col. } \]
\[\text{\textsuperscript{114}} \text{See generally Nanda, A Critique of the United Nations Inaction in the Bangladesh Crisis, 49 DEN. L.J. 53 (1972).} \]
\[\text{\textsuperscript{115}} \text{See id. at 58.} \]
\[\text{\textsuperscript{116}} \text{See id. at 58-59.} \]
\[\text{\textsuperscript{117}} \text{See id. at 63-64.} \]
\[\text{\textsuperscript{118}} \text{See id. at 55-56.} \]
\[\text{\textsuperscript{119}} \text{See id. at 60-63.} \]
\[\text{\textsuperscript{120}} \text{V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES AND THE WORLD COMMUNITY 102 (1970).} \]
\[\text{\textsuperscript{121}} \text{Emerson, Self-Determination, 65 AM. J. INT'L L. 459, 465 (1970).} \]
\[\text{\textsuperscript{122}} \text{See, e.g., 18 U.N. MONTHLY CHRONICLE 39 (Jan. 1981); 17 U.N. MONTHLY CHRONICLE 23 (Nov. 1980) (Report of the Special Committee on Decolonization). For an earlier report} \]
IV. Appraisal and Recommendations

Although a literal reading of the 1960 Declaration on the Granting of Independence to Colonial Countries and People\(^\text{128}\) would apparently foreclose any attempt at secession,\(^\text{124}\) it is submitted that the 1960 Declaration should be read in historical context. The genesis and object of the Declaration, the specific issues it addressed, and its timing are all crucial considerations. The Declaration was meant to eradicate Colonialism which most states by late 1950’s had recognized to be a palpable evil. A fear of tribal fragmentation of the newly emancipated states outweighed the apparent illogic of maintaining the arbitrarily drawn colonial borders.\(^\text{128}\) Accordingly, the 1960 Declaration can both be seen as an effort to remove the “salt-water colonialists”\(^\text{128}\) and to maintain the semblance of stability in the fledgling states. When the Declaration is analyzed in the context of these considerations and in light of the subsequent U.N. pronouncements which do not exclusively address issues of colonialism, such as the General Assembly Declaration, on Principles of International Law Concerning Friendly Relations\(^\text{127}\) and the Definition of Aggression,\(^\text{128}\) a persuasive case can be made for recognizing the legitimacy of some secessionist movements in a noncolonial context.

Even assuming the legitimacy and permissibility under international law of the right to secede, many difficult definitional hurdles remain before this right could be applied and implemented. To establish the minimum standards of legitimacy, it is necessary to identify: 1) the group that is claiming the right of self-determination; 2) the nature and scope of their claim; 3) the underlying reasons for the claim; and 4) the degree of the deprivation of basic human rights.

The identification of “peoples” who are claiming the right of self-determination is a difficult task. The claim to the right to participate in all value processes—power, wealth and resources, respect and rectitude, enlightenment and skill, and affection and well-being\(^\text{129}\)—(focusing on the

\(122\) G.A. Res. 1514, supra note 43.

\(124\) This would be the outcome since under the Declaration on the Granting of Independence to Colonial Countries and Peoples all attempts arrived at “the partial or total disruption of the national unity and the integrity” of a state are prohibited. G.A. Res. 1514, supra note 43.


\(129\) Clark, supra note 3, at 79.

\(127\) See notes 73-82 supra and accompanying text.

\(128\) See notes 83 & 84 supra and accompanying text.

\(129\) Professor Myles McDougal articulates these value processes in M. McDougal, Stud-
deprivation of human rights) is collective and not individual. Both objective and subjective elements need to be considered to identify such "peoples." Both kinds of elements are often present when a claim for self-determination is made. From an objective standpoint, the group’s sense of identity may be traced to a combination of elements such as a common ethnic background, a shared history, language or religion, while from a subjective standpoint it may be due primarily to an ethos or state of mind. Arguably, the emphasis should be on the subjective factors of a group’s identity and a common destiny, for it is that group’s own values and preferences which lie at the basis of their claim to have the power to decide their future course. Accordingly, psychological perceptions and not tangible attributes, such as racial characteristics, should determine whether the group seeking secession meets the threshold requirement.

The nature and scope of the alienation of the subgroup and the separation between the subgroup and the dominant group in a body politic should also be considered. The major question here relates to the extent to which perceptions and commitments are shared by members of the subgroup. The focus has to be on how widely the demands articulated by the elites of the subgroup are shared by the other members of the subgroup. This inquiry will give rise to two further questions: What is the proper percentage of support required to constitute a following sufficient to warrant serious consideration of the claim to self-determination? and how does one identify and accommodate those who prefer to remain with the body politic?

The next major step toward legitimizing a movement is ascertaining the reasons underlying the group’s desire to secede. For a claim to be considered valid, the reasons ought to be compelling. There must be little hope that any action short of separation would satisfy the subgroup’s desire for effective participation in the value processes. Since self-determination cannot be considered in isolation without studying its potential impact upon the parent state, the surrounding region, or the international community, every claim must be examined in a broad context and must be required to meet the test of the maximization of values which the community as a whole strives to achieve.

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130 For a thoughtful analysis, see Suzuki, supra note 9, at 848-56.
131 See generally Dinstein, supra note 9, at 104-05.
132 See generally Suzuki, supra note 9, at 816.
133 For a criticism of the various theories of national self-determination, including plebiscites as the preferred mechanism to determine the wishes of the people, see W. Ofuatey-Kodjo, supra note 4, at 28-38.
134 See generally Suzuki, supra note 9, at 813-20. Professor Suzuki articulates the following criteria to determine the legitimacy of a claim:
A combination of several reasons may underlie the claim to secede: divergent political beliefs, the desire to control and manage one's own resources more effectively and a strong ethnic or cultural identification with a neighboring group. However, in light of the "maximization of community values" standard mentioned previously, and in view of the nature of the international system which tends to revolve around states, dissimilar or even divergent political beliefs, claims to resources, or ethnic or cultural identification cannot form the main thrust of a claim to self-determination.

Since the current state system reflects and accommodates divergent views as to political and economic organizational structures, it would be dangerous and unworkable to accord legitimacy to claims rising out of ideological beliefs. Claims arising out of the desire to control and manage one's own natural resources are implicit in any self-determination movement, whether or not such desire makes up a major part of the claim. Claims to resources and group identification should not, by themselves allow the claim to territorial separation to supercede the principle of territorial integrity.

Finally, when a group seeks territorial separation in order to become part of a neighboring state inhabited by a population with whom the group identifies on religious, linguistic, tribal, historical, or cultural grounds, it is understandable and even emotionally compelling, especially since the colonial powers drew up boundaries without considering the ties between the people who would be affected by them. In the absence, however, of other factors related primarily to the deprivation of the group's human rights by not allowing it to participate in the society's value processes, international legitimization of secession based on such principles would seriously undermine the stability of the world order.

Once the group has been identified and its reasons for seeking separation established, the only remaining test to determine the legitimacy of a claim to secession is the nature and extent of the deprivation of human rights of the group making the claim. It is noteworthy that the law of international human rights, although of recent origin, has made dramatic advances during the last three decades. Not only have human rights

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The critical questions are whether the sub-group's disidentification is real and whether its demands are compatible with basic community policies. In short, to approximate a public order of human dignity, the test of reasonableness is the determining factor in deciding how to respond to the claim of self-determination. The total context of such a claim must be considered: the potential effects of the grant or denial of self-determination upon the subgroup, the incumbent group, neighboring regions, and the world community.

Suzuki, supra note 9, at 784 (footnotes omitted).

186 See, e.g., note 124 supra.

187 See generally M. McDougal, H. Lasswell & L. Chen, Human Rights and World
issues become a matter of widespread international concern, but the status of an individual under international law has also undergone a radical transformation in light of the emerging expectation that an individual has a right to a dignified human existence. Since this right finds fruition when the group to which the individual belongs has the opportunity to participate in the value processes of the body politic, it is in this context that territorial integrity, self-determination and other related principles of international law such as “humanitarian intervention,” non-intervention, and prohibition on the use of force must be examined. As an observer has recently remarked, the need is to “focus on the essential relationship between the principle of self-determination and human rights, and assert the essential nature of the right of self-determination as a right that justifies the remedying of a deprivation by restoring self-government.”

The test to determine severe deprivation of a group’s human rights involves an examination of the extent to which it suffers “subjugation, domination and exploitation,” and the correlative extent to which its individual members are deprived of the opportunity to participate in the value processes of a body politic because of their group identification. Once this “human rights deprivation” test is met along with the test of legitimacy of the claim for territorial separation by its evaluation in a contextual setting, such a claim should be accorded recognition by the international community. The traditional principle of self-determination, which was primarily instrumental in the dramatic transformation of former colonies into independent states, is thereby extended to include the right of territorial separation of such people.

Since secession appears to be an irrepressible feature of the contemporary world scene, it is imperative that existing institutional structures within the United Nations framework be used to accomplish it. If neces-


See The Declaration Concerning Friendly Relations, supra note 41.

See U.N. Charter art. 2, para. 4.

Opuatey-Kodjo, supra note 4, at 190.

See preamble of the Declaration Concerning Friendly Relations, supra note 41.

See note 132 supra and accompanying text.
sary, new institutions should be established to apply these tests toward a determination of whether or not the circumstances warrant the right to secession. The recognition of this right is likely to have several desirable effects. The institutionalization of a right of secession will introduce some element of predictability to generally destabilizing secessionist movements. The ability to predict the international reaction to a given movement will benefit both those within and without the value processes of a state. A governing state will hesitate before committing itself to a bloody civil war if it knows not only that it will receive little outside help, but also that the antagonists will receive international encouragement. Conversely, if a secessionist movement can predict from the outset that its claim is legitimate under international standards, it might be more willing to mediate within the structure of the governing state. Moreover, predictability will minimize chaos not only within states, but between and among states since intrastate conflicts invariably effect the world community, as was so forcefully demonstrated by the recent conflicts in Angola and Zaire. By whichever mechanism, abusive state practices will be deterred.

At the United Nations, the Secretary-General of the United Nations is authorized under Article 99 to bring the matter of secession before the Security Council. While the Security Council has the primary responsibility under the Charter to act on situations which potentially threaten international peace and security, the General Assembly has secondary competence to make appropriate recommendations. Perhaps the U.N. human rights machinery is the proper forum for investigating the claims for territorial separation. The Subcommission on the Prevention of Discrimination and Protection of Minorities has been specifically authorized to discuss situations which reveal a consistent pattern of violation of

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146 This point is made in Buchheit, supra note 4, at 219.
147 Buchheit, supra note 4, at 219.
150 The U.N. Charter provides: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." U.N. CHARTER art. 99.
151 See generally U.N. CHARTER arts. 24, 34, 39-51.
human rights.\textsuperscript{153} Other possibilities include the emergency meetings of the U.N. Commission on Human Rights,\textsuperscript{154} initial investigation by a senior official of the U.N. Commission on Human Rights,\textsuperscript{155} and the application of the machinery available under the International Convention on the Elimination on All Forms of Racial Discrimination\textsuperscript{156} and other U.N. instruments.

V. CONCLUSION

It is not the purpose of this paper to encourage and promote the right of secession. It seems desirable and necessary, however, to enhance awareness of the likelihood that the international community will, in the future, be faced with claims for territorial separation in non-colonial settings and that the absence of institutions, procedures, and strategies to implement the right of secession will leave few alternatives to violence. It is anticipated that all efforts will be made by the international community through its established norms, institutions, and procedures, to integrate and promote participation by the group seeking separation in the value processes of the body politic. On balance, however, the severe deprivations of human rights often leave no alternative to territorial separation. The world community must respond efficiently and effectively to the consequences of such separation. There is a growing recognition of the close link between human rights and international peace and security. It is not premature to accord recognition to the right to secession in an effort to promote these goals.

\textsuperscript{153} This authorization is granted under Resolution 8 (VIII) of the U.N. Commission on Human Rights. \textit{See} 42 U.N. ESCOR, Supp. (No. 6) 131 (1967).


\textsuperscript{155} \textit{See} Nanda, \textit{supra} note 112, at 67.