

THE UNIVERSITY OF HULL

INTERNATIONAL LAW AND SELF-DETERMINATION: *the Interplay
of the Politics of Territorial Possession with Formulations of Post-
Colonial National Identity*

being a thesis submitted for the degree of

Doctor of Philosophy
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in the University of Hull

by

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Summary

The principle of self-determination has great pedigree. It is a norm that had at heart, the foundations of the concept of democracy - based on the idea that the consent of the governed alone, could give a government legitimacy. These noble ideas, expressed in the American and French Declarations form the cornerstone to the principle of self-determination. This is the principle that, through changes influenced by various political factors, was primarily responsible for the decolonisation process that has shaped the current international community. Self-determination has been used in equal rhetorical brilliance by a number of great leaders - some meritorious, with a genuine concern for human emancipation, others dubious, with the vested interest of ascendancy to power at the heart of their project. In any case, 'self-determination' has come to mean different things in different contexts.

It is this particular issue that this thesis wishes to tackle. Being a vital principle, especially in the context of the post-colonial state, it is one factor that at once, represents a threat to world order, while at the same time holding out the promise of a longer-term peace and security based on values of democracy, equity and justice. This thesis looks at the intricacies of the norm in its current ambiguous manifestation and seeks to deconstruct it with regard to three particularly inter-linked discourses: that of minority rights, statehood & sovereignty and the doctrine of *uti possidetis* which shaped the modern post-colonial state. IN analysing these factors we shall focus specifically on the option of secession from the modern post-colonial state – one of three options stated explicitly by General Assembly Resolution 1514 (XV) as constituting the act of self-determination.

These norms are then sought to be analysed further within two case studies. The first of these looks briefly at the situation concerning the creation of Bangladesh - a case of self-determination achieved. The second case study, much more complex in itself, looks at the situation concerning the Western Sahara where self-determination (whatever its manifestation) is yet to be expressed. In the course of this latter case study we shall seek to highlight the problematic nature of 'national identity' and the 'self' in settings far removed from post-Westphalian Europe from where these norms originate, and which remain so integral to the modern discourse of international law.

INTERNATIONAL LAW AND SELF-DETERMINATION: *The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity*

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Abbreviations

AJIL	American Journal of International Law
Afr.JIL	African Journal of International Law
ANC	African National Congress
Ariz.LR	Arizona Law Review
As.YIL	Asian Yearbook of International Law
Aus.JIL	Australian Journal of International Law
BYIL	British Yearbook of International Law
CJIL	Canadian Journal of International Law
CJTL	Columbia Journal of Transnational Law
CYHR	Canadian Yearbook of Human Rights
EJIL	European Journal of International Law
EPL	European Public Law
For.Aff.	Foreign Affairs
GAOR	General Assembly Resolutions
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICESCR	International Convention for Economic, Social and Cultural Rights
ICCPR	International Convention for Civil and Political Rights
ICLQ	International & Comparative Law Quarterly
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
IHRR	International Human Rights Reports
Ind.JIL	Indian Journal of International Law
ILM	International Legal Materials
Int.Aff	International Affairs
Int.Org	International Organisation
Int.Sec	International Security
JIA	Journal of International Affairs
KLA	Kosovo Liberation Army
MEJ	Middle Eastern Journal
MJIS	Millennium Journal of International Studies
NTIR	Nordisk Tidsskrift for International Ret
NYIL	Netherlands Yearbook of International Law
NYUJILP	New York Journal of International Law & Politics
PCIJ Rep.	Permanent Court of Justice Reports
PLO	Palestinian Liberation Organisation
POLISARIO	Frente Popular para la Liberacion de Saguia el-Hamra y de Rio de Oro
Pol.Stud.	Political Studies
S/PRST	Statement by the President of the Security Council
S/RES	Security Council Resolution

SAYIL	South African Yearbook of International Law
Soc.Res	Social Research
Surv.Int.Aff.	Survey of International Affairs
SWAPO	South West African Political Organisation
TJIL	Texas Journal of International Law
Trans.Grot.Soc	Transactions of the Grotius Society
UDHR	Universal Declaration for Human Rights
UN	United Nations
UNRIAA	United Nations Report on International Arbitral Awards
UNYB	United Nations Year Book
VJIL	Virginia Journal of International Law
YJIL	Yale Journal of International Law
YJLH	Yale Journal of Law & Humanities
YLJ	Yale Law Journal

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Introduction

Nationalist fervour is the founding principle of many post-colonial states within the international system of sovereign states today. These states usually came into being after the successful and sometimes violent negotiation of the transfer of power from the colonisers to *the people*. One of the discourses that legitimated this process was the concept of self-determination. Self-determination however remains an ambiguous concept in international law - useful in the context of the anti-colonial struggle, but translating dubiously to the unravelling of that very structure in the face of 'postmodern tribalism'¹. It seems that technological progress driven 'globalisation', has been accompanied by a seemingly contradictory trend of emerging 'tribalism' manifesting itself in the threat of fragmentation to the sovereign state. This process has sought to legitimate itself by calling on the discourse of self-determination. Thus within international law, self-determination has become all things to all men. It is the rhetoric that has been used by people as varied as Wilson and Lenin during the period of the Great Wars, and then by the likes of Gandhi and Nkrumah as they sought to rid their countries of colonialism. Today it is used by varied groups including the KLA, Polisario, the PLO, the Chiapas, ETA and the IRA to name only a few.

This process has been reflected in international legal discourse by the meticulous scholarship of well-known international lawyers such as, amongst others, Thomas Franck, Patrick Thornberry, Rosalyn Higgins, Christian Tomuschat, Martti Koskenniemi and Malcolm Shaw. These scholars have worked on the different aspects of the process of self-determination; reflecting the maze of issues that are linked to this fascinating area of international law. This thesis draws on their work and attempts the examination of the theory as it has been manifest in the two very different situations of the Bangla secession and the attempts towards self-determination in the Western Sahara. It needs to be stated at the outset though, that the prime focus of this work remains the examination of the option of secession from within the post-colonial state.

Thus we will begin by looking at the development of the self-determination discourse from the ideal expressed in the American and French Declarations, to the Wilsonian conception of it that theoretically legitimised the forces against colonialism. But in doing so, one of the questions that we shall seek to address is the need to define 'the people' in terms of the right to self-determination. Chapter Two will draw on the work of a number of experts in minority rights to examine how the treatment of minorities evolved as one of the main directions of the international law of self-determination, and also to test their claims to 'peoplehood'. However, minorities, while being central to the Wilsonian conception of self-determination, cannot be said to have the right to self-determination². Thus the question of who a people are, is left unanswered temporarily. Chapter Three will then move to the conception of statehood - which is, in a limited sense, the alpha and omega of the problem. It is the alpha since it is from states that groups, notably 'national'

¹ See Franck 'Post-Modern Tribalism and the Right to Secession,' in Brölmann et al (eds.) *Peoples and Minorities in International Law* (1993) p.3

² See Thornberry P., *International Law and the Rights of Minorities* (1994) p.14

minorities seek to secede, but in doing so, the modern international legal system forces them back into the straight jacket of another state.

However not all minorities have a right to self-determination. In cases where they do (a process which is governed by political rather than legal foundations), the exercise of this right is restricted by General Assembly Resolution 1541 to: a) forming a separate state, b) integrating with an existing state, or c) associating with an existing state. This, more than anything else shows the rigid structure that international law seeks to frame the right of self-determination within. However, the final theoretical aspect of the discourse that we shall seek to examine in Chapter Four, is perhaps the most vital. It also moves us some way towards answering the question raised in Chapter Two as to who a legitimate people were, who could be considered as having the right to self-determination. This chapter seeks to examine the roles of boundaries in defining a people, and analyses the effect of this on the post-colonial state. This analysis will be pursued by a study of a doctrine closely related to the right of self-determination; namely the doctrine of *uti possidetis*.

Having examined four theoretical aspects of the discourse of self-determination we shall turn to two case studies where we shall look at the issues raised through the lenses of the theory already presented. The choice of these two cases is based on the simple idea that in Bangladesh we saw the norm of self-determination come to fruition in that a sovereign state came into being at the end of the process of 'national liberation.' However in our second case, that of the Western Sahara, the issues involved are more complex. The final section of the thesis is thus divided into three chapters. The first of these will examine the legality or otherwise of the East Pakistani secession from the Union of Pakistan to form the separate state of Bangladesh, while the last two chapters will examine the issues to be considered in the Western Sahara Case. Chapter Six, will try and portray the international legal history in determining 'the people' in the Western Sahara, while Chapter Seven will draw on the work of anthropologists such as Gellner³ to try and examine the nature and concept of the identity that existed in the region⁴. In presenting this work, it is hoped that the complexities of the issue of self-determination will be highlighted, along with the lack of clarity in the international legal perspective of this fascinating and extremely relevant subject.

³ See generally, Gellner E., *Arabs & Berbers: From Tribe to Nation in North Africa* (1972)

⁴ The work on the Western Sahara is also based on considerable field-work which included interviews with the Polisario and Moroccan government officials as well as a month in region, funded by Law School, University of Hull, UK.

Part 1

Theoretical Underpinnings of the Discourse of Self-Determination

CHAPTER ONE

THE HISTORY OF THE NORM OF SELF-DETERMINATION

Introduction

Nationalist fervour is not unknown in the annals of history. It had torn apart and disintegrated the Ottoman and the Austro-Hungarian empire before the start of the Second World War¹. It was after those wars that the principle of carving up a territory and entrusting it to different sovereignties became the vehicle for the victorious powers' re-division of Europe². However, it was a long road from there to the self-determination that we have come to recognise in the post decolonisation era³. While nationalist fervour and disintegration may be two characteristics of the self-determination principle, to view it as merely these would be to neglect the depth of the issue. In point of fact, the biggest challenge to self-determination today is that it means different things to different peoples: used successfully to build states from entities and peoples faced with oppression - but also used to break-down these same states and identities at later times in history. What this thesis seeks to examine is the different shades of self-determination in international usage. This chapter will seek to track the progress of the idea of self-determination from the original norm that draws its sustenance from the American Declaration of Independence and the concept of the consent of the people, to modern claims of self-determination as secession from the state⁴. It is a generally accepted fact that the concept of self-determination traces its

¹ Shirer, W.L. *The Nightmare Years: 1930-1940* (1984)

² Hannum, H 'Rethinking Self-determination,' in 34 *VJIL* (1993) 3; also see Berman, N., 'Modernism, Nationalism and the Rhetoric of Reconstruction,' in 4 *YJLH* (1992)

³ See Brownlie, I., 'An Essay on the history of the Principle of Self-determination,' in *Grotian Society Papers: Studies in the History of the Law of Nations*, C.H. Alexandrowicz ed. (1970)

⁴ For the debate on secession see Buchheit, L.C., *Secession: The Legitimacy of Self-determination* (1978) and 'The Logic of Secession,' in 89 *YLJ* (1979-80) 802; Beran, H., 'A Liberal Theory of Secession,' in *XXXII Pol.Stud.* (1984) 21; Birch, H., 'Another Liberal Theory of Secession,' in *XXXII*

roots to the American Declaration of Independence⁵, the Enlightenment period and Jacobean followers of the late eighteenth and nineteenth century⁶. We will try and briefly look at factors that transformed the norm from what it originally started off, to what it is today. In this process we will also try to identify the characteristics of self-determination and limit its definition for the purpose of this thesis. One of the first steps at understanding self-determination, is to study the theory behind it and try to find the link which transformed it from a political principle to a legal principle of question⁷.

1.1 The Two Models of Self-determination Theory

Koskenniemi traces the theory of the principle of self-determination in his article titled 'National Self-determination Today: Problems of Legal Theory and

Pol.Stud. (1984) 596; Buchanan, A., *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania to Quebec* (1991) also 'Federalism, Secession and the Morality of Inclusion,' in *37 Ariz.LR* (1995) 53

⁵ For general opinions on self-determination see Baker & Dobbs(eds.) *The Public Papers of Woodrow Wilson* (1925-7); Cassese, A., *Self-determination of Peoples: A Legal Reappraisal* (1995) and 'Political Self-determination: Old Concepts and New Developments,' in *United Nations Law/Fundamental Rights: Two Topics of International Law* (1979); Cobban, A *The Nation State and Self-determination* (1969); Crawford, J., *The Creation of States in International Law* (1979); Cristescu, A., *The Right of Self-determination: Historical and Current Development on the Basis of the United Nations Instruments* (United Nations Doc. E/CN.4/Sub.2/Rev.1 1981); Emerson R 'Self-determination,' in *65 AJIL* (1971) 459 and *From Empire to Nations: The Rise to Self Assertion of Asian and African Peoples* (1964) also *Self-determination Revisited in the Era of Decolonisation*, (1964); Franck, T., *The Power of Legitimacy Among Nations* (1990); Fukuyama, F., *The End of History and the Last Man* (1992); Gellner, E., *Nations and Nationalism* (1983) and *Conditions of Liberty: Civil Society and Its Revival* (1994); Gros-Espiell, H., *The Right to Self-determination: Implementation of the United Nations Resolutions*, UN Doc. E/CN4/Sub.2/405/Rev.1 (1980); Hannum, H., *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* (1980); Hobsbawm, E.J., *Nations and Nationalism Since 1780* (1990); Notter, H., *The Origins of Foreign Policy of Woodrow Wilson* (1937); Kirgis, F.L., 'The Degrees of Self-determination in the United Nations Era,' in *88 AJIL* (1994) 304; Kiss, A., 'The Peoples' Right to Self-determination,' in *7 HRLJ* (1986); Kohn, H., *The Breakdown of Nations* (1957); Sureda, R., *The Evolution of the Right to Self-determination: A Study of United Nations Practice* (1973); Quayne, H 'The United Nations and the Evolving Right to Self-determination,' in *47 ICLQ* (1998) 537-572; & McQuodale, R 'Self-determination: A Human Rights' Approach,' in *43 ICLQ* (1994) 857- 885

⁶ See Koskenniemi Martti 'National Self-determination Today: Problems of Legal Theory and Practice.' in *43 ICLQ* (1994) 241

⁷ For general reading see Koskenniemi, op. cit. 6, 241-269; also see Whelan Anthony, 'Wilsonian Self-determination and the Versailles Settlement,' in *43 ICLQ* (1994) 99-115

Practice⁸ from which we shall draw on for this section. Koskenniemi identifies two schools of thought the principle one, portrayed as a patriotic one and the other which displays the secessionist element labelled respectively as the *classical* and the *secessionist* models. According to him, self-determination which identifies the nation as the State is the classical, or Hobbesian conception of self-determination based on the assumption ‘that the authentic expression of human nature in primitive communities is something essentially negative’⁹ and needs to be channelled into formally organised States to prevent *bellum omnium*. Nations are thus artificial communities¹⁰, a collection of individuals who are linked principally by the existence of a state decision procedure which makes it possible for them to participate in the conduct of their common affairs within the State. Thus the presence or absence of those procedures and their proper functioning is at the core of national self-determination. Anything else is destructive, irrational passion¹¹. The second model of self-determination is the secessionist sense which according to Koskenniemi has a more ‘romantic’ feel to it, being built around Rousseauesque ideas¹². It conceives of nationhood as something more basic and fundamental than merely decision making processes. It is concerned less with how the popular will is expressed, ‘more to what end it is exercised, whether it participates in the natural life form appropriate for each nation as an authentic (and not artificial) community’¹³. It views primitivity as a virtue that was lost in the political struggles that organised itself into a State.

⁸ Koskenniemi *op. cit.* 6

⁹ Koskenniemi *ibid.* 249

¹⁰ This is also borne out by Anderson B. *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1993)

¹¹ See Davidson Basil *The Black Man's Burden. Africa and the Curse of the Nation-State* (1992)

¹² Koskenniemi *ibid.* 250 This is interesting from a Western Sahara perspective and the partial opting out of the Berber tribes see Chapter VII Section 7.1.1

¹³ Koskenniemi *ibid.* 250

Classical self-determination looks at the form of political participation and recognises States and only States as the legitimate holders of the various goods of collective personhood. It thus appears conservative with an aversion towards nationalistic passion. The romantic notion on the other hand, attaches value to statehood only to the extent that it represents the communal identification of the people or the nation it enjoins. It buttresses struggle and self-denial as individuals subjugate their own ends for the greater collective good. For Koskenniemi, the struggle between the two models of self-determination is the basis on which the current international law of self-determination wrestles unsuccessfully with. To understand the characteristics of self-determination, it is important to look at the norm in tandem with the concept of statehood that is vital to it. We shall do this in chapter three when we shall explore the relationship between the norm of self-determination and that of the sovereign state¹⁴. Suffice to repeat at this juncture, Koskenniemi's conclusion on the relationship between the norm and statehood: 'National self-determination, has an ambiguous relationship with statehood as the basis of the international legal order. On the one hand, it supports statehood by providing an explanation for why we should honour existing *de facto* boundaries and the acts of the State's power-holders as something other than gunman's orders. On the other hand, it explains that statehood *per se*, embodies no particular virtue and that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be overruled or its consequences modified in favour of a group or unit finding itself excluded from those positions of authority in which the sustenance of the rule is determined'¹⁵.

¹⁴ See Chapter Three Section 3.3

1.2 *The Origins of the Concept*¹⁶

*Self-determination in Historical Perspective*¹⁷

The genesis for the norm of self-determination traces back to the American Declaration of Independence¹⁸ of 1789 and was echoed in the French Revolution a few years later in which the French National Assembly declared on 17th November 1792¹⁹, that:

In the name of the French people, the National Assembly declares that it will give help and support to all peoples wanting to recall their freedom. Therefore, the Assembly considers the French authorities responsible to give orders to grant all means of assistance to those peoples, to protect and compensate the citizens who might be injured during their fight for the cause of liberty.

The essence of both these revolutions from that point hence hinges on the consent of the governed to make a government legitimate. In fact, the American Declaration of Independence sought to manifest two radical propositions²⁰. First, as mentioned, 'that governments, instituted to secure the 'unalienable rights' of their citizens, derive their just powers from the consent of the governed' and second, that by this decision to make the government answerable to the people, the newly defined entity of the state, earns 'separate and equal station' in the community of states by demonstrating 'a decent respect to the opinion of mankind'²¹. Thus we see that the right to self-determination as enunciated by the American Declaration had both an

¹⁵ Koskenniemi *ibid.* 248

¹⁶ See Lupis Ingrid Detter De Lupis *International Law and the Independent State*(1987); also Hannum H (1980) *op. cit.* 5 and Cobban, A (1969) *op. cit.* 5

¹⁷ See Sureda R., *The Evolution of Self-determination* (1973)

¹⁸ Franck 'Emerging Right to Democratic Governance' 86 *AJIL*(1992) 46

¹⁹ Hayward, J.E.S., *After the French Revolution: Six Critics of Democracy and Nationalism* (1991)

²⁰ See Franck (1992) *op. cit.* 18 p. 46

²¹ Franck *ibid.* 46

internal (in the form of legitimate government) as well as external element (legitimacy in the society of sovereign states). Franck labels the first of the propositions suggested by the American Declaration as the ‘democratic entitlement’²², and he links this concept of entitlement to legitimacy of government. He goes on to suggest that ‘legitimacy’ can be empirically tested by the demonstration of ruler observance and the decisions of rule-making or rule applying institutions²³. He sees self-determination as the root of democracy, and while it will not be possible for us to discuss the concept of democracy here, it is necessary to state that this remains a cornerstone of the concept of self-determination²⁴. In seeking to re-examine the Wilsonian conception of self-determination, Whelan suggests that there are three historical roots to the idea: first, the idea of legitimacy that Franck focuses on, in his work; second, the idea of state sovereignty which is central to the self-determination discourse in general and the work undertaken within this thesis. Third, which he states as ‘ethnic nationalism, often exclusivist and irredentist, which collapsed the nineteenth century multinational empires in the twentieth century’²⁵. Thus, ‘...self-determination basically postulates the right of a people to be organised in an established territory, and to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement’²⁶. Of course the concept does not merely begin with the American Declaration since there were clear signs of roots to

²² Franck *ibid.* 46

²³ For a further discussion on legitimacy see Franck *ibid.* pp. 51-2

²⁴ For discussions on Democracy see Benn, A.N.W (ed.) *Arguments for Democracy* (1981); Bibo, I., *Democracy, Revolution, Self-determination* (1991); Bowen V, *Democracy and Human Rights* (1990); Buchheit (1978) *op. cit.* 5; Cristiano, T., ‘Secession, Democracy and Distributive Justice,’ in 37 *Ariz. LR* (1995) 65; Fukuyama (1992) *op. cit.* 5; Szasz, M.C., *Education and the American Indian: The Road to Self-determination since 1928* (1977) and Quashgah, ‘Legitimacy of Governments and Resolution of Intra-National Conflicts in Africa,’ in 7 *Afr.JIL* (1995) 284

²⁵ Whelan ‘Wilsonian Self-determination and the Versailles Settlement’ in 43 *ICLQ* (1994) pp. 99-101

²⁶ Franck (1992) *op.cit.* 18 p. 52

'legitimacy' in Ancient Empires²⁷. The idea of the importance of the consent of the people had begun gaining currency earlier and as one historian points out: '...by 1866 the method of appeal to a vote of the inhabitants, either by plebiscite or by representative assemblies, especially elected, bade fair to establish itself as a custom amounting to law'²⁸. Of course, this development in use of the consent of the people in formation of government came to an abrupt halt with the rush for colonial territory, which we will go into greater depth later. However, the modern rise of democratic entitlement as far as international law is concerned was born from the Versailles Peace Conference of 1919²⁹. The work at this Peace Conference, was an attempt to bring back concern for national minorities who had been ignored when the Congress of Vienna drew maps of Europe. American President Wilson, concerned about the oppression of minorities within larger states that did not represent them, made 'self-determination' his guiding principle in the redefinition of maps.

1.3 Wilson: the Father of Modern Self-determination

The father of the modern norm of self-determination is President Wilson, who first used the phrase in all its rhetoric brilliance throughout the post war period. There is no doubt however, that even Wilson did not intend the principle to be absolute and universal³⁰. In fact, in his famous Fourteen Points Address to the US Congress on January 8, 1918, he deliberately omitted the phrase 'self-determination' despite the fact that he was dealing with the specific territorial settlements of the remnants of the Austro-Hungarian and Ottoman empires. He did however, refer to it a month later

²⁷ See generally, Watson, A. *The Evolution of International Society: A Comparative and Historical Analysis* (1992)

²⁸ S Wambaugh *A Monograph on Plebiscites* (1920) pp. 41-45

²⁹ See Hannum *Autonomy, Sovereignty and Self-determination* (1990) pp. 20-34

³⁰ See Jennings I., *An Approach to Self Governance* (1956) p. 55

suggesting that national aspirations must be respected and that ‘peoples may now be dominated and governed by their own consent’. He went on to warn statesmen that they will ‘henceforth ignore [the principle of self-determination] at their peril’³¹. However despite the severity of the rhetoric expressed in favour of the principle, a few sentences later Wilson immediately limited its scope. This has become a common phenomenon in all documents dealing with this issue ever since. Wilson, while stating that ‘all national aspirations shall be accorded the utmost satisfaction’ still voiced the concern that it should be so ‘without introducing new or perpetuating old elements of discord and antagonism’³² that might disrupt Europe. However it is clear that at the time that Wilson made his Fourteen Point Address, he was using the term ‘self-determination’ as a pseudonym for a right to democracy³³. This has, in modern self-determination literature been classified as ‘internal’ self-determination³⁴ which as we have already seen is language that drew upon the American Declaration and the concept of a ‘democratic entitlement’, as discussed above.

Thus while the idea of internal self-determination remains fairly similar to the one first expressed within the meaning of the American Declaration, the expression of ‘external’ self-determination has undergone a conceptual shift that has completely altered its meaning. In the American Declaration the ‘external’ aspect of self-determination referred to the idea of legitimacy of the government of a state in the international society of states. However modern self-determination literature refers to ‘external’ self-determination as the process by which secessionist groups, from within

³¹ Woodrow Wilson ‘Fourteen Point Address January 8 1918’

³² Whelan (1994) *op.cit.* 7 p. 102

³³ See Alston *International Human Rights in Context* (1996) pp. 973

³⁴ See Thornberry, P, ‘The Democratic or Internal Aspect of Self-determination with some remarks on Federalism,’ in Tomuschat *Modern Law of Self-determination* (1994) p. 101

a state can gain entry to the international society of states by breaking-away from the state structure that does not represent them. Thus, a subtle change in meaning and usage of the concept of external self-determination has seen its denunciation in modern self-determination literature. It has been suggested by a number of authors that 'external' self-determination in its modern guise, is not coherent to the norm of territorial integrity, a concept we shall examine later. Internal self-determination however, is considered very much in line with the UN Charter-based system and the overall principles of reaffirming 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small', and would 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'³⁵. The Versailles Settlement is the best representative of the idea of self-determination as Wilson defined it. It traces its roots back to the 'legitimacy of a rule' that is dependent on the 'consent of the governed' and where subjects are responsible for the state³⁶. As mentioned earlier, the idea of the consent of the people had been gaining currency and by 1866 the method of appeal to a vote of the inhabitants, either by plebiscite or by representative assemblies, especially elected, bade fair to establish itself as a custom amounting to law³⁷. This statement needs a limiting clause since it would not be generally true on an international scale to suggest that democratic norms were spreading, rather that they were spreading in what has euphemistically been called the 'civilised nations'³⁸. Non-western peoples had no recourse to this progress, their indigenous systems being replaced by colonialism. In fact, this period saw the institutionalisation of colonisation bringing vast tracts of Asian and African lands

³⁵ Preamble of the United Nations Charter 1945

³⁶ See Whelan (1994) *op.cit.* 7 pp. 101-103

³⁷ See n. 28

under the European rule. External subjugation for these states was nonetheless accompanied by the idea of legitimacy of rule spreading domestically³⁹. With victory in the First World War for the Allies, Wilson deemed that post war order should be informed by the notion that ethnically identifiable peoples or nations would govern themselves⁴⁰. However by this Wilson meant that identifiable peoples' or 'nations' should be given the means to govern themselves, within the spirit of internal self-determination. Thus, self-determination could be understood as self-governance which implied that people would have the choice to select their own form of government. Whelan talks about the difference in the Anglo-American view of the nation as a 'community of organisation, of life and tradition' in contrast to the German notion of *Volk* - which was 'a community of blood and origin'⁴¹. The Wilsonian concept of self-determination is nonetheless, best understood as concern for oppressed minorities and ethnic nationalities⁴². This was expressed in the Versailles Settlement in the form of three important central and interlocking elements⁴³. Firstly and most importantly, the creation of a scheme whereby identifiable people were accorded Statehood. Secondly, the decisions regarding disputed areas which Wilson determined could be sorted out on the basis of plebiscites⁴⁴, and finally, the protection of ethnic minority groups that were too small to be accorded Statehood. The vision for these groups was a system of protection

³⁸ See Statue of the ICJ - article 38

³⁹ See Whelan (1994) *op.cit.* 7 p. 108

⁴⁰ Whelan (1994) *ibid.*

⁴¹ See Whelan (1994) *ibid.*; for a much more in-depth version of these principles see Gamberale 'National Identities and Citizenship in the European Union' in *1 EPL (1995)* p. 4 & p.633 where the author compares the German, French and British ideas of the citizens. Also see chapter Two Section 2.4

⁴² See Whelan (1994) *op.cit.* 7, Sureda (1973) *op. cit.* 5; Baker & Dobbs (1925-7) *op. cit.* 5; Notter, H.(1937) *op. cit.* 5

⁴³ Whelan (1994) *op.cit.* 7 p. 100

⁴⁴ This is an interesting concept since it shows more respect for the will of the people than the concept of *uti possidetis*

within special minority regimes within their states, supervised by the Council of the League of Nations. In addition, the colonies of the defeated powers were turned into Mandates and entrusted to the control of the Allies.

Needless to say, there were preconditions that made this system of self-determination work, and there were also problems associated with it. One of the first preconditions that made such a mammoth exercise possible, was the fact that the Allies won the First World War and defined the terms of peace. In the international system leading up to the League of Nations Charter, a defeated state could not effectively defend its sovereignty, and a settlement could easily be imposed upon it. This is significant in light of the discussion that we will examine in chapter three about State sovereignty and its relationship with the concept of self-determination. Suffice to say at this stage, sovereignty is often one of the biggest hurdles to self-determination in general, and to secession in particular⁴⁵.

There were numerous problems with the Versailles treatment of self-determination too, not least of which is that it was not consistent since only defeated states had to surrender colonies while the Allies were allowed their colonial territories without regulation. In addition, the Plan was not uniformly accepted, meeting with objections from France and Italy. Also, as pointed out by Whelan, there tended to be a bias towards certain minorities favoured by Wilson over others which made the process less than objective⁴⁶. These problems led to a disenchantment of the principle and patchwork Wilsonism due to the fact that the principle could not be applied universally, integrally, forcefully and scientifically. In addition, Wilson's 'weak-kneed submission to the wiles of his cynical and more forceful cohorts at the

conference table and to the pressures of the powerful Polish lobby in the US' led to a dilution of the concept⁴⁷. There were also internal American objections to the plan, best summed up in the words of Secretary of State Lansing who stated: 'When the President talks of self-determination what has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability'⁴⁸. Similar sentiments are expressed by Jennings who highlights the problems associated with self-determination: 'Nearly forty years ago, a Professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because people cannot decide until someone decides who the people are'⁴⁹. As Pomerance suggests, the fact is that 'self-determination' as conceived by Wilson, was an imprecise amalgam of several strands of thought, some associated in his mind with the notion of self government; others, conceived as a result of wartime developments, but all imbued with a general spirit of democracy (consent of the governed)⁵⁰. The notion was in place to protect 'the right of every people to choose the sovereignty under which they shall live, to be free of alien masters, and not to be handed about from sovereignty to sovereignty as if they were property'⁵¹. Thus, one of the important issues to remember is that the Versailles Settlement which reflected the

⁴⁵ See Chapter Three, Section 3.3

⁴⁶ Whelan (1994) *op.cit.* 7. p. 108

⁴⁷ See Pomerance *Self-determination in Law and Practice* (1982) esp. pp. 1-8

⁴⁸ H Lansing *Self-determination* in the Saturday Evening Post, 9 April 1921 pp. 7 as quoted in Whelan (1994) *op.cit.* 7 p. 108

⁴⁹ Jennings (1956) *op.cit.* 30 pp. 55-6

⁵⁰ Pomerance (1982) *op.cit.* 47 p.1

⁵¹ Wilson's war message to Congress, as quoted in Baker and Dobbs (1925-1927) *op.cit.* 5 Vol. 3 pp. 187, 389, 411, 414 also see Nathan Feinberg *Studies in International Law* (1979) pp. 460 - 96; also see Hula E., 'National Self-determination Reconsidered,' in *10 Soc.Res.*(1943) 1-21, also see Notter H.,

Wilsonian concept of self-determination is specific to the exigencies of European wars. This however, has subsequently become the basis by which self-determination got linked to the principle of nationalities and ethnicity and 'self' came to take on an ethnographic character. The Wilsonian concept of 'nation' remained that of the 'community of organisation, of life, and of tradition' which as mentioned was in contrast to the German collectivist concept of *Volk* as 'community of blood and of origin'⁵². It is in this contradiction of who a 'people' are entitled to be⁵³, that Wilsonian concepts of self-determination break-down when transferred universally. As Whelan points out though, '...the problem of identifying peoples under the Wilsonian principle is not... a complex one of differentiating between groups as a basis of language, culture, race, religion, aspirations and so on, though this is necessary and will often be difficult and controversial; rather, it is a simple question of line-drawing. Depending on where the dividing line is drawn, an ethnic, religious or other community aspiring to nationhood can become either a 'people' entitled to full self-government, or a minority, with only minimal rights accorded to members of what was, in the Versailles scheme, a residual category'⁵⁴. This concept of line-drawing and its legitimacy within international legal discourse is the focus of chapter four which looks at the merits of the Doctrine of *Uti Possidetis*, and its effects on self-determination.

While deconstructing the notion of who a people are, under the Wilsonian scheme, it is important to note that Wilson himself understood who could decide who the people were: as demonstrated by Draft Article III which places the onus on the victorious Allies.

(1937) *op.cit.* 5 p. 104.

⁵² See Gamberale *op. cit.* 41

⁵³ This is an issue dealt with generally in Chapter Two

‘...the Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial re-adjustments, if any, as may in the future become necessary by reason of changes in present social conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgement of three-fourths of the Delegates, be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary’⁵⁵.

Thus, it was clear that ‘who’ the people were would be decided by the High Contracting Parties, in answer to the question posed by Jennings. The Wilsonian concept of self-determination though, did foresee the possibilities of changes, due to ‘changes in present social conditions and aspirations or present social and political relationships’⁵⁶. This is a good indicator that the norm of self-determination, for Wilson, was a dynamic one that might include at a later stage, the need to question and re-open the territorial settlements that had been guaranteed by the Versailles Settlement. However in the interests of order, the process of gaining such a re-negotiation of territory would require a 3/4th majority within the Delegates of the High Contracting Parties, and it would be sought, first in the interest of the peoples concerned; second, only with their consent; and finally, were such a change to be

⁵⁴ Whelan (1994) *op.cit.* 7 p. 103

⁵⁵ Miller *The Drafting of the Covenant Vol. II (1928)* pp. 12-13 also *Vol. IV* p. 30

⁵⁶ Article III as quoted above

effected, material compensation would need to be provided to the party that was to lose a portion of its territory. Draft Article III thus, explicitly tries to create a clear-cut legal mechanism for the resolution of self-determination disputes, in sharp contrast to the modern law of self-determination which remains largely rhetoric, as we shall see in the rest of the chapter. Before that however, it is interesting to see how the Wilsonian model of self-determination worked in practice. For this it is necessary to briefly highlight the salient features of one of the first such cases to be submitted under the norms - the Åland Islands Case.

1.3.1 Åland Islands Case

This group of islands was ceded by Sweden to Russia in 1809 by the Treaty of Fredrikshamn. When Finland proclaimed independence from Russia in 1917, the Islanders requested Sweden to back their claim to return to Sweden (92.2% of the population were of Swedish extraction). Finland refused to hold a plebiscite, sent troops to the island, arrested and charged the separatists with treason. The United Kingdom brought the dispute before the Council of the League under the terms of Article 11 of the Covenant. Finland objected claiming that the matter was covered under its domestic jurisdiction. This was rejected and the Council asked Jurists to rule on the matter. The Jurists suggested that, normally, the situation at hand would be within Finnish jurisdiction but since the situation does not refer to 'a definite established political situation depending exclusively upon the territorial sovereignty of a State' it was outside the scope of exclusive Finnish jurisdiction. It also suggested that since the 'state was not fully formed or undergoing transformation or

dissolution'⁵⁷ the Council could look into the matter. This is a matter that we shall return to in looking at self-determination in the process of transition and what Koskenniemi refers to as 'normal' and 'abnormal' situations⁵⁸. The Commission of Inquiry however, came to the exact opposite conclusion and suggested that the issue was within the jurisdiction of the Finnish government with arguments that extolled the virtues of stability and protection of minorities⁵⁹. One of the questions considered by both the Jurists and the Commission of Inquiry was whether the Finnish government was sufficiently established. A manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State could give rise to an international dispute because the situation would assume 'such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations'⁶⁰.

The Rapporteurs suggested that if Finland refused certain rights to the Islanders then they should be ready to hold a plebiscite to determine exactly what they want. It followed therefore, that the disposing of a part of a state is within the jurisdiction of the state which can decide whether it wants to hold a plebiscite or not. However, if a state treats a group in a discriminatory manner or the claim of domestic jurisdiction is put forward by a new state, itself being the result of the exercise of the right of self-determination, against a group within it that also claims self-determination. Sureda claims that if a State treats a group in a discriminatory manner

⁵⁷ The Åland Islands Case *PCIJ Reports (1919)*; also see Sureda (1973) *op.cit.* 5 pp.111-116 & 233-237; Barros, J., *The Åland Island Question: Its Settlement by the League of Nations (1968)*

⁵⁸ Koskenniemi (1994) *op.cit.* 7 p. 257

⁵⁹ Sureda (1973) *op. cit.* 5, p.32

⁶⁰ See the Comment by the *Commission of Inquiry* in Sureda (1973) *op.cit.* 5 p.33 & p.111

then that group has the right to secession - a view which in the Åland Islands Dispute is borne out by the Commission of Inquiry as well as the Commission of Jurists. Also, if the state concerned refuses to grant the victimised group a minimum of guarantees, there is a case for secession.

Thus we see that even immediately following the expression of Wilsonian norms of self-determination, the Åland Islands Dispute was not settled on the basis of allowing a 'people' namely the Swedes, to rule themselves, with the idea of a territorial state gaining precedence over the identity of a people. This is a trend that perhaps fractured Wilsonian thought and set in motion the development of self-determination norms as we recognise them today: i.e. with emphases on ideas of stability and territorial integrity. However, the next step in the development of the norm came in the aftermath of World War II. With the norm of self-determination tarnished, due to Hitler's interpretation of it to justify belligerent annexing of territories backed by claims to be re-uniting the German people, the Allies were once again left to lay down the conditions of peace. The concept of self-determination once again figured in the peace settlement and though it only got limited mention in the Charter⁶¹, gradually gained significance following the war. One of the prime factors towards its re-gaining focus was the support of the Soviet Union in its development.

1.4 Soviet Support: the Norm changes guise

Looked at from a perspective of the Second World War and the support that the norm received from the Soviet Union, there is a strong hint to suggest that the norm had already begun to be used in different contexts. In a booklet on the right to

self-determination, Lenin⁶² was highly critical of imperialism and referred specifically to the overseas possessions of the traditional colonial powers such as Britain, France, Spain and Portugal. This criticism of imperialism continued even after Lenin's death, though the Soviet situation presented an interesting contradiction: the Baltic Republics, with a right to secede from the Soviet Union written into their Constitution, had this right deliberately suppressed from within the Soviet⁶³. Lenin's thoughts on the subject though made it clear that the meaning of self-determination had already veered away from the Wilsonian concept of the protection and self-governance of minorities. He directed it away from the idea of minorities being oppressed by majorities, and chose instead to highlight the deficiencies in the principle that talked of self-determination and rule of the people while being supported by imperialist European powers with overseas colonies. He thus made it his mission to garner support from countries outside the Western bloc, to impair the power exercised by the British and French. It was this force, reluctantly backed by America, which led to the concept of self-determination gaining wider application under the UN Charter-based system. Thus self-determination was transformed from the Wilsonian conception of self-governance for oppressed minorities within Europe in the aftermath of the First World War, to being the norm that changed the course of the history of the twentieth century by setting free, the annexed lands of Africa and Asia. Already, there was a vast divergence from initial thoughts on self-determination expressed by Wilson in the days leading up to his Fourteen Point Address. One of the prime differences in UN self-determination, as developed by Soviet backing for

⁶¹ Articles 1 and 55, UN Charter 1945

⁶² Lenin V *The Right to Self-determination* (1938)

⁶³ See Shaw Malcolm 'The Heritage of States: The Principles of Uti Possidetis Today,' in *67 BYIL* (1996) 75-154 at p. 110 also see generally, Shahenn, S., *The Communist (Bolshevik) Theory of National Self-determination; Its Historical Evolution up to the October Revolution* (1956) and

decolonisation, and the original concept post First World War, was the fact that a 'people' were no longer defined ethnically or racially - these factors were subordinated to a group of people being under 'colonial rule.' No longer did race, ethnicity or nationality matter; these considerations were defeated by the condition of being considered a coherent unit under the rule of a colonial European power. The new right formulated saw the meaning of self-determination change to simply be the freeing of colonial people from their colonial masters, and their right to govern themselves. Thus the principle still appealed to the basic underlying functions that had governed the original Wilsonian idea, namely the idea of the consent of the governed, and the idea of a people being able to choose their own form of government. However, the major change that took place saw the broadening of the norm as it sought universal rather than European application.

1.5 The 1960 'Declaration on the Granting of Independence to Colonial Territories and Peoples'

Thus, the Soviet Union was primarily responsible for pushing the western nations to decolonise, by quoting to them, a subtle version of their own principle of self-determination. The wave of decolonisation gradually began to gain currency in the international climate and by the time the Declaration on the Granting of Independence to Colonial Countries and Peoples⁶⁴ was passed in 1960, this political principle of uncertain applications had begun to function as a quasi-legal principle. This Resolution is significant since it focused specifically on the situation of colonialism. As a General Assembly Resolution, it was passed unanimously raising

Starushenko, G., *The Principle of National Self-determination in Soviet Foreign Policy (1963)*

⁶⁴ GAOR 1514(XV) passed by 89-0-9 (Portugal, Spain, South Africa, United Kingdom, United States of America, Australia, Belgium, Dominican Republic, France) Henceforth referred to as the 1960

questions of its validity in international law as a customary norm or a norm of *jus cogens*. There is little ambiguity in the resolution and it is one of the clearest statements on self-determination within international law. At the time of its framing, the abhorrence of colonialism was already acknowledged and the freedom of larger countries such as India from the colonial yoke helped in spurring on this movement. The Resolution is linked to the Charter of the United Nations by the opening paragraph which states ‘Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights...’⁶⁵. This suggests clearly that the norm of self-determination was one that was universally accepted. The text of the Resolution also links it to ‘better standards of life and larger freedom’. This suggests that the norm of self-determination was already accepted to a certain extent as being one that promoted better standards of life and freedom. The 1960 Declaration though, despite its optimistic tone for the emancipation of people, had unwittingly, the basis for the modern conflict written into it. The second paragraph returns to the principle of stability and suggests that the resolution was being adopted ‘Conscious of the need for the creation of conditions of stability and well-being...’⁶⁶. This is an important facet of the argument. It needs to be pointed out that the self-determination of colonial peoples and their emancipation could not be allowed to come at the price of instability. The fear at the time, and one that continues to exist today in the face of external self-determination is the threat it naturally poses to order. In colonial times of the 1960s, fears were that, with the exit of colonial powers, former territories rather than being able to constitute themselves into sovereign states, would fragment into anarchy and violence. The colonial powers

Declaration

⁶⁵ The Resolution 1514 (XV)

⁶⁶ Resolution 1514 paragraph 2

had begun their land-grab towards the end of the 18th century and the Resolution was coming into force nearly 150 years after this event. By then, boundaries had in many cases been well defined for a significant period. Besides, many of the regions annexed by the colonial powers and drawn together within a boundary, had within them, different peoples with strong antagonistic tendencies towards one another. It is herein being suggested that, at the time of the Resolution, the authorities were conscious that decolonisation could be disruptive to international peace and security but chose nevertheless to proceed with the task in the interests of protecting fundamental human rights. One other factor that enabled this process was that the rhetoric of the term proved useful propaganda in Cold War politics of the time. The main thrust of the Resolution itself was the host of newly formed states who, with the support of the Soviet Union, were keen to reformulate the international sphere of influence. One of the important results of the Declaration is that it included self-determination as a fundamental human right, bringing it within the scope of the Universal Declaration of Human Rights 1948⁶⁷, by linking it to issues of discrimination⁶⁸. The Resolution also recognises ‘the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence’⁶⁹. Such yearning is considered legal in this context rather than political, and is portrayed positively with the document elaborating how this yearning can be brought to fruition. The next paragraph is also instructive since it recognises that an increased number of conflicts are due to the denial to people of their freedoms and rights. It labels this denial of rights as a menace which, in the words of the Resolution, ‘constitute a serious threat to world peace’. Thereafter, it goes on to narrow the applicability of self-

⁶⁷ Universal Declaration of Human Rights 1948

⁶⁸ Resolution 1514 *ibid.*

⁶⁹ Resolution 1514 *ibid.*

determination and in the second half of the preamble, actually specifies that the ‘peoples of the world ardently desire the end of colonialism in all its manifestation’. There is no effort made to define colonialism, its attributes or ‘manifestations’ - a definitional lacuna that haunts modern self-determination in its quest for normative symbiosis. In this regard, a question that needs to be raised: What is ‘colonialism’ and how is it manifested? Addressing the questions posed by two case studies in the second section of this thesis, it is sought to examine the merits of the claims of self-determination away from strict colonial interpretation. One rather vague way that colonialism is defined within the document itself is the recognition that colonialism ‘prevents the development of international economic co-operation, impedes social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace’. The next paragraph also suggests that colonisation includes exploitation of resources endowed to a people by colonial powers that dominate them. The Resolution then affirms that ‘peoples may freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law’. This idea of self-determination of peoples including their right to their own resources, is one with many fascinating possibilities but will be beyond the scope of this present work. We will here, restrict ourselves to determination by a people of their political will in the face of oppression. The 1960 Declaration also recognises that the process of liberation is ‘irresistible and irreversible’; the latter is an interesting concept in examining the finality of self-determination and the doctrine of *uti possidetis* in Chapter Four of this thesis. It also calls for an end to colonialism and ‘all practices of segregation and discrimination’ in order to avoid serious conflicts in the future. Finally, the emergence of new states, is

welcomed and the Resolution 'solemnly proclaims the necessity of bringing to a speedy and unconditional end, colonialism in all its manifestations'.

The Portuguese, as one of the powers targeted by the newly emergent interpretations of the norm of self-determination, had grave problems in coming to terms with the new concept. Throughout the decolonisation process the Portuguese insisted that the 'overseas territories' it ruled were sovereign Portuguese territory and not colonies. It did not consider itself liable to make reports under Chapter XI of the Charter which dealt with non-self-governing territories and required the state overseeing them to progress them towards self-rule and report on that progress to the United Nations Trusteeship Council. The Portuguese insisted that, by virtue of a domestic Act which made all overseas territories integral parts of Portugal, reporting on them would constitute a violation of sovereign Portuguese rights and a defeat of article 2(7) of the UN Charter. The Portuguese had already fought one case in the ICJ in support of this right - *The Rights of Passage Case*⁷⁰- and were the focal point of discussions with regard to their duties under the UN Charter to report the progress made with respect to the independence of its non-self-governing territories. Portugal continued to refuse to report on overseas colonies, claiming that they did not come under the scope of this article. It was perhaps to bring situations such as these within the ambit of the resolution that the phrase 'colonialism in all its manifestations' was referred to in the Resolution.

Having firmly established the grounds on which the Resolution was based, it further declares:

⁷⁰ See *The Rights of Passage Case ICJ Reports (1960)*

1. That subjugation, domination and exploitation of people constitutes a denial of human rights and is contrary to the United Nations Charter
2. That all people have the right to self-determination
3. That inadequacy of democratic institutions etc. should not serve as a pretext for delaying independence.
4. That armed action or repressive measures against a people struggling for independence should cease, and the integrity of their national territory be respected.
5. That immediate steps should be taken in Non Self Governing Territories to move them towards their independence.
6. That attempts to disrupt partially or totally the territorial integrity of a state was incompatible with the purposes and principles of the UN Charter.
7. That all states would observe the Charter, the Universal Declaration and the principle of non-intervention in the internal affairs of another state.

Looked at in depth, the Resolution declared that self-determination is a legitimate right of *all* peoples. There is no effort made to limit this right to any specific people. However, there is no doubt that despite no explicit statement of the same, the spirit of the text calls for self-determination of people under a colonial ruler. Paragraph 5 for instance, reads: 'Immediate steps shall be taken in Trust and Non-Self Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed, or colour, in order to enable them to enjoy

complete independence and freedom'⁷¹. The Resolution does not limit self-determination to only these areas specifically including '...all other territories which have not yet attained independence'. Thus it can be concluded that the Resolution does not limit the right of self-determination to a particular people, taking instead a broader approach that any people victim to 'subjugation, domination or exploitation' had this inherent right. Another important feature of the Resolution is clause 6, which raises the territorial integrity versus self-determination argument which is examined in Chapter Three of this thesis. This clause specifically mentions that: 'Any attempt aimed at partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. Looked at from a colonised point of view, this statement suggests that for example, in decolonising India, British territorial integrity was not affected. Similarly the independence of the Congo in no way compromised the territorial integrity of Belgium⁷² nor did decolonisation of Algeria affect France. Thus it can be established that emancipation of a distinctly colonial people does not affect the territorial integrity of the colonial power. It does of course have significant economic and political implications, but it does not affect the 'territorial integrity of a state'. This is important to the definition of self-determination in the modern era, since self-determination without the counter-balancing force of territorial integrity would run the risk of anarchy⁷³. The territorial integrity clause is thus an important control to self-determination in an international system that is preoccupied with the need for stability and order. Thus it could be concluded that the examples mentioned above

⁷¹ Resolution 1514 paragraph 5

⁷² See generally, Libois G J, *The Katanga Secession (1966)* also Heraclides *Self-determination of Minorities in International Politics (1991)* pp. 58-79

⁷³ See Brilmeyer L., 'Secession and Self-determination: A Territorial Interpretation,' in *16YJIL(1991)* 177-202; Suzuki, E., 'Self-determination and World Public Order: A Community Response to

were in keeping with the 'purposes and principles of the Charter'. In what way then, can the territorial integrity of a state be challenged? Would geographic proximity be an issue in determining the violation of territorial sovereignty? - i.e. the fact that, the territories mentioned above were not geographically adjacent to the colonial power? Would the situation change if the country was split into different sections? An example of this is the freedom of Norway from first Denmark and then Sweden. Did the Norwegian secession from the union with Sweden in 1805 affect the territorial integrity of Sweden? Alternatively, did the loss of Bangladesh in 1971 affect the territorial integrity of Pakistan? The importance of these questions arise since modern claims for self-determination are being made away from the traditionally colonial setting.

1.6 Resolution 1541 (XV)

The next development in the self-determination discourse after the 1960 Resolution was the General Assembly resolution 1541 (XV). This arose as a direct result of the need to condemn Portuguese behaviour in refusing to report on its colonies, as required by article 73. Portugal contended that the need to report on the premise that its colonies came within the ambit of domestic jurisdiction [Article 2(7)] of the Charter. The *Rights of Passage Case*⁷⁴ had already touched upon such issues a few years earlier when Portugal claimed the right to travel through India to gain access to their colony. The ICJ ruled that Portugal did not possess this right of passage, since the enclave concerned was colonial property. However Portugal still insisted that the territories under their control in various parts of the world were integral parts of their country. This prompted the formulation of General Assembly Resolution

Territorial Separation,' in *16 VJIL* (1976) 779-862

1541⁷⁵ which reiterated that countries report on their overseas colonies. The first principle of the Resolution clearly indicates that ‘... an obligation exists to transmit information under Article 73 (e) of the Charter in respect of such territories whose peoples have not yet attained a full measure of self government’⁷⁶. The second principle suggests that the obligation to report on the situation exists as long as the territory concerned has not attained a ‘full measure of self government’⁷⁷. The Resolution also confirms that this obligation is of an international legal nature. In response to Portugal’s claim that its colonies were integral parts of the country, principle IV states that an obligation exists to transmit information in respect of ‘a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it’⁷⁸. This is a highly problematic situation, since it is debatable why geography should be given a preference over any one of many other factors that could be of equal if not greater importance⁷⁹. The Resolution though, does admit that other elements such as administrative, political, juridical, economic and historic factors could also be considered in determining the nature of relationship between a metropolitan state and its colony⁸⁰. To safeguard the interests of self-determination, the Resolution also defines what constitutes ‘full measure of self government’⁸¹ stating that it must result in a decision where the people concerned vote in free and fair elections to decide whether to:

⁷⁴ See *ICJ reports (1960)*

⁷⁵ GAOR 1541 on 15 December 1960 see *UNYB (1960)* 509

⁷⁶ GAOR 1541 (XV) Principle I

⁷⁷ UNGAOR 1541 (XV) Principle II

⁷⁸ GAOR 1541 (XV) Principle IV

⁷⁹ See the discussion in Chapter Four about the importance of boundaries

⁸⁰ GAOR 1541 (XV) Principle V

⁸¹ GAOR 1541 (XV) Principle VI

(a) Constitute themselves as a sovereign independent State; (b) Associate freely with an independent State or (c) Integrate with an independent State already in existence⁸².

Self-determination literature however, remains highly contradictory. On the one hand, it endorses that peoples should have the right to determine their own political future, while on the other hand suggesting that the sanctity of national boundaries requires to be respected and that breaking-down States is unacceptable in international law. Thus despite Resolution 1541 stating clearly the three available options of self-determination to a people, option a) of secession, tends to be ruled out in the interests of international order⁸³. This seems like a misunderstanding of the situation: if a people is dominated by an alien regime and has the inherent right to govern themselves it may be necessary at times to break-away from the government in power and form a new more representative regime. However it becomes clearer if looked at in the post-war situations facing statesmen of the period: at this time the map of the world was shaded in the colours of the colonial powers. States such as the Britain, France, Portugal, the Dutch and others 'owned' pieces of land and entities that were distant from their own borders. From that point of view self-determination simply meant allowing peoples under colonial regimes, power to express their own choice of government to emancipate themselves of colonial oppressors. In that situation the need for breaking away from the main body of the state or 'secession' as it is termed, was unnecessary since the very act of colonised people choosing their own regimes ahead of the colonial powers was an act that fulfilled norms of self-determination. There are a few exceptions to this rule: notably the case of the partition

⁸² This argument is also quoted later by the Ambassador of Morocco in his suggestion that self-determination does not need to include only secession -- see Appedix 2 . It is also echoed in General Assembly Resolution 2625

of the subcontinent of India where the larger entity was divided into first, two and then, three smaller states; comprising India, Pakistan and Bangladesh⁸⁴. Another similar yet opposite example, is the merging of Gold Coast and Upper Volta to form the state of Ghana. Thus it can be asserted that colonised people ridding themselves of foreign domination was an act of self-determination that rendered the option of secession redundant. At the time that Wilson voiced his concern though, the disintegrating Austro-Hungarian and Ottoman empires threatened to bring into existence a host of new sovereign states to the potential detriment of the larger perspective of European and World peace. Thus international peace super-ceded justice in a sense that the emphasis for peace and security overshadowed the case some people may have had for a new state. This trend has persisted in the histories of the two international organisations that attempted to regulate the post World War years. The League of Nations aimed to eliminate war,⁸⁵ a cause for which international justice could be sacrificed in the view of the League. The UN, in many ways wiser from the lessons learnt in World War II, was an organisation basically, to regulate peace post World War II. The UN Charter reads very much like a post-war document, constantly emphasising building an environment of stability and secure peace: 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...'⁸⁶. There is just one reference to self-determination in the Charter⁸⁷ which talks of developing 'friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen

⁸³ See discussion in Section 1.8

⁸⁴ The Bangladesh case is interesting and is one we shall return to examining how a state may be legitimately constituted in cases of alleged genocide see Chapter V

⁸⁵ Article 14 , Kellogg Briand Pact 1928

⁸⁶ Preamble UN Charter 1945

universal peace'. But as this clause shows, even though the need for self-determination is expressed, the same sentence implies that it is a means to an end: that of strengthening universal peace. Mazrui sees this as a definite Western and Christian bias in the UN Charter,⁸⁸ a theme we will return to in examining the nature of the norm. In many ways, one of the presumptions in this thesis is that granting the right to self-determination is a long-term approach to strengthening universal peace. However it acknowledges, in the short-run, this path is fraught with dangers that directly threaten peace and security concerns of the modern system. Allowing people to freely determine their political future could destroy the international system of sovereign states and leave vulnerable peoples open to influences of power mongers and anarchic forces. It is this, rather justified fear that has been at the heart of the debate within self-determination literature of the conflict between territorial integrity and self-determination⁸⁹. Higgins for instance argues that the right to self-determination must always be secondary to the right to territorial integrity. She claims that, this is the guarantee that keeps the international legal system in place⁹⁰. Brilmeyer⁹¹ and Tomuschat⁹² on the other hand argue for a limited right that, in certain special circumstances, allows secession as an option of self-determination.

Principle VII of Resolution 1541 draws attention to other options to secession which may be more in keeping with the need for order. But it emphasises that any free association should be the result of 'free and voluntary choice' gauged by a 'democratic process'. Further, the associated territory needs to be given a right to

⁸⁷ Article 1(2), UN Charter, 1945

⁸⁸ See Mazrui Ali *Cultural Forces in World Politics* (1975) 7

⁸⁹ See Rosalyn Higgins 'Judge Dillard and the Principle of Self-determination,' in *23VJIL*(1983) 387-394 ; also see Brilmeyer, L (1991) *op. cit.* 73

⁹⁰ Higgins (1983) *op.cit.* 89 p. 390

⁹¹ Brilmeyer (1991) *op.cit.* 73 pp. 200-202

⁹² Tomuschat 'Self-determination in a Post Colonial World,' (1994) *op.cit.* 34

determine its own internal constitution, free from outside interference. Principle VIII lays down norms for equality of peoples in an erstwhile non-self governing territory should it choose to integrate with a specific country; and attempts to safeguard the new entity from discrimination within the new state⁹³.

This document is an important one in the literature of self-determination but one often neglected. It is one of the last documents that clearly defines the terms it uses. Perhaps one of the reasons for this is that it concerns the specific dismantling of colonial oppression and has limited value outside this context. Since it deals with the situation surrounding the Non-Self-Governing Territories it cannot be used to draw general analogies. Nonetheless, there are some aspects of it that merit closer examination. One of the best examples of the clarity of the document its frequent reference to 'full measure of self government'. This is rhetoric that is often used in self-determination literature. However this Resolution defines the extent of the term, listing the three options mentioned above, as proof that a state has reached its full measure of self-government. In addition, it also deals with situations in which free association and/or integration is allowable as proof of a territory having fulfilled its right to self-government thus preventing colonial countries from hiding behind this garb. The Resolution is free from the contradiction present in later self-determination documents in that it does not mention territorial integrity in any of its Principles.

1.7 The International Covenants for Human Rights (1966)

⁹³ GAOR 1541 (XV) Principle IX

The next set of documents important to an understanding of the evolution of the self-determination norm are the International Covenants of Human Rights⁹⁴. Comprising the International Covenant for Economic, Social and Cultural Rights (ICESCR) and the International Covenant for Civil and Political Rights (ICCPR), the documents lay down the foundation of what has subsequently developed as International Law of Human Rights. The norm of self-determination is the common Article 1 in both documents. The *travaux préparatoires* of the International Covenants⁹⁵ reveals the reasoning that before any rights are enjoyed it is vital for the people to be masters of their own political destiny. Thus the right of self-determination is not restricted to a political or civil right but propounded as the gateway to economic, social and cultural rights.

The Article itself states that:

1. 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.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realisation of the right to self-determination, and

⁹⁴ International Covenants on Human Rights (1966) passed vide GAOR 7700 (XXI)

⁹⁵ See McGoldrick, D., *The Human Rights Committee: Practice and Procedures of Law Making at the United Nations (1991)*

shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This article has some salient features that need highlighting:

1. All peoples have the right to self-determination:

The Covenants do not restrict the right of self-determination to a colonised or oppressed people but includes *all* peoples. In the context of Wilsonian statements this basically meant that all states had the right to be democratic (internally) with the consent of the people having elected a legitimate government, which thereby gained legitimacy (externally) in the international society of states. In the context of the decolonisation of the time, it simply meant that colonised peoples had the right to freedom. However the International Covenants have been understood as being living structures that need dynamic interpretation⁹⁶. Thus the term ‘all people’ still remains, over decades, open to interpretation. State practice provides little indication of what constitutes ‘a people’. These aspects of the definition shall be examined in chapter two when looking at the issue of minority rights to self-determination. For the moment it suffices to state that this is one of the biggest controversies surrounding the principle of self-determination, as suggested by Jennings in his criticism of Wilson discussed earlier.

2. ‘Freely determine’ ‘political status’ ‘economic, social and cultural development’

Self-determination guaranteed to peoples, does not stop at merely political representation. It includes determining their own form of development whether

economic, social as well as cultural. This raises interesting questions which are well highlighted in the case of Bangladesh in which quasi-colonial economic exploitation and prevention of social and cultural development is alleged; despite the fact that politically the then East Bangladeshis were in the majority in the soon to be formed Parliament⁹⁷. An important aspect raised here that will recur within this thesis, especially in the case studies, is the idea of neo-colonialism.

3. 'Freely dispose of their natural wealth...'

This was an issue at the heart of the Katanga secession. Katanga, a resource rich region of the Congo, decided it no longer wanted to be exploited under the government of the country, and sought to secede from the state. This would be a valid option under international law in view of the clause above. However the restricting clauses in the document arguably imply that secession should not leave the rump state dismembered, hampering its territorial integrity and self-determination. While this provision is primarily to prevent colonial exploitation of the resources of the colonised, its development is impaired since it could set dangerous precedents in motion. Namely, every part of a country that had resources could opt for secession, alleging that its resources supported the whole of the country. This could have disastrous effects for the international system. Thus, this road to self-determination is little travelled and not likely to be pursued much in view of its potential for exploitation. However this concept of self-determination is beyond the scope of this thesis.

⁹⁶ See generally McCoubrey H & White N., *International Organisations and Civil Wars (1995)*

⁹⁷ See Chapter Five

4. 'The state Parties'... 'shall promote' ...'and respect' (the norm of self-determination) 'in conformity with the provisions of the Charter of the United Nations'

A few points here need to be focused on. For a start, this clause puts the self-determination norm into perspective i.e. States are party to the UN Charter and the International Covenants. Yet, self-determination movements by definition, are non-state parties, outsiders to the international system of sovereign states which, in one instance of self-determination i.e. secession, attempt to gain entry into the club of statehood. The wording of this document suggests that State Parties should admit these outsiders, by promoting and respecting their rights. The implication is that State Parties relinquish their powers to outsiders. However self-determination movements, whether genuine or not, have historically been crushed with the full brutal force of the state. States are unwilling to respect self-determination movements who they perceive as a threat to themselves; yet it is to statehood that these movements are forced to turn.

The other issue that needs serious consideration is that States are called upon to promote and respect the norm of self-determination 'in conformity with the provisions of the Charter'. This once again brings us back to the conflict between territorial integrity and self-determination. The UN Charter respects the norm of self-determination but gives international peace precedence over international justice implying support for territorial integrity over self-determination - since the latter has the option of secession attached to it. It has been argued by many⁹⁸ that it is wrong to suggest that self-determination includes the right to secession. However as shown earlier, in the examination of Resolution 1541 (XV), options available to non-self

governing territories in their quest for self-determination include secession, integration and association⁹⁹.

There can be a case made out that all colonies are akin to Non-Self Governing Territories in that a) they are distinct from their rulers and b) they do not govern themselves. Therefore using the model provided for us by Resolution 1541 (XV) we can derive that self-determination includes the right to secession. That is not to suggest that an act of self-determination must necessarily end in the creation of a new state. Indeed that is not what the Resolution suggests, listing the two other options that exist for Non-Self Governing Territories. But it needs to be acknowledged that any act of true self-determination ought to have considered as an option, the right to secession. Entities still need to be encouraged not to secede in keeping with the UN principles, and in the interests of international peace, security and economic development. But denying them the option altogether will be a violation of the human right to self-determination. States too need to be encouraged to provide the different entities within themselves more autonomy or greater minority rights in a bid to appease separatist movements and include them within the State.

1.8 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN (1970)¹⁰⁰

The 1970 Declaration passed by the General Assembly was meant to be a clarification of the purposes and principles of the United Nations. Its passage through

⁹⁸ Notably Higgins (1983) *op.cit.* 89; Suzuki (1976) *op.cit.* 73 ; Brilmeyer (1991) *op.cit.* 73

⁹⁹ See p. 7 see GAOR 1541 (XV) Principle VI

¹⁰⁰ GAOR Resolution 2625 (XXV) henceforth referred to as the 1970 Declaration

the General Assembly had such wide consensus¹⁰¹ that it has been suggested that it can be considered as encompassing norms of *jus cogens*. General Assembly Resolutions are normally quite low in the hierarchy of sources of international law given by Article 38¹⁰² of the Statute of the ICJ. Since General Assembly Resolutions are recommendatory by nature, they are not binding, but usually indicators to the ICJ, of the direction of political debate. However, when a General Assembly Resolution is passed with such unanimity, it has been argued, the Resolution reflects 'international custom' or 'state practice' two sources of international law that are higher up in the hierarchy of sources of international law. International custom and especially norms of *jus cogens*, are a significant part of international law. In the words of Brownlie, 'the major distinguishing feature of such rules is their relative indelibility. They are rules of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect'¹⁰³. Brownlie himself, and others, notably Thornberry¹⁰⁴ argue that the entire 1970 Declaration can be said to contain norms of *jus cogens* since they were passed consensually by states and are therefore evidence that custom exists in international practice to this effect. The Declaration itself is written confirmation of this existing custom and in that sense it is a document with binding legal force. This is a strong argument since it shows consensus exists amongst states with respect to the various norms of international law.

¹⁰¹ Passed by the General Assembly without a vote

¹⁰² See article 38 of the Statute of the ICJ as appended to the UN Charter 1945

¹⁰³ Brownlie *Principles of Public International Law* (1993) p. 302

¹⁰⁴ Thornberry P 'The Friendly Relations Declaration,' in Lowe V. & Warbrick C. (eds.) *The United Nations and the Principles of International Law: Essays in Memory of Professor Michael Akehurst* (1991)

The Declaration while incorporating the ‘principle of equal rights and self-determination as one of its seven principles, nonetheless falls short of shedding any more light on the treatment of the right to self-determination in international law. The text gives ‘all peoples’ the right to ‘freely... determine’, without external influence, ‘their political status and to pursue their economic, social and cultural development. It also links the concept of the right to the duty that states have towards the respect and promotion of this right¹⁰⁵. The obligation created for the state is that:

‘ Every State has the duty to promote, through joint or separate action, the realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having regard to the freely expressed will of the peoples concerned’¹⁰⁶.

This is interesting since it establishes two important points in the course of what the UN has come to view as self-determination. In the process, it also demonstrates the variation of the discourse from the original norm expounded by Wilson. Firstly, the Declaration states clearly that all peoples have the right to determine their future. This issue has of course, been discussed earlier since this statement is also echoed in the International Bill of Rights. However, the 1970 Declaration is one of the first

¹⁰⁵ See ‘Comment on Duties and Their Implications in the African Charter,’ in Steiner & Alston (1996) pp. 693-5

¹⁰⁶ See the 1970 Declaration GAOR 2625 (XXV)

documents to expand on the decision of these 'people'¹⁰⁷. It states that this determination is of 'political status' which is significant since it demonstrates what is at issue in self-determination. According to this Declaration self-determination is the decision to choose a form of political governance. In this sense it is closer to the original American Declaration, which enunciated the consent of the governed as being the basis for a legitimate government, and bears out Franck's analysis of the importance of democracy within the international system of sovereign states¹⁰⁸. The Declaration also states that determination of political status should take place free of external interference. Thus the processes that occur as the forces of self-determination unfold, ought to be contained within the domestic arena of the state and not be dictated to by forces outside this particular parameter. The second important point established by the text of the 1970 Declaration as quoted above, is the expansion of the role of the State in allowing/facilitating this process. This is extremely problematic and it is in light of these clauses that the Declaration begins to show that it is located in the specific time-frame of decolonisation. In these circumstances, the requirement of a State to respect the right in accordance with the Charter, is logical: the state, either the coloniser itself, or a third party indirectly concerned with the entity seeking self-determination, is required to respect the Declaration and the ethos of self-determination expressed therein. Thus it has a duty to either isolate itself allowing the process to take place, or be more pro-active in helping the UN fulfil its goal of achieving true self-determination¹⁰⁹. The latter can be achieved by a number of methods: by facilitating the process indirectly, for instance, in public support of the

¹⁰⁷ See the discussion on peoplehood Chapter Two Section 2.4

¹⁰⁸ Franck T, (1990) *op.cit.* 18 p. 46

¹⁰⁹ For general reading on the idea of humanitarian intervention see Bull, Kingsbury and Roberts *Hugo Grotius & International Relations* (1990). It needs to be noted that in current political jargon the term 'humanitarian intervention' is used to denote an intervention within a sovereign state in response to

cause of the national liberation movement, or directly, in providing arms to the national liberation movement. This view of options in support of self-determination is highly contentious since the Charter attempts to discourage the use of force in international relations, and provision of arms to national liberation movements remains dangerous to order. The other options available to states in assisting the forces of self-determination, are to act collectively with other UN members, possibly through the mechanism of Chapter VII and the United Nations Security Council, in emancipating subjugated peoples. Despite the objection raised by some colonial states¹¹⁰, this was not problematic, since the process of decolonisation was taking place with active involvement from colonial powers by the time of the 1970 Declaration (barring a few exceptions¹¹¹). The 1970 Declaration actually clearly states that, one of the purposes of the principle is to bring a speedy end to colonialism with regard to the will of the peoples concerned. This, it is suggested dates the international legal right of self-determination, since it presents us with a paradoxical argument. First we have a scenario where the norm of self-determination in the pre-UN era was interpreted as a right to be exercised by minorities to emancipate themselves and set them within their own sovereign states. This is then broadened, in the UN era to *all* people under colonial subjugation. Parallel to this development within international law, is the growing notion that decries colonisation as abhorrent to humanity. However at the next step the realms of 'who' a colonial oppressor is, is restricted to *salt-water* colonisation¹¹². As a result the people subject to alien subjugation are

human disaster (whether natural or man-made).

¹¹⁰ See Gott 'Indian Foreign Policy & the Annexation of Goa,' in *Surv. Of Int. Aff. (1961)* pp. 428-454; Neumann, H., 'Portugal's Policy in Africa,' in *41 Int.Aff. (1965)*p. 663; Martelli, G., 'Portugal and the UN,' in *40 Int.Aff. (1964)* p.453

¹¹¹ One notable exception is of course, the Spanish withdrawal from the Western Sahara which we shall be looking at in the latter half of this thesis, in Chapters Six and Seven.

¹¹² See The Belgian Thesis Chapter Two Section 2.4

deemed to be people under the domination of white colonial empires such as that of Britain, France, Spain, Portugal, Holland, Belgium and South Africa. The problem with this is that the 1970 Declaration, if interpreted strictly is redundant today since the territories under subjugation of these forces have been emancipated¹¹³. Thus the important question posed by the 1970 Declaration in the context of self-determination is not only 'who are the people?' which we will address in the second chapter of this thesis, but also 'who are the colonisers?' It may be argued that since the Resolution is a general document addressing self-determination beyond the context it is still valid today; however this leaves us with the interesting question of the scope of the coloniser. The text itself offers further clues:

...and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights and is contrary to the Charter of the United Nations¹¹⁴.

This paragraph suggests that the concept itself of subjugating, exploiting or dominating a people is contrary to the spirit of the UN Charter. It is relevant to consider whether the word 'alien' was intended to apply to all the three verbs listed i.e. 'alien subjugation', 'alien domination' and 'alien exploitation' which can be interpreted very differently from one that reads 'alien subjugation' as well as (perhaps non-alien) 'domination and exploitation' which may be more general. In the latter case, it would suggest that domination or exploitation of a people by anyone, alien or similar is against the spirit of the Charter. While this would be true of the spirit of the Charter, it remains contentious due to the concept of state sovereignty that we shall

¹¹³ With the exception of Ceuta and Melilla which are still disputed between Morocco and Spanish

discuss in depth in Chapter Three. However, a suggestion as to the reading of the text: the UN Charter is a post-war document that came about after the devastation of World War II¹¹⁵. A large part of this devastation was the targeting of Jewish people by Hitler's regime, which used the norm of self-determination to try and create a fatherland that extended across Europe and re-united all German people. This is an interesting concept in view of the idea of *Volk* in German nationality and has been discussed elsewhere¹¹⁶. As part of this process, the regime targeted Jewish people within Germany as well as in neighbouring states that were conquered. If the Charter, post World War Two allowed self-determination of only those peoples subject to 'alien' domination and exploitation, it would technically leave German Jews powerless against the state's regime, while protecting Jews outside the state. This issue displays the clear paradox that is at the heart of this discourse; protection of peoples within a state remains the biggest problem for the discourse of international human rights. However if the state is dictated to by external powers, it would defeat the concept of decolonisation, since it would be manifested in the form of domination and exploitation once again.

Thus the 1970 Declaration arguably looks at self-determination in a wider context than the domination of people by a 'white' power. However, while this debate cannot be dismissed, there is another more controversial debate that is also highlighted: the debate between territorial integrity and self-determination, already discussed in the context of Clause 6 of the 1960 Declaration. In this Declaration too, we see the issue unresolved, though it is elaborated more than in previous documents. The 1970 Declaration declares:

¹¹⁴ GAOR 2625

¹¹⁵ See Simma B, *The United Nations Charter - A Commentary* (1994) see especially Chapter Two

¹¹⁶ See Gamberale *op. cit.* 41

Every State has the duty 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 resistance to such forcible action in pursuit of the exercise of the right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations¹¹⁷.

This clause appears to endorse self-determination over territorial integrity since it states that a people struggling to emancipate themselves should be allowed to pursue this course of action. In addition it also states that Member states have a duty to seek support, and are entitled to receive it from other Member states of the UN. This remains the best expression of the right of a people to armed support in fighting a war of revolution. However this striking endorsement is negated by the very next paragraph which plunges the discourse once more into the territorial integrity versus self-determination debate:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour¹¹⁸.

¹¹⁷ *Ibid.* GAOR 2625

In addition, it requires 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'¹¹⁹.

Thus the endorsement of self-determination and the right of people to freely implement it towards achieving their desired status is once more subjugated to the norm of territorial integrity. While this seems extremely contradictory to the spirit of the UN as discussed above, it nonetheless highlights the precedence of order in the perception of the international system. A freely available process of self-determination is seen as action harmful to order, which is entrenched in the UN Charter. As a result when the document refers to not authorising or encouraging action aimed at the dismemberment of an existing state, it seems to locate the phenomenon of exercise of the right of self-determination to its specific application in decolonisation. In those cases, the Metropolitan States were not considered as possessing any rights over their 'overseas territories'¹²⁰, and thus their achievement of independence was not considered disruptive to the state. However in modern self-determination struggles this paragraph has been interpreted by states as negating the right to secession of an entity from the state. Thus the Document seems to contradict itself by ruling out secession or the 'establishment of a sovereign and independent State' as an option. This remains problematic and is central to the theme we shall keep returning to within the self-determination discourse: the conflict between the UN system of sovereign states protecting themselves and their interests as states on the one hand (territorial integrity), while guaranteeing human rights and freedoms (of which self-determination is one of the most important) on the other. The discussion on

¹¹⁸ GAOR 2625 *ibid.*

¹¹⁹ GAOR 2625

¹²⁰ See generally, Wright, Q 'The Goa Incident,' in *56 AJIL (1962)* pp. 617-632

sovereignty will shed more light on this phenomenon¹²¹. Suffice to say at this stage that the conflict is perhaps deeper than merely a conflict between two norms of international law. It is a conflict that views political participation within a state as a domestic rather than an international issue. States thus strongly resist being dictated to by the international community in fear of colonialism that has seen the development of the norm of self-determination in the first place¹²².

While what constitutes ‘self-determination’ and whether it is a part of customary international law or not is debatable, one needs to take into account another norm that has influenced and affected the practice of modern self-determination. This particular norm, which has been complimentary to the decolonisation process of the twentieth century was first derived in Spanish America in the twelfth century¹²³ and is referred to as the *Doctrine of Uti Possidetis*¹²⁴. The norm, a derivation from Roman law as discussed in Chapter Four, was first used in the Spanish retreat from Latin America. The general rule that was formulated at that time was that while retreating from a territory, the boundaries left behind were sacrosanct and could not be altered under any circumstances¹²⁵. Over time this rule came to be respected since it ensured that departure of a colonial ruler did not lead to violence and fragmentation influenced by separatist forces. There being a lot of merit in such a scenario, the rule was easily accepted and was considered a norm customary international law and may be even a norm of *jus cogens*. In time, in the 20th century decolonisation movements, the same rule was respected by colonial powers and it was generally accepted that the state,

¹²¹ See chapter three Section 3.2

¹²² Also see the discussion on ‘independence’ Section 3.1

¹²³ See generally Todorov M *Conquest of America* (1991)

¹²⁴ For a general reading see Shaw M, 67 *BYIL* (1996) *op. cit.* 63; also see chapter Four

¹²⁵ As will be discussed in Chapter Four

once constituted within fixed geographic boundaries could not be altered. Thus the decolonisation movement respected this rule and barring a few exceptions,¹²⁶ colonisers left their former territories as single units. The norm was also officially extended to Africa by its new rulers, as reflected by the Cairo Declaration examined in Chapter Four. If one has to follow Brownlie's definition of norms of *jus cogens* as stated above then it could be questioned whether the development of the modern norm of self-determination has in part replaced the older norm of *Uti Possidetis* that has existed for such a long time. If this were true, the territorial element would stand reduced, and secession would not be as frowned upon as it currently is. These are issues that we shall return to in the concluding chapter of this thesis. Thus, as we have seen in this chapter, 'self-determination' has travelled a long road to its present form.

Conclusion

In summary a few points that are worth noting:

1. Self-determination originally draws sustenance from the American and French Declarations that suggest that only the consent of the governed can make a government legitimate.

2. President Wilson, used these ideas of self-governance and the 'democratic entitlement' to formulate the political principle of self-determination. This principle was expressed in the Versailles Settlement and had, as its major thrust, the protection of oppressed minorities in the aftermath of World War I.

3. With the collapse of the League of Nations and the growth of the UN, encompassing values of democracy and fundamental human rights, the norm of self-determination made its re-appearance.

¹²⁶ As already mentioned - India and Ghana see Sureta (1973) *op.cit.* 5 p.156

4. With independence movements around the world, gaining freedom from colonial rulers, the political norm of self-determination gradually began to be expressed, with Soviet help, in the guise of a legal norm.

5. The 1960 Declaration gave the idea of colonial emancipation a legal justification and couched it within the terms of self-determination.

6. The resultant Resolution 1514 constituted a three-pronged norm of self-determination which gave former colonised people the choice to 1) constitute for themselves a new sovereign state, 2) associate with an existing state or 3) integrate with an independent state.

7. The norm of self-determination became the prime right by the International Bill of Rights 1966, enshrined as a primary human right.

8. The 1970 Declaration, considered by some authors a statement of modern norms of *jus cogens* accorded a high priority to the principle of self-determination. However, it also valued the norm of territorial integrity as highly, thereby casting a cloud over the resolution of the conflict between the norm of self-determination and territorial integrity.

9. The modern discourse of self-determination raises many pointed questions that are addressed in the chapters following. These are a) Who are the people entitled to self-determination? b) What is the basis of the sovereign state held out as being the caveat for the representation of peoples on the one hand, while being the biggest hurdle to this achievement for sub-state groups? How does the sovereign state discourse affect the norm of self-determination? c) What are the determining factors, in state practice, to decide which groups of people ought to be given the right to self-

determination in its secessionary sense? How has this affected the notion of 'identity'?

These questions will be examined in the following chapters. Chapter Two looks at minorities' claims to be a separate people, drawing out the original Wilsonian concept to the modern law of self-determination. Chapter Three looks at the sovereign state, examining its foundations and historical origins, before analysing whether it is the only representative of peoples' political aspirations in the modern system of international law. Finally, Chapter Four concludes the theoretical part of the thesis by examining the territorial bias in the formulation of modern identities and in the process analyses the artificial birth of the Doctrine of *Uti Possidetis*.

CHAPTER TWO

WHO ARE THE PEOPLE? NATIONAL MINORITIES IN SELF-DETERMINATION DISCOURSE

Introduction

The protection of minorities cannot be considered a phenomenon of the twentieth century. Throughout history, there has been an effort to protect the few from the tyranny of the many¹. Nevertheless, it took the atrocities of World War II to highlight the potential danger that minorities face in the presence of an all-powerful state. As seen in Chapter One, concern about the vulnerability of minorities within the state was one of the key elements in the formulation of the Wilsonian ideology on self-determination. Wilson believed that only the consent of the governed could make a government legitimate. This led him to conclude that national minorities' interests are best served by allowing them to constitute separate sovereign states. Minorities too small for separate statehood, he suggested, could be protected under the umbrella of special minority protection regimes under the League of Nations system. While the Wilsonian concept of self-determination has changed significantly², presence of minorities still raises questions about the concept of democracy and the rule of the majority. In this chapter, we shall seek to explore the issue of minorities and how they relate to the modern international law of self-determination. It needs to be pointed out at the outset, that minorities cannot be construed to have a right to self-determination³ within modern international law. As discussed, the law is specific to the rights of

¹ For general reading on the history of Minority Rights protection see Thornberry P., *International Law and the Rights of Minorities (1991)* esp. pp. 25-52 also see Brölmann et al *Peoples and Minorities in International Law(1993)*

² As discussed in Chapter One

³ This is a right specifically for 'peoples' and minorities in general, are not classed as a people

colonised peoples only. Nonetheless, it can be emphatically stated after examination of the *travaux préparatoires* of the International Covenants,⁴ the history of state practice⁵ and the working of the Human Rights Committee⁶, that granting national minorities the right to self-determination would be beyond the intentions of the drafters of the International Covenants. Indeed this is in keeping with the evolution of the norm from Wilsonian ideals to the language of the 1970 Declaration as examined in Chapter One. To counter that it needs to be admitted that there have been a few exceptions in the past few years that have opened this norm to questions⁷. The fact however, remains that international law tries to build an order in international society by which nations may pursue development in an organised and peaceful manner as contained in the UN Charter. This is bolstered by the 1970 Declaration, intended to re-enforce the Aims and Purposes of the UN⁸. The function of international law in this situation therefore, is to provide the framework on which an ordered society can be built. The fact of international society being so diverse and varied makes the situation extremely complicated. On the assumption that need for order⁹ is desirable, it has to be stated that forces of secession, as one expression of self-determination, are not conducive to order in the short term.

The relevance of minorities to this thesis stems from the fact that minorities are the best indicators of the politics of exclusion in an international system that

⁴ See McGoldrick D., *The Human Rights Committee: It's Role in the Development of the ICCPR (1991)*

⁵ See especially, Sureta R *The Evolution of the Right to Self-determination: a Study of UN Practice (1973)*

⁶ *Grand Captain of the Mikmaq Tribal Society Case (HRC) UNDOC A/39/40 (1984)*

⁷ Notably Eritrea which has recently won independence from Ethiopia see Heraclides *Self-determination of Minorities in International Politics (1991)* 177-195. The case of Bangladesh is often quoted under this heading too, however demographic data suggest that the Bengalis were not a minority within the joint state of Pakistan see Anthony *Rape of Bangladesh (1971)*

⁸ General Assembly Resolution 2625 (XXV) see Chapter One, Section 1.8

⁹ For the concepts of 'order', 'international system' and 'international society' see Bull H., *The*

cherishes democracy above all other systems¹⁰. Minorities are an essential element to the development of the norm of self-determination since they were at the centre of the development of Wilsonian ideals as seen in Chapter One¹¹. However, protection of minority rights is an obvious fall-out from democracy. Minorities are different from the majority; with different interests that cannot always be fulfilled by a majority government that does not, in a literal political sense, need to understand their peculiar desires. They therefore, remain voiceless in a democratic society leading to feelings of exclusion. With development of the right to self-determination, and emergence of smaller states from larger ones¹², the question of secession from their present unrepresentative state to form a more representative state of their own, as Wilson suggested in the Versailles Settlement¹³ takes on added relevance. In the context of post-war world, size cannot be considered as a determinant in the formation of new states as evidenced by the existence of micro-states in the international system¹⁴. However, international law does not give minorities the right of secession primarily due to the fact that it would unleash separatist: read disorderly forces which threaten to destroy international order as groups within groups attempt to seize power and form their newer sovereign states. The problem arises as the right of self-determination is granted to 'peoples'. Since there remains obscurity as to who these 'people' might be, minorities, best placed in terms of the politics of difference, have sought consideration as 'peoples'¹⁵. The justification for this is based on the original formulation of the norm of self-determination that targeted minority groups within states as 'peoples'

Anarchical Society: A Study of Order in World Politics (1995)

¹⁰ See Franck T, 'The Emerging Right to Democratic Governance' in 86 *AJIL* (1992) 46.

¹¹ See generally Whelan 'Wilsonian Self-determination & the Versailles Settlement,' in 43 *ICLQ* (1994) 99

¹² As evidenced in the break-up of the Soviet Union and Yugoslavia

¹³ See Chapter One Section 1.3

¹⁴ See Franck T, 'The Right of Self-determination in Very Small Places,' in 8 *NYJIL* (1976)

¹⁵ See the *Mikmaq Tribal Case op.cit* 6

entitled to self-determination. However modern fears that allowing free reign of secessionary rights to minorities could threaten overthrow of order, are justified. In the post World War I settlement, the Allies oversaw the transfer of power to targeted minorities. Today the UN cannot play that same role since it is comprised of the very sovereign states whose territory might be compromised by such action. Thus while under the Versailles Settlement the territory held by the Allies was beyond the scope of the settlement, today all states would be subject to similar rules under the UN umbrella and this causes states to tread carefully when formulating law that could compromise their territorial integrity.

2.1 What is a Minority?

One of the first problems we are faced with is the need for a working definition of a 'minority'. We shall examine the emergence of a panorama of views on who minorities are, and the discussions leading to the International Covenants of Human Rights which first conferred international legal status to the right of self-determination. While doing this, we shall also attempt to trace the history of legislation that attempted to give minorities a vestige of protection from stronger, more powerful entities. We shall then examine current minority rights' legislation and the direction in which they seek to take minority protection - a fair indication of current thinking on minority rights protection. It needs to be emphasised that minorities are not the homogenous masses that international law often makes them out to be. A few examples will highlight the differences that exist between minority groupings that further complicate the issue of minority rights protection. Having understood the concept of minorities and the extent to which their presence is perceived as threatening, the next step would be to examine why they are viewed as a

threat. The nature of the threat posed is important since it largely determines the action that is taken either in their protection or in restriction of their rights. This interplay is the best indicator of the faltering progress of minority rights' protection. The perceived threats of the minority are two-fold: they face the threat of elimination either physical or cultural and may also pose a threat to the majority by challenging their ideas and ways of life. Having dealt with the threats that they pose to each other, we shall look at the attempts throughout history to try and solve the problem.

When you liken practices such as genocide, a crime against humanity,¹⁶ with simple forces of assimilation and nation –building,¹⁷ you get a lop-sided picture of minority rights. There is however, an argument propounded that the right to existence is as much under threat from forces of cultural assimilation as they are from the threat of physical extermination in acts of genocide¹⁸. A brief glance at the Genocide Convention¹⁹ and the practices of assimilation and integration will give us an insight into the difficulties that beset the concept of 'nation-building'²⁰ that fired the post-war generation. This will lead us once more, to the question of who a 'people' are. In light of the above we shall try and re-define the concept of a minority in terms of whether they could constitute a people, and if so whether they could be granted the right to self-determination.

¹⁶ Evidenced by the Nürnberg and Tokyo War Crimes Trials post World War II, and the current Tribunals on Rwanda and the Former Yugoslavia. Also see *The Convention on the Prevention and Punishment of the Crime of Genocide 1948*.

¹⁷ See K Deutsch's ideas on 'Nation Building' quoted in Heraclides (1991) *op.cit.* 7 pp. 1-15

¹⁸ See generally Thornberry P (1991) *op.cit.* 1 esp. pp. 141-256

¹⁹ The Genocide Convention 1948

²⁰ See Deutsch K & Foltz (eds.) *Nation-Building* (1963)

2.2 The Concept of a 'Minority' in Historical Perspective

Specific groups of peoples in international law have been protected by treaties and other means over the centuries²¹. Thornberry focuses on the historic background of minority protection, tracing international law as it moves from protection of particular groups within specific contexts to becoming principles that can be generally applied and categorised as norms of a 'universal' character²². Thornberry identifies three broad phases of international protection of the rights of minorities. These are: a) in the seventeenth and eighteenth centuries when particular groups of people were protected by states through treaties; b) under the League of Nations system when the protection of minorities was resolved by the concert of powers and finally c) under the UN system as it stands today.

He traces a number of treaties signed predating the *Peace of Westphalia*, which suggest that protection of minorities is not necessarily an enlightened concept of the present age of maturing awareness of human rights. In fact, the *Treaty of Pomerania*²³, signed in 1660 is a classic example of an early treaty that respected the rights of minorities. This treaty ceded Pomerania and Livonia to Sweden, with a clause suggesting that the 'cities of Royal Prussia, which, as a consequence of this war, have become the property of...(Sweden), will maintain all the rights, liberties and privileges which they have enjoyed...in the ecclesiastical or the lay domain.'²⁴. This shows the awareness that prompted Poland and the Great Elector to ensure the

²¹ Thornberry P (1991) *op.cit.1* p. 25

²² See 'Historical Background: International Law Moves from Protection of Particular Groups to Norms of a Universal Character' in Thornberry (1991) *ibid.* p. 25

²³ Treaty of Pomerania 1660 between Poland and Sweden

²⁴ Article 2(3). The Treaty of Olivia 1660, as quoted in Thornberry (1991) *op.cit.1* p. 25

protection of the rights of the people of Pomerania and Livonia in handing them over to the sovereignty of Sweden. Thornberry lists a number of other treaties with similar effects such as the *Convention of 1881 for the Settlement of the Frontier between Greece and Turkey*²⁵. This treaty deals with Greek respect for the religious rights of Muslims as indicated by Article III:

The lives, property, honour, religion and customs of those of the inhabitants of the localities ceded to Greece who shall remain under the Hellenic administration will be scrupulously respected. They will enjoy exactly the same civil and political rights as Hellenic subjects of origin²⁶.

Even more interesting is Article VIII of the same treaty:

Freedom of religion and of public worship is secured to Mussulmans in the territories ceded to Greece. No interference shall take place with the autonomy or hierarchical organisation of Mussulman religious bodies now existing, or which may hereafter be formed; nor with the management of the funds and real property belonging to them. No obstacle shall be placed in the way of the relations of these bodies with their spiritual heads in matters of religion²⁷.

This treaty is significant in that it realises the importance of minority rights protection, yet raises some issues that have become vital in the centuries that immediately followed. The use of the word 'autonomy' significantly, suggests

²⁵ Hurst, *Key Treaties of the Great Powers*, (1972) vol.2 p. 592

²⁶ Article III, *Convention of 1881 for the Settlement of the Frontier between Greece and Turkey* as quoted in Thornberry (1991) 25

²⁷ Article VIII, *Convention of 1881 for the Settlement of the Frontier between Greece and Turkey* as quoted in Thornberry (1991) 25

absence of strong central control in the daily lives of the people. However, the qualification of the non-interference is restricted only to religious bodies. This cannot be construed as giving rise to rights of the minorities to organise politically. The last clause does bring political realisation closer since it states that these hierarchical bodies shall not be blocked from communicating with their spiritual heads in matters of religion. One question that needs addressing is a hypothetical scenario in which a spiritual head calls for secession and declares *Jihad* (Holy War)²⁸ to rid the people of its Christian oppressors. In this situation ostensibly, the treaty suggests that the spiritual head could communicate and relate his message through the religious organisation formed under the clause protecting freedom of religion in the 1881 Treaty²⁹. This scenario would obviously not have been imagined when drafting the treaty. The fact that such clauses were used nonetheless, demonstrates the loose federalised structure that seemed part of nineteenth century state-craft. Another example of this type: i.e. guarantees of religious protection on the ceding of a territory is the *Convention of Constantinople 1879*³⁰ which grants liberties to the people of Bosnia and Herzegovina on their occupation by Austro-Hungarian forces. Once again, the Austro-Hungarian forces promised to 'honour customs, freedom of religion, personal security, and property of the Mussulmans'³¹. These treaties are also an indication of the status of minorities in that period. They were a group of people (and not necessarily a people) who were numerically inferior and could be differentiated from the mainstream population of a state by factors such as customs and religion.

²⁸ For an interesting discourse on Jihad in Islam see Ali S.S. 'The Conceptual Foundation of Human Rights: A Comparative Perspective,' in 3 *EPL*(1997) p. 219

²⁹ See generally Thornberry (1991) *op.cit.* 1 pp.25-37 - for various other treaties in the early period: including the *Treaty of Vienna 1607*, the *Peace of Augsburg 1555*, *Peace of Westphalia 1648*, *Treaty of Nijmegen 1648*, *Treaty of Ryswick 1697* and the *Treaty of Peace 1713*

³⁰ Hurst (1972) *op.cit.* 25. p. 583

³¹ Article VIII of the *Convention of Constantinople 1879* between Austro-Hungary and Turkey as quoted in Thornberry (1991) p. 26

They needed protection for their customs, freedom of religion, personal security (lives) and property. The issue of ethnicity and race as criteria of identification had not yet arisen, but the treaties concluded were admittedly usually between peoples that were racially similar and populated the continent of Europe. The fault lines were already drawn though, for the crisis of ethnic cleansing and the break-up of Yugoslavia in the 1990s³². This is also perhaps an indication that international law in general as it evolved, took on a European outlook³³.

Another type of protection for minority groups was when a state spoke on behalf of a particular community. These kinds of treaties, which include the *Promise of St. Louis of France in 1250*³⁴, (subsequently renewed by Louis the XIV and XV in 1649 and 1737)³⁵ to protect the interests of the Maronites as if they were French subjects, would be highly contentious in today's international legal climate. The French promised that the rights of the Maronites would be protected by French action against any party that might oppress them. In terms of the UN Charter today, this would violate article 2(7) - the domestic sovereignty clause. However this kind of treaty was not uncommon. Similar treaties saw the protection of the Christians by the Austrians - by the *Treaty of Carlowitz 1699*³⁶ and the protection of Orthodox Christians by the Russians by the *Treaty of Koutchouk-Kainardji, 1774*³⁷ & *Adrianople, 1829*³⁸.

³² See Huntingdon Samuel, 'The Clash of Civilisations' in *For. Aff. (Summer 1972)*

³³ See generally Mazrui Ali *Cultural Forces in World Politics (1975)*

³⁴ See Heyking 'The International Protection of Minorities -- the Achilles Heel of the League of Nations,' in *Transactions of the Grotius Society XII (1937)*

³⁵ As quoted in Thornberry (1991) *op.cit. 1* p. 27

³⁶ As quoted in Thornberry (1991) *ibid.* p. 27

³⁷ Parry's Treaty Series, pp. 45, 349

³⁸ Hurst (1972) *op.cit. 25 vol. 1*, p.188

Minority protection was given further impetus by the French and American Revolutions discussed in Chapter One. Religion became less of an issue as the concept of 'nationality' grew. The American Revolution is significant since it highlighted that governments derive their power from the consent of the governed and that 'nations achieve a 'separate and equal station' in the community of states by demonstrating 'decent respect to the opinions of mankind'³⁹. In his article Franck argues that this radical vision, 'while not yet fully word made law, is rapidly becoming, in our time, a normative rule of the international system'⁴⁰ since these principles have given rise to issues of representation of a population in the affairs of sovereign states. At this point it is interesting to trace the route that allegiance took until it ended up at the altars of the State⁴¹. Early humanity had a need to unite and identify with a group. The family partly fulfilled this need, which later developed into tribal allegiance. Religion and the Latin concept of *salus* gradually replaced this. *Salus*, a Latin word meaning 'salvation' was a concept that came directly with Catholicism and implied that there was salvation only within the Church which could not be achieved independently. Thus, allegiance to religion was born as is reflected through some of the treaties highlighted above. However the American and French Revolutions shifted allegiance once more. The Nation State, secure in the post-Westphalian era had come to represent the protection of all that was within it. The Nation State proved that it could provide *salus* in earthly terms. Survival was an issue and as Hegel points out, by going to war and facing the threat of annihilation by the Other, the Nation State matured to become strong enough to mobilise its people

³⁹ Franck T.M (1992) *op.cit.* 10 p. 46

⁴⁰ Franck (1992) *ibid.* p.46

⁴¹ See generally Watson *The Evolution of International Society: A Comparative Historical Analysis* (1992)

against an outside, often demonised enemy⁴². Thus the myth of the State was born. As Andersen points out, state builders sought to ‘achieve the orientation of social life towards the state, to make people feel that they were part of this imagined community which was at the heart of the national project’⁴³. This discourse though, is particularly interesting in examining minorities’ issues since in today’s terminology they could be construed as the enemy within. In the past, the opponent (in the case of declaration of war) or the potential opponent (in the case of the need to mobilise people at other times) was usually portrayed as being different. Thus, the discourse of ‘The Other’⁴⁴ was an important factor in the ability of the state to convince its people to abandon ploughshares and take up swords in defence of the life of the State. Since most people at most times are opposed to war⁴⁵ the only way to persuade them to fight is to convince them that the enemy mobilised on the border of the State was demonic and presented a threat to their entire way of life. This was often manifested by negative references to cultures and traditions that were different from that of the people within the state.

The discourse of *Otherness*, whilst being ideal to counter the challenge posed by foreigners threatening state boundaries, however proves inadequate in protecting the minorities within. This is evidenced today, in the Western categorisation of Muslims as fundamentalists⁴⁶. In the past, this would have been a vital weapon against these foreigners since it would mobilise people within the state to rise and defend the

⁴² Hegel, as quoted in Elshstain: ‘Sovereignty, Identity and Sacrifice’ in *20 MIJS* (1991)395

⁴³ Anderson, B, *Imagined Communities: Reflections on the Origin & Spread of Nationalism* (1993)

⁴⁴ William Connolly has done interesting work in this area see Der Derian and Shapiro (eds.) *International Intertextual Relations: Postmodern Readings of World Politics* (1989)

⁴⁵ See Claude I *Swords Into Ploughshares: The Problems and Progress of International Organisations* (1965)

⁴⁶ See Clare Garner ‘The British are becoming Muslim-haters’ in *The Independent* Friday 21 February 1997 reporting the findings of the Runnymede Trust set up by the Commission on British Muslims and

honour of their state against 'The Other'. However, large scale economic and other forms of interaction has seen a large and increasing Muslim population in Western countries. These Muslims, while holding on to their unique identity are nonetheless Westernised in that many of them are brought up under western systems of education and influenced by western lifestyles and beliefs. In this sense they are westerners with an Islamic identity. The conflict is demonstrated in, for instance, Muslims being demonised in a bid to overthrow a cumbersome dictator in Iraq during the Gulf War⁴⁷. The process today is less to encourage people to swap ploughshares for swords. Rather it is to convince people within the state that war is the only alternative: in order to quell national conscience in the face of the death and destruction modern weaponry wreaks⁴⁸. With this process well underway, the effects are felt strongly within the Islamic community in western states. Since most western people will not come across this cumbersome dictator, they transfer their feelings onto the people they do come across: i.e. the western minorities with Islamic identity that live within the state. Thus, a discourse which in the past could mobilise people, today has the effect of creating rumblings within the state as minorities feel the pressure of oppression.

To worsen the situation, forces of globalisation cause greater interaction between peoples leading to higher degrees of population displacement. Peoples are thus being forced closer together which is dangerous since as cultures clash they tend to become more militant and assert their identity more fiercely. As Franck suggests, this leads us to the current scenario of 'post-modern tribalism'⁴⁹. He defines this as a movement

Islamophobia

⁴⁷ For general reading on the Media and the Gulf War see Taylor P.M *War & Media: the Propaganda & Persuasion in the Gulf War (1992)*; Bennet W.L & Paletz D.L. *Taken by Storm: Public Opinion & US Foreign Policy in the Gulf War (1994)*; also see Television Documentary Channel IV *Proud Arabs and Texas Oilmen* (London: Platform Films 1993 production for Channel IV)

⁴⁸ See generally Chomsky N., *Necessary Illusions (1989)*

⁴⁹ See Franck T.M 'Post-modern Tribalism and the Right to Secession in Brölmann et al (eds.) (1993)*op.cit.1 p.3*

which 'seeks to promote a political and legal environment conducive to the break-up of existing sovereign states... in a bid to constitute uni-cultural and uni-national units. It asserts a political, moral, historically determinist and legal claim to support this agenda'⁵⁰. He suggests that this trend has forced upon us a growing need to 'rethink fundamental norms such as title to territory and its relation to human personality and group identity'⁵¹. This trend that has driven the postmodernist school of political thought typified by Derrida and Critical Theory which submits that these 'settled' ideas have suddenly come under pressure from the changing dynamics of world politics, and calls for their deconstruction⁵². Derrida defines the process of Deconstruction as 'a criticism or strategy of interpretation directed at concepts that attempt totalisation or closure. It demonstrates how the supplements or remainders left over from the theories in fact destabilise it, and cannot be subsumed. Deconstruction theories attempt to shake the edifice of common sense thought and show how apparently stable edifices are in fact in danger of being undone'⁵³. This approach reinforces the statement of Foucault: 'It is fruitful in a certain way to describe that which - is by making it appear as something it might not be, or that might not be as it is... by following lines of fragility in the present, in managing to grasp why and how that which is might no longer be that which is'⁵⁴. Thus the issue of minority rights needs to make us re-think the concept of the State⁵⁵ which is vital if we are to understand the intricacies of the factors that influence the discourse of self-determination. It also needs to be remembered that while States and 'nation-building'

⁵⁰ Franck (1993) *ibid.* p. 5

⁵¹ Franck (1993) *ibid.* 5

⁵² See Silverman H.J. (ed.) *Derrida & Deconstruction* (1989)

⁵³ Boyne R *Foucault & Derrida: the Other Side of Reason* (1990). also quoted in Bull H *Anarchical Society* (1995) *op. cit.* 9, *esp.* Chapter IV

⁵⁴ Foucault M quoted in Bull (1995) *op. cit.* 9 Chapter IV

⁵⁵ See Chapter Three of this thesis

have been central to world politics for the past fifty years, their consolidation is not a foregone conclusion. As postmodernists point out, the nation state is a historical construction rather than a natural object and identification with it is merely a product of policies and institutions of the state operating over a long period⁵⁶.

2.3 Current Attempts to Protect Minorities

In considering the question of minorities, we need a working definition of what a minority is. This was an important issue during the framing of the International Covenant for Civil and Political Rights⁵⁷ in 1966. Article 27 of this document is purported to be at the heart of minority rights protection in current international law. Thus it is important to understand how the drafters defined the concept of minorities⁵⁸.

A UN study undertaken by Caportorti, Special Rapportuer in the ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ defines a minority as:

A group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language⁵⁹.

⁵⁶ See generally Der Derian & Shapiro (1989) *op. cit.* 44

⁵⁷ Hereinafter referred to as the ICCPR

⁵⁸ Lerner N ‘The Evolution of Minority Rights in International Law in Brölmann et al (eds.) (1993) *op.cit.1* pp. 77 - 102

⁵⁹ Caportorti F *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*

Some features that merit discussion are:

1) Numerical inferiority: A minority is a minority because it is numerically inferior to the majority. Nonetheless, situations have existed within state practice when a numerically inferior dominant culture, has forced the less dominant majority into behaving like minorities. This phenomenon is referred to as a situation of 'reverse minority'⁶⁰ as manifest by the apartheid regime in South Africa. Another interesting example, which we will focus on in Chapter Five, is the situation in former East Pakistan, where the numerically superior Bengalis, used grounds of discrimination and treatment as minorities in the raising of the banner of Bengali nationalism which ultimately enabled it to secede from the combined state of Pakistan.

2) Minorities are essentially groups: This is important due to the fact that there have been discussions as to whether minority rights are in fact individual or group rights⁶¹. The discussion on third generation rights highlights the western influence on concepts of human rights⁶² and raises questions about whether individual rights are in contradiction to community rights⁶³. It is clear that the International Bill of Rights focuses primarily on first (civil and political) and second (economic, social and cultural rights) generation rights both of which are exclusively individual rights. The growth in third generation, or group rights is a relatively new phenomenon within the discourse of international human rights law. However, the earliest expression of a group right within current human rights law is the reference made in Article 1 to the

of 1977, UNP Sales No. E.91.XIV.2

⁶⁰ See Lerner (1993) *op.cit.* 1 p.95

⁶¹ For the discussion on first and third generation rights see Steiner & Alston (1997) Chapter IV

⁶² For a general discussion on the Western-ness of Human Rights see Ali S., (1998) *op.cit.* 28

⁶³ Also see Donnelly Jack 'Third Generation Rights' in *Peoples and Minorities in International Law*

international right of self-determination. This cannot be viewed as an individual right since the *travaux préparatoires* of the International Bill indicates that the prime motive for giving it such importance was that unless a people could determine their own political destiny, other rights would be meaningless⁶⁴. The suggestion of a 'people' enjoying this right en route to other rights (which are framed primarily as individual rights) suggests that self-determination, referred to in article 1 of the ICPPR and the ICESCR was clearly a group right. In addition, the article concerning the rights of minorities (article 27) is also framed as a third generation right, though it can be expressed as concerning the rights of an individual in belonging to a minority group.

3) Minorities exist within a state: This concept is not as obvious as it seems, as illustrated by the case of the gypsies. It is contentious to suggest that gypsies especially in Eastern Europe exist purely within states. Modern border and immigration controls restrict their movements strictly to the state in which they happen to live. However this demonstrates the pre-eminence of the state system within international society and hints at the compromise that minorities are forced into, to conform to the needs of the international system. The case of the Saharawis in the Western Sahara⁶⁵ is similar and demonstrates the problems involved in straight-jacketing peoples to fit into alien state structures⁶⁶.

4) Non-dominant position: For a minority to be oppressed, it usually has to be in a non-dominating position. In African and Asian societies especially, the high

(1993) 119 - 154; also see Donnelly *Universal Human Rights in Theory and in Practice* (1985)

⁶⁴ See McGoldrick D., *The Human Rights Committee* (1991) *op.cit.* 4

⁶⁵ Western Sahara Case (ICJ Reports 1975) also see Chapter 7

degree of social stratification usually means that certain tribes or groups traditionally have fixed roles. For example in Nigeria, the Ibos have traditionally been involved in the government of the State while the Hausas have traditionally worked in trading activities⁶⁷. Another good example of this stratification is the caste-system in India - where the ruling priestly classes or Brahmins, despite being numerically inferior, managed to rule the vast number of people under them by creating a hierarchical system. This is not altogether different from the rule of a royal family over the masses. In these situations the definition has a tendency to break down since it looks at people that are different and foreign, which in current non-western countries does not mean the same thing.

5) Differences in ethnicity, religion and linguistics: These three criteria are selected by Caportorti as being necessary and sufficient for one group of people to vary from another group. While these characteristics are, perhaps, the most significant of the differences between people, they are by no means the only important ones. As the minority rights discourse has developed the criteria have broadened to include various other factors such as cultural, racial and traditional values. This list of criteria might easily increase, presenting the danger of recognising and institutionalising too many fault-lines within the identity of people, to the detriment of order.

6) A majority that maintains a sense of solidarity: This is important since it creates a zone of exclusion between the minority and the majority group. Since this zone consists of nuances of identity, it is impermeable and leads to feelings of

⁶⁶ See Chapters Six and Seven

⁶⁷ For literature on the cultural make-up of Nigeria and the genesis of the Biafran crisis see Heraclides (1991)*op. cit.* 7 pp.80-95

isolation and oppression. Such sentiments are easily exploitable by separatist forces within states often fuelling the formation of self-determination/autonomy movements. This is not to doubt the merit of all secessionist movements but merely to highlight that many such movements are from minority groups being excluded within the state. Unable to penetrate the wall of solidarity that surrounds the majority and excludes them, they find the formation of a separate entity an attractive option.

7) Unity aimed at preserving the culture, traditions, religions and language of the majority: The exclusive solidarity of the majority is especially piquant to the minority in light of the protection afforded to the way of life of that majority. This means protection of a culture, tradition, religion and language which usually differs from that of the minority group. This thus, constitutes a direct threat to the corresponding values of the minority, leading them to question whether their interests are adequately protected within the existing State.

Thus, it can be seen that the minority definition of Caportorti packs a lot of information in it and highlights the issues pertinent to the discourse of minority rights and the need to maintain their identity. This leads us on to the threat factor that minorities pose. The threat associated with minorities can be broadly bifurcated into two segments. First, the threat posed to minorities by the majority and second, the threat posed by minorities to the majority.

Dealing first with the threat posed to the minorities. It needs to be understood that this is the issue of minority rights as understood in international law today. Minorities being different from the rest of the population have an equal right to a separate existence and identity. This right to existence is the cornerstone of

international human rights protection. It arises from the basic fact that humans are born with certain inherent rights that ought not to be taken away from them. The 'democratic entitlement' as Franck calls it, suggests that people have the right to decide⁶⁸; a norm that nonetheless breaks down when applied to the minority versus majority issue. The fact that minorities are different cannot be considered, as reason for them to escape the protection afforded to all by the human rights discourse⁶⁹. As Thornberry points out the right to existence is a 'necessary prerequisite for all other rights'⁷⁰. Without this basic right the entire discourse of human rights becomes self-defeating. How exactly is 'existence' defined? Turning once again to Thornberry, he defines it as 'a notion which has special connotation for a group. It is about a shared consciousness of its members, manifested in language, culture, religion, shared sense of destiny or other such factors'⁷¹. Existence in general however, may be two-fold: the physical existence and the existence of an identity.

Physical existence is an important and old concept in international law protected by domestic laws and international criminal law⁷². The best example of a violation of minority physical rights to existence is the abhorrent practice of genocide. Long an issue in international law, this has been the subject of The Convention on the Prevention and Punishment of the Crime of Genocide, 1948⁷³. This convention, with all its shortcomings is still an important stepping stone to the physical protection of minorities. This is demonstrated by the Nuremberg Principles which indicted Nazi perpetrators of genocide against the Jews in World War II and the current attempts of

⁶⁸ Franck T.M (1986)*op.cit.* 10 p.46

⁶⁹ See Thornberry 'The Right to Existence - Introduction' (1991) *op.cit.* 1 p.57

⁷⁰ Thornberry (1991) *ibid.* p. 57

⁷¹ Thornberry (1991) *ibid.* p. 57

⁷² Especially by recent developments for an International Criminal Court to try war criminals guilty of genocide

⁷³ Convention on the Prevention and Punishment of the Crime of Genocide 1948.

War tribunals dealing with the genocide in the former Yugoslavian and Rwandan and Burundi conflicts. It is clear that Genocide is a crime against humanity falling under international rather than state jurisdiction⁷⁴. The mass destruction of groups through extermination of its members is clearly unacceptable to an international community that highly values international peace and security⁷⁵, and is fast encompassing human rights norms as being equally important. Why minorities are particularly susceptible to genocide is an issue that will be looked at again in the threat that minorities pose to the majority. Before that there is a need to consider the more important issue of a threat to a minority group.

The rights of a people to existence and maintenance of their separate identity does not fall readily into any category of rights. There is also no legislation as such that directly deals with the issue of the deprivation of an identity to a minority. In fact, history has shown us that this, rather than genocide has been the more efficient 'final solution' for a majority in addressing the problem of minority rights. This is well illustrated in the post-war world when 'nation-building' became a preoccupation of the UN system. Karl Deutsch⁷⁶ focuses on this issue, also dealt with by Heraclides in some depth⁷⁷. The problem with 'nation-building' is that it overrides differences and speaks the language of 'national unity' in a bid to plaster over inherent differences that exist within a multicultural state. The idea behind the norm is a direct extrapolation of the need for international order and security. Despite growing awareness of cultural diversity, it threatens independent cultures with merger thereby re-enforcing the myth of statehood. States have a variety of ways of denying

⁷⁴ See generally Harris D.J *Cases and Materials in International Law* (1997)

⁷⁵ As indicated by the UN Charter

⁷⁶ Deutsch K *Nationalism & Social Communication* (1966)

minorities their right to a separate existence. That is not to suggest that States always have a sinister agenda of depriving minorities of their identity, however the effect of deprivation of a cultural identity to a minority has a similar effect as genocide in that while it does spare the lives of the *Other*, it also ensures that the culture they pass on will be that of the majority group⁷⁸. So, what are the mechanisms available to a state to legally deprive a minority group of its identity? Thornberry identifies six different policies towards minorities that can alter them to counter their difference. It is worth examining these briefly since they highlight the nature of the threat that exists to minority groups⁷⁹.

1) Assimilation⁸⁰: This process is based on the idea of superiority of a dominant culture which aims, either consciously or unconsciously, to produce a homogenous society by getting minority groups to discard their own culture in its favour. The merits of such an approach are of course, that it gives the State ultimate security by ridding it of potential secessionist forces based on the politics of exclusion and difference.

2) Integration: Less sinister than assimilation, it nonetheless, is a process based on a similar assumption of the need for homogeneity within a State. It is different, however, in that diverse elements of different cultures are merged while retaining their separate identity. In this form of policy there is not always an insistence on the elimination of all differences; only the differences that are perceived as harmful to the

⁷⁷ See Heraclides A (1991) *op.cit.* 17, esp pp. 1-60

⁷⁸ See Thornberry (1991) *op.cit.* 1 pp. 141- 255

⁷⁹ Thornberry (1991) *op.cit.* 1 'Introductory reflection' pp. 1-13

⁸⁰ For United Nations given definitions on assimilation, integration etc., see *UN Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, UN Sales No.71.XIV.2

overall unity of the body. It is thus a more selective and perhaps equitable form of assimilation. Thornberry sees integration as a positive concept since it a) eliminates pure ethnic cleavages and b) guarantees equal rights and opportunities⁸¹.

3) Fusion: A policy perhaps even more positive than integration since it treats the merging cultures as equal. It is a process by which two or more cultures merge to form a new culture with attributes of parent cultures inherently different from them. The positive aspect of the equality of cultures however, does not hide the fact that this often leads to loss of diversity in parent cultures. It is nonetheless, the most equitable of all minority policies and ideally suited to a world that values international order.

4) Pluralism: This is a policy or approach that aims to create interdependence. It is the kind of approach that is analysed at macro levels by authors such as Keohane⁸² and is based on the assumption that economic development requires different ethnic groups to be interdependent. Pluralism is thus a policy that unites different ethnic groups while permitting them to maintain and cultivate their distinctive ways. This is an approach which recognises that people will be different and rather than trying to change that fact, focuses on a functional approach that deals with the difference. In terms of the discourse of *Otherness* it attempts to live beside the *Other* without trying to change or influence the direction of its development, but recognising the need for interaction.

5) Segregation: Long practised in South Africa under the apartheid regime of Pretoria, it is a policy based on the belief of the superiority of the dominant culture. It

⁸¹ Thornberry (1991) *op.cit.* 1 p. 4

aims to keep certain ethnic groups separate, unmixed and ranked in a hierarchical position. As pointed out earlier the former Pretoria regime in South Africa was a case of *reverse minority* where a dominant minority group kept the majority in abeyance.

6) Ethnodevelopment: This recent policy, strongly favoured by North-American Indian groups and other indigenous people, strives to preserve each identity. It involves 'strengthening and consolidating a distinct society's own culture by increasing independent decision making capacity to govern its own development'⁸³. This, rather than State policy, is a typical demand of indigenous people as they strive to determine their own political future from dominant cultures that in seeking order, try to eliminate them.

The other issue that needs to be addressed is the threat that minorities pose to the majority or dominant culture within the state. Minorities present unique challenges to an international system of sovereign states that respects order above all else⁸⁴. According to Bull, order in social life consists of an arrangement of life that promotes certain goals and values⁸⁵. He lists three things as the primary goals of all ordered societies: security against violence, an assurance of maintenance of promises or undertakings and stable possession of things. On an international spectrum, order is a pattern of activity that sustains 'elementary and primary goals of the society of states or the international society'⁸⁶. The goals of international society are thus: preservation of the system, maintenance of sovereignty of states, peace i.e. absence of war and

⁸² Keohane & Nye : Power & Interdependence: Revisited in *41 Int.Org. (1987)*725

⁸³ Thornberry (1991)5

⁸⁴ See Bull H (1995) *op.cit.*9, and Mazrui A (1975) *op.cit.*33

⁸⁵ Bull, H (1995)*op.cit.*9 p. 4

⁸⁶ Bull (1995) *ibid.* p. 8

restriction on violence⁸⁷. These goals are contained in the UN Charter. System preservation is vital to Charter-based international organisations while state sovereignty is maintained by Article 2(7)⁸⁸. Evidence of the system's commitment to maintain order is contained in the preamble⁸⁹ that calls for maintenance of international peace and security as the primary goal of the UN. Minorities challenge order since they, ostensibly present a State with threats from within. This threat is essentially two-fold: firstly, the threat to the sovereignty of the State. This is a growing threat in light of the development of self-determination as an increasingly viable and attractive option. With the threat of assimilation and other forms of loss of identity looming, disaffected minorities have begun to demand a greater degree of autonomy. This, either by way of internal realisation of political dreams (internal self-determination) or by the disruption of the existing state in a bid to secede. The second threat that minorities pose is by way of challenges to existing cultural structures within a State. Their lifestyle locked in *Otherness*, often conflicts and clashes with existing value systems of the majority. In the clash that ensues, one culture tends to adopt a defensive posture with respect to the other, and stereo-types are invariably born to ward off the challenge that each presents to the other. The treatment of the Jewish people over this century is the best indicator of this process. The discourse of *Otherness* was a vital part of the strategy that saw the alienation of the entire culture in Europe. Sadly unable to learn from past mistakes, a similar scenario threatens in the perception of Islam today.

⁸⁷ Bull (1995) *ibid.* p.8

⁸⁸ *Nothing contained in the present Charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII .Article 2(7) United Nations Charter*

2.4 Claims to Peoplehood

From the point of view of the self-determination discourse, a question that now needs to be addressed is whether minorities constitute ‘a people’. The significance of this lies in that international law gives ‘all peoples’ the right to self-determination⁹⁰. The evolution of the concept of self-determination from early Wilsonian ideals where minorities were given prime importance, to salt-and-water colonial oppression, and other forms has already been explored in Chapter One. Suffice to highlight at present the fact that if a minority is accepted as a people, it gains special recourse to the self-determination option. This issue is however, not open to question since it has been resolved for us by the drafters of the International Covenants⁹¹ and the Special Rapporteur⁹². The consensus on the appropriateness of minorities as peoples is best captured in the words of Thornberry: ‘Self-determination is usually described as the right of peoples not minorities. But self-determination and minority rights are locked in a relationship which is part of the architecture of the nation State, since whenever a State is forged, the result is the creation of minorities... self-determination is now an accepted principle of international law, possibly of *jus cogens*, but a restricted principle for minorities’⁹³. However, as Thornberry himself points out elsewhere, ‘... self-determination and the rights of minorities are two sides of the same coin’⁹⁴. He also points to research undertaken by the Minority Rights Group which suggests that ‘when a colony or subject people accedes to independence

⁸⁹ For a discussion of the legality of the preamble see Chapter 3, 3.1 Preamble

⁹⁰ See Article 1(1) ICCPR & ICESCR 1966

⁹¹ McGoldrick D., (1991) *op. cit.* 4

⁹² Caportorti (1977) *op. cit.* 59

⁹³ Thornberry (1991) *op. cit.* 1 p. 14

⁹⁴ Thornberry Patrick ‘Self-determination, Minorities, Human Rights: A Review of International Instruments,’ in 38 *ICLQ* (1989) 867 - 889

in the name of self-determination, political unity and integral statehood will rarely be matched by national unity and ethnic homogeneity'⁹⁵.

One of the early attempts to link issues of minorities and self-determination was in the course of what is referred to as the Belgian Thesis. During the course of this particular debate in the General Assembly, the Belgian representative suggested that:

... A number of States were administering within their own frontiers, territories which were not governed by the ordinary law; territories with well defined limits, inhabited by homogenous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word'⁹⁶.

This supports one of the main arguments of this thesis: that certain groups within current post-colonial 'self-determined' states are denied a right to democratic governance and self-determination. These groups, by virtue of existing within states, have no recourse to determine their own political future guaranteed by the international Charter-based system'⁹⁷. The argument put forward by Belgium at that time, was a mere tactic of '... anger at the criticism directed against conditions in the non-self-governing territories by less advanced States,'⁹⁸ as pointed out by the Iraqi delegate. The Belgians later admitted this'⁹⁹ but the interpretation that surrounded the

⁹⁵ Thornberry (1989) *ibid.* 867

⁹⁶ UNDOC A/Ac.67/2, p. 3-31. For further reading on the issue also see 89 Rec.des Cours 321, *The Question of Aborigines Before the United Nations; The Belgian Thesis (1954)*

⁹⁷ See The UN Charter preamble and Articles 1, 55 & 56

⁹⁸ See UNDOC A/C.4/SR.257, para 11, also quoted in Thornberry (1989) *op.cit.*94 p.874

⁹⁹ See Van Langenhove, *The Question of Aborigines Before the United Nations; The Belgian Thesis (1954)* pp. 83-84

reaction built a consensus on the restrictions on the principle of self-determination. Self-determination was thus viewed as the concept that exclusively freed people from salt-water colonialism. This was borne by the appeal to geographic factors in the definition of a Metropolitan Colonial State that effectively ruled out broader interpretation of the principle. As has been discussed earlier, Resolution 2625¹⁰⁰ did subsequently re-open the issue of the broadening of the norm in 1970, earlier attempts in 1960 having failed.

Having examined the salient issues that surround minorities in international law, we still do not have a clearer picture of what they are or who they include. To add to the confusion of minority rights are the rights of indigenous peoples. After denial of self-determination to minorities, indigenous peoples began to consider themselves to be in a category higher than minorities. This would enable them to set forth claims for self-determination. Indigenous peoples point out that their claims to self-determination are different from that of minorities since they have even fewer rights than the former. While indigenous peoples have strong claims to self-determination, their case is beyond the scope of this chapter¹⁰¹.

It is clearly too ambitious to suggest that the International Covenants and state practice link self-determination to minority rights. The only possible link between the two issues is the controversial and unresolved one of whether a minority can

¹⁰⁰ Resolution 2625 (XXV) Passed unanimously (148-0 with 8 abstentions). Also believed to be norms of *Jus Cogens* in International law.

¹⁰¹ See in Tomuschat (ed.) *Modern Law of Self-determination* (1995)

constitute a people. As Thornberry points out, this is one of two rather weak aspects of positive interpretation¹⁰² of the minority issues discourse with self-determination:

a) Minorities cannot be construed to be a people within the meaning of Article 1. This argument is not supported by the *travaux préparatoires* of the ICCPR which indicates that self-determination is an action for all peoples. Minority rights issues however are covered strictly under article 27 and falls short of the right to self-determination. One of the best rulings, ambiguous though it might be, was by the Human Rights Committee¹⁰³ in the *Mikmaq Tribal Society Claim*. During this case the HRC stated that minorities were not a 'people' and rejected the *Mikmaq* claim. It cited as grounds, the failure of the Grand Captain of the tribe to prove that he was the authorised representative of the society. It also cited failure on his part to advance evidence supporting his claim that he, personally, was victim of a violation of rights contained in the Covenant¹⁰⁴. The claim was thus declared inadmissible, but it would be interesting to see what the ruling might have been had the Grand captain been able to demonstrate that he had the mandate of his Society. It needs to be pointed out though, that this case while coming under the guise of minority rights was actually a case of indigenous people seeking the right to self-determination. Another case worthy of mention is the Sandra Lovelace affair¹⁰⁵. This case demonstrates that Article 27 applies to individuals belonging to Indian groups as members of minorities. The case involved the loss of the right of an Indian woman to live on the reservation by virtue of marriage to a non-Indian. The case was considered by the HRC under Article 27 but had little to do with political self-determination since the right challenged was an

¹⁰² Thornberry (1989) *op.cit.* 94 p.881

¹⁰³ Subsequently referred to as HRC

¹⁰⁴ UNDOC A/39/40 (1984) 200 at 203, Communication No. 78/1980

individual rather than a collective right. A third case that merits deeper study is the status of the Kurds to rights as a separate people. The report of the HRC for 1987 posed a question to the Iraqi government under Article 1 of the Covenant, on receipt of a communication from the Kurds. The Iraqi reply stated that the Constitution 'recognised the ethnic rights of the Kurdish people as well as the legitimate rights of all minorities... the Kurds were part and parcel of the Iraqi people'¹⁰⁶. This demonstrates the powerful arguments that states inevitably use, to counter minority rights' claims. They can always claim that the issue raised is an internal matter beyond the reach of the international community. The Kurds are a fascinating case in that, if recognition is granted to them as a people it would signal re-drawing of the maps of five different states. This is an indication of the political pressure against such a move, legitimate though the call for a Kurdish homeland might be.

b) Rights applicable to whole peoples: This is shown clearly within the *travaux preparatoires* and is also within the ambits of the belief held within the international community of states on the issue of self-determination. Of course, definitional aspects of what a 'whole people' are, once more raises its head. But, perhaps an insight into one case where minorities have failed, and another where they have succeeded in forming a new state are worth looking at¹⁰⁷. The two cases are Biafra (May 1967-January 1970), and the secession of Eritrea from Ethiopia in 1992 by a UN sponsored plebiscite.

¹⁰⁵ UNDOC A/36/40 (1981) 166 Communication No.R6/24. Also see the Lubicon Lake Band Case

¹⁰⁶ UNDOC A/42/40 paras 352, 353, 385, 386.

¹⁰⁷ For further examples of minorities and secession see Heraclides (1991) *op.cit.* 17. Examples he also focuses on include Katanga, The Southern Sudan, Iraqi Kurdistan, & The Moro Region.

Biafra was merely one of the regions that had thought about seceding from Nigeria after the country first came into being in 1960. This was due mainly to the existence of 'deep cultural divisions, the effects of colonial rule, modernisation and the Nigerian political system itself from independence onwards'¹⁰⁸. Nigeria is a remarkable case since it is highly heterogeneous consisting of 200-400 ethnic groups of which the largest three are the Hausa-Fulani, the Yoruba and the Ibo tribes which dominate the north, the West and the East respectively¹⁰⁹. Within their respective areas, these tribes constitute a majority but live alongside minority groups in every single region in this multi-ethnic society. Besides the ethnic cleavage is the religious cleavage between the Muslims in the north, the Christians in the east, and the west more or less evenly divided between the two religions. There also exists within the eastern region, a religious minority (10%) of animists. With colonialism preventing the formation of a common identity Heraclides notes that it was not surprising that the country, upon independence had no common value system, but rather three visions of what the country should be. 'Nigeria was to become a classic example of the positive correlation between modernisation and politicised ethnicity'¹¹⁰. The situation within the country was not helped by 'Ibo ambition and assertiveness'¹¹¹ which wanted to dominate over Yoruba and other tribes that had traditionally been powerhouses within the region. A coup in the North in July 1966 with the loss of lives of thousands of Easterners proved the final provocation. The Ibos read the event, as heralding a warning of an era of suppression of Ibo culture and values by the north- as typified by the killing of senior Ibo officers. In response to the coup, the eastern military governor Colonel Ojukwu called for a loose association or confederation of the four

¹⁰⁸ Heraclides (1991) *op.cit.* 17 p. 82

¹⁰⁹ Heraclides (1991) *ibid.* 82

¹¹⁰ Heraclides (1991) *ibid.* 83

regions. Thus far the scenario as expressed in our discourse from the Ibo point of view, is one perceived as the threat of cultural domination by the Northern people over the Ibos. The killing of Ibo officers and thousands of Easterners in the North is construed as an aspect of the physical threat that existed to the Ibos. The call for a loose association of four regions was a bid towards internal self-determination, a right which minorities have in the face of physical and cultural threats. It has to be remembered that the situation in the North and the mass massacre of Easterners (Ibos) could be constituted to be genocide. The Ibos had the right to defend themselves, which they utilised by calling for a loose federal structure and self-rule. This failed after mis-interpretation of the Aburi Accord,¹¹² and the Easterners could ostensibly argue that they had little option but secession from Nigeria. After all, the state that no longer provided them with security for their way of life (cultural identity) or their physical person and property (genocide). The conflict continued for three months as the eastern region insisted on self-rule while the northern region was determined to maintain a tight federal system of twelve states, ultimately resulting in secession and declaration of independence of Biafra in May 1967. The country then plunged into a brutal civil war, as government forces tried to defeat, what they perceived as, the secessionist forces within Nigeria. The separatists meanwhile insisted on their right to existence as a separate state and backed up this argument with force. Within international law of self-determination as applied to minorities, the Biafra case raises the important question with respect to minorities and self-determination:

Were the Ibos a people?

¹¹¹ Heraclides (1991) *ibid.* 84

¹¹² See Heraclides (1991) *ibid.* 85

This question can be analysed by reference to certain parameters by which a people are differentiated. The Ibos would certainly be considered a minority within Caportorti's definition. However more importantly could this minority be considered a 'people'? That is the definitive question that can validate Ibo claims to statehood. International law is silent on the criteria used, but examining the case of the Ibos it is clear that they varied from other Nigerians (or rather, other tribes that inhabited Nigeria). This difference stemmed from their ethnicity, culture & tradition and history: both geographic and traditional. It remains difficult to gauge whether this by itself is enough to constitute separate 'peoplehood'. The issue was only resolved when the Nigerian army once more gained control over the territory and defeated the secessionist movement by superior force. Thus the claims to peoplehood were relegated to being inconsequential in mitigating circumstances and the moot point remains that the Biafrans would have been a 'people' had they won the civil war against the Nigerian army¹¹³.

Eritrea: The case of Eritrea is special since it achieved statehood by secession from Ethiopia by a UN-mediated plebiscite held within the territory after many years of violent struggle by Eritrean 'freedom' forces against the Ethiopian government machinery. Ethiopia was the only African polity not to have come under any significant colonial influence of a white power (apart from a brief period between 1936 and 1941 when Italy occupied it). However Eritrea had been an Italian colony from 1889 until 1941. It therefore had special credentials for the right of self-determination as a former non-self-governing territory within the meaning of Chapter

¹¹³ See Nanda, V 'A Tragic Tale of Two Cities,' in 66 *AJIL*(1972) 321

XI of the UN Charter¹¹⁴. At the time of decolonisation expansionist Emperor Haile Selassie I, attempted to integrate it within Ethiopia by exerting pressure on the British (who had taken the territory as a mandate from 1941 until 1952). The British and Americans called for a federal relationship between Eritrea and Ethiopia (against the votes of the Czechoslovakians and the Soviet Union who called for independence based on self-determination.) A federation was thus forged between Ethiopia and Eritrea against the wishes of Italy who wished to maintain the territory as a trust with a view to future independence. The UN did take measures to allow for protection of the newly created minority including the creation of a separate Eritrean Constitution and Assembly. Selassie however had a different agenda and set out to integrate the new 'province', consisting of 9 % of the territory and 10% of the population, into the state of Ethiopia¹¹⁵. He rendered Eritrean self-government bodies powerless; and by 1962 had incorporated the territory of Eritrea into the state of Ethiopia as a fourteenth province. This as we shall see, highlights one of the main problems of minority rights. The Eritreans are not a homogeneous people consisting of different tribes and groups. There has also been a Christian - Muslim divide which has affected the unity of the Eritreans. The question of where the benchmark would be in aiming for democratic representation is an issue that constantly crops up in self-determination movements. In this case would it suffice to create the state of Eritrea? Would there perhaps be a case for further secession of Muslim/Christian areas, or areas based on the linguistic, ethnic or tribal grounds? In the independence struggle since 1970, 'some form of separatism, though not necessarily independence, has been strongly supported by a

¹¹⁴ See the UN Charter especially article 73

¹¹⁵ See Heraclides (1991) *op.cit.* 17 p. 179; also see generally Gayim, E., *The Eritrean Question* (1993) & 'The Eritrean Question: Self-determination & the State,' in 38 *GYIL* (1995) p.349

great majority of Eritreans...'¹¹⁶. Heraclides points to seven main reasons why the independence movement gained ground during the ten years of attempted integration between 1952 and 1962 by Selassie. These threats primarily focused on the denial of a unique identity by various punitive state actions. These included the banning of Eritrean newspapers, political parties and trade unions; replacement of Eritrean languages by the official Ethiopian language of Amharic and the rise in imperial power within the territory. In addition, Selassie suspended the UN sponsored Constitution and banned the Eritrean national flag¹¹⁷. The abolition of the federal state finally triggered off an armed struggle for Eritrean independence. By 1970, a full-fledged war was being fought against the secessionist north which, after a brief interruption by the overthrow of Selassie, continued until 1990. The situation only improved when, after UN mediation, the Eritreans won the right to hold a plebiscite under UN auspices. This plebiscite returned a huge vote in favour of independence and the state of Eritrea was born. Eritrea thus remains one of the best examples of a situation in which a minority group managed to break away from a state. It also presents in the years leading up to the war of independence, clear demonstration of a state's attempt to destroy the cultural identity of a minority by assimilation.

Conclusion

One strong chord that binds both cases focused on above is the fact that they were 'whole peoples' in that they existed within a specific geographic location. This idea of geographic factors in determination of identity will be looked at within the restrictions of the Doctrine of *Uti Possidetis*, in Chapter Four. However, these cases

¹¹⁶ See Heraclides (1991) *ibid.* 180

too, hint at the primacy of geographic factors in determining identity. While the Biafrans were a majority in the east of Nigeria, they were a minority in the rest of the state. As for the Eritreans, their identity comes from being an entity since 1889, besides the fact that they were labelled a non self-governing territory and therefore a unit of self-determination. Their case holds firm despite the cultural and religious divides within the population of the new state. It is not difficult to predict the reaction of the international community though, if the Christian controlled highlands within Eritrea seek to secede from the Muslim controlled lowlands surrounding the Red Sea. And it is this fear of a continuously available self-determination process that is the fear of the international community of states.

However, despite what these cases might suggest about the relationship between minority rights and to self-determination, international law would still insist that minority rights be covered under Article 27 of the ICCPR. Self-determination issues on the other hand remain the right of peoples, covered under Article 1 of the Covenant. The HRC is not forthcoming on the subject of interpretation of Articles 1 & 27. It however recognises that ‘the right to self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights’¹¹⁸.

Of course, this does not mean that international law no longer affords protection to minorities. They are protected by the Genocide Convention 1948, and other treaties like the International Convention on the Elimination of All Forms of Racial Discrimination 1966. The Helsinki Final Act though, is symptomatic of the manner in

¹¹⁷ See Heraclides (1991) *ibid.* 181

which it calls on states to respect minority rights. Principle VII of the document states that:

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of Human Rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

There is, within this document, no mention of any right to self-rule. Furthermore, the clause in 'states on whose territories national minorities exist' allows states such as Iraq, as discussed earlier, to deny existence of any national minorities by claiming that the Iraqi constitution protects their rights as full-fledged nationals. Other instruments such as the African Charter are even more restrictive about minority rights to self-determination. In point of fact, African states tend to believe that the issue of minority rights is essentially an European one. Articles 19 & 20 of the Banjul Charter does not focus in any depth on the words 'people' and 'the right to existence'. Article 20(1) refers specifically to rights of colonised peoples under salt-water colonialism. In any case, there is little evidence to suggest that the word 'people' refers to anything other than whole people.

Thus, in conclusion it may be stated that though minorities might have a legitimate claim to being a separate people it is with extreme difficulty that they gain the right to self-determination. Minorities however, continue to use the self-determination discourse and States continue to deny relevance to them. International law does not support the argument for minorities since self-determination is a strict

¹¹⁸ The HRC, as quoted in Thornberry (1989) *op.cit.* 94 p.883

right of peoples with defined geographic limitations. Minorities have at times used the discourse to dismember states and achieve independence as evidenced by the Eritrean case. This, while not frowned upon by international law is not supported by it either. The best approach as far as minorities are concerned is perhaps to start from a bottom-up method: i.e. guaranteeing for themselves basic rights as promised by Article 27 of the Covenant¹¹⁹ and developing their identity with the goal of securing a right to self-determination in protection of their future interests. Granting minorities limited autonomy and self-government in the short-term may be advisable, forcing interdependent economic development and federalism within the State with the longer-term goal of dulling separatist sentiment. By this, minorities may be encouraged by the right to represent themselves within defined units, while at the same time the territorial integrity of the State will not be compromised. Thus, it is suggested that a long-term solution involves granting territorially based minorities the right to federate. But also that in examining self-determination questions, minorities as a group do not have the right to self-determination based on this aspect alone. In this sense, there has been a distinct change in the self-determination discourse from Wilsonian ideals. As we have seen in this chapter though it is difficult to show who a 'people' are despite differences that in one case were not enough for secession (Biafra) while in another case (Eritrea) succeeded after a long-drawn-out war.

¹¹⁹ As for instance in the Sandra Lovelace Case *op.cit.* 105

CHAPTER THREE

THE STATE AND SELF-DETERMINATION: THE CONCEPTUAL CONFLICT BETWEEN SELF-DETERMINATION AND TERRITORIAL SOVEREIGNTY

Introduction

Having examined how norms for granting 'peoplehood' in terms of the self-determination discourse have changed, we now turn to a very important concept within the issue of national self-determination. This chapter seeks to examine the paradigm of the state and analyse its transition from a feudal entity to the modern body that is now the goal that national liberation movements aspire to. During this discourse, it will be necessary to look, primarily, at two concepts before examining them in the light of the norm of self-determination, namely the 'state' and 'sovereignty'. These issues will highlight the theoretical basis for analysing arguments in the conflict between self-determination and territorial integrity and the effects thereof on the international legal discourse of self-determination.

3.1 The State

Basic textbooks on international law suggest that the modern state traces its history back to 1648 and the Peace of Westphalia¹. This event was significant since it ended the Thirty Years' War in Europe and led to the signing of a Treaty that maintained the peace for the next century. Grotius's *De Jure Belli ac Pacis*² is often combined with the Peace of Westphalia to locate the origins of the modern territorial based states-system³ in the second

¹ Harris D.J *Cases and Materials of International Law* (1997); also see Brownlie *Principles of Public International Law* (1995); Shearer I, *Starke's International Law* (1993)

² Grotius also wrote theology and historical works, but the works concerning international relations are all concerned primarily with the law of nations, and include *De Jure Praedae* (circa 1604); *Mare Liberum* (1609) and *De Jure Belli ac Pacis* (1625)

³ See Higgins, 'Grotius and the Development of International Law in the UN Period' in Bull, Kingsbury and Roberts (eds.) *Hugo Grotius and International Relations* (1990) pp. 267-9

quarter of the seventeenth century. Prior to that, the then existing forms of political organisation could not be easily categorised and referred to in generic terms of 'statehood', since they varied from loose federal structures of vassal states to the more organised city States common in the Aegian⁴.

An inter-linked concept to the development of the 'state' is 'sovereignty', its modern form having evolved from the Peace of Westphalia. This is an issue that we shall focus on in the latter half of the chapter. However as international lawyers tend to concur, the Peace of Westphalia was not the definable moment in history when the state was born⁵. The following quote from the Breisach Trial of 1474 demonstrates this clearly:

The Holy Roman Empire did not formally recognise the secession of the Swiss Confederation until the Peace Treaty of Westphalia (1648). In fact, as early as the seventies and eighties of the fifteenth century, the process of Swiss emancipation from the Empire was rapidly advancing. To select as the decisive date the Peace of Basle of 1499, with which the recognition of the *de facto* independence of the Swiss Confederation is usually linked, would appear to over-formalise this particular event. Moreover, by the time of the Breisach Trial, the Holy Roman Empire had degenerated to such an extent that relations between its members were conducted on a footing hard to distinguish from international relations. In this state of disintegration, alliances, counter-alliances, treaties of subsidy, policies of neutrality and balance of power were more significant than the Emperor, the Diet or the Reichskammergericht. Thus, in the relations between these units, which, *de facto*, were largely independent, law fulfilled functions more comparable and akin to those of international law than municipal law.

⁴ See for instance the 'Ancient State Systems,' in *The Evolution of International Society* (1992) pp.24-134

⁵ Harris (1997) *op.cit.* 1 pp.15-17

Similar to the relations between Italian City-States while these still belonged to the Roman Empire of the German Nation, the relations between Burgundy and its enemies fall into a category of quasi-international law. Its essential characteristic is a state of *de facto* equality on which entities conduct their mutual relations as if they were subjects of international law⁶.

Thus when looking at developments in international law, one needs to be wary about ascribing too much importance to one particular date. International legal discourse is aware of the problems associated with this, however the modern state system is considered to draw significantly on the Peace of Westphalia in 1648 which therefore maintains its importance within the discourse despite the contradictions presented in the quote from the Breisach Trial of 1474.

The classic definition of a state in modern international law however, is given in the words of Article 1 of the Montevideo Convention on Rights and Duties of States 1933,⁷ as follows:

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 other States.

⁶ See The Breisach Trial 1474 as quoted in Schwarzenberger *International Law* (1968) p.464

⁷ The *Montevideo Convention on the Rights and Duties of States, 1933* was adopted by the 7th International Conference of American States in 1933

The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law⁸. Despite the above, there arise a lot of exceptions to the rule with each of the norms under constant scrutiny via the variety of entities that have laid claims to statehood. In point of fact, Harris, in a note states that there is evidence 'to suggest that these requirements, which are concerned solely with the effectiveness of the entity claiming the rights and duties of a state, have been recently supplemented by others ... of a political or moral character'⁹. The most important of these, of course, is statehood achieved through the due process of national self-determination. Despite the fact that international law accepts the Montevideo Convention as a reflection of customary international law, there have been numerous instances since the Convention, that have not fulfilled the criteria set out by this Convention but have, nonetheless, functioned as quasi-state entities. The Montevideo Convention criteria remains a very restrictive reading of the concept of statehood within international law for a variety of reasons and Article 1 easily deconstructs under analysis of state practice since 1933.

For a start, the idea of a permanent population is problematic since it clearly excludes nomadic populations. This theme recurs later in this work¹⁰; however, it is necessary to point out here that despite the problem it poses in excluding non-sedentary populations, this requirement of statehood is well respected in state practice. It is one of the first instances that demonstrates how the discourse of statehood that forms the foundation of international law, straight-jackets populations that have traditionally been non-sedentary. It also highlights the impact of the development of an European model of statehood on smaller less structured communities all over the world. This is especially true in the Western Sahara where two

⁸ Harris (1997) *op.cit.* 1 p. 102

⁹ Harris (1997) *ibid.* p. 102

¹⁰ See Chapter Six and Seven

ancient non-state political systems were considered anarchic despite internal checks and balances¹¹. One of the case studies in this thesis will examine these particulars of the *Western Sahara Case* where a nomadic population is striving for statehood¹². Another instance of a people rendered helpless by the modern system of states with permanent populations are the gypsies of Central & Eastern Europe who have found the territories they normally traverse, barred by constraints of international borders. As a result, these groups of people have been marginalised and excluded from the state. Very often the nationality they are offered fails to be representative and as a result they exist as one of the more problematic national minorities in countries like the Czech Republic, Hungary and Slovakia¹³. As discussed in Chapter Two though these groups have no separate rights as a people. Instead they are ‘minorities’ and are not adequately protected under international law from the powers of the state. The Gypsies and the Saharawis also provide a classic questioning of the second norm of statehood as given by the Montevideo Convention: the prerequisite of a defined territory. Under current circumstances, states need frontiers that function as territorial restrictions to the exercise of sovereignty by one entity as opposed to that of the neighbouring entity. These boundaries are administrative and political tools that seek to restrict the sphere of influence of a supreme power to a domestic region within which it can claim its authority. Unfortunately, this development evolving primarily in Europe, was then imposed via colonialism upon other parts of the world where its effects often proved incoherent. As a result, the straight-jacket of the territorial state remains highly problematic in many post-colonial situations, not merely in the case of the nomadic peoples but also in other situations where the territorial demarcations do not correspond to any cognisant history of the region other than colonialism¹⁴. While the

¹¹ See generally, Chapter Seven, Section 7.1

¹² See the Judgement in the Western Sahara Case *ICJ Reports (1975)*pp.4-61

¹³ See Farnham, R *Gypsies, Tinkers and Other Travellers (1975)*; Acton, T *Gypsy Politics and Traveller Identity (1997)*; Chatwin, B., *The Songlines (1987)*

¹⁴ See generally, Grovogui, *Sovereigns, Quasi-Sovereigns and Africans (1996)*

idea of a fixed territory is perhaps necessary to ensure maintenance of order within and between entities. actual demarcations of boundaries remain highly contentious issues in international law¹⁵. Conflicts regularly arise since during various historical times, different regions functioned as different units or entities, or parts of units thereof. The classic examples of this exist in sub-Saharan Africa¹⁶ where the state boundaries drawn by European colonisers show complete ignorance for local ethno-politics of the region. As a result, the straight lines that define some of the African states show little respect for geographic, social, cultural, linguistic, ethnic, and racial factors¹⁷. To compound the problem, the highly respected doctrine of *uti possidetis*. (focus of the next chapter), obstructs the alteration of borders. This has generated injustice in the distribution of land and power to the new sovereigns. It also places great importance on a 'critical date'¹⁸ - a vital concept in deciding and influencing the history of a given territory for eternity. The effects of colonialism in displacing traditional lifestyles and habitats extends much further than Africa and is compounded by the dynamic nature of human society and the nature of identity. We shall analyse these effects and their inter-relationship in the latter half of this and the following chapter¹⁹.

State practice in the post-war world has also shown the next two norms of the Montevideo Convention to be equally problematic in granting of statehood to various entities. While the Montevideo Convention may set out norms of statehood, statehood is actually recognised by the international community of territorial states (not always acting in unison)

¹⁵ The list of ICJ Cases where a boundary dispute was the issue includes: *Land and Maritime Boundary between Cameroon and Nigeria (1990)*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*; *Maritime Delimitation between Guinea-Bissau and Senegal*; *Territorial Dispute (Libya v Chad)* to mention only a few in the last 8 years

¹⁶ See generally, Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States,' in 90 *AJIL* (1996)4. ; Jackson R.H 'Juridical Statehood in Sub-Saharan Africa' in 46 *JIA* (1992) pp.1-16; Herbst J 'Challenges to Africa's Boundaries in the New World Order' in 46 *JIA* (1992) pp.17-30; also see Shaw M 'The Doctrine of Uti Possidetis' in 67 *BYIL* (1996) pp.75-154

¹⁷ See Jackson *op.cit.* 16 pp.1-2

¹⁸ See Shaw (1996) *op.cit.* 16 p.130

through the largely political mechanism of state recognition. There is a vast amount of literature on the subject of recognition that will not be possible to examine here. Suffice to say that international law recognises two kinds of situations, with regard to recognition, the constitutive principle and the declaratory principle. This is not an avenue that we shall explore in this thesis, it being a separate and complex issue that will not add to the merits of this piece, having already been discussed elsewhere²⁰. The categories themselves are highly contentious, since in accepting either the 'declaratory' or 'constitutive' school of thought, international law itself forecloses the issue by first neglecting the concept of recognition within the Montevideo Convention and then accepting that the political action of recognition, nonetheless, possesses legal validity.

The Montevideo Convention suggests that for an entity to constitute a state and thereby a person in international law, it must also have a government that has the capacity to enter into relations with other States. The need for a government can be interpreted narrowly or broadly since the Convention is silent on this issue. It does not specify any particular kind of government, and thus it can be assumed that as long as the entity has an authority that can regulate its internal activities, it would fulfil this criterion. This places the onus on 'effective control' as a litmus test of a government. There has been a growing school of thought however, encouraged by developments in the international human rights discourse, suggesting that the only form of government that is acceptable in future will be a democratic one²¹; however this conclusion is not widely accepted and could perhaps be considered premature. For the moment, it seems that the right to democracy does not exist though the aspiration for it does. Therefore, assuming that the Convention is silent on the kind of government required for running the state, the clause is fairly easily accepted. There have been instances in history

¹⁹ See generally, Chapter Four

²⁰ See Harris (1997) *op.cit.* I pp.144-161 ; Bronwlie (1995) *op.cit.* I; and Dugard *Recognition and the UN (1987)*

²¹ See Franck 'Emerging Right to Democracy' in *86 AJIL (1992)* 46; also Fukuyama *The End of History and the*

though, where a particular authority, despite exerting *de facto* control over a region, has not been recognised by the international community as the government of it. The recognition of the Republic of China (Taiwan) by the UN as the government for the Chinese mainland despite the government of the Peoples Republic of China exercising effective and exclusive control over the mainland²², is a clear example of this. Questions have also arisen over whether a government could be termed 'independent'²³ if it acted at the behest of another sovereign. This was illustrated in the case of Manchukuo in 1935²⁴ when invading Japanese forces declared statehood and left behind a 'government' to rule over Manchuria. Independence is to a certain extent factual as well as legal²⁵, and while there are a number of shades of independence, the laws of statehood are clearly in place to prevent the creation of 'puppet states.' As Lauterpacht suggests:

The first condition of statehood is that there must exist a government actually independent of any State... If a community, after having detached itself from the parent State, were to become, legally or actually, a satellite of another State, it would not be fulfilling the primary condition of independence and would not accordingly be entitled to recognition as a State²⁶.

A more recent example of a similar entity that is considered a 'puppet state' by the international community is the situation in Cyprus where the entity named the 'Turkish

Last Man (1992) who suggests that democracy is the ultimate form of government

²² See Henckaerts J.M (ed.), *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (1996)

²³ For an interesting discussion on the role of norms of independence in communities in transition see 'Theme II Roundtable: Communities in Transition: Autonomy, Self Governance and Independence' in *Proceedings of the ASIL 1993* Moderated by Michael Reisman and including Professors T. M. Franck, B. Hernandez and R. Higgins, on April 3, 1993

²⁴ Harris (1997) *op.cit.* I p. 109

²⁵ Harris (1997) *ibid.* p. 109

²⁶ Lauterpacht *Recognition in International Law* (1948) pp. 26-9: also quoted in Harris (1997) *op.cit.* I p. 109

Northern Republic of Cyprus' is not recognised by any state other than Turkey which was responsible for its creation by invasion²⁷.

Despite examples to the contrary however, the idea of the type of authority that administers a territory is a relatively less contentious concept than the fourth and final requirement of the Montevideo Convention. This requires that States possess the 'capacity to enter into relations with other States'²⁸. Once again, the parameters for such action is left undefined and state practice has shown that this is perhaps the most flaunted of the four requirements of statehood. In the modern era of interdependence, it is difficult to draw a firm line under the constituents of 'capacity' and 'relations'. Two examples that would perhaps clarify this statement is firstly the American embargo on states such as Cuba and Iran²⁹ and secondly the non-recognition of Israel by the Arab States that led to the Yom Kippur War in 1967³⁰. The Cuban case is particularly interesting: the US laid an embargo on Cuba and declared to its Allies in particular and the international community in general that in its view any trading contact with the Castro regime would be considered as being illegal. The reason cited was that Castro's communist 'repressive' regime allegedly reneges on human rights. Iran too has been placed in a similar category; this time perceived in Washington as 'a state that sponsors terrorism'³¹. In both these cases, the American government has made this claim and holds strong reservations against any of its Allies trading with the two countries. Yet, if the Montevideo Convention is to be read at face value, such an edict, if respected by its Allies without it directly affecting their interests would leave them open to renegeing on clause 1(d) of Article 1 of the Convention. International law would implicitly recognise that states

²⁷ See especially, Nejatigil, Z.M. *Our Republic in Perspective* (1983)

²⁸ Montivideo Convention article 1(d)

²⁹ See generally Bassiouni M. (ed.) *Legal Responses to International Terrorism: UN Procedural Aspects* (1988)

³⁰ See Chomsky *The Fateful Triangle* (1983)

³¹ See generally, Yonah, A *State-Sponsored Terrorism: Theory & Practice* (1979); Laquer, W., *Terrorism* (1979); O'Sullivan, N (ed.) *Terrorism, Ideology and Revolution* (1986); George, A (ed.) *Western State Terrorism* (1991)

wishing to trade with these two countries be allowed to, in fulfilment of their sovereignty. Being part of a programme of UN imposed sanctions against a state would be legal under the UN Charter since it would amount to collective action against a given state. However, to be forced to adhere to sanctions imposed unilaterally by another State would lead to questions about the viability of the adhering states' sovereignty in the face of the edicts of this more powerful state. It would also raise questions over the concept of its 'independence' referred to above in quoting Lauterpacht³². Of course the other side of the coin is that states would ultimately follow the edict of a more powerful state since it is in their national interest to do so, and the protection of national interest is a key element of sovereignty. Nonetheless, the decision with regard to trading partners is a classic display of the intricacies of the situation. The second example is similar; the creation of Israel in 1948 was not collectively recognised by the Arab world. Without casting any aspersions on the merits of such a decision, it needs to be analysed how such a body of inherently different states could act in unison. Not all Arab states were affected by the creation of Israel; some such as Lebanon, Syria and Jordan definitely more affected (with the flow of refugees) than states such as Saudi Arabia, Iraq, and Iran which were also Arab in identity. However, the states acted as a unit, when called upon by the League of Arab Nations to refuse to recognise the entity that had been formed within their midst. This also raises questions of whether states, in surrendering some of their sovereignty to supra-national organisations such as the UN, the European Union and the League of Arab Nations, actually begin to compromise the requirements of Article 1(d). It further raises another interesting question about national identities, their ebb and flow with respect to supra-national bodies. Besides the examples mentioned above, there are direct instances of bigger states acting on behalf of smaller 'sovereign' states in the international arena. States such as Bhutan and the Cook Islands are instances of states whose foreign

³² Lauterpacht (1948) *op. cit.* 26

relations are conducted for them by bigger and stronger neighbours India and New Zealand respectively. These states while technically referred to as 'associate' States, nonetheless function as fully sovereign states within the UN system with voting rights in the General Assembly independent of their more powerful neighbours. Thus, the Montevideo Convention despite being the best and only clear indicator of the criteria for statehood in international law, nonetheless sets out four highly contentious conditions to be fulfilled for an entity to be considered a state and thereby a person in international law. Further, the Convention also fails to take into account the array of states that exist in the category of 'associate' states. These states are particularly interesting since they do not easily fit this generic category ascribed to them. Indeed, as pointed out by geographer Sidway in a paper looking at the Southern Africa Development Agency, there exist 'sovereignty-scapes' rather than sovereigns in certain parts of the world³³. International law of statehood, as given by the Montevideo Convention fails to reflect this diversity.

Then there is the issue of the South African Bantustans. Based ostensibly on a policy of 'separate development for Afrikaners and whites', it originated largely from the ideas of Prime Minister Voerwoerd in the 1950s and attracted strong international censure for a number of years for fostering racist ideas. The territorial implications of this policy however, reverberated in 1968, when the regime followed a policy of re-settling over 900,000 people belonging to government designated tribal groupings, into 800-odd resettlement areas. The policy was allegedly carried out to return the people to their 'homelands', and installed in this new territory they were offered independent statehood separate from South Africa³⁴. By 1971, the South African government declared this grand movement of people into 'homelands' as an

³³ The paper by Sidway J (University of Birmingham) was presented at the Critical International Studies Group at Newcastle University, April 25, 1998

³⁴ See Richardson, H.J. III. 'Self-determination, International Law and the South African Bantustan Policy,' in *17 CJTL (1978)* pp. 186-7

exercise of the peoples' right to self-determination and sovereign independence³⁵. However the 'homelands' were within South African international boundary limits and constituted 13 percent of its national territory. In addition, the areas were not contiguous but often interspersed with exclusively white areas³⁶. To confrontation from the international community that such entities were invalid states based on racial discrimination, the South Africans 'vehemently denied this...' and pointed to the increased 'autonomy' of the homelands as well as the 'independence' of Transkei³⁷. Thus 'independence' and the 'capacity to enter into relations with other states' are extremely loose clauses that international law fails to define. In the context of the South African experience there is an interesting debate whether the apartheid regime in Pretoria could be likened to colonial rule. Dugard and some others suggest that the South African situation is completely different and merits special treatment³⁸. This argument is supported by the 'Benelux'³⁹ countries suggesting that: 'the three delegations were opposed to the general tendency ... to equate the position of the black people of South Africa with the situation of a people living under colonial rule. [They] could not acquiesce in the suggestion that the white population be equated with white overlords. That would amount to a kind of reverse discrimination'⁴⁰. The discussion above serves to highlight the problem with use of terms within international law and the various shades of interpretation are attached to every one of them⁴¹. This is especially relevant here

³⁵ See UN Unit on Apartheid, Notes and Documents, UN.Doc.20/74 (1974) & UN.Doc. 36/75 (1975), also quoted in Richardson (1978) *op.cit.* 35

³⁶ E.g. Transkei consisted of three discontinuous pieces of land with Whites Only territory in between.

³⁷ Richardson (1978) *op.cit.* 35 p. 192

³⁸ See Dugard 'Namibia, Southwest Africa: The Court's Opinion, South Africa's Response, and Prospects for the Future,' in 11 *CJTL* (1972) pp.14-49 also see Lissitzyn, O 'International Law and the Advisory Opinion on Namibia,' in 11 *CJTL* (1972) pp. 50-73

³⁹ Belgium, Netherlands and Luxembourg

⁴⁰ 12 *UN Monthly Chronicle*, No.11 (1974) p.25 as quoted also in Richardson (1978) *op.cit.*35 p. 193

⁴¹ While it is not possible or necessarily desirable in this work to closely examine the etymology of words, it nonetheless is a concept that needs to be borne in mind. For an interesting array of work in this field see Constantinou C., 'Diplomatic Representations... or Who Framed the Ambassadors?' in 23 *MJIS* (1994) pp. 1-23; Tiffin & Lawson (eds.) *De-Scribing the Empire: Post-Colonialism and Textuality* (1994); Halliday, F., *Rethinking International Relations* (1994); and Walker R.B.J & Mendlovitz (eds.) *Contending Sovereignties: Redefining Political Community* (1990)

when dealing with the idea of the capacity of states to enter into relations with other states and concepts of independence and self-determination.

Having considered the meaning of 'the State' in the Montevideo Convention let us turn to the meaning the UN Charter ascribes to it⁴². There are two relevant Articles in the Charter important to our discussion here. The first concerns who can be member states of the UN, (Article 4, UN Charter). The second prescribes the limits to powers that can exercised within their domestic territorial regions (Article 2(7)). To begin with Article 4 states that:

(1) Membership in the UN is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organisation, are able and willing to carry out these obligations.

(2) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

There are two issues that we shall briefly examine here. First, membership is open only to that entity which the UN considers a state (subject, of course, to that entity expressing a desire to join the organisation) and second, the issue of procedures required to gain entry. The latter issue gains importance later in the work, when we look at how national liberation movements can make the transition to statehood. Article 4(1) is interesting since it does not specifically define a state although there are strong indicators of the intention to have as broad a membership as possible⁴³. However, while the organisation was keen to gain universal representation there is strong evidence to suggest that conditional universality is deemed

⁴² See B.Simma: *The UN Charter -- Fifty Years Anniversary (1994)*; Higgins R *The Development of International Law through the Political Organs of the UN (1963)*; Dugard J, *op.cit.* 20, pp. 51-111

⁴³ See article 2(6) and the commentary in Simma B, *The Charter of the UN: A Commentary (1994)* pp.132-139

required to enable the organisation to achieve its basic goal i.e. the maintenance of international peace and security⁴⁴. The Article itself sets out five conditions required for admission to the UN Organisation as a member. The applicant must be: a) a state, b) be peace-loving, c) ready to accept obligations contained in the Charter, d) ready and able to carry out those obligations, and e) be willing to do so⁴⁵. Thus, the Charter does not specifically define what a state is, but adds other attributes required for membership in addition to the basic premise of statehood. The Charter, nonetheless, remains a relevant yardstick in measuring international state practice, since the UN is the most universal of all clubs that states subscribe to. While initially there was little doubt about the states eligible for membership to the new organisation (with the exception in the formative years, of 'enemy states'⁴⁶) the problem became acute in the post-decolonisation era. The Organisation's membership increased phenomenally from the 51 original founding members to 184 by January 1994⁴⁷. One of the results of decolonisation was that entities created out of the process were granted statehood and thereby UN membership without recourse to any conditions whatsoever. This is exactly the argument made by Jackson when he suggests that empirical statehood in sub-Saharan Africa is merely an illusion⁴⁸. His argument is primarily that in admitting new members emerging out of the decolonisation process, the UN in its quest for universal membership, did not consider the merits of some of the cases presented before it. Thus, in many cases automatic membership was granted and as a result 'many states in sub-Saharan Africa are far from credible realities'⁴⁹. He squarely lays the blame for this phenomenon to the paternalistic attitude adopted by the UN which, he claims, was merely a continuation of the attitude that

⁴⁴ Simma *op.cit.* 43 p. 159

⁴⁵ See *Conditions of Admission, ICJ Reports (1948)* p. 56 & p.68

⁴⁶ See Simma *op.cit.* 43 p. 160

⁴⁷ Currently at 185 with the admission of Palau see <http://www.un.org.html>

⁴⁸ See Jackson (1992) *op.cit.* 16 p.1

⁴⁹ Jackson *ibid.* p.1

shaped the self-determination norm post 1919 under the League of Nations⁵⁰. Until 1960, there remained empirical conditions under which statehood and thereby membership of the UN was granted. However, the 1970 Declaration made colonial occupation an universal evil. The Declaration states that ‘the further continuation of colonialism in all its forms and manifestations is a crime which constitutes a violation of the Charter of the UN, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the principles of international law’⁵¹. Thus as Jackson suggests ‘European overseas rule of non-western peoples was now condemned as nothing less than a crime against humanity’⁵². The justification behind this move was that colonial countries were exercising jurisdiction over territories they had no right to in the first place. Thus, the underlying thinking in the decolonisation movement was that the quicker this ‘crime against humanity’ was removed from an increasingly humanitarian world order, the easier the process of maintenance of international peace and security would become. Unfortunately, in the quest for a quick solution to the problem of decolonisation, enough attention was not paid to some of the states that came into existence within the international community. Juridical statehood, thus, came to represent a factor in current adversities faced by many states since it preserves jurisdictions regardless of geographic and other rationales⁵³. In addition to being harmful to international peace and security, it created entities where powerful domestic state apparatus was left in dangerous hands, while the conditions within the polity were not organised enough to make these powers answerable to anyone. Thus state practice of granting statehood over the last fifty years reveals a bias by which states emerging from the decolonisation process, were granted UN membership much easier than states coming out of different processes⁵⁴. This also

⁵⁰ See Rigo-Sureda *Evolution of the Right of Self-Determination (1973)* -- also see Chapter One

⁵¹ The 1970 Declaration GAOR 2625 (XXV)

⁵² Jackson (1992) *op.cit.* 16 p.4

⁵³ See Jackson (1992) *op.cit.* 16 pp.4-5

⁵⁴ See Rigo-Sureda (1973) *op.cit.* 51 see Chapter One Section 1.3

corresponds to the earlier bias discussed in Chapter One, of different standards applied by the international community to the parameters of colonialism⁵⁵. In some of these cases, no criteria seemed to have been applied other than the overthrow of European colonial powers from the territory. This salt-water colonial ‘emancipation’ was accepted by the UN as a righteous process requiring no checks and balances. However, as the Cold War progressed, norms of admission tightened significantly with only a few states being admitted between 1979 and 1989. With the end of the Cold War though, there has been an influx of new membership primarily due to ‘revolutions’ in the eastern bloc leading to the break-up of the Soviet Union into independent states with separate membership at the UN. In addition, the ‘velvet divorce’ between the Czech Republic and the Slovak Republic and the disastrous and bloody break-up of Yugoslavia into its 6 constituent ‘sovereign’ Republics⁵⁶ further increased the number of emerging states. Other movements seeking secession and formation of new states were denied, prime examples of which are Chechnya, the Nagano-Karabakh region, the Krajina region of Croatia and Kosovo, among others, by use of strong military or forceful action from the centralised incumbent power.

Reverting to the text of Article 4(1), it is interesting to note that the only condition the UN places upon states wishing to join, is that the Organisation must believe them to be ‘able and willing to carry out these [the Charter] obligations’. Once again, the Charter does not specify exactly what these obligations are but it is safe to assume that this is a reference to the aims and goals of the UN Organisation and the obligation to respect the Charter itself. It is also interesting to note that the organisation values the entity’s ‘ability ... to carry out obligations’ suggesting that effective control of a territory would be a basic prerequisite for

⁵⁵ Chapter One Section 1.4

⁵⁶ For more details on these three break-ups see Shaw (1996) *op.cit.* 18 pp. 106-111

membership to the organisation. This would put into doubt, for example, the early membership of the Republic of China (RoC) in light of its claim to exercise sovereignty over the whole of China. However not only did the UN fail to recognise this, it also gave the RoC the ultimately powerful position within the UN political structure i.e. a permanent seat in the Security Council. This continued until 1971 when the organisation finally rectified the situation with recognition of the mainland Chinese government. After rescinding the membership of the Security Council of the Republic of China, it invited the Peoples' Republic of China to take its place on the Council. This incident demonstrates that, despite a system of checks and balances to membership, the UN has still been subservient to political considerations of powerful States⁵⁷. Also related to the issue of UN membership in recent years, is the idea of the 'Observer Status' especially to national liberation movements⁵⁸. Thus UN practice, while more useful than the Montevideo Convention in understanding the nuances of statehood nonetheless fails to throw up a cohesive definition. For such a definition it is necessary to look at some of the literature in the field of International Relations and political theory⁵⁹.

For the time being, it suffices to close with Richard Ashley's definition of the state. For Ashley the state 'is a decision making subject uniquely presiding over some well-bounded domestic domain from which it's authority derives and that the state is competent to make choices and deploy coercive means in the service of some coherent set of interests originating within this domain, prior to the moment of decision itself'⁶⁰. However, it is important to note that the position of the state has evolved with the ebb and flow of international legal

⁵⁷ Also see Simma (1994) 'Special Problems' pp. 166 - 175

⁵⁸ See Section 3.3.2

⁵⁹ See Hinsley F.H. *Sovereignty* (1986)

⁶⁰ Ashley R 'Untidying the Sovereign State: A Double Reading of the Anarchy Problematique' in *17 MJIS* (1988) pp. 227-262

developments in the post war years. Since we are mainly concerned with the conception of the state under the UN system, it is interesting to chart its evolution. Higgins does exactly this in her book 'The Development of International law Through the Political Organs of the UN'⁶¹. She points out that the problem of defining what constitutes a state is restricted by constant efforts to list a set of criteria that need to be fulfilled. She suggests that 'it is necessary instead, to appraise the community interests which will be affected by the decision to interpret it in one way or another'⁶². The issue of the changing of the norms defining a state and the possible erosion of Article 2(7)⁶³ brings us to another important issue - the limits of sovereignty as given by the domestic jurisdiction clause of the UN Charter.

3.2 Sovereignty⁶⁴

The second contested term is the concept of sovereignty. The Oxford Dictionary defines a sovereign as 'supreme' before, interestingly, suggesting the word 'royal' and then 'supreme ruler' especially 'monarch'⁶⁵. This etymology of the term is particularly interesting; though historically the term referred to a supreme ruler, it is out-dated since most UN member states today tend to have collectivised governments of one type or another. Thus, despite most countries today functioning under collective governments i.e. the exercise of diffused power, the dictionary, and thereby common usage and perception of the term still does not suggest that the word 'sovereignty' is necessarily synonymous with 'state'. In international legal discourse there has been a change in the meaning and usage of the term from its initial Grotian implications to its modern usage. For Hugo Grotius the importance of sovereignty

⁶¹ Higgins, R *The Development of International Law Through the Political Organs of the UN* (1963)

⁶² Higgins (1963) *op.cit.* 62 p. 11

⁶³ See Blum, Y.Z., *Eroding the United Nations Charter* (1993)

⁶⁴ For a general international legal history to the development of the norm of sovereignty see H. Steinberger 'Sovereignty,' in R. Bernhardt (ed.) *Encyclopedia of Public International Law 10* (1987) pp. 397-418; also see C. Rousseau *Droit International Public 2* (1974) pp. 60-93

⁶⁵ The Concise Oxford Dictionary, VIIth edition, 1983, Oxford: Clarendon Press 1014-5

could not be understated⁶⁶. It led him to suggest that: ‘... because civil society was established to maintain public tranquillity, the state acquired a right, to the extent necessary to achieve this goal, to limit the right of resistance’⁶⁷. More importantly, he remained sceptical of the sovereignty of the people thereby displaying a Centrist and Statist argument about the suitable governance of people. He implied that a king who was subject to the people, was ‘improperly’ a king. For him, the good of the governed remained a priority and the King or Sovereign was required to understand and rule with this objective in mind without having to consult the people, who could not be superior to the King in this matter⁶⁸. Thus, the King functioned more as a guardian, whose leadership of the people needed to be responsive to their needs without necessarily seeking their consent. There is a remarkable parallel between the system outlined by Grotius and the non-European societies systems’ of elders in tribes who were meant to govern the tribe with the good of the governed at heart⁶⁹. This is a link that has not been sufficiently explored in international law which, instead, developed along lines different from Grotian thought. This is reflected in the Bible in the Book of Chronicles:

...for guardianship is for the sake of the ward, and yet the guardian has authority over the ward. And the guardian might decide under pressure that in order to preserve the tranquillity of his people he should enslave them to a foreign power. For life was of more value than liberty, and God himself spoke of it as a benefit that he does not destroy men but delivers them into slavery⁷⁰.

⁶⁶ See R.J. Vincent ‘Grotius, Human Rights and Intervention’ in Bull, Kingsbury and Roberts *Hugo Grotius and International Relations* (1990) pp. 241-56

⁶⁷ Grotius *De Jure Belli ac Pacis (JPB)* Whewell’s translation Cambridge 1895 book I chapter 4 para 21 as quoted by Vincent (245)

⁶⁸ Vincent (1990) *ibid.* p.246

⁶⁹ See Chapter Seven and the structure of the Bilad Shinqit tribes Section 7.1.2

⁷⁰ 2 Chronicles 12: verses 7 and 8

Yet as international legal discourse of sovereignty developed, the two words 'state' and 'sovereignty' became increasingly associated and the idea of sovereign ruler or king was relegated. Part of this process was due to the American and French Declarations discussed in Chapter One, and a growing belief in the importance of the consent of the governed giving legitimacy to government, in sharp contrast to views expressed above.

According to Hinsley sovereignty is 'final and absolute political authority in the political community'⁷¹. He qualifies this 'absolute' suggesting that 'sovereignty developed in response to, and in support of, the states' emergence as a dominant feature in the modern world' which he suggests 'through repeated invocation' and 'epoch defining statements achieved canonical status'. This already raises contradictions since the state, as it developed, is territorially based; this is the first restriction to the concept of an 'absolute political authority'. Morgenthau's definition seems to rectify this situation with the statement of sovereignty as 'supreme power over a certain territory'⁷². Modern international law does not separate the idea of a territorially based state from the concept of sovereignty either. This is based on the idea of the equality of all states which, in theory at least, is considered to be a norm of *jus cogens*⁷³. The concept of sovereignty independent of the bounds of a fixed territory would immediately raise questions about the exercise of absolute sovereignty by one state overflowing and negatively affecting the domestic jurisdiction of its neighbour. It is fear of such a system of world governance that led to the inclusion of Article 2(7) in the Charter of the UN⁷⁴. Article 2(7) states that:

Nothing contained in the present Charter shall authorise the UN to intervene in

⁷¹ Hinsley quoted in Onuf 'Sovereignty: Outline of a Conceptual History' in *16 Alt. No. 4 (1991)* pp. 425-446

⁷² Morgenthau *Politics Among Nations (1973)* p.13

⁷³ See R. Jennings & A. Watts *Oppenheim's International Law Vol. 1*, 9th edition (eds.) p. 4 or Harris D.J (1997) *op.cit. 1*. pp. 835-837

⁷⁴ For a discussion on the intricacies of article 2(7) see Simma (1995) *op.cit. 43* pp. 139-154

matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Essentially, what this clause sets down are rules that international organisations and other states need to respect in dealing with issues within the domestic jurisdictions of a given state. This principle has, therefore aptly been referred to as the ‘domestic jurisdiction’ clause, or as Simma calls it ‘the principle of non-intervention’⁷⁵. He states that: ‘the relevance of such non-intervention clauses was and still is seen to be in the limitation of the jurisdiction of international courts or courts of arbitration in favour of state jurisdiction. This can be described as the establishment of judicial non-intervention.’⁷⁶. The norm was neither born with the UN Charter nor was the Charter the first to elaborate on it, there being a similarity between it and Article 15(8) of the League of Nations Charter that reads:

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement⁷⁷.

Thus, it can be stated that the concept of domestic jurisdiction is, as old, in terms of treaty law, as 1919; although international legal historians would suggest that it goes back to 1648 and the Peace of Westphalia⁷⁸. It is also a well-established norm of not only customary international law but also considered a norm of *jus cogens*. In modern international law, the only respected compromise to state sovereignty is the use of enforcement measures authorised

⁷⁵ Simma (1995) *op.cit.* 43. p. 141

⁷⁶ Simma (1995) *op.cit.* p.141 para 2

⁷⁷ Article 15(8) Covenant of the League of Nations 1919

by the Security Council under the mandate of Chapter VII as outlined in Article 2(7). However, various authors have pointed out that this norm of sovereignty has been increasingly challenged in recent years by modern life, a concept we shall turn to a little later. Before we do that, it is necessary to look briefly at the development of the norm of sovereignty.

Lapidoth, in her article 'Sovereignty in Transition' does exactly this and her work tracing the traditional norms of sovereignty serves us well in looking into this issue⁷⁹. According to her, one of the first authors to develop a theory of sovereignty was Jean Bodin (1530-1596) whose reasons for doing so were motivated by the need to reinforce theoretically, the French monarchy against feudal lords, the Pope and the Emperor. Towards this end his definition of sovereignty included concepts of 'absolute and perpetual power of the Republic'⁸⁰. Lapidoth clarifies this to mean that, by 'absolute', Bodin referred to the 'totality of legislative power and the lack of a higher earthly authority'⁸¹ though he did see sovereignty being subject to the laws of God and nature. This early theory of sovereignty had a profound effect on the rise of the state system in the aftermath of the Peace of Westphalia⁸². Thus, even in early literature, we see that the idea of sovereignty while including the concept of totality and absolute power was conversely subject to heavenly authority. The conceptual basis got stronger under Hobbes⁸³ who viewed sovereignty as being completely free from limits. He wrote that '...since there is no leviathan above the states, and because the latter are in a state of nature warring against each other, no superior rules would be binding on them'⁸⁴ a

⁷⁸ See Onuf (1991) *op.cit.* 72 p. 436

⁷⁹ See Lapidoth 'Sovereignty in Transition' in 45 *JIA* (1992) pp . 325-366

⁸⁰ Bodin "Six Livres de la République (1576) as quoted in Lapidoth *op.cit.* 79 p.326

⁸¹ *Ibid* Lapidoth (1996) *op.cit.* 79 p.327

⁸² Lapidoth (1996) *op.cit.* 79 p.327

⁸³ Hobbes *Leviathan* as quoted by Lapidoth (1991) *op.cit.* 79 pp. 326-7

⁸⁴ *Ibid.* Lapidoth

problematic statement since such absolutism is difficult to maintain. Hegel developed the conceptual framework further though the idea of unlimited sovereignty⁸⁵ ‘almost to the extent of [supporting] totalitarianism and expansionism’⁸⁶. His prime argument was that if the state had absolute power to command, it would have no obligation to obey others - citizens of its own state or those of other states. This idea was directly in opposition to the American Declaration of Independence and the French Revolution, both of which made it clear that while the state did have supreme powers, this power derived itself from the desire of the people to be governed by themselves. Kelsen also rescued the drift in the concept of sovereignty towards absolutism attempting to replace it with the idea of international legal order or concepts of *Weltrechtsordnung* or *civitas maxima*⁸⁷. Rosseau though, was critical of the absolutist concept of sovereignty that was developing. He believed that it was ‘at the same time uncertain in its content, inexact from the point of view of legal technique, contrary to social reality, and lastly, dangerous by virtue of the practical consequences it is susceptible of setting in motion’⁸⁸. He suggested, instead, replacement of the norm of sovereignty with the idea of independence characterised by exclusiveness, autonomy, comprehensiveness and competence. This is interesting since it brings in the ideas of responsibility and a sense of duty created by the wielding of absolute power. It also neatly links with the idea of democracy and the central concept regarding the derivation of the power of the state from the people it represents as espoused by the French and American Declaration mentioned earlier.

⁸⁵Lapidoth (1996) *op.cit.* 79 p. 327

⁸⁶ Lapidoth (1996) *op.cit.* 79 p.327

⁸⁷ Kelsen H., ‘*Das Problem der Souveränität und die Theorie des Völkerrechts -- Beitrag zur Reinen Rechtslehre, Auflage von 1928 (1960) 320* ; also as as quoted in Lapidoth (1996) *ibid.*

⁸⁸ See Rousseau *Droit International Public Vol. II (1979) p.60*

3.2.1 Sovereignty in Modern Times

While there has been no revolution as such which has led to subtle changes in the norms guiding the concept of sovereignty, the following section hopes to highlight that modern 'sovereignty' varied greatly from the old Hobbesian and Hegelian concepts outlined above. Sovereignty in today's context has more to do with the concept of independence in arriving at decisions rather than exclusive and absolute power in making them. As pointed out by Huber, sovereignty in relations between states signifies independence in regard to a portion of the globe, and 'the right to exercise therein, to the exclusion of any other State, the functions of a State'⁸⁹. Thus western sovereignty today at least, has as its recognisable features, the features of modernity including liberalism, capitalism and the role of the state as outlined in the previous section⁹⁰. Of course once the scope of the study is broadened beyond the context of the economic Northern states, the definition becomes more blurred and has been stated earlier, some authors argue⁹¹ that it is questionable whether some of the Southern states can be called states at all. Onuf sees liberalism as being the core of modernity, capitalism as its paymaster and the state as being the highest social realisation, the primary agent of modernisation while also being the paramount problem of it⁹². Other authors ignore the modernity theme and suggest sovereignty as a concept that can be identified as the objective feature which entitles states to engage in international relations with 'constitutional independence'⁹³ which is defined as being a legal, absolute and a unitary condition. The international law definition given by Bindschedler remains unconvincing: he defines modern sovereignty thus: 'a state is sovereign if it is subject only and exclusively to international law, it enjoys full personality under international law and has the power to decide on politically

⁸⁹ See the *Island of Palmas Case*, UN, Reports of International Arbitral Awards 2(1949) 838.

⁹⁰ Onuf (1991) in *Alt. op.cit.* 72 pp.440-441

⁹¹ Notably Jackson (1996) *op.cit.* 16

⁹² Onuf (1991) *op.cit.* 72 pp. 440-441

⁹³ James, A, *Sovereign Statehood: The Basis of International Society* (1986) p.39

important matters⁹⁴. This definition is perhaps unconvincing since states are subject to international law in a very vague sense. To clarify, international law is a body of law that is heterogeneous and divided into various spheres. It is perhaps simplistic to suggest that a state is subject to international law in the same way that an individual is subject to domestic law, since there are a number of factors that make this comparison invalid. Amongst these are the fact that while in domestic law, consent is not necessary for the law of the land to be applicable, international law requires express consent before any norms can be expressly applied to the state⁹⁵. An example of this is that despite having an International Court of Justice to deal with possible disputes between states, states still have to explicitly agree before the Court is allowed any jurisdiction over them⁹⁶. However while this requirement is clear in terms of the International Court of Justice, it remains more ambiguous with respect to other aspects of international law, most clearly with respect to norms of customary international law. The argument here is that if states are subject to international law, barring the norms of *jus cogens* and elements of international custom (which they arguably submit to, since they play a part in their formation) it is only due to their choice to be subject to these norms. The element of subjectivity is highly qualified in international law and while it is true that states are subject to international law, it is only because they subject themselves to it in the belief that it is in their national interest to do so. Thus the Bindschedler definition is perhaps inaccurate in suggesting that a ‘...state is sovereign if it is subject only and exclusively to international law...’ since states arguably being sovereign, choose to subject themselves to international law. This thereby suggests that sovereignty precedes subjection to international law and is not a result of it. The second half of the definition is also highly problematic since

⁹⁴ Bindschedler Rudolf ‘Betrachtungen über die Souveränität,’ in *Recueil d’études de Droit International en Hommage a Paul Guggenheim (1968)* 174

⁹⁵ Barring a few norms of *jus cogens* such as non belligerent use of force, rights against genocide and *pacta sunt servanda* amongst others

⁹⁶ Article 40 of the International Court of Justice Statute as appended to the Charter of the UN 1945

Bindschedler argues that the state needs to have the ‘power to decide on politically *important* matters’⁹⁷. It is necessary to understand exactly what constitute ‘important matters’ since it could refer to a variety of issues such as tax laws, criminal laws, human rights provisions domestically or externally, or may be matters pertaining to the use of force in the international arena. It is quite clear that the degree of freedom and ‘power’ that a state has, to decide and influence these matters varies greatly from issue to issue and state to state. This can be illustrated by an example. Tanzania used unilateral force in ousting the Idi Amin regime from Uganda. This was a display of sovereignty beyond borders and its propriety is therefore suspect in international legal terms. However the opposite view, that failure of Tanzania to use force in ousting the Pretoria regime from South Africa is a defeat of its sovereignty since the government could not act on ‘politically important’ matters gives an extremely distorted picture of sovereignty. This is particularly pertinent in light of Tanzania’s fervent anti-apartheid stand. It abhorred the Pretoria regime and ought therefore to have pursued action in South Africa similar to that in Uganda. However viewing international law without taking into account political considerations that shape such actions gives an incomplete picture. Yet this idea of sovereignty derived from international law is not merely Bindschedler’s idea since it comes from a line of tradition which includes Austrian experts such as Kelsen and Verdross⁹⁸ both of whom underlined derivation of powers of the sovereign entity from international law. However, the argument being presented here is that international law provides state-induced limits to sovereignty rather than being a source of the derivation of sovereignty. We shall return to this theme after considering what sovereignty in a current scenario entails.

⁹⁷ Emphasis added

⁹⁸ See generally, Ushakov ‘*International Law and Sovereignty - Collection of Articles, Contemporary International Law*, Russian text edited by Tunkin (1969) pp. 97-117. Also see Ogden S ‘Sovereignty and

Lapidoth suggests seven main implications of sovereignty⁹⁹ in modern international law including: the sovereign equality of all states as given by the 1970 Declaration¹⁰⁰; the principle of non-intervention¹⁰¹, exclusiveness¹⁰², the presumption of a state's competence¹⁰³, no binding adjudication without consent, the principle of *jus ad bellum*, and finally the positivist theory of international law - which supports the 'notion that the source of the validity of all international law is the free will of the states'¹⁰⁴. Here, the author underscores the primacy of the state under international law in two cases. First, the idea of non-binding adjudication without consent as discussed above and second, the 'positivist theory of international law'. By this she refers to 'the notion that the source of validity of all international law is the free will of the states'¹⁰⁵ which, once again, renders Bindschedler's definition redundant. Another characteristic that merits comment is that the norm of non-intervention is perhaps, the biggest change in limits to sovereignty compared to past experiences.

In centuries preceding this, the state had more powers than it does now as is demonstrated by a number of factors within international law. These factors are easily viewed at three levels: 1) the relationship at the level of the state and supra-state organisations 2) the relationship between states and 3) the relationship between the state and individuals or groups of individuals. Firstly, in terms of the relationship between the state and supra-national bodies, the best example is a comparison on ties that linked the post-Westphalian State

International Law: The Perspective of the Peoples Republic of China' in *NYUJILP* 7(1974) 1-32.

⁹⁹ Lapidoth (1996) *op.cit.* 79 pp. 329-331

¹⁰⁰ See General Assembly Resolution 2625 (XXV) of 1970

¹⁰¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The USA) Merits, *ICJ Reports* (1986)14

¹⁰² In terms of power within a territory

¹⁰³ Lapidoth acknowledges Rousseau 1(1970) p. 274 while admitting that the validity of this rule in international law is contested

¹⁰⁴ Lapidoth *op.cit.* 79 p. 332

¹⁰⁵ Lapidoth *op.cit.* 79 p. 332

to the Vatican City and the limits imposed upon the state by the current UN regime. In the case of the former, the state bought its freedom from the Church by virtue of the Thirty Year War that culminated in the Peace of Westphalia, discussed earlier. That pact settled the issue of state sovereignty and divorced the foreign policies of the Calvinist states from the throes of the Catholic Church. From this point onward, the Church did not and could not play any direct role in the politics of the individual states. It did not directly impose any restrictions on the state, which henceforth more or less decided its own external policy. In sharp contrast, the UN has a number of restrictions on states, some of which we shall elaborate later. Amongst these are the restrictions on the use of force, and the conduct of relationships with other states. These are dictated by the UN Charter and reinforced by 1970 Declaration which sought to codify them into law. This leads us directly to a relationship between states, the second level, at which there has been a demonstrable change in the concept of sovereignty. With the growth of cross-border interaction especially within the discourses of human rights and environmental awareness, co-operation has gained importance between states. However even should this fail, international regimes that currently exist attempt to hold states responsible for the damage they cause to other states. Thus, in the particular case of environmental damage, while limitation of sovereignty to a restricted territory remains, it nonetheless forces states to be aware and control any effluents that spill beyond their borders. With respect to human rights, the situation is very different. It has to be understood that international human rights discourse, contains issues traditionally considered as domestic policy. Human rights defined broadly, and more particularly in the International Bill of Rights, remain primarily individual rights exercised within the territory of the state. These rights are expressed in two forms: one set of rights, negatively defined, restricts the interference by the state into individuals' lives, while the other set of rights, positively defined, lays down actions required by the state to improve the conditions of its population. Thus, both sets of rights are essentially exercised

against the state and in this pure sense they remains a threat to the sovereignty of states. What needs to be added though, and which is vital to understanding the functioning of international human rights discourse, is that these limits and challenges to state power are self-imposed. States imposed these restrictions upon themselves by agreeing to principles and signing and ratifying the relevant human rights treaties. The threat to sovereignty though, still remains for states that have not signed the treaty and do not agree with its terms. These states while not being directly bound by the provisions of the treaty could nonetheless be brought to account by the workings of customary international law to which all members of the international community are answerable. In additions, norms of *jus cogens*, the strongest international law, binds states notwithstanding tacit consent. Examples of norms of *jus cogens* are: the limits of the use of force, norms against genocide, norms against slavery and servitude and controversially, the right of self-determination. We shall return to these in a moment since they directly concern the discourse of self-determination and its interplay with statehood. One last point that needs to be mentioned before we move on to examine this, is the change in the relationship at the third level: i.e. the relationship between the state and the individual. It follows from the discussion above, that the human rights discourse has made inroads into the domain of issues that were primarily on the domestic agendas of states. In the past, the rule of the sovereign held firm and subjects to that sovereign were forced to pay heed to them or risk the displeasure of the sovereign. This ancient rule within international relations has held firm with the UN Charter and is expressed in the terms of Article 2(7) that we have been examining. However, in light of the discussion above on the erosion of 2(7) by inroads made on human rights in particular, this veil of domestic jurisdiction has been pierced with increasing regularity, thereby directly affecting the relationship of the state with its polity.

Arguably, developments at all three levels have been influenced by the growth of international law and the code of conduct governing the practice of international law and foreign relations. While it can be argued that these developments could not have taken place without the aid of state parties themselves, it still remains open to question why, once consent was given by a 'sovereign' power it was bound to this consent. This would seem to suggest that, at the time that the power was given (to international law in this case) by the state, its sovereignty was stronger than it is at the later time when it seeks to challenge this power. For instance a state that has agreed to be bound by a specific treaty, is prevented from reneging on this contract by the norm of *pacta sunt servanda*. Thus, while a sovereign state was exercising its sovereignty in signing a given treaty, it would appear to have lost its sovereignty - with respect to the matters contained therein within the treaty - to international law; when subsequently wanting to challenge the pact it previously consented to. This would suggest that the sovereignty of a state when entering the treaty is greater than after it has chosen to bind itself. The corollary to this is that states ultimately bind themselves to international documents because it is in their express interest to do so,¹⁰⁶ and also in light of the discussions in Chapter One with respect to the idea of international order which sustains *pacta sunt servanda* as a vital principle. Some examples of ways in which states have seen a transition and a weakening in their sovereignty are¹⁰⁷:

a) limits to the use of belligerent force¹⁰⁸

b) limits to intervention¹⁰⁹

c) being bound by norms of *jus cogens*¹¹⁰

¹⁰⁶ This would include the case of coercion - since the state would rather agree to a treaty than face the wrath of the coercer. However in international law it needs to be pointed out that coercion is enough to invalidate a treaty and set the signator free from *pacta sunt servanda* [as given by Article 51 & 52, Vienna Convention (1969)]

¹⁰⁷ Also see Herbst (1992) *op.cit.* 16 pp.17-30

¹⁰⁸ See article 2(4) UN Charter -- see Commentary in Simma *op.cit.* 43 p.136

¹⁰⁹ Heraclides 'Secession, Self-determination and Non-intervention: In Quest of a Normative Symbiosis' in *45 IA (1992)* pp. 399-420

- d) theoretical sovereign equality¹¹¹
- e) the individual petition mechanism¹¹²
- f) environmental treaties¹¹³
- g) the developing right to self-determination¹¹⁴
- h) status of national liberation movements¹¹⁵

Of the list above, the ones directly concerning this thesis would be the limits to the use of belligerent force and intervention, the norms of *jus cogens*, the individual petition mechanism, the developing right to self-determination as discussed in Chapter One and the status of national liberation movements. As mentioned earlier,¹¹⁶ self-determination evolved from Wilsonian ideals to its current status in international law. Now having discussed the role of the state in international law it is necessary to return to this theme and examine it in the light of the important norm of a state's territorial integrity and the threat posed by self-determination. As discussed earlier, the state and its sovereignty presents the norm of self-determination with its biggest hurdle, since international law does not permit any party to intervene in matters within the domestic jurisdiction of a state. Thus while self-determination, an obvious threat to state sovereignty evolved, it did so in the specific context of colonialism in the last fifty years. And colonialism as discussed in Chapter One was seen within the white v black or salt-water lens of international relations. We shall now turn to the examination of these limits to sovereignty within the context of self-determination.

¹¹⁰ See Harris (1997) *op.cit.* 1 pp. 835-7

¹¹¹ See Harris (1997) *op.cit.* 1 pp. 106-7, 190 & 627

¹¹² See Steiner & Alston *International Human Rights in Context: Law Politics and Morals* (1996) pp. 535-551

¹¹³ For example the limits to the emission of greenhouse gases

¹¹⁴ See Heraclides *The Self-determination of Minorities in International Politics* (1991) Chapters 1&2

¹¹⁵ As evidenced by the granting of 'Observer status' to the ANC, the SWAPO and the PLO in direct threat to the sovereignty of the territories which claimed to represent them see Simma (1995) *op.cit.* 43

3.3 Limits to Sovereignty

3.3.1 Norms of *Jus Cogens*

These have been partly discussed in Chapter One, in discussion of the 1970 Declaration which is considered one of the documents that elaborates the norms of *jus cogens* applicable within international law. The Declaration is merely a listing of the principles and purposes of the UN Charter and derives directly from Chapter Two of the Charter. Classic examples of norms of *jus cogens* include the norm against genocide, *pacta sunt servanda*, norms against slavery and servitude, limits to the use of force and self-determination. All these arguably present limits to the sovereignty of the state as discussed above in terms of *pacta sunt servanda*. The following section examines the limits imposed in terms of the use of force. First we shall look at the extent of the state's use of force, and secondly, the use of force directed at the body of the state during humanitarian intervention in support of national liberation movements. In addition, the argument against genocide and slavery and servitude will be analysed in Chapter Five in examining the issues arising in the Bangladesh Case. That particular case will also allow us to examine the issues of use of force, and limits to intervention. But this section attempts to put forth a theoretical analysis of the issues. Before we proceed further, it is necessary to understand exactly what the concept of 'national liberation movements' implies.

3.3.2 Status of National Liberation Movements

According to Higgins, 'wars of national liberation' are said to occur when 'people entitled to self-determination take up arms against the governments ruling the territory where they seek to exercise that right'¹¹⁷. This taking up of arms is illegal but in the ensuing fight

¹¹⁶ See Chapter One, Section 1.3 - 1.5

¹¹⁷ See R. Higgins *Problems and Process: International Law and How We Use it* (1994) pp. 39-55 at p.43

against the government the so-called liberators see a change in guise in their international armed conflict status¹¹⁸. Their arguments, usually, are that they act against a repressive state that violates their right to self-determination, a norm of *jus cogens*. The state, on the other hand, is perfectly entitled to protect its territorial integrity and can theoretically use any means short of genocide to prevent fragmentation of its territory. Thus, while liberation movements use arguments in support of self-determination, states respond by using the argument of territorial integrity. This highlights the issue of the conflict flagged up in Chapter One, with respect to self-determination and territorial integrity. International law as mentioned, is ambiguous on the matter and this has not been helped by the aforementioned 1970 Declaration that while affirming self-determination as a norm of *jus cogens*, provides equally strong support for territorial integrity which is protected under the UN Charter. During the colonial period, national liberation movements had a strong voice since they could more easily be distinguished, in terms of race and ethnicity from the traditional white European powers that ruled over them. With colonialism declared abhorrent, they had a free reign to securing the independence of 'their' state. However, in recent years, with the growth of 'postmodern tribalism'¹¹⁹ this has been increasingly challenged. The biggest problem remains in the determining the 'genuine' national liberation movement from a separatist group trying to usurp political power using a legalistically determinist argument of self-determination. If a national liberation movement can be proved to be genuine then the right of self-determination arises since the people that the group represents could feel a genuine alienation within the structure of the state, which perhaps does not recognise their rights to the extent required under international law. This grievance could then be addressed by the state within the compromises of internal self-determination such as autonomy or federalism. However, it

¹¹⁸ See Chadwick *Self-determination, Terrorism and the International Law of Armed Conflict* (1996). Also see generally H. McCoubrey & White N.D *International Organisations and Civil Wars* (1995) pp. 31-54

¹¹⁹ See Franck 'Post-Modern Tribalism and the Right to Secession,' in Brölmann et al (eds.) *Peoples and*

remains hard to judge support for a national liberation movement, unless it is present in the domestic politics of the given state. The vicious circle here is that if the secessionist political party, is fairly represented in the domestic political milieu, then the need for it to have separate statehood is perhaps negated in the interests of international unity and the order. Thus what is more than likely is that liberation movements are often pushed into resorting to force to bolster their argument to the international community, and this very use of illegitimate force prejudices the case against them in the Statist discourse of the international system.

Nonetheless, in the context of state practice over the last two decades, there has been an increasing awareness within the international community of the importance of national liberation movements. Part of this awareness has, perhaps, been elicited by resort to 'terrorism' by these movements. This in itself, is problematic since it suggests that, illicit force can still play an important part in a system that abhors the use of such force¹²⁰. In this milieu, the UN is re-orienting its relationship to sub-national groups in general and to national liberation movements in particular. Traditionally, international law has been considered to be the law between states¹²¹; this concept has, however, evolved to take into account sub-state groups that play an important role within the international polity. One of the first groups to be recognised, within the domain of international law despite being a non-state party, was the Swiss Red Cross¹²² which catered to the needs of the wounded on the battlefield irrespective of ideology or affiliation. This group was recognised as being vital to the humanitarian needs during armed conflicts. In recent years however, with growth of the legal principle of self-determination, national liberation movements have gained special status. UN recognition of the Palestinian Liberation Organisation (PLO) in 1988, and subsequent recognition of the

Minorities in International Law (1993) p.3

¹²⁰ See generally Chomsky *Necessary Illusions: Thought Control in Democratic Societies* (1989)

¹²¹ See Shearer (1993) *op.cit.* 1 Chapter IV

African National Congress (ANC) and SWAPO demonstrated this. It represents a commendable effort by the UN to be sensitive to voices excluded in purely Statist agenda. Since then, national liberation movements have had a curious position in international law. While only express recognition allows them to be considered *de jure* international persons, they are, nonetheless, *de facto* players in the peace and security of many regions. It is still ambiguous whether the UN is obliged to help a recognised national liberation movement achieve its goal at the cost of a recognised member state. The situation concerning the ANC was different from that of other national liberation movements since South Africa at the time, was no longer a Member State of the UN and thus overt support to the ANC would not affect the relationship of Organisation and Member. Nonetheless, even this liberation movement failed to gain logistical support from within the UN itself, perhaps due more to political processes within the UN Security Council. In other cases of UN recognition of a liberation movement, there is no doubt that this constitutes erosion of the affected states' sovereignty. For example recognition of the PLO, which has, in its manifesto, the destruction of the Jewish State of Israel, presents a direct compromise of Israel's sovereignty and its status as a Member of the UN. These are issues that international law does not shed much light on, and take place under a curtain of political activity, central to the processes of international law.

The question, from a national self-determination point of view, is whether a recognised national liberation movement can receive armed support from a third party, with the aim of helping it achieve the international right of self-determination of a people. This question concerns us in the Bangladesh case, and it is therefore necessary to delve into the theoretical aspect of the concept of intervention in support of self-determination and the threat that it poses to sovereignty and the state system.

¹²² See McCoubrey & White (1995) *op.cit.* 120 pp. 50-4

3.3.3 Limits to Intervention

The idea of intervention goes back to the time of Grotius who addressed the issue in his discourses even though he did not refer to it in the same terms¹²³. As Higgins points out in her piece on Grotius and the Development of International Law in the UN Period¹²⁴, Grotius saw the link into intervention as being the concept of a 'just war' or *jus ad bellum* - the lawfulness of resorting to war. Grotius stated that '...an unjust cause of war is the desire for freedom among a subject people'. Contradicting this with extraordinary liberalism, he declared: 'an unjust cause of war also is the desire to rule others against their will on the pretext that it is for their good'¹²⁵. In this sense he articulated, centuries before modern international law, the ambiguity inherent in the conflict of interests between territorial integrity and self-determination. This ambiguity is also borne out by Higgins who concludes her piece ambiguously:

Today the great debate is as to whether self-determination is a right applicable only to persons under alien or colonial rule (as some of the UN membership would hold) or whether it applies to all those who do not have the opportunity to participate in the public life of their own country and choose their own political system. Although Grotius did not, of course, address this point, the generosity and spirit of his remarks leaves one in no doubt as to the answer that must be embraced by the international lawyers of today¹²⁶.

Notwithstanding the Grotian view however in modern international politics, humanitarian intervention remains the act of intervening in a sovereign state, with or without the express permission of the sovereign, in a bid to alleviate human suffering. This suffering

¹²³ See generally Murphy C.F. 'The Grotian Vision of World Order,' in 76 *AJIL* (1982) 477

¹²⁴ Higgins (1990) *op.cit.* 3 pp. 267-80

¹²⁵ JPB book II chap 22 para 11 and 12 as quoted by Higgins (1990) *op.cit.* 3 p. 278

may be through natural causes such as floods or drought, but could also include man-made factors such as genocide¹²⁷. The argument presented here is that if 'self-determination' is accepted as a right that seeks to emancipate people, the question must be raised as to whether an intervention is permissible in favour of a struggling 'national liberation movement'. After all the International Bill of Rights does see the right of self-determination as the prime human right. However it needs to be stressed again that although the scope of 'humanitarian intervention' may be widening¹²⁸, we remain some distance away from a legally formulated right to humanitarian intervention in favour of self-determination. This is primarily since such an eventuality would require erosion of the norm of state sovereignty to a greater extent.

3.3.4 Limits to the Use of Belligerent Force

According to Hegel, the use of force was the mechanism by which a state could mobilise its people¹²⁹. In the past, the strength of a state could be gauged by its armed forces, a source of security to the people and their way of life within the state. However, since 1928,¹³⁰ efforts have been made to limit and even ban the use of force in the international sphere¹³¹. Nevertheless, the state has always had the best resources to use force unproblematically, and one of the modern characteristics of sovereignty is the right to a monopoly on the use of force within the domestic sphere¹³². As Higgins points out in examining the writing of Grotius, '...central to Grotius's enunciation of the law is the insistence that *bellum privatum* is largely

¹²⁶ Higgins (1990) *ibid.* p. 278

¹²⁷ This argument has been used with varying degree of success in a number of interventions including: Tanzanian intervention in Uganda, Indian intervention in East Pakistan, and UN involvement in Rwanda, besides more recent instances concerning the former Yugoslavia

¹²⁸ witness the 'liberation' of Kosovo by NATO

¹²⁹ As quoted in Elshtain 'Sovereignty, Identity and Sacrifice in 20 *MJIS* (1991) 395

¹³⁰ Kellogg-Brian Pact 1928

¹³¹ For a discussion of the history of the Use of Force see McCoubrey and White *International Law and Armed Conflict* (1992)

¹³² See R. Higgins (1994) *op.cit.* 117 p.53

forbidden'¹³³. For Grotius war is essentially limited to the state with the individuals being afforded other remedies such as litigation to bring claims against one another or the state. Should they have recourse to force, Grotius believed it would compromise the order that the state could maintain and was its duty to provide. The limitations on use of force, he wrote, could only work if states asserted a monopoly over use of force¹³⁴. In recent years however, the UN has passed resolutions that offer material and moral support to those fighting in 'wars of national liberation'. No clear basis for this is to be found in the text of the Charter'¹³⁵. The main reason for the post-Second World War revival of the legitimation of non-state violence in this format, according to Higgins, has been the emergence of the concept of self-determination¹³⁶. Thus, the modern state faces restrictions of two kinds on the use of force: first, as pointed out above, the threat to its monopoly on the use of force, and second, discussed elsewhere,¹³⁷ the restrictions on the force that governments can apply in international relations. The latter is regulated by the force of Article 2(4) of the UN Charter amongst other documents¹³⁸. From the point of view of the discourse of self-determination, the legitimation in some cases of use of force in national liberation, has thrown up a whole host of possibilities for the self-determination discourse which are still difficult to unravel.

Conclusion

Thus, the discourse of statehood and sovereignty is one of the vital concepts within the self-determination discourse. When self-determination is read as secession, it presents a threat to existing order and is, therefore, undesirable to states. At the same time however,

¹³³ Higgins (1990) *op.cit.* 3 p.276

¹³⁴ Higgins (1990) *ibid.* p. 277

¹³⁵ See Falk 'Intervention and National Liberation' in Bull *Intervention in World Politics*; Ronzitti 'Resort to Wars of National Liberation', in A Cassesse (ed) *Current Problems of International Law* (1975) and Heather Wilson *International law and the Use of Force by National Liberation Movements* (1988)

¹³⁶ Higgins (1990) *op.cit.* 3 p. 280

¹³⁷ See generally McCoubrey & White (1995) *op.cit* 118, Chadwick (1996) *op.cit.* 118

secessionist movements in breaking away from a state often aspire to statehood themselves. This shows the immense importance of the concept to international law of self-determination. The concept of statehood has embedded itself within international law, driven by a strong need for order¹³⁹. One of the strongest manifested principles within the international system that backs the centrality of this concept is that of territorial integrity. Territorial integrity, however, runs contrary to the spirit of self-determination, which suggests that any people being repressed, dominated or exploited within a state have a right to seek self-determination. This was easier to achieve during colonialism. Immediately after the decolonisation experience, post-colonial states under threat gained immense protection from an international system that was wary about recognising national liberation movements such as that of Biafra as discussed above. However in recent years there appears to have been a gradual shifting of the conceptual paradigm. The case for Eritrean self-determination via the 1991 UN sponsored plebiscite, was central to this trend. In addition there has been the granting of observer status to national liberation movements, and a growing awareness of the exclusion within states of large tracts of populations in post-colonial countries. This also comes at a time when the practice of state-craft itself is undergoing changes and, arguably, seems to wield less influence than in the past. Despite all this, however, it has to be affirmed that self-determination in the context of secessionary movements remains difficult to achieve. In the context of the post-colonial state that is the prime focus of this thesis, there is another factor that has played an immense role in deciding the parameters of the self-determination achieved so far. That is the drawing of boundaries, which is so integral to the definition and identity of the territorial-based state. Boundary regimes in themselves are admittedly necessary, however the ways and

¹³⁸ Kellogg-Briand Pact; article 51; Definition of Aggression, 1970 Declaration amongst others.

¹³⁹ See Bull *Anarchical Society: A Study of Order in World Politics* (1995)

means by which they have affected identity in the colonial state proves central to the modern problem of separatism. This will be the focus of our next chapter.

CHAPTER FOUR

THE NORM OF UTI POSSIDETIS JURIS: THE DECIDING FACTOR IN THE CREATION OF MODERN NATIONAL IDENTITY

Introduction

Having examined the role of statehood in modern international law of self-determination, it is important to now turn to, what is arguably the most influential doctrine in shaping the modern state and the identities created within it; namely the Doctrine of *Uti Possidetis*. This chapter will attempt to trace the history of the doctrine from its derivation in Roman law, and analyse its influence and effect on the development of the right of self-determination, in the process of becoming an integral mechanism of modern international law. For this purpose, we shall draw on some of the cases before international tribunals where reference was made to the norm of *uti possidetis*, in a bid to locate the merits of the norm and its working in particular situations. Notwithstanding these merits though, the norm of *uti possidetis* directly conflicts with the idea of self-determination; we shall examine the fault lines between the two principles, attempting to arrive at a symbiosis. We shall also attempt to analyse the viability of the norm in the context of post-decolonisation self-determination tussles. Finally, it is hoped that this chapter will provide the legal precedents in state practice as well as in international cases in an examination of the restrictions *uti possidetis* places on self-determination.

4.1 Meaning of the Doctrine of Uti Possidetis

The Doctrine of *Uti Possidetis* has, in one form or another, been the biggest contributor to the constitution of nearly 80 percent of the states that currently exist¹. It has also contributed to the creation and maintenance of modern national identities as we shall seek to demonstrate in the course of this chapter. What the doctrine basically states is ‘that new States will come to independence with the same boundaries that they had when they were administrative units within the territory or territories of a colonial power’². This doctrine, when applied to the self-determination discourse, suggests that newly ex-colonial States will inherit the boundaries created for them by their colonial rulers. In the words of the judgement of the *Burkina Faso-Mali Case* ‘...by becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power’³. Thus, while underlining the principle of stability of boundaries it provides a territorial limitation to the exercise of sovereign power in relation to its neighbours by a given state by means of a demarcated boundary line that had existed at the moment of independence. This demarcated boundary line was, from this point onwards declared sacrosanct and given international legitimacy.

The norm of *uti possidetis* originates in Roman law where it was a basic tenet of the Roman Praetor, for promotion and maintenance of order. Authors such as Mazrui⁴ would see this as being problematic and would, perhaps, suggest that this is further evidence of Westernisation and Christianisation of international law. This claim cannot be totally repudiated owing to the fact that development of international law was located around states

¹ It has played a role in nearly all of the states that came under the influence of colonialism, though admittedly some states were affected less than others as we shall see during the course of this chapter.

² Shaw, M. ‘The Heritage of States: The Principle of *Uti Possidetis Juris* Today,’ in 67 *BYIL* (1996) 97

³ *Burkina Faso-Mali Case* (1986) see *ICJ Reports* (1986) 568

⁴ Mazrui, A. *Cultural Forces in World Politics* (1975)

emerging in Post-Westphalian Europe. Also as mentioned earlier, international law traditionally considers as its origin, the discourse of Hugo Grotius - *De Jure Belli ac Pacis*⁵ written in the sixteenth century. Grotius himself did not refer to the norm of *uti possidetis*, though it is clear from his discourse that he considered the maintenance of order a prime requirement of international law, as evidenced from his thoughts on intervention referred to in the previous chapter⁶. The Doctrine of *Uti Possidetis* though, traces its roots directly to the Roman law norm of *uti possidetis ita possidetis* which forms the basis for the modern doctrine. '*Uti possidetis ita possidetis*' was the interdict of the Roman Praetor, primarily in place to prevent 'disturbance of the existing state of possession of immovables as between two individuals'⁷. Translated, it reads, 'as you possess, so you possess'. This is interesting since, as we shall see later, when applied to international territory, what this doctrine did was to reduce the situation to one that could take place between two individuals. In the course of this process it treated the cause of their dispute, i.e. the territory, as a possession of the current occupier. This has all kinds of ramifications for international law that we shall examine in some depth in the latter half of the chapter. What the original norm sought to do was clear: it prevented further aggravation over a particular possession by simply assuming the title of the goods belongs to its current possessor. It thereby negated the case of the aspirant to the possession, to which he/she may/may not have had a valid claim. This translated into an international legal situation where a territorial dispute between sovereigns, was resolved by legalising the possession of the *de facto* occupier of the territory. This sovereign could continue to exercise sovereignty over it, while the aspirant's claim was dismissed, ostensibly

⁵ For a general discussion on the influence of Grotius on international relations see Bull, Kingsbury and Roberts (eds.) *Hugo Grotius and International Relations* (1990)

⁶ See the Higgins 'Grotius and the 'Development of International Law During the United Nations Period' in Bull, Kingsbury & Roberts (1990) *ibid.* pp. 267-280; also see Chapter Three especially Sections 3.3.3 & 3.3.4

⁷ Moore, J.B., 'Memorandum on *Uti Possidetis*: Costa Rica-Panama Arbitration 1911' in *The Collected Works of John Bassett Moore* (1944) 328 as quoted in Shaw (1996)*op.cit.* 2 p.98

since it was being disruptive of the peace. Thus, status quo would be preserved, irrespective of the means by which possession had been gained.

International law in the Doctrine of *uti possidetis*, saw an opportunity to restrict conflict and allow consolidation of the *de facto* situation following hostilities. This was convenient as it allowed simple conclusion of peace in a given situation without redress and re-assessment of the relative merits of each side. It had the added benefit of ignoring other sources of difference i.e., tribal affiliations or social cohesion, which were cumbersome to determine in demarcation of territory. Thus, in the case of belligerent occupation, the doctrine required that peace be achieved by a simple decision to allow the aggressor to continue possession of the territory gained by conquest, and the status quo be maintained from that point onwards. The doctrine thus, has the effect of trying to ‘stop the clock’ in a given situation and carry on, from that point, in peace. In the words of Shaw ‘...the norm served to preserve the status quo even if the latter was established as a consequence of force. It appeared in international law as a principle of consolidation of the *de facto* situation following hostilities so that the simple conclusion of peace would vest in the belligerents, such territory, as was actually under their control at that point. It then materialised in the era of colonisation in the form of a doctrine of actual possession with the aim of mitigating disputes between expanding powers... (and) ...bestowed an aura of historical legality to the expropriation of the lands of indigenous peoples’⁸. The state was thus able to proclaim the juridically acceptable nature of its own territorial definition, internally as well as externally. The doctrine of *uti possidetis* thus adds the thrust of territoriality to the discourse of statehood and sovereignty discussed in the earlier chapter. It also, by way of this process, forecloses questions of legitimacy and recognition; restricting them to a purely territorial basis, in

precedence over other legitimising principles such as ethnicity, tradition, race, religion, ideology or history. It thus seeks and attempts to induce a re-reading of history, based on the specific definition of a territory as the state, rather than an allegiance to a sovereign, as in the past⁹.

One of the first manifestations of this doctrine, as it developed in international law, was in the Spanish withdrawal from Latin America.¹⁰ Here, we also see first signs of differences of meanings in the application of *uti possidetis*. '*Uti possidetis juris*' referred to a legal boundary line based on legal title, as was the rule adopted by the successor States to the Spanish Empire. *Uti possidetis de facto* on the other hand, was an interpretation based on factual possession maintained by Brazil, the successor to the Portuguese colony on the continent¹¹. This idea of *de facto* possession as a factor first emerged only after the war of 1801 fought by Spain and France, against Portugal. The war itself was considered by Brazil, as having revoked the Spanish-Portuguese treaty of 1777 delimiting the relevant boundaries, and marked a reversion of the original principle of *uti possidetis* in international law which simply accepted the territorial results of war and actual possession irrespective of how this was achieved¹². The modern manifestation of the doctrine of *Uti Possidetis* seems to favour the Brazilian approach of *de facto* possession over any other system.

In this sense, it is claimed that the doctrine of *uti possidetis* merely respects the *de facto* situation that existed prior to the departure of the colonial ruler. In this situation, lines

⁸ Shaw, M. *op.cit.* 2,(1996) 98

⁹ See generally Hinsley *Sovereignty* (1986)

¹⁰ For a general reading of the Spanish withdrawal from the Americas see Picon-Salas M, *A Cultural History of Spanish America from Conquest to Independence* (1962); also see Pastor B.B *The Armature of Conquest: Spanish Accounts of the Discovery of America 1492-1589* (1992)

¹¹ Shaw *op.cit* 2 (1996) p. 100

¹² See Judge Caneyro's separate opinion in the *Minquiers and Ecrehos case*, *ICJ Reports* (1953)p. 47 &104

drawn by the previous occupier, i.e. the colonial power would be taken to be sacrosanct with no alterations allowed. To allow any re-definition of the lines inherited by newly emerging states in transition was not considered conducive to order. This would be especially true in the manifestation of the decolonisation process in the latter half of the twentieth century, when mounting international pressure forced European colonial powers to abdicate vast tracts of Asian and African lands that they previously possessed. It needs to be acknowledged that the nature of colonialism did not allow for grooming of a non-colonial successor who could be primed for smooth transition of power. This left newly emerging states vulnerable to vested interests within the state who, it was feared, might try to seize power on departure of the colonial ruler. These groups were, normally, sub-state entities with agendas that included a re-negotiation of territory on the basis of historic identities. In some cases, neighbouring states too were interested in re-negotiation especially when they considered that their lands had been included by the colonial ruler, in the territory of the newly independent state¹³. Thus, the emerging state would need support from the international community until it could gain confidence and experience in state-craft. The norm of *uti possidetis* thus suited this situation perfectly. It prevented the re-negotiation of boundaries, and the territory that comprised the new state, was guaranteed control under the new ruler since no territorial negotiation was allowed. This meant that the ruler need not necessarily, exercise *de facto* or effective control over the entire territory, which would be considered part of his/her state. In addition, sub-state and other state parties were deterred from trying to undermine the integrity of the new state. In this sense, the ruler could be certain that territories left to him/her by the colonial ruler, would exist as a unit, irrespective of any claims to the contrary. The doctrine, therefore was a recognition that in the interests of order, a 'snap-shot' of the territory at the moment of

¹³ This situation will be examined in depth in the Western Sahara Case which we shall be focusing on in Chapters Six and Seven

independence would have to be taken as fixed, so that economic development could be pursued from that point. As stated by the International Court of Justice ¹⁴ in the *Burkina Faso-Mali Case*, ‘...the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries may be no more than delimitation between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term’¹⁵. However, this is already a substantial change from the discourse of the ‘state’ and the importance of the concept of allegiance to a sovereign being the basis of it that we examined in Chapter Three; this leads Jackson to suggest that empirical statehood in some post-colonial territories is non-existent¹⁶. We shall examine these claims later against the backdrop of the effects of the norm. Before that, it is necessary to trace the historical development of the norm of *uti possidetis* to its current status in modern international law.

4.2 Historic development of the norm

Although the doctrine derives from Roman Law, the meaning ascribed by the Praetor, is only one part of the modern doctrine of *uti possidetis* which has changed guise as it was applied in different situations. Under Roman Law, the solution proposed to the conflict that arose over a given property did not address the final disposition of the property. Rather, it shifted the burden of proof during the proceedings to the party not holding the property (in this case the land), thus presenting the possessor with an inherent advantage. As mentioned above, this edict came to be summarised in the phrase *uti possidetis, ita possidetis*: as you

¹⁴ Henceforth referred to as the ‘ICJ’

¹⁵ ICJ Reports (1986) 566

¹⁶ Jackson ‘Juridicial Statehood in sub-Saharan Africa.’ in *46 JIA* (1992) 1

possess, so you possess. However, the idea of *uti possidetis* when combined with the principle of self-determination throws up interesting results, the first of which can be seen in the Creole action in Latin America which drew on these ideas in wresting independence from the Spanish¹⁷. In that particular situation, the use of the doctrine revealed two prime advantages: it ruled out the concept of the territory being *terra nullius*¹⁸ since this could leave it open to newer claimants, and it also prevented conflict among new states of the former empire. This norm, conducive to an orderly Spanish withdrawal from Latin America, was rehabilitated in the decolonisation of Africa in the middle of the twentieth century but encountered numerous problems. The African example, as we shall dwell in some depth later in this chapter as well as in the case study of the Western Sahara in the second half of this thesis, was particularly fragile. This was due to the nature of the boundaries erected by the colonial rulers. Their demarcation and restriction of each others influence in the continent which had created artificial entities continent-wide. Thus, units left behind by colonial powers had little bearing to the history or geography of the region, often placing antagonistic tribes within the same boundary¹⁹. Thus the dilemma faced at decolonisation, was either to allow re-negotiation of boundaries along less problematic lines, or simply accept the situation created, and pursue development without running the risk of fragmentation²⁰. This reasoning is relevant to the origins of the norm highlighted above, where the situation was resolved, by a decision taken at a given point in time in the interests of order, and considered as settled. Thus, in the decolonisation of Africa and Asia (to a lesser extent) it was decided to choose the departure of the colonial ruler as the point or 'critical date' from which the physical dimensions of the new state would be constructed. The logic of the situation was clear to post-independence African

¹⁷ See Anderson, B., *Imagined Communities: Reflection of the Origin and Spread of Nationalism* (1991) 56-59

¹⁸ See the discussion in Chapter Seven Section 7.2.2

¹⁹ See Heraclides *The Politics of Self-determination and Minorities* (1991)

²⁰ See Herbst J 'The Creation and Maintenance of National Boundaries in Africa,' in *43 Int. Org.* (1989) pp. 673, & 678-85; also see Kapil R. 'On the Conflict Potential of Inherited Boundaries in Africa,' in *18 World Politics*

leadership who readily extended the doctrine of *uti possidetis* to the African continent, expressing it in the language of the Cairo Declaration in 1964²¹. This was subsequently re-enforced in numerous international law cases²². The Cairo Declaration was an endorsement of the values of order over chaos, since leaving the issue of boundaries open at the stage of transfer of power to ‘the people’ was perceived as threatening widespread bloodshed as tribalism was allowed free reign. The doctrine also succeeded in keeping irredentist neighbours at bay while the fledgling state consolidated itself. Internally, it reminded minorities without a political voice that, with the option of a re-negotiation of boundaries ruled out, they would need to seek recompense from within the state structure. It was hoped that this would lead minorities to be more participatory within the state structure they had inherited. Thus, only a few years after the voicing of his plan of self-determination driven by concern for minorities, Wilsonian ideas stood completely defeated. While under Wilsonian self-determination,²³ the international community²⁴ would need to ensure that territorially based minorities could govern their own state, or be protected under a strict regime of minority rights monitored by the League Council, under the UN decolonisation system the role was reversed. Minorities within recognised state structures drawn by colonial powers, would need to remember that they had no option for true Wilsonian self-determination. Instead they would have to seek inclusion within the state, and in this process, the onus was placed purely upon them as the state had no incentive to try and appease them since, with

(1966) p. 656 & 660

²¹ See Brownlie I *African Boundaries: A Legal and Diplomatic Encyclopaedia* (1979) pp.10-11; also see Preamble to the OAU Charter (1963); also see OAU Document AHG/Res. 16(1) & *Africa Research Bulletin* (July, 1964) 122; Naldi ‘The Case Concerning the Frontier Dispute (Burkina Faso/Mali): *Uti Possidetis* in an African Perspective’ in 36 *ICLQ* (1987) p. 893. It needs to be mentioned that the attempted secession of Katanga played a significant part in the crystallisation of African attitudes toward the potential dangers of re-drawing boundaries; with its attendant threat of demarcations based on relative wealth, besides the issue of cross tribal affiliations.

²² Also see: Rann of Kutch in 50 *ILR* 407 (Bebler’s dissenting opinion); Dubai-Sharjah Case 91 *ILR*; Burkina Faso Mali case *ICJ Reports* (1986) 565; Guinea-Bissau/Senegal case 83 *ILR* 35; El Salvador Honduras case *ICJ Reports* (1992), p.351 & 386; Libya Chad Case *ICJ Reports* (1994) p.83 (Ajibola)

²³ As discussed in Chapter One, Section 1.3

borders guaranteed, they posed little threat to the state²⁵. In this light, this situation presented an extremely dangerous and problematic shift in the power dynamics away from minorities and towards the state. 'Quasi- Sovereigns'²⁶, with the area of their influence demarcated and guaranteed externally, faced no threat of secession from minorities, who were only protected within the ambit of article 27 of the ICCPR²⁷. State action against them could thus only reach the international community via the Reporting system of the Covenant²⁸; and in those countries that had signed the Optional Protocol on individual reporting mechanism, via this method²⁹. But as discussed, even this route, exclusive to countries who had consented to the individual reporting procedure, presented a problem as the HRC³⁰ was extremely cautious in examining cases of what they considered 'group rights'³¹.

Problematic as it was in its application in African and Asian decolonisation, the doctrine of *uti possidetis*, came to be perceived as conducive to order. The next step of its development took place when international order was threatened once again, by separatism. The end of the Cold War and the subsequent unravelling of the socialist Eastern bloc countries of East and Central Europe saw forces of fragmentation, controlled centrally over centuries, ignited once again. In the break-up of the Soviet Union, Yugoslavia and the Velvet Divorce between the Slovak and Czech Republics, international law took the opportunity to stress the importance of the norm of *uti possidetis*.

²⁴ Represented at that time by the League of Nations

²⁵ This idea of the 'threat' has been discussed in Chapter Two Section 2.3

²⁶ See Grovogui Siba, N *Sovereigns, Quasi-Sovereigns and Africans: Race and Self Determination in International Law*(1996)

²⁷ See the discussion on Art. 27 in Chapter Two Section 2.4

²⁸ Article 40 of the ICCPR (1966) see Steiner & Alston *International Human Rights in Context* (1996) 505-534

²⁹ Optional Protocol I to the ICCPR (1966). For a general commentary on the individual reporting mechanism See Steiner & Alston (1996) *ibid.* pp. 535-551

³⁰ Human Rights Committee

³¹ Chapter Two Section 2.4

The former Republic of Yugoslavia comprising 22 regions had been amalgamated into 6 Republics under Tito. These Republics corresponded closely with the pre-1918 historical boundaries, but left, nonetheless significant minorities within each administrative Republic that together formed the Federal Republic of Yugoslavia³². During the break-up of Yugoslavia between 1991 and 1992³³, the doctrine of *uti possidetis* was stressed by the EC Arbitration Committee which in 1991 stated that ‘... it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise’³⁴. Nonetheless, the edict was largely ignored except between Slovenia and Croatia who had decided not to contest the borders they inherited against each other. Thus, in its conditions for recognition of states seeking to emerge as independent countries, one of the requirements laid down was a strict following of the doctrine of *uti possidetis*. Its application in this situation required that administrative boundaries of the old federal state be maintained and given international legitimacy. There were, however, significant differences in the application of the norm in this case in contrast to the decolonisation process. First, the people of former Yugoslavia could not be considered to be under colonial influence in its narrow interpretation used in international law. Second, the borders that the state fragmented along had a certain historical legitimacy (pre-1918) which was absent in some of the African and Asian decolonisations which rarely respected any local fault-lines. Later developments in the former Yugoslavia actually threaten rather than strengthen the case for *uti possidetis* most notably with the Dayton Peace Agreement which set out the boundaries emerging in the region through the process of occupancy and negotiation rather than geographic history.

³² See generally Stojanovic, S ‘The Destruction of Yugoslavia,’ in 19 *Ford. JIL* (1996); Radan, P ‘Secession and Self Determination: The Case of Slovenia and Croatia,’ in 48 *Aus.JIL* (1994) 183

³³ See Weller, M ‘The International Response to the Dissolution of the Socialist Federal republic of Yugoslavia,’ in 86 *AJIL*(1992) 569-607

³⁴ 92 *ILR* 168

The break-up of the Soviet Union is more complicated due to several re-drawings of boundaries of the different Republics by different leaders³⁵. In the 1920s the Soviet Union absorbed new territories that had been independent since the war, including the Ukraine, Belarus, Georgia, Armenia and Azerbaijan besides smaller areas in Central Asia³⁶. By 1926 the Soviet Union comprised 8 Republics, based on purely ethnic factors (though not to the satisfaction of all)³⁷. By 1939 however, and as contemplated in the Molotov- Ribbentrop Pact, the USSR invaded and annexed the Baltic Republics Estonia, Latvia, Lithuania as well as the Romanian territory of Bessarabia, creating four new republics; besides annexing parts of Poland³⁸. By the end of the war, the Soviet Union had further expanded over parts of Eastern Europe. This process of expansionism was mirrored internally in Soviet moves in re-aligning its peoples. Boundary changes were enforced, as internal borders were rearranged, taking away land from the newer entities and amalgamating it with older republics. These land transfers before the end of the Second World War thus changed the population dynamics in the Republics that formed the Soviet Union, unlike in Yugoslavia. In addition there was a constant flow of people from one part of the Soviet Union to another dictated by the Central government, and with the movement of peoples and the changing of internal boundaries, allegiance of people to their territory became difficult to determine. By and large, with a few exceptions³⁹, the land transfers ceased after the war. At the time of the dissolution of the Soviet Union into its constituent Republics, the doctrine of *uti possidetis* therefore raised the

³⁵ See generally, Staruschenko, G *The Principle of National Self Determination in Soviet Foreign Policy* (1965) and Shahenn, S *The Communist (Bolshevik) Theory of National Self Determination: Its Historical Evolution Upto the October Revolution* (1956)

³⁶ Shaw (1996) *op. cit.* 2 p.110

³⁷ See Krasner R, *The Geography of nationalism in Russian and the USSR* (1994) pp. 107-8 & 111.

³⁸ Treaty of Non-Aggression between Germany and the Soviet Union, Secret Additional protocol August 23, 1939 in Documents of German Foreign Policy 1918-1945. also see 'The Dniester Conflict: Between Irredentism and Separatism,' in *45 Eur-Asia Studies* (1993)

³⁹ Krushchev's gift of Crimea from the Russian SSR to the Ukrainian SSR in 1954 and the transfer of a part of the Kazakh SSR to the Uzbek SSR in 1963 as quoted in Shaw (1996) *op. cit.* 2 p. 110

spectre of similar difficulties as those faced in the African transfer of power from colonial states to indigenous ones. Once more, stress was on order and the maintenance of newly independent states in the same shape as when they were part of the old Soviet Union. Fortunately, the break-up was relatively peaceful with only the Baltic States rejecting the conversion of internal borders to international boundaries. The former Republics still maintain claims against each other despite the fact that the Charter for the Commonwealth of Independent States formally respects *uti possidetis*⁴⁰. The Agreement linking the Commonwealth of Independent States signed at Minsk on 8 December 1991 states that ‘... the High Contracting Parties acknowledge and respect each other’s territorial integrity and the inviolability of existing borders within the Commonwealth’⁴¹. This receives further backing in the Alma Ata Declaration (21 December 1991) signed by 11 former Republics which refers to the States ‘... recognising and respecting each other’s territorial integrity and the inviolability of existing borders’⁴². This leads Stephen Ratner to suggest, with respect to the resolution of the break-ups of Yugoslavia and the USSR, ‘important evidential support for international acceptance of the *uti possidetis* principle in this particular context’⁴³. He claims further support from the subsequent State practice concerning the attempted secession of Abkhazia from the Republic of Georgia and the fighting between Azerbaijan and Armenia concerning the Armenian populated Nogorny-Karabakh area of Azerbaijan. This is perhaps not the complete picture, since issues of national interest largely dictate states’ actions. Thus, while the resounding decision of the Commonwealth of Independent States to endorse the frontiers they received needs to be acknowledged, these states nonetheless still maintain territorial claims against each other. Thus, it would seem that the conclusive ‘evidence’ suggested by

⁴⁰ See Philip Chase ‘Conflict in the Crimea: An Examination of Ethnic Conflict under the Contemporary Model of Sovereignty,’ in *34 CJTL (1995)* p.219 & 222-39

⁴¹ Charter of the Commonwealth of Independent States in *31ILM (1992)*138

⁴² See *31 ILM (1992)* 148

⁴³ Ratner S ‘Drawing a Better Line: *Uti Possidetis* & the Borders of New States,’ in *90 AJIL (1996)*590 – 624 at

Ratner, could merely be reflections of steps undertaken by the parties in their immediate national interest, rather than any overwhelming endorsement of the doctrine of *uti possidetis* within state practice. Had the states at the same time, dropped their respective claims, this idea would perhaps have been more credible; without that provision contradictions remain.

The break-up of Czechoslovakia presented a very different scenario from the other two. For one, the borders of the former Czechoslovakia were much older in pedigree. The country was initially created after World War One when the Allies combined the areas of the Austro-Hungarian Empire which included Bohemia & Moravia as separate units under the Holy Roman Empire, with Slovakia which was part of the Austro-Hungarian Empire, and a part of Silesia and Ruthenia. The border between the Czech Republic and the Slovak Republic is thus the old Moravian - Hungarian border. Nazi Germany, separating the 'protectorate' of Bohemia and Moravia from the independent state of Slovakia, also used it as an international boundary. Thus the two Republics easily dissolved their Union along this historic line, without any contention. The application of the doctrine of *uti possidetis* in the case of the Velvet Divorce between the Slovak and Czech Republics, can therefore be presented as least problematic of modern cases. However, the problem of the Gypsies in both the new states is not addressed by the settlement, and the norm of *uti possidetis* breaks down badly when faced with a non-sedentary population, as we shall dwell on in the Western Sahara Case in the second half of this thesis.

The doctrine of *uti possidetis* has thus evolved significantly with situations, as presented. The primary aim of the doctrine remains uncontested i.e. to preserve order. However, before we examine what strict adherence to the doctrine implies in the modern era,

it is necessary to examine the opinions emanating from international tribunals who have ruled on the issue of *uti possidetis*.

4.3 Viewed in international legal history

In explaining the need for a stable boundary the Court, in the *Temple of Veah Prear Case* reiterates the purpose of a boundary: ‘...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 process be called into question, and its rectification claimed, whenever any inaccuracy by reference to a clause, in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious’⁴⁴. The fear of a continuous and freely available process is viewed by the Court as being undesirable to order. This is also borne out by the ruling in the *Burkina Faso-Mali Case* which attempts to explain the rationale behind the Doctrine suggesting that ‘...the principle [of *uti possidetis*] is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, whenever it occurs. Its obvious purpose is to prevent the independence and stability of States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power’⁴⁵. The interesting point about this particular statement by the ICJ is that the principle of *uti possidetis* is considered a ‘general principle’ which is ‘logical’. This needs to be clarified as one of the main features of the doctrine. International law is in place to regulate relations between players in the

⁴⁴ *ICJ Reports (1962)* p. 34

⁴⁵ *ICJ Reports (1986)* p.565

international sphere. One of its prime purposes, as indeed the prime purpose of law, is to provide order. Thus the Court sees it as logical that it would endorse a principle such as *uti possidetis* in the interests of order. In doing so, it links the concept to the obtaining of ‘independence’⁴⁶. Independence is first mentioned as one of the conditions which calls for the use of the doctrine, but is also suggested as one of the features of statehood that is undermined by abuse of it. Thus *uti possidetis* according to the ICJ, fulfils the dual purpose of ensuring peaceful transition of a polity from oppression to independence; while, at the same time, ensuring in that transfer the ‘independence and stability’ of the State is not endangered. In another ruling, in the *Dubai-Sharjah Arbitration*, the Arbitration Tribunal shows that it works along similar lines in warning that ‘... the re-opening of the legal status of the boundaries of a State may give rise to very grave consequences, which may endanger the life of the State itself’⁴⁷.

Over the last four decades the principle seems to have achieved what Ratner describes as a ‘legal valence’⁴⁸, within international law. This, he suggests, is evidenced by the fact that state practice is clearly supportive of it. Besides, the Doctrine of *uti possidetis* can also be put forth as a norm of customary international law since it appears in numerous constitutions of states. In the words of Judge (Ad Hoc) Torres Bernadez who, in his separate opinion in the *El Salvador/Honduras Case*, emphasised, ‘...from the start, the first Constitution of the Central American Republics defined their respective “national territories” by a broad reference to the 1821 *uti possidetis juris*’⁴⁹. Recent judgements have also confirmed this, notably in that same *El Salvador/Honduras Case* where the Chamber emphasised the importance of the *uti possidetis juris* principle as one which has in general, resulted in certain and stable frontiers

⁴⁶ Also see the discussion on ‘independence’ in Chapter Three Section 3.1

⁴⁷ See 91 ILR pp. 543& 578; also see Bowett ‘The Dubai - Sharjah Arbitration of 1981.’ in 65BYIL(1994) p.103

⁴⁸ Ratner (1996) *op.cit.* 43 pp.598-601

throughout most of Central and South America⁵⁰. In addition to this, the norms of stability and order are also given prime importance in the United Nations Charter and the Cairo Declaration of 1964 in which African leaders endorsed the principle for African decolonisation. However, as also pointed out by Ratner, the content of the doctrine remains contentious with regard to *opinio juris*. There remains a gap in the *opinio juris* of the doctrine that suggests a less than 'rock-solid basis' for a customary norm. It also raises the possibility that *uti possidetis* was no more than a policy decision adopted to avoid conflicts during decolonisation.⁵¹ It thus has the feel of a political doctrine that has been made a legal one and ascribed a legal valence despite the obvious deficiencies it presents as a legal concept. The doctrine of *uti possidetis* clearly cannot be considered to be a norm of customary international law on the same level as the norm of self-determination since it fails to gain universal support. It is, however, put forth as a principle of strong legal standing when cases of self-determination are being resolved. In contrast, the norm of self-determination, despite its ambiguity is more convincingly accepted as a norm of *jus cogens* despite the fact that its 'universal' acceptance is qualified by each state's perspective on the issue. The ICJ curiously refers to *uti possidetis* as a 'general principle' as referred to earlier, in the *Burkina Faso - Mali Case*. However, perhaps, the general principle the Court refers to in that case is the need for order and stability which would make the application of the norm 'logical'⁵². As also pointed out above in the discussion of the Opinion of the EC Arbitration Commission discussing Yugoslavia, it is also a norm that is repeatedly breached⁵³ which seems to suggest dubious legal content. It has, perhaps, been expounded by the Court on a more probationary basis, as

⁴⁹ ICJ Reports (1992) 631

⁵⁰ ICJ Reports (1992) 386

⁵¹ Ratner (1996) *op. cit.* 43 p.607

⁵² ICJ Reports (1986) 565 also see Territorial Dispute (Libya/Chad), ICJ Reports (1994) 6, 89 (Feb. 3). This is also reflected in the *Compromis* of the two states that recognised that the principle was beyond dispute. See p.557

⁵³ See Rigo-Sureda *The Evolution of the Right of Self-determination: A Study of UN Practice (1973)* III

an extension of a valid political principle that upholds the general principle of the need for order and stability⁵⁴. In fact in the 1993 *Honduras Borders Case*⁵⁵ the *compromis* presented to the Chamber by the parties, authorised the tribunal to take into account, interests of the parties that might go beyond the *uti possidetis line* of 1821 and to modify the line as needed through an exchange of territory which it sees as just⁵⁶. The Panel determined a line that varied from the *uti possidetis line* - and the ICJ refused to regard the norm as a peremptory norm that would override a provision in the *compromis* presented by the disputants⁵⁷. The Helsinki Final Act in contrast, supported the rule by stating that border changes in Europe were allowable as long as they were peaceful and had the consent of the parties.⁵⁸ There is however, some evidence to question the Vienna Conventions (Law of Treaties and Succession of States)⁵⁹ as far as the inviolability of boundaries is concerned.

Thus, today international boundaries serve the important function of limiting the territorial sovereignty of one governing entity against that of another - and in that sense, no longer conform to Oppenheim's idea of them as 'imaginary lines'⁶⁰. Anderson suggests that it is not only the lines that are imaginary, but that the state itself is an 'imagined community'⁶¹. We shall seek to understand, in the rest of this chapter, how the doctrine of *uti possidetis* affects and alters national identities in some parts of the world. One of the questions we will address is whether the process of ensuring peace and stability within post-colonial fledgling entities at their inception as independent states,⁶² jeopardises longer-term peace and stability

⁵⁴ See Ratner *op.cit.* 43 pp.595-6

⁵⁵ *ICJ Reports (1992)* pp. 558-9

⁵⁶ See Treaty of Arbitration, July 16, 1930 article V in the *Honduras Border Case 2 RIAA (1933)* p. 1309, 1322

⁵⁷ See the discussion in the concluding section on the modifications allowed to the *uti possidetis line* Section 4.9

⁵⁸ CSCE Final Act August 1 1975, Principle III, in *14 ILM (1975)*pp. 1292 & 1294

⁵⁹ Vienna Convention on the Law of Treaties and the Succession of States 1969, see Shaw (1996) *op.cit* 2 and the discussion on article 62 and 11 pp.86-92; also *Fisheries Jurisdiction ICJ Reports (1974)* pp. 3 & 18

⁶⁰ 1 Oppenheim's International Law 661 (Robert Jennings & Arthur Watts eds. 1992)

⁶¹ See Anderson B (1991) *op.cit.* 17 pp. 1-4

⁶² 'State' is used in terms of the Montevideo Convention of 1933. As discussed previously, colonialism would

by enforcing statehood and smothering ancient identities. It will also be important to analyse, in the course of the rest of this chapter, the applicability of the norm to self-determinatory struggles beyond the colonial context. We have considered the applicability of the doctrine in the Yugoslav and USSR break-ups, neither pursued with much conviction. In both cases, the doctrine affirmed by the international community failed; broke down in the former USSR and presided over bloody conflict in former Yugoslavia.

The dependence, in modern international law, on boundaries is a necessary constraint of the physical proximity of peoples in this technological era. This has perhaps forced international law to do away with the idea of the international frontier zone as a matter of customary law⁶³ and to come to rely more heavily on a strict drawing of linear lines to present a territorial limitation to sovereignty. This is perhaps inevitable and it will not be possible to examine this here⁶⁴. Suffice to say, that international law treats this boundary line as the only relevant legal construct for the limiting of the jurisdiction and activities of the state. It is thus important within international law to ensure that the principle of one state not being able to operate in the sphere of influence of another is best, and perhaps most effectively demarcated by a simple line that limits their respective areas of sovereignty⁶⁵. These lines in typical European nation-states are the result of historical processes over many centuries and includes a Hegelian need for the state to achieve 'political manhood'⁶⁶ in defence of these borders against irredentists and other claimants. In post-colonial states though, these boundaries are merely constructs of colonial rulers which, via the doctrine of *uti possidetis*, are frozen. Thus smaller movements, post-independence are prevented from compromising the territorial integrity of the state. In this scenario, we shall need to pose the question of whether this, in itself,

arguably prevent territories under this influence being considered 'states' due to the absence of a sovereign 'independent' government

⁶³ Lotus Case *PCIJ (Ser. A) (1927)* No. 10 at 18-19 September 7

⁶⁴ See Linklater, A & Macmillan J., *Boundaries in Question: New Directions in International Relations (1995)*

⁶⁵ Ratner (1996) *op.cit.* 43 p.609

constitutes a defeat of the principle of self-determination. For as we have seen,⁶⁷ endorsing self-determination and at the same time supporting territorial integrity, causes conflicts. If we now add to that equation, the idea that some boundaries are completely inviolable, then it raises doubts about self-determination that we will need to examine. The need for this is apparent in the face of what Professor Thomas Franck calls the 'post-modern tribalism' that threatens to disrupt international peace and security. Franck defines post-modern tribalism as a force that 'seeks to promote a political and legal environment conducive to the break-up of existing sovereign states... in a bid to constitute unicultural and uninational units. It asserts a political, moral, historically determinist and legal claim to support this agenda'⁶⁸. This, he claims has forced a growing need to rethink fundamental norms such as title to territory and its relation to human personality and group identity⁶⁹.

The merits of the idea behind the norm are clear and are expanded below. But it should also be noted, as Waldock states in his report on the Succession of States and Governments in Respect of Treaties, that international law cannot accept a clean slate approach to boundary treaties⁷⁰. However, international law goes a step further when it comes to colonial territories in that boundaries left behind by the colonial rulers, whether sanctified by treaties or not, remain untouched by succession to colonial states by non-colonial rulers⁷¹.

⁶⁶ See Elshstain 'Sovereignty, Identity & Sacrifice,' in *20 MJIS (1991)* p. 395

⁶⁷ See Chapter One & Three: territorial integrity v self-determination debate

⁶⁸ Franck T. 'Post-Modern Tribalism & the Right to Secession,' in Brölmann et al (eds.) *Peoples and Minorities in International Law(1993)* p.3

⁶⁹ Also see Falk & Camilleri *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World,* (1992)

⁷⁰ See *YBILC, (1968), vol. 2, pp. 92-3*

4.4 *The merits of the norm*

Ratner outlines three basic arguments in favour of *uti possidetis* as a general rule: first and foremost, as emphasised above, it is in the interest of order and ‘reduces the prospects of armed conflicts’ (irredentist neighbours as well as other potential internal claimants)⁷². This is borne out by the Court in the *Burkina Faso - Mali Case* quoted above in reference to the prevention of fratricidal struggles. According to Ratner, the second facilitation of the norm is that ‘...a cosmopolitan democratic state can function within any borders’⁷³. This idea is logical in that if a state is ‘democratic’ and ‘cosmopolitan’ it would arguably take into account the diversities that exist within the state structure, and therefore gladly endorse the principle of *uti possidetis* in pursuit of order and development. To such a state, identity would matter less than development, since different peoples within the structure would have free expression of their identity. Of course, take away the assumption of ‘democracy’ and grave problems begin to be unearthed. Thirdly, according to Ratner, the doctrine of *uti possidetis* is ideal from an international legal standpoint since the ‘default role of international law is in supervising transition’⁷⁴. This is, perhaps, the best expression of why the international legal system endorses the doctrine of *uti possidetis*. The international community has been aware for a long time, of problems associated with determining which ‘people’ have the right to self-determination since the enunciation of the modern principle of self-determination in the Wilsonian era⁷⁵. As discussed in Chapter One, the criticism of Lansing and Jennings were directed at this question within the self-determination discourse i.e. who are the people. The international community was well informed of different factors in determining allegiances of a people, especially in the case of minorities. Post World War I plebiscites have also

⁷¹ Other interesting cases that also demonstrate this trend. See *Columbia v Venezuela RIAA Vol. 1* p.233, *El-Salvador-Honduras ICJ Reports (1992)*, *Libya-Chad ICJ Reports (1994)* and *Guinea-Bissau Senegal 83 ILR*

⁷² Ratner (1996) *op.cit.* 43 p.591

⁷³ Ratner *ibid.*

⁷⁴ See Arbitration Commission Opinion No. 3 (January 11, 1992) in *31 ILM (1992)* 1499

demonstrated the difficulties in relying exclusively on territory as the determining factor. Nonetheless, the doctrine of *uti possidetis* was rehabilitated in the decolonisation process during the latter half of the twentieth century for the reason that international law considers itself playing a supervisory rather than regulatory role. Had it defined for itself, any other role, it would have needed to examine the merits of the cases and rule on conflicting issues. For this to be possible, the international legal system would have to regulate the system of sovereign states, for which it clearly has no mandate. Thus, in an observatory capacity the best solution to the problem of emerging identities within inaccurately demarcated territories in post-colonial states, was to accept them as *de facto* and *de jure* and simply supervise the transfer of power under the auspices of the Trusteeship Council of the UN⁷⁶. In addition, modern international law requires the territorial definition of states to be central to the system since spatial dimensions and a restricted sphere of application of authority provide the essential framework for the operation of an international order founded upon strict territorial division⁷⁷. As Shaw states, ‘...the territorial delineation determines, from the nationality of inhabitants to the application of particular legal norms; and is the essential framework within which the interests of States are expressed and with regard to which they interact and collide’⁷⁸. As a result, laws relating to territory would have to gain the highest position of all norms in international law since they are basically the foundation upon which international law functions. This would have to remain, despite growth in trans-national structures and ideas of humanitarian concern. It is also, as discussed in the previous chapter, a central idea to the concept of statehood, and support for the system is also demonstrated by most sub-national movements that seek to secede from the state, in that they choose to form their own

⁷⁵ As discussed in Chapter One Section 1.3; also Chapter Two Section 2.4

⁷⁶ See Chapter XI and XII, the United Nations Charter, 1945

⁷⁷ Shaw (1996) *op.cit.* 2 p.75

⁷⁸ Shaw (1996) *op.cit.* 2 p.75

states which are territorially defined. This nonetheless leaves us with the problems associated with nomadism which will be addressed in the context of the Western Sahara Case.

Thus as Shaw suggests, ‘the principles of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing territorial heritage of new States at the moment of independence and converting existing lines into internationally recognised borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimating functions. It is also closely related to the principles of the stability of boundaries and both draws upon, and informs a variety of other principles of international law, ranging from consent and acquiescence to territorial integrity and the prohibition of the use of force against States’⁷⁹. He does, however, concede that boundaries, as products of political events and human action, are artificial to that extent. We shall return to this idea in deconstructing the norm of *uti possidetis* since there is a vast difference in the artificial creation of the state by human action driven by colonialism to other forms of ‘artificial’ experiences. It is also important to note that the idea of strict linear divisions of space between sovereigns is a relatively modern concept⁸⁰. In earlier centuries, the concept of a border zone had predominance over fixed-line frontiers⁸¹ to reflect the penumbra of influence that a sovereign exercised - stronger at the epi-centre and gradually weakened at edges, closer to the epi-centre of other sovereigns. This is borne out by the study that we will undertake in looking at the existing structures prior to colonialism in the Western Sahara⁸². The need for defined borders arose only as States developed in the post-Westphalian world and populations expanded into border areas with significant increase in cross-boundary communication. According to Reeves though, the doctrine of natural frontiers in practice prior to the Westphalian era, was an

⁷⁹ Shaw (1996) *op.cit.* 2 p.76

⁸⁰ Shaw (1996) *ibid.*

⁸¹ See Reeves ‘International Boundaries’ in 38 *AJIL* (1944) 533

attempt to achieve precise boundaries in earlier centuries⁸³, founded upon the assertion that certain kinds of natural features such as mountain ranges, forests, water bodies and deserts were preferable to artificial boundaries. Thus ancient boundaries tended to be more geographic in nature rather than dependent on ethnicity or race. This also serves to demonstrate that the use of geography as determining factor in limitations to territory was significant, more so than other norms of identity such as ethnicity, race, linguistics or tradition. Having said that, the lack of proximity of cultures was, perhaps, a strong reason for these issues not being central factors. Today's situation varies primarily, in the proximity of cultures enabled by technological advances, which have brought us sharply in focus with the *Other*.⁸⁴ Thus, the layers and complexities of identity⁸⁵ suggest that territoriality is perhaps one of the least subjective of factors in determining modern restrictions to the territorial state. This is vital not only to the maintenance of order within the system of states but also to its attendant ideas of 'independent' 'sovereign' states and their equality before international law⁸⁶. If states within the system were allowed to fluctuate in location and size, more powerful states could conceivably annex weaker states thereby defeating international law. Therefore a territorial expression of statehood, and of individual political and legal orders would have to gain precedence driven by the institution of more or less rigid boundaries.

The idea of boundaries being central to the international system is not being disputed here. It is clear that if order is to be preserved, then boundaries would have to play a significant role within international relations. However, the issue that needs to be addressed is

⁸² See Chapter Seven. Sections 7.1.1 & 7.1.2

⁸³ Reeves (1944) *op.cit.* 81 p.533

⁸⁴ See generally W. E. Connolly *Identity/Difference: Democratic Negotiations of Political Paradox* (1991); also see Connolly W.E. (eds.) *Legitimacy and the State* (1984)

⁸⁵ See Franck, T 'Clan, Super-Clan: Loyalty, Identity and Community in International Law and Practice,' in 90 *AJIL* (1996) pp.359-383

⁸⁶ See Suganami H., 'Grotius and International Equality' in Bull, Kingsbury and Roberts (1990) *ibid.* pp.221-256

the strict rigidity of these boundaries protected by the doctrine of *uti possidetis* since it often forces post-colonial peoples into the straight-jacket of the state. As a result, while short-term peace and stability is ensured, long-term order is compromised. To go back to the second of Ratner's three arguments for the Doctrine of *uti possidetis*, if states were democratic and drew their legitimacy 'from the consent of the governed'⁸⁷ then the doctrine would function ideally. However many of the states created by European powers in Asia and Africa have not succeeded in being democratic. As a result, the identities of peoples are being compromised by a system that professes the human rights' project to be one of the main points on its agenda. Once we come face-to-face with ideas of post-modern tribalism that Franck discusses and the choice of identity available through the information age⁸⁸ it is not difficult to understand why these 'quasi-states' are proving more difficult to maintain. Thus, it seems, separatist and fragmentary forces of 'post-modern tribalism' and other 'new social movements'⁸⁹ are growing at a similar rate as interest in the international community grows in norms of international justice⁹⁰ and humanitarian concern. Perhaps the root cause of these compelling opposite forces draw on the same facet: the growth in telecommunication and media presence and the sheer volume of information that is increasingly available to myriad's of people⁹¹. Could it thus be that international law risks being outpaced in the changing scenario by relying too heavily on backing artificial constructions in former colonial countries? The response of international law would have to be a considered one since it relies heavily on state practice and as long as states regard territoriality as central, the international legal discourse will have little other alternative. But how is this affected by the fact that the states in this case would be an interested party and therefore ought not to be allowed to affect

⁸⁷ See The American Declaration, discussed in Chapter One, Introduction

⁸⁸ See generally Franck (1996) *op.cit.* 85

⁸⁹ See Falk & Camilleri (1992) *op.cit.* 69

⁹⁰ As demonstrated by the Human Rights Discourse being on the international agenda see generally, Steiner & Alston (1997) *op.cit.* 28 & Wallace, R *International Human Rights in Context* (1998)

the rate of change of international law? The answer to that will have to come up against the immovable fact that the state, as discussed in the previous chapter, will remain a prime player in the international community. This, despite the growth of human rights and other perceived threats to sovereignty⁹²; as Motyl points out, states have merely changed their areas of influence, not dropped them and the future still looks good for the state⁹³.

Thus the effects of *uti possidetis* is that the artificial constructs of colonial super-powers legitimated via boundaries originally in place to restrict each others influence in exploiting the land and resources of (especially) African lands, are frozen for posterity. However, these lines do not correspond to any logical signifier, except the fact that the territory had been for a short spell in its history, under the rule of a particular foreign oppressive authority. Thus the territoriality being defended by international law via the doctrine of *uti possidetis* is one that was created by the force of an aggressive power and maintained by that force for different periods of time. During this period, it is clear that the human rights of the local people were exploited by the regime, which also usurped their resources by suitably appropriating them. However, despite colonialism being defeated, lands created by these regimes are to be maintained in their strict form despite indigenous history and traditions of the region that preceded this event. As Lord Salisbury commented on the map of Africa in 1890: 'We [the colonial powers] have engaged... in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were'⁹⁴. This statement

⁹¹ Franck (1996) *op.cit.* 85 pp. 376-382

⁹² See Lapidoth R, 'Sovereignty in Transition,' in 45 *JIA* (1992) pp. 325-366

⁹³ Motyl A.J. 'The Modernity of Nationalism: Nations, States and Nation-States in the Contemporary World' in 45 *JIA* (1992) pp. 307-324

⁹⁴ Cited by Judge Ajibola *ICJ Reports* (1994) 53

was quoted by Judge Ajibola in the *Burkina Faso-Mali Case*, who nonetheless stressed the importance of the maintenance of these boundaries. The ruling in that case also drew on the idea of consent from the African peoples in the statement of their leaders expressed in the Cairo Declaration. In the words of the Court: ‘...the essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self determination of peoples’⁹⁵. However, this could be questioned when examined in the light of the realities offered by Jackson in describing the juridical state in sub-Saharan Africa, as merely the expression of the leadership in maintaining the monopoly of power sans legitimacy⁹⁶.

Thus, while the basis of *uti possidetis ita possidetis* is completely tilted towards the preservation of the order, which is not contested; what is problematic is that the order created in the first place, was based on and maintained by the strength of the ‘finder’. This was a norm that was in force in the early times of international law but its validity today needs to be challenged especially in light of Article 2(4) of the Charter of the UN which forbids the use of force against boundaries. What the Doctrine of *uti possidetis* appears to do, is to allow stronger powers to use force and then legitimise it by preventing retaliation. This is obviously beneficial to the belligerent first striker and against international law of armed conflict⁹⁷. Nonetheless, the problem with this argument is that international law has to be subject to the *intertemporal rule* which suggests that the laws and actions of a given period ought to be judged only against the standards then prevalent⁹⁸. Thus, to judge the actions of the European

⁹⁵ *ICJ Reports (1994)* p. 567; also see Crawford ‘The General Assembly, the International Court and Self Determination’ in Lowe and Fitzmaurice (eds.) *Fifty Years of the ICJ* (1996) 585

⁹⁶ Jackson (1992) *op.cit.* 16 pp. 6-9

⁹⁷ See generally McCoubrey H & White N. *International Law & Armed Conflict* (1992)

⁹⁸ See H Lauterpacht *Collected Papers*, I (1970) pp. 132-3; also see Jennings & Watts (eds.) 1 *Oppenheim's*

colonial state against standards currently in existence would be unfair, and invalid in international law. However, while the *intertemporal rule* might not suggest that actions of colonial powers were illegal, in modern times they clearly would be. The question therefore being posed, is whether the strict maintenance of an order that would be considered illegal today, at the time of its creation and maintenance, should still be allowed to persist in the interest of short-term order and at the cost of possibly long-term peace and stability.

4.5 Conflict with Self-determination

Of greater importance to us in the context of this work, is the relationship between the norm of self-determination on the one hand and the doctrine of *uti possidetis* on the other. As discussed above, historical evolution of the term was directed by the need to regulate the order left behind by the colonial ruler. In this sense it is ideally suited to the discourse of self-determination as defined in the *salt-water* sense of Chapter One. Thus, if a group of people is living under colonial rule, they have a right under international law to emancipate themselves. This right is also bolstered by the duty of Member States of the UN to help them achieve this task, and the role of the colonial state not to prevent this from transpiring⁹⁹. The doctrine of *uti possidetis* as we have seen, was applied in this context and decolonisation by and large, respected the norms laid down by the doctrine¹⁰⁰. However, in the decolonisation process, it also created new identities by forcing peoples together under alien allegiances, in a territorial straight-jacket. As we have seen, order has been declared by the international community to be one of the most vital assumptions of the system of sovereign states¹⁰¹. The Chamber of the

International Law (1992) pp.1281-2: also see *Rights of Passage Case, ICJ Reports (1960)* pp. 6 & 37; *Rights of US Nationals in Morocco, ICJ Reports (1952)* p.176 & 189

⁹⁹ See the 1970 Declaration GAOR 2625

¹⁰⁰ For exceptions see Rigo-Sureda (1973) *op.cit.* 53 p.156

¹⁰¹ Note the constant references to the words 'international peace and stability' in the United Nations Charter. For a discussion on 'order' in international society see Bull H, *The Anarchical Society: A Study of Order in World Politics* (1995) esp. Chapter 4

ICJ examining the relationship between the two concepts in the *Burkina Faso-Mali Case*, stated that, ‘...at first sight *uti possidetis* conflicted with the right of peoples to self-determination’¹⁰². However, it emphasised that *uti possidetis* was merely a general ordering principle, whose purpose was to prevent independence and stability of new States from being fragmented by the challenging of frontiers. Thus, the relationship as far as the Court was concerned between self-determination and *uti possidetis* was that the latter ensured that the former process was not compromised by separatists. This has led Shaw to conclude that ‘where the situation was such that a conflict appeared between the two principles, then that of *uti possidetis* would have precedence, and that for reasons of stability’¹⁰³.

Ratner expresses the temptation of ethnic separatists to divide the newly emergent state along further administrative lines¹⁰⁴ as a spill-over of the doctrine of *uti possidetis* due to the sheer simplicity of the rule. Clearly, the threat of separatists is one that international law is being forced to deal with on a regular basis. In this sense the doctrine of *uti possidetis*, while initially preventing this from going ahead fails ‘peoples’ caught under neo-colonial oppression in that it does not ensure protection of their rights within the state’s sacrosanct boundaries. International law with its strong bias in favour of the states who give it legitimacy, is forced to desist from this by the operation of Article 2(7) which protects the domestic sphere of every state from international interference. However, the extension of the rule to modern break-ups leads to genuine injustice and instability, with the creation of artificial identities that sit uneasily in new states¹⁰⁵. The norm also gives state leaders the advantage of time to gloss over the issues of territorial adjustments that are often crucial to a

¹⁰² See 92 *ILR* 168

¹⁰³ Shaw (1996) *op.cit.* 2 p.124

¹⁰⁴ Also see Hannum H ‘Self Determination, Yugoslavia and Europe: Old Wine in New Bottles?’ in 3 *Transnational Law and Contemporary Legal Problems* (1993) pp.57 & 69

¹⁰⁵ Ratner (1996) *op.cit.* 43 p. 591

thorough exercise of the right of self-determination. Ratner, therefore, calls for a re-examination of this rule of international law since its application today not only 'ignores critical distinctions between internal lines and international boundaries based on historical and other characteristics; but [also] the assumption that all such borders must be so transformed is unwarranted'¹⁰⁶.

Thus, the doctrine of *uti possidetis* is based on a set of assumptions which need to be examined further. Ratner suggests two assumptions:

First, that the proliferation of many smaller more ethnically based states is undesirable; and second, that the international community must sanction secession only in exceptionally limited circumstances¹⁰⁷. In addition, the doctrine also assumes that the state best represents the interests of the people within it, that territoriality is the only objective norm in the definition of a 'people' and in an oblique way, implies that all former colonial states begin their history at the time of the departure of the colonial power from the region. These assumptions are mostly problematic with perhaps the exception of the second about secession which should only be allowed in exceptional circumstances. Even that forecloses the issue and importance of order to the system - which is not being questioned in this work. However these assumptions need to be examined in turn. First, the idea that proliferation of many smaller and more ethnically based states is undesirable. There is no real justification for this other than the fact that we live in times of close interaction and fierce expressions of ethnicity might unleash forces of xenophobia that could destroy international order. This is especially true in the modern era where migration and frequent contact with people of different ethnicity do not enable easy dismantling of regions along ethnic lines.

¹⁰⁶ Ratner p. 591 *ibid.*

¹⁰⁷ Ratner (1996) *op.cit.* 43 p.593

The second assumption that secession should only be allowed in exceptional and limited circumstances, once again bows to the need for international order. If secession is easily available it could compromise the merits of the state and the separatist forces that usher it could only prove to be worse at representing the people of the state, for the simple reason that the 'people' could always fragment along smaller lines from within. Third, the assumption in the international community, that the state best represents the interest of 'the people'. This draws on the previous chapter and the discourse of statehood. Statehood is clearly something that secessionist movements aspire to, since it is the only recognisable form of political public governance of territory at international level. Thus statehood is linked inextricably to territory. The problem however is that if states were composed, as the American Declaration stated in 1789 of governments whose legitimacy derived from the consent of the governed, then this assumption would be logical. As it happens the reading of self-determination is extremely selective and in the decolonisation process, rather than create institutions of democracy, colonial powers merely handed over the reigns of power it held to an emerging force irrespective of its legitimacy in terms of the people it would govern. Thus, the self-determination that transpired was merely a transfer of power rather than a pro-active decision of the governed to form a legitimate government. As a result, the doctrine merely kept in place power structures and similar attitudes, the change merely being in the colour of the successor. The fourth assumption that the doctrine makes, is that territoriality is the only objective factor in determining the identity of the people. In making this assumption it draws on the final point, that the international community seems to suggest that the history of post-colonial regions begin from the departure of the colonial power. By legitimising the structures the new state inherits, the doctrine suggests that in the interests of order, the territory ought to make less important, other legitimating factors that form part of identity including ethnicity,

race, tribal affiliation and linguistics amongst others. It thus determines that territoriality is to be the only legitimising factor in the determination of identity for reasons discussed above. In addition, it fails to take into account that this was artificially imposed in the first place. This is extremely problematic, since it leads to the impression that the history and shared experiences of the peoples of a given territory prior to the arrival of the colonial power are irrelevant. Thus, the doctrine of *uti possidetis* implies some extremely difficult assumptions that negate its value.

4.6 Shortcomings of *Uti Possidetis*¹⁰⁸

The two prime flaws with the doctrine thus are that, firstly it creates states by creating new identities with rigid boundaries, the preservation of which is not always feasible. Secondly, as evidenced by the modern break-ups, it transforms internal boundaries to international ones with disregard for the interconnection between the internal border and the forging or maintenance of national unity. This problem has already been discussed in the course of this chapter. The second problem is particularly disastrous since it fails to recognise the purpose boundaries served in the first place. In the case of the decolonisation of territories, boundaries that have been given international legitimacy, had in many cases, been drawn by colonial powers merely to restrict the influence they exercised over a territory in contrast to that of their rival to the territory i.e. another European power. In this sense, it was a demarcation over property, the title to which was not held by either of the two parties. This was borne out by the Lord Salisbury's quote above, and is clearly not a feasible way to demarcate sovereignty restrictions. It might have functioned well enough under colonial regimes, since the nature of the regimes on either side of the boundary was similar and there

¹⁰⁸ Criticism of *uti possidetis* -- Francis Vallat - First Report on Succession of States in respect of treaties UN DOC. A/CN.4/278 & Adds 1-6 reprinted in [1974] 2 YBILC at 1, 77-80, UN DOC. A/CN.4/SER.A/1974Add.1 (Part I) (Somali claim to Ogaden region of Ethiopia and Northern Frontier District of Kenya) see Kapil (1966)

were no emotive links based on other legitimating factors between them and the territory. However, take away the colonial regimes and the boundaries are extremely difficult to maintain since they neglect other factors considered more important such as ethnicity and tribe, to name only two. In modern break-ups too, while Yugoslavia initially fragmented into its six constituent Republics pre-1918, movement of peoples internally and the minorities that exist within each of the Republics has made it extremely difficult for preservation of boundaries as they are. The situation is, perhaps, even worse in the former Soviet Union where the boundaries of the Republics were altered periodically by central powers to suit their interest, and in that sense do not reflect actual historic realities of any given time. Thus, the simple transition of a boundary from an internal/colonial one to an external international frontier presents a host of problems that are, perhaps, central to the critique of the doctrine of *uti possidetis*. In addition, there are also practical impediments to the modern exercise of the doctrine in self-determination conflicts since it relies exclusively on the 'photograph' of the territory; what it shows when it was taken¹⁰⁹. The ruling in the *Burkina Faso Mali Case* suggests that '*...uti possidetis* applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is i.e. to the photograph of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock but does not put back the hands'¹¹⁰. Thus, this idea of a 'critical date' is vitally important to the spatial dimensions of a territory. Shaw suggests that 'the critical date as a legal concept posits that there is a certain moment at which the rights of the parties crystallise, so that acts after that date cannot alter the legal position. It is the moment which is more decisive than any other for the purpose of the formulation of the rights

op.cit. 20 pp. 663-670

¹⁰⁹ See LFE Goldie 'The Critical Date,' in 12 *ICLQ* (1963) pp.1251 & 1267

¹¹⁰ *ICJ Reports* (1986) 568

of the parties in question'¹¹¹. However, post-colonial self-determination conflicts have revealed the absence of such spatial and temporal clarity in many boundaries. This critical date remains extremely hard to agree upon and fix and remains the biggest impediment to assuming a given snap-shot of a territory, leaving it open to doubts in terms of coping with separatist forces today where its application is extremely limited.

One of the most fundamental consequences of juridical statehood is to preserve the former colonial jurisdictions, regardless of their potential for development. However, juridical statehood, according to Jackson, works against both regional and national development in four ways:

- i) it preserves existing jurisdictions regardless of their potential as viable countries;
- ii) it recognises and respects any and all governments even if they exploit their jurisdictions mainly for their own benefit;
- iii) it provides aid to such regimes without requiring that such governments secure a mandate from their populations;
- iv) it promotes strict adherence to the practice of non-intervention thereby tolerating all kinds of rulers and rule in existing jurisdictions¹¹².

Thus, if the logic of the doctrine of *uti possidetis* is to be followed as in Latin America, it would suggest that ignorant civil officers, typically situated in foreign offices in London and Paris in the middle of the nineteenth and twentieth century have shaped the identities and destinies of African peoples for all time. Lines drawn across a map is all that international law requires to cement identities, despite the fact that these lines were drawn by

¹¹¹ Shaw (1996) *op.cit.* 2 p.130

¹¹² Jackson (1992) *op.cit.* 16 pp. 9-11

ignorant colonial rulers, cutting across rivers, lakes and mountains, as well as, more importantly, tribes, cultures and beliefs. This situation was presented to newly emergent colonial people with no option but to exist within boundaries drawn for them. For this purpose, principles and ideas of 'nation-building'¹¹³ were emphasised, bolstered by the idea that the people were similar and that differences between them could be overcome at the altar of the creation of a sovereign state. This could, perhaps, have been a plausible alternative had the sovereign state been a creation of these societies themselves. That too however, was imposed upon people who were suddenly supposed to realise a strong national identity. The sovereign state they had been agitating for under colonial rule, was held up as the living and stirring proof that the people that constituted it were of one ilk. This omnipotent state then set about constituting for itself national myths and legends to appeal to different kinds of peoples often within it, in a bid to uphold 'values' of the state, and maintain the system. Separatism was strongly discouraged in international law which viewed it as a threat to order, and under national law separatists were held guilty of treason for threatening to compromise principles their forefathers had fought for, in gaining independence from colonial rule. This approach often created, within the confines of one state, people who gradually realised that they had little in common with each other. Sustained through the freedom struggle by the common need to oust the colonial power, their unity fragmented with the common enemy gone. Peoples, often of different race, ethnicity, tribe and religion suddenly found that they had to co-exist within the new structure of the state, with its inviolable boundaries. Under colonial influence, the strong unrepresentative government had prevented the structure from developing along these fault lines. However, with that power gone and new power handed over to, usually, one set of people as against another, these differences began to re-surface. The root of the problem is, perhaps, that often post-colonial peoples who found themselves

¹¹³ See generally Deutsch, K *Nationalism and Social Communication* (1966)

within the boundaries of one sovereign state had only two things in common with each other. First, they had been under the same colonial ruler, and second, they existed on a territory deemed by that ruler to be a unit which would be frozen on their departure. This choice of territoriality, over all the other differences in such a forthright and unchangeable manner by a colonial ruler, is perhaps what is most problematic about the doctrine of *uti possidetis*. Despite that, the Court in *Burkina Faso Mali Case* states that: ‘...the obvious deficiencies of many frontiers inherited from colonisation, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of consideration of equity. These frontiers, however unsatisfactory they may be, possess the authority of *uti possidetis* and are thus fully in conformity with contemporary international law’¹¹⁴. This approach once again, is dictated by fear of a threat to order and causes international law to give precedence in the short-term, to order over the notion of equity which is so central to the norm of self-determination. This leaves the extremely problematic situation in places such as sub-Saharan Africa, where in the words of Jackson: ‘the empirical state... is less extensive than its territorial jurisdiction. (Control of the former does not require anything like control of the latter). The leader has to be backed by the army, commands the government bureaucracy, the treasury and central bank, the foreign aid and has the support of key ethnic leaders, he has enough for empirical control. Diplomatic recognition is usually his for these... Thus as a result, politics in Sub-Saharan Africa, is not so much a contest to develop the country, as a contest to gain control of and use the apparatus of the state. Government became a kind of protection racket run by ruling élites for their own benefit’¹¹⁵. This highlights not only a defeat for the order that is so precious to the international community, but also negates any ‘development’ that the Court refers to as being

¹¹⁴ *ICJ Reports (1986)* 633

¹¹⁵ Jackson (1992) *op.cit.* 16 p.8

essential to Africa. This is reflected in the opinions of authors who suggest that *uti possidetis* is an 'indefinite and illusory concept with an uncertain meaning'¹¹⁶. This was also reflected by the tribunal in the *Beagle Channel Case* which seemed unclear as to the precise status of the norm in international law, accepting it as 'possibly, at least at first, a political tenet rather than a true rule of law'¹¹⁷.

4.7 *Uti Possidetis and Modern International Law: A Symbiosis*

The question that this section wishes to pose is whether the trend of decision of the early nineteenth and middle twentieth century represents good law at the turn of the twenty-first century, and the resultant challenges that are faced in an international polity of complex and dynamic identities¹¹⁸. The other important paradigm shift is the gradual evolution of the landscape of the right to self-determination as highlighted previously. This right of self-determination in the sense of secession makes the doctrine of *uti possidetis* untenable in some circumstances; however as pointed out by Shaw¹¹⁹ if conflict arises the latter will have to prevail. However, even at the time of decolonisation of Africa, a consensus for a re-drawing of the boundary lines did exist¹²⁰. The doctrine of *uti possidetis* was the preferred policy because it kept decolonisation orderly. This, of course, was extremely important in international legal system that valued international peace and security above all other norms. It also made the whole process of transfer of power easier since all that was required was a transitional period and the formation of a new government, usually an easy task since it meant submitting to the independence party at the forefront of the anti-colonial agitation. Modern

¹¹⁶ Fisher 'Arbitration of the Guetamala- Honduras Boundary Dispute,' in 27 *AJIL* (1933) pp.403-427 at 415.

Also see Waldock 'Disputed Sovereignties in the Falklands Island Dependencies,' in 25 *BYIL* (1948) 311-353

¹¹⁷ *Beagle Channel Case* HMSO, 1977 pp. 5-7

¹¹⁸ Especially in light of Franck (1996) *op.cit.* 85 pp. 376-383

¹¹⁹ Shaw (1996) *op.cit.* 2 p.152

¹²⁰ See Resolutions adopted by the All African Peoples Conference, Accra, December 5-13, 1958 in Legum Colin Pan Africanism: A Short Political Guide (1962) 228 - denouncing 'artificial frontiers drawn by Imperialist

international law can draw on the comments of the Badinter Commission, who in reference to former Yugoslavia, stated that *uti possidetis* 'is today recognised as a general principle' and that this 'principle applies all the more readily'¹²¹. The Commission seems to have erred though, since the norm was especially in place for orderly decolonisation and with that process having been historically completed the basis of the norm is, perhaps, exhausted and its application in non-colonial break-ups, suspect. This view is endorsed by Ratner who suggests that the error of the Commission stems from a misreading of the *Frontier Dispute Case* on which it relied for its endorsement of the norm of *uti possidetis*¹²². It made the assumption that only *uti possidetis* would avoid anarchy by preventing attacks by one former Yugoslav Republic on another¹²³. Thus, though modern international law seems to endorse the doctrine of *uti possidetis*, the question of its applicability to non-colonial situations remains extremely problematic, especially in situations where the norm has already frozen artificial entities. In these cases it is extremely questionable how this doctrine can reign in separatist forces that now threaten some of these artificial entities.

Conclusion

It is important first of all to note that order is an important facet within international law. The critique here is not put forth to dispute the need for order, rather that in the interest of order, the doctrine of *uti possidetis* merits a double reading today¹²⁴. Notwithstanding Pan Africanist arguments for re-negotiation of boundaries at the time of colonial departure, the doctrine clearly had a beneficial effect in stalling chaos. In those times of transition, with no recognisable political cohesion, other options would perhaps have been dangerous. However,

powers to divide the peoples of Africa' and calling for the 'abolition or adjustment of such frontiers at an early date.'

¹²¹ Badinter Commission Opinion No. 3

¹²² Ratner (1996) *op.cit.* 43 p.614

¹²³ See 31 *ILM* (1992) p. 1500

the suggestion being made here is that the freezing of boundaries for posterity is even more problematic, as is the assumption that the new state created could function as a cohesive unit when its foundation is questionable. International law deals self-determination a double blow by twinning the doctrine of *uti possidetis* with protection of territorial integrity. In the first instance, sub-national groups excluded from the national project are forestalled from negotiating boundaries by the doctrine of *uti possidetis*; especially useful in the transition period. However, once this transition is complete, these groups still do not merit the right to self-determination, in the sense that any call for a separate state violates the territorial integrity of the new state, fiercely protected by international law. Thus, it is suggested that between these two concepts, self-determination is effectively made redundant. An expression of self-determination in these situations at best, is limited to demands for autonomy or federation; but again, the state as the incumbent power controls all rights since *uti possidetis* and territorial integrity essentially exclude voices of non-state actors. At the end of this process, the norm of self-determination fails to operate effectively since the only determinant to statehood is the deciding of the 'critical date' at which the boundary is frozen, and all other factors in determining the identity of a people are dismissed. In this sense it is suggested here that the hand-over of power via 'self-determination' in colonial situations, is akin to the analogy of privatisation or deregulation of a colony where it is taken away from the hands of the all-powerful colonial state and left, instead, to private market-driven forces. These political market forces rarely have at heart, the interest of the people in whose name they are claiming emancipation. With regard to Africa, the question that needs to be asked is whether the doctrine of *uti possidetis* has negatively affected the process of decolonisation as authors such as Herbst and Jackson suggest. Herbst for instance suggests that, '...should the African state system be overthrown, the continent may see a period of upheaval that makes the

¹²⁴ See Ashley, 'A Double Reading of the Anarchy Problematique,' in *17 MJIS (1988) 227-262*

previous three years look tame in comparison. The problem of Africa's boundaries and the potential for them to be redrawn must be faced squarely both by African and Western policy makers who hope to anticipate these crises and devise policies appropriate to the stability of African states within world order'¹²⁵. More importantly, historical negation of the doctrine aside, the doctrine itself needs to be seriously re-examined in the light of modern self-determination struggles where it perhaps fails to be conducive even to short term order - as aptly demonstrated in Yugoslavia.

It is also important not to overstate the principle of *uti possidetis* which does not posit that existing boundaries, at independence, are immutable and incapable of change forever. It merely states that without evidence to the contrary, the boundary that continues is the one in force at independence, and that any alteration must be demonstrated and proved by acceptable evidence¹²⁶. This is also borne out by the Court in the *El-Salvador Honduras Case* where a Chamber of the Court ruled that despite the principle of *uti possidetis* freezing 'for all time' the provincial boundary at independence, '... it was obviously open to those States to vary the boundaries between them by agreement'¹²⁷. This idea of modification by consent was also reflected in the EC Arbitration Committee's view on frontiers in Yugoslavia as quoted above. Thus boundaries frozen under the doctrine of *uti possidetis* can be modified in two important cases; either at the behest of the parties themselves, or in the interests of peace and security¹²⁸. The former has the obvious deficiency that it still remains a Statist discourse and excludes sub-state secessionary movements. The latter is problematic for the similar reasons that the doctrine of *uti possidetis* applied to legitimising artificial frontiers in the decolonisation

¹²⁵ Herbst J 'Challenges to Africa's Boundaries in the New World Order,' in 46 *JIA* (1992) p.19

¹²⁶ Shaw (1996) *op.cit.* 2 p. 152

¹²⁷ *ICJ Reports* (1992) p.408

¹²⁸ Ratner (1996) *op.cit.* 43 p.617

process in Africa¹²⁹, as highlighted above. Even when modifications to a frontier are allowed at the behest of the state, there is a subtle but vital difference to the norm of self-determination. As Ratner puts it, ‘...while cession of a territory by a State is an attribute of sovereignty, secession is an act contrary to the will of the State.... Where the boundaries of an independent State are altered by the secession of part of that State and a third State is involved in circumstances amounting to intervention, then the principle of respect for the territorial integrity of States at least will be breached’¹³⁰.

It is clear that the principle of territorial sovereignty with its attendant precepts of territorial integrity and the stability of boundaries that focus essentially upon continuity and certainty, will remain central to the international system. In the interests of order, it is paramount that alterations to boundaries remain difficult to achieve, especially in the face of latent fragmentism that threatens to unravel the state in some parts of the world. The doctrine of *uti possidetis* clearly played a vital role in the transition period when the fledgling states emerging out of decolonisation were most vulnerable to these forces of separatism and fragmentation. However, prevention of the norm of *uti possidetis* from being over-run by self-determination as some authors indicate¹³¹, is to perhaps overstate the case of short-term order in an international society where the dynamics of allegiance are changing rapidly. As Franck suggests, we live in a society that is simultaneously pursuing ‘greater centrifugalism and centripetalism, greater divergence and convergence’ that complicates the issue of global identities beyond the realms of statehood¹³². For international legal discourse, the state has always been the alpha and the omega of allegiance and identity however this ‘single uni-

¹²⁹ See the following in quote from the Judge in the *Rann of Kutch Case* where the Judge ruled, in referring to the jagged boundary between Indian and Pakistan that this jaggedness ... ‘would be unsuitable and impracticable as an international boundary.’ 50 *ILR* p.520

¹³⁰ Ratner (1996) *op.cit.* 43 p.620

¹³¹ See Shaw (1996) *op.cit.* 2 conclusion no. 6

dimensional system for defining identities and loyalties is under pressure from the same forces as are challenging the supremacy of the state'¹³³. This is not to suggest that the territorial state is waning, merely that identities are perhaps spilling outside the concept of the territorial state and if true emancipation is to occur, the territorial basis of such norms need to be re-examined. If not, the concept of self-determination itself will be severely compromised to a point of redundancy. It is, perhaps, premature to hold up *uti possidetis* as the caveat for post-colonial problems; it is merely a vital starting point, which if applied in conjunction with other legitimising factors could be an apt evolution, capable of maintenance of long-term peace and security. At this point, it is necessary to re-emphasise that self-determination, is an enormously complex and rich process within international law. However, if its goal is to enable individuals and groups to realise their human rights, then the complexity of the territorial element cannot be wished away through invocation of any hallowed formula. In the sphere of diverse international politics that we live in, it is dangerous to adopt a uniform and automatic course of action, without regard to the intricacies of every given situation. The doctrine of *uti possidetis* in itself 'perpetuates a subterfuge: a formalised self-determination that enables a new state to form along the administrative lines of an old territorial unit, but neglects the underlying territorial issues that prompted the dissatisfaction in the first place' and 'perhaps lays the groundwork for a new round of interstate conflicts and attempted secession'¹³⁴. It is only by delving into the problem of self-determination in its entirety, and by directly 'engaging the territorial question, with all its dimensions, that the international community is likely to control the break-up of states in an orderly manner consistent with

¹³² Franck (1996) *op.cit.* 85 p.360

¹³³ Franck *ibid.*

¹³⁴ Ratner (1996) *op.cit.* 43 p.624

human dignity'¹³⁵. Thus the simple extension of *uti possidetis* to modern day conflicts cannot be a caveat to problems of post-modern tribalism, or genuine self-determination.

¹³⁵ Ratner (1996) *op.cit.* 43 p.624

Part 2

Practical Implications of the Discourse of Self-Determination in Bangladesh and the Western Sahara

CHAPTER FIVE

CASE STUDY I

THE BANGLADESH SECESSION IN INTERNATIONAL LAW: SETTING NEW STANDARDS?

Introduction

Having examined the theoretical framework within the self-determination discourse, it is now time to see how the norms of international law of self-determination apply to actual situations. This section of the thesis will build on theories and issues discussed earlier and will seek to examine these ideas from the perspective of state practice in the light of secession¹. In this chapter we shall look at the case of the secession of Bangladesh from the union of Pakistan consisting of Bengal (East Pakistan) and West Pakistan consisting of Pakistan as it stands today (with the provinces Punjab, Sindh, Baluchistan and the North West Frontier Province). The main hypothesis put forth in this chapter is that notwithstanding the theory, secession, in some cases, could be argued as being a legitimate option within international law. In attempting to demonstrate this argument we shall look at secession in the face of alleged genocide. What this chapter seeks to do is suggest that despite secession being against the principles of international order mentioned, it nonetheless is on occasion, justified and desirable within international law. That is not to suggest that the argument for preserving order is suddenly over-turned, but rather to demonstrate that preservation of an unjust order is sometimes not in the long term interests of international peace and security. The Bangladesh Case is also remarkable for the portrait it leaves us with, of the arguments against

¹ For general reading on secession see Buchheit, L.C., *Secession: The Legitimacy of Self-determination* (1978) & 'The Logic of Secession,' in 89YLJ(1979-80)802; Beran H. 'A Liberal Theory of Secession,' in XXXII *Pol.Stud.* (1984)21; Birch, H., 'Another Liberal Theory of Secession,' in XXXII *Pol.Stud.* (1984) 596; Buchanan, A., *Secession: The Morality of Political Divorce from Fort Sumpter to Lithuania to Quebec* (1991) and 'Federalism, Secession and the Morality of Inclusion,' in 37 *Ariz.LR* (1995) 53

conceptualising self-determination merely as the 'salt-water' type² that led to the decolonisation process. It needs to be remembered that the Bengali Nationalists movement repeatedly claimed that it was being treated as a colony of Pakistan and that they therefore had a right to self-determination. The attached appendix³ details the facts about the Bengali struggle for this self-determination. In the aftermath of the Second World War, the Allies constructed an international system with restrictions on the use of force that also encompassed values of peace and security aimed to providing order⁴ after two world wars in the space of thirty years. This system, with the UN at the centre, has endured and today forms the basis of the international law governing relations between states. Like the League of Nations system earlier on, the system has had to cope with numerous challenges that threatened the very foundations of the organisation. However, despite challenges, the system has endured and grown in legitimacy. In outlining one of the crises of self-determination that challenged the rules of international law, this chapter seeks to analyse how its resolution could be extrapolated to the development of the international law of self-determination. In a bid to fully understand the underlying issues at stake it will be necessary to look at three other general areas of international law affected by the crisis, besides our prime area of self-determination. We will also seek to show the inter-relatedness of these issues that are finely interwoven within the fabric of self-determination. Thus the ground covered will include besides the norm of self-determination, that of the use of force, statehood and sovereignty and finally the act of recognition. These areas are particularly pertinent since most self-determination cases are concerned with them and this chapter seeks to demonstrate how problematic they are.

² See chapter Two 'the Belgian thesis' in Section 2.4

³ See Appendix One *History of the Struggle*

⁴ For a general reading of 'order' in world society see Bull, H. *The Anarchical Society: A Study of Order in International Society*(1995); also see Vincent R.J., 'Hedley Bull and Order in International Politics,' in *17MJIS* (1988) 195-214

5.1. Self-determination⁵

5.1.1 The Evolving Norm

As mentioned earlier, the self-determination movement gained momentum after formulation of the UN Charter⁶ with the active support of the Soviet Union⁷. The UN Charter stated the right of self-determination as one of its objectives⁸ and as colonial regimes began to unravel a norm of international law evolved that effectively put paid to colonial empires. By 1971 the norm had developed into full-fledged international law⁹ and was the foundation for the development of international law of human rights¹⁰ based on the belief that unless people had freedom to determine their own political future 'human rights' would be meaningless to them. As discussed in Chapter One, leading up to the Bangladesh crisis, self-determination had come to mean the freeing of subjugated peoples from the yoke of foreign domination. 'Foreign' was not defined but it may be argued that it referred strictly to the mechanism by which countries may be freed from traditional white colonial powers that had dominated over them during the previous century. This movement had already seen the 'independence'¹¹ of India in 1947 though its partition into Pakistan and India was not in keeping with doctrine of *uti possidetis* adhered to in the decolonising process¹².

Besides in the international climate of the time, the only time a section within a newly independent country had tried to secede it had resulted in fierce army action while the

⁵ For general reading see, Brownlie *Principles of Public International Law* (1995), Tomuschat *Modern Law of Self-determination* (1994) & Harris *Cases and Materials of International Law* (1997)

⁶ In the modern context though, Self-determination traces its root back to Roosevelt's Atlantic Charter of 1941, see Sinha 'Is Self-determination Passé', in 12 *CJTL*(1973) 260 also see Chapter One

⁷ See Cassese, 'Right to Self-determination,' in Henkin *The International Bill of Rights*, also see Lenin V *Rights of Nations* (1947)

⁸ Article 1(2): 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples....' UN Charter, 1945

⁹ See Higgins R, 'UN and Law Making: Political Organs,' in 64 *AJIL* (1970) 43 also see Emerson R, Self-determination in 65 *AJIL* (1971)459; also see Chapter Three, Section 3.1

¹⁰ Article 1 of the International Bill of Human Rights (1966)

¹¹ This term is used to mean the freeing of Indian domestic affairs from the British Crown. It is one of the arguments of this piece that country's such as India have yet to attain 'independence'.

¹² The norm of *Uti Possidetis* - which called for the maintenance of colonial boundaries. First followed by the Spanish in the twelfth Century while withdrawing from Latin America; see Chapter Four

international community held its breath and waited for the result of the civil war¹³. The realisation of the problematic nature of self-determination was highlighted by the Biafran struggle¹⁴ and the clash of the conflicting norms of self-determination and territorial integrity. On the one hand self-determination was calling for people to be allowed to determine their own political destiny, while on the other hand the international system was inherently tilted towards preservation of the status quo. Since self-determination outside the colonial context would undoubtedly lead to disintegration, the international community endorsing values of international peace and security was forced to restrict development of the norm¹⁵. Besides, states at risk of being fragmented themselves were perpetrators of the law and unwilling to abdicate power. The failed Biafran secession further strengthened the view that self-determination was to be interpreted strictly in the colonial context¹⁶. The creation of myriads of new states from the decolonisation process was already a revolutionary movement within the international community of states and further fragmentation was considered extremely harmful to international order. The creation of Bangladesh therefore challenged norms of international law though the tide was strong enough for it to carry away a number of norms¹⁷. It still needs to be questioned though whether self-determination is any clearer post Bangladesh, as in the days leading up to it. This is a question we shall attempt to answer in some detail during the course of this chapter.

¹³ Biafra 1967-1970 see generally Post, 'Is There a Case for Biafra?', in *44 Int. Aff. (1968)*

¹⁴ Also see Chapter Two Section 2.4

¹⁵ For the conflict between territorial integrity and self-determination, see Higgins R, 'Judge Dillard and the Western Sahara Case,' in *23 VJIL (1983)* 387-394 & Brilmeyer L., 'Secession and Self-determination: A Territorial Interpretation,' in *16YJIL (1991)* 177-202

¹⁶ See Nayar K, 'Self-determination Beyond the Colonial Context: Biafra in Retrospect,' in *10 TILJ (1975)* 321-345

¹⁷ See the 1970 Declaration GAOR 2625 (XXV) passed less than a year before the Bangladesh crisis, analysed in Chapter One Section 1.8

5.1.2 Bangla Claims to Statehood¹⁸

Fear of Hindu domination of the significant Muslim population of undivided India forced the original partition of the country. Backed by the two most densely populated Muslim areas of the subcontinent the Muslim League expressed this sentiment as early as 1940 calling for creation of a federal state with two 'separate and autonomous' wings¹⁹ at either ends of the subcontinent. This dream was fulfilled in 1947 with India divided and the creation of the two wings of Pakistan separated by a couple of thousands of kilometres of Indian territory. However the fledgling state had some inherent problems²⁰ and fragmented further by its 25th anniversary, resulting in the creation of Bangladesh. This challenged the norms of international law since India had already 'determined' its future by eliminating the British from the subcontinent. That expression of the 'will of the people' had resulted in India being partitioned into two separate entities, namely India and Pakistan. As far as international law was concerned, the partition itself went against the grain of the norm of *uti possidetis*²¹ - the principle stating that boundaries were sovereign and should not be changed on departure of the colonial power. However, this norm was broken in the belief that the division of the two major communities would present a better quality of stability and order within the subcontinent. Thus two states had been created based on the grounds of religion; which challenged contemporary customary international law and also constituted religion as a ground for the determination of statehood. Despite the partition of undivided India into two separate states however, there remained some unresolved issues. Certain pockets of the subcontinent were dominated by Muslim communities namely Hyderabad²², Kutch²³ and

¹⁸ For a general reading see Nanda V, 'Self-determination in International Law: The Tragic Tale of Two Cities,' in 66 *AJIL* (1972) 321

¹⁹ Lahore resolution 1940 passed by the Muslim League

²⁰ See Feldman *The End and the Beginning* (1975) pp. 98-113

²¹ As discussed in Chapter Four

²² See Arbitral Tribunal 1950

²³ See Rann of Kutch Case, *ICJ Reports* (1960)

Kashmir, and while the former two have been resolved the issue of Kashmir has remained a stumbling block in relations between the states since 1947. This crisis came in the post-war period when state practice had embraced the norm of 'nation-building'²⁴ that was central to UN ideals. Using religion or ethnicity as a grounds of division was abhorrent to the new international system, in light of the Nazi genocide of Jews and other atrocities of World War Two inspired by ideas about superior ethnicity of Aryans. However despite this, the partition of India went ahead, in the ostensible interest of the preservation of order and the regional peace and security of the Indian subcontinent. One other issue of note was that as far as the international community was concerned self-determination in the 'salt-water' model was a once for all action. Undivided India, by expression of its will to be emancipated from British rule had already exercised and thereby exhausted its right to self-determination. For the people of East Pakistan and other peoples of the subcontinent²⁵ however, partition was merely one phase of self-determination. East Bengal had for long felt treated like a colony of West Pakistan; captive market for poor quality goods and a resource hot-bed for raw materials and foreign exchange²⁶. There had also never been a fair representation of Easterners in the affairs of the Pakistani State inducing them to re-examine their position within the Union. With martial law lifted and elections based on universal suffrage²⁷ Easterners hoped that their superior numbers would come to bear on the affairs of the state at last²⁸. But this hope remained unfulfilled and the argument in most of the literature suggests that it was the high-

²⁴ Deutsch K & Foltz (eds.), *Nation-Building* (1963)

²⁵ Notably peoples in Punjab, Kashmir, Hyderabad, Nagaland, Assam, Tamil Nadu et al in India and Baluchis, Sindhis, Pukhtuns in Pakistan

²⁶ From the jute trade. For a further elaboration of the economic factors see generally, Sisson & Rose, *War & Secession* (1990) pp. 8-28, Feldman (1975) *op cit.* 20 pp.29-36

²⁷ See history of Bangladesh, Appendix One; also see *Bangla Desh Documents* (1975)

²⁸ At the time of the 1970 elections East Pakistanis represented over 50% of the total population Sisson & Rose (1990) *op.cit.* 26 p.21

handedness of General Yahya Khan and the West Pakistani politicians followed by the punitive action of the Pakistan army which prompted the call for outright independence²⁹.

5.1.3 *The merits of the Bangladeshi Case*³⁰

In light of the call for independence, it is interesting to examine the claim of the Banglas to self-determination as a separate state. This will help to illustrate the kinds of norms that have been used in state practice in the pursuit of statehood. The Bengalis have arguably always constituted a 'different' people from the West Pakistanis. Separated geographically by thousands of kilometres of Indian territory, the only things common to the two wings of Pakistan was Islam and the fear of being submerged in Hindu domination. As the rift between the two wings widened, calls for autonomy gave way to demands for independence based on self-determination. There are a number of factors that support this case. Geographic, historic, social and cultural factors all suggest that Bengalis constitute a separate people³¹ within the meanings discussed in Chapter Two. Added to the economic exploitation already mentioned, East Bengalis believed they had a good case for outright independence based on self-determination especially after their victory in the general elections and the subsequent action of the army against them. The geographic factor in the determination of the Banglas separate peoplehood is highly significant. While geographic factors have largely been ignored in the drawing of international boundaries in Africa in general and sub-Saharan Africa in particular³², even there states were not constituted separated by miles of hostile territory in between. It can be argued that the old colonial empires were similar to the state of post-independent Pakistan in that the territories under one area of control were not attached. The

²⁹ See generally Mascarenhas, A., *The Rape of Bangladesh* (1971); Rose & Sisson (1990) *op.cit.*26, Choudhary *The Genesis of Bangladesh* (1972)

³⁰ See Nanda V (1972) *op cit.* 18

³¹ See Nanda (1972) *op cit.* 18 p.328

³² See Jackson R, 'Juridicial Statehood in Sub-Saharan Africa,' in 46 *JIA* (1992) 1-16

idea of labelling West Pakistan as the Metropolitan state and East Pakistan as its overseas territory³³ would be highly controversial since these terms specifically refer to ‘salt-water’ colonialism. However, authors writing about the secession of Bangladesh seem to suggest that this is the situation that was created³⁴. This is a concept that is fairly central to this thesis in that it attempts to challenge the racial and ethnic basis of terms such as ‘colonial oppression’. This thesis is trying to argue that following colonial emancipation, the states formed were still not ‘representative’ in any sense of the word. In Bangladesh, other factors that need to be taken into account are historic, cultural and linguistic factors all of which seem to point towards the grant of peoplehood in international law to the Bengalis. This would be accompanied by a separate right of self-determination to that exercised on their behalf by undivided India in achieving freedom from the British Crown. As far as the history of the region is concerned it has never been linked in any way, other than by Britain, to West Pakistan. In fact this is largely true for most regions of the subcontinent. As far as cultural, ethnic and racial features go too, there is little to link the peoples of the two (former) segments of Pakistan. Perhaps, the issue that did clinch the issue for the Bengalis was the linguistic differences. This is true in the sense that it was an issue that Bengalis mobilised around in their call for autonomy. However, institutionalising linguistic difference in the subcontinent is dangerous due to the presence of nearly 200 different languages besides dialects, and it is a move that will be resisted fiercely, in the name of order.

That brings us to the action of the Pakistani army in curbing separatist violence, labelled by authors as genocide³⁵ which further determined the resolve for self-determination resulting in the secession of East Pakistan and the formation of the independent state of

³³ See GAOR 1541 (XV) & Rigo-Sureda *Evolution of the Right to Self-Determination* (1973) pp.147-164

³⁴ Notably Rose & Sisson (1990) *op.cit.* 26; and Mascarenhas (1971) *op.cit.* 29

³⁵ See Mascarenhas (1971) *op.cit.*29, Rose & Sisson (1990) *op.cit.*26

Bangladesh. Besides once again challenging the norm of self-determination for the reasons states above, this action was also an affront to Pakistani sovereignty. Article 2(7) of the UN Charter³⁶ gives the state of Pakistan the right to conduct its domestic affairs in a manner it sees fit without undue interference from the international community. The crisis in the east was an internal affair having been aggravated after domestic elections. This belief had precedence in the Biafran crisis where the Nigerian army was allowed a free reign in re-asserting its sovereignty over the secessionist region of Biafra by use of its armed forces and ‘police action’. The international community in that situation was powerless to act as it would have been in Bangladesh with the impasse in the Security Council influenced by Cold War agendas³⁷. The Bangladesh case though, which might have been resolved in a manner similar to that of the Biafra, was influenced decisively by Indian action or ‘intervention’ in contravention of basic norms of the UN Charter³⁸. India used legally questionable military force in aid of the creation of Bangladesh with what has subsequently been accepted as the right to self-determination of the Easterners, although at the time India argued that it had acted in self-defence. Once again, it could be argued that the precedent for this action too existed in the wake of Tanzanian intervention in Uganda in deposing the Idi Amin regime. However, what transpired in East Pakistan was third-party intervention against a sovereign nation in aid of a separatist movement that sought to challenge the internal sovereignty of the state to which it belonged. That India and Pakistan have not enjoyed a peaceful relationship suggests even more strongly that political factors were prime motivators for Indian action. We shall return to this theme later in the chapter when dealing with the validity of the Indian action in favour of self-determination.

³⁶ For a discussion on the relevance of 2(7) see Chapter Three Section 3.2

³⁷ For a discussion on the Security Council debate during the crisis see Harris (1997) *op.cit.* 5 p.892

³⁸ Namely article 2(4) which states: *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, or in any other manner inconsistent with the Purposes of the United Nations.* also see Article 2(5)

5.1.4 Evolution of the Norm of Self-determination post Bangladesh³⁹

The right of the Bengalis to independence is arguably justified; but fulfilment of it by armed intervention of a third state challenges the foundations of international law. Should the norm of self-determination be crystallised keeping Bangladesh in mind a number of other cases too could be resolved in a way that is not to the liking of certain actors of the international community. A classic example of this could be another explosive Indo-Pakistan crisis in Kashmir. Already the cause of two major wars and numerous skirmishes⁴⁰, resolution of that crisis following similar norms will see reversal of roles of the two powers in the subcontinent. The Kashmiri claim to independence is at least as strong as the Bengali one, the only notable difference being geographic factors. In addition Indian claims that ‘terrorists’ in Kashmir are backed by Pakistani forces is parallel to Indian logistic support for separatist forces in 1971⁴¹. If Bangladesh could be formed legally with Indian intervention then Kashmir too could be formed with Pakistani intervention. This is perhaps the main reason why India and Pakistan themselves multi-ethnic states as well as the international community, are apprehensive about the self-determination principle. It would directly challenge the foundation of the international system and undermine the maintenance of the order - the prime aim of the UN system. The creation of Bangladesh also demonstrates the problems of secession in questioning the parameters of the entities that deserve the right to self-determination. This is particularly relevant in view of the agitation of the Chittagong Hill Tribes currently seeking autonomy from the Dhaka-based Bangladeshi government⁴². Inherent contradictions are unavoidably a part of international law since self-determination crises are highly dissimilar and not open to generalisations. While it is useful to examine the cases

³⁹ See Brilmeyer L, (1991) *op.cit.* 15 p.187

⁴⁰ 1948 and 1962 (besides the escalation of the 1971 war). Also more recently, the trouble at Kargil, Kashmir see <http://www.india-web.com/goif.html> & <http://www.pak.gov.pk/main.html>

⁴¹ *Mukhti Bahini and Mukhti Fauj* - the two sections of the *rebel* forces that with the aid of Indian arms and Indian forces gained Bangladesh its freedom.

chosen here against the norms concerning self-determination, it needs to be stressed that drawing general conclusions that can be broadly applied, will not be helpful. There is a reflection of this diversity in the Statute of the ICJ and Article 38⁴³ that lists the sources of international law available to Courts in determining a dispute. Although debate has taken place within the academic community⁴⁴ as to whether these sources are hierarchical, the fact that previous court rulings are placed at 38 (d) is a clear indication of the acceptance by drafters of the diversity of situations. Besides this, Article 59 of the Statute states that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. This suggests further that the rulings of the ICJ are not binding by themselves in respect of other cases between other state parties or even for other cases between the same state parties. Having said that, international law does seek to create a system of rules by which international order can be maintained, and these rules need to stand up to various situations keeping in mind the diversity that exists, but also the fact that some similarities might exist between situations. In principle therefore, if the constitution of Bangladesh by Indian use of force is viewed as self-determination then questions need to be asked how and why the Kashmir issue should be resolved by a different set of rules, and if so what these rules might be.

5.2 Armed Intervention by a Third Party

To return to the question posed above about the legality of Indian action in Bangladesh, it is first necessary to examine the customary law and state practice that existed at the time leading up to the Bangla crisis. We will start this section by looking briefly, at the

⁴² See <http://www.pathfinder.com/asiaweek/970207/newsmap/banglade.html> accessed on July 22, 1997

⁴³ Article 38 of the Statute of the International Court of Justice as appended to the UN Charter

⁴⁴ See Akehurst, M 'The Hierarchy of the Sources of International Law,' in 47 *BYIL* (1974-5) 273; Baxter 'Multi-lateral Treaties as Evidence of Customary International Law,' in 41 *BYIL* (1965-6) 275; Kirgis 'Custom on a Sliding Scale,' in 81 *AJIL* (1987) 146; also see *Asylum Case ICJ Reports* (1950) 266 & *North Sea*

laws of wars and the history of the attempt to ban the use of force prior to the UN Charter. This will be followed by a brief analysis of the situation under the UN Charter to give a base to the legitimacy of the use of force in the international community. Finally turning to the Bangladesh question we shall examine the effect of the laws on self-determination. For this it is necessary to examine the provisions of the 1970 Declaration once more before attempting to analyse the precedent, if any, that the Indian action in the Eastern region of the subcontinent sets.

5.2.1 *The use of force prior to Bangladesh*⁴⁵

The norms for the use of force have developed over the last few centuries⁴⁶ to a point today where use of force to settle disputes is virtually outlawed. The concept of a 'just war' traces its roots back to St. Augustine of Hippo and encompasses such figures as St. Thomas of Aquinas and others⁴⁷. However, never before has an international framework been built around concepts of non-violence. In the aftermath of World War I, efforts were made to ban the use of force. These efforts were resisted by sovereign states who viewed war as an expression of their sovereignty. The efforts made under the League were based primarily on assumptions that World War I was a blunder stumbled upon rather than planned towards. It has been argued that while the League system outlawed the use of force completely it was still subject to Article XV⁴⁸. Others argue that though the Kellogg-Briand Pact of 1928⁴⁹ banned resort to force in relations between states, all major actors had exceptions where they believed they could use force. The attempt failed to recognise reality as was seen by the outbreak of

Continental Shelf Cases *ICJ Reports (1969)* 3

⁴⁵ For general reading see Brownlie, *International Law and the Use of Force by States (1963)*

⁴⁶ See Brownlie 'Use of Force in Self Defence,' in *38 BYIL (1961)*

⁴⁷ See McCoubrey & White, *International Law and Armed Conflict*, (1992) Chapter One

⁴⁸ I.e. the arbitration panel that was in place to regulate/prevent use of force.

⁴⁹ Treaty of Paris 1928; also see Wright, Q., 'Meaning of the Pact of Paris,' in *27 AJIL (1933)* 39-61

another world war within fifteen years of it. The termination of that war and creation of the UN Charter system saw use of force begin to take on a more defined shape.

5.2.2 Use of force under the Charter system

The two relevant articles of the UN Charter concerning the use of force are Articles 2(4) and 51⁵⁰. The language of the two articles has been debated amongst scholars questioning the existence of a right to anticipatory self-defence⁵¹ and the exact constitution of 'action' by the Security Council. The crux of the issue, however, is that use of force is clearly outlawed with the sole exception being in exercise of self-defence. Thus leading up to the Bangladesh crisis, the use of force in international law was frowned upon by the international community. States however continued to resort to violence in pursuit of national interests⁵² always justifying their actions under Article 51. This is perhaps more a tribute to the existence of the law rather its failure to outlaw violence. One of the loopholes with the self-defence argument is that 'aggression' has never been satisfactorily defined and this meant that judging responses to it (self-defence) would always prove problematic. A UN Special Committee⁵³ met in Geneva in 1973 to address the 'Question of Defining Aggression'. This was, however, after the Bangladesh crisis and their definition was not endorsed anyway due to its inherently problematic nature.

⁵⁰ The former calls on members to refrain from using the force or the threat of it in their international relations whilst the latter gives the right of self-defence - either individual or collective in the event of an *armed attack*.

⁵¹ Used by Israel for geo-strategic reasons

⁵² E.g. UK in the Suez Crisis (1956) see Thomas H *The Suez Affair* (1967), US in Grenada (1984), the USSR in Czechoslovakia (1968)

⁵³ UN Special Committee, *The Question of Defining Aggression* see Benjamin Ferencz 'Defining Aggression -- The Last Mile,' in *12 CJTL* (1973) 430-463

5.2.3 Use of Force and Self-determination: the 1970 Declaration

As mentioned earlier, the 1970 Declaration is highly significant in international law since it is seen as a norm of customary international law⁵⁴. The Declaration states that:

...Every state has the duty to promote through joint and separate action, realisation of the principle of equal rights and self-determination of peoples⁵⁵.

It also declares that every state must refrain from forcible action that deprives peoples of their right to self-determination; which is how India viewed Pakistani military action against the Bengalis. However, while the 1970 Declaration is generally favourable for the Indian argument for intervention, it nevertheless still goes against Charter norms which outlaw use of force and interference in sovereign affairs of another state. And the Declaration has the saving clause stating that nothing in it should be seen as being contrary to the norms of international law⁵⁶. The questions remain though, since the aiding of self-determination movements by third parties is in clear contravention of a state's sovereignty. The Bangladeshi situation only provides us with an illustration of how the norms operated in this case rather than shedding any light on the development of the norms themselves. In recent years the term 'intervention' (humanitarian or otherwise) has been increasingly used to justify (usually UN Security Council) action in aid of international peace and security. In fact UN practice of the early nineties arguably poses a strong case in favour of intervention. Of course irrespective of the political nature of UN interventions and motives therein, the fact remains that they took place under the auspices of the Security Council which has the right for such action under the rules entrusted to it by the UN Charter. Thus if the Security Council intervened in a self-

⁵⁴ See Rosenstock 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' in *61 AJIL (1967)* 713; also Danilenko 'International *Jus Cogens*: Issues of Law-Making' in *EJIL (1991)* 42

⁵⁵ The 1970 Declaration (GAOR 2625 (XXV))

⁵⁶ Chapter One Section 1.9

determination struggle it could arguably be legal under Chapter VII. This is despite the domestic sovereignty clause - Article 2(7) - since this particular Article explicitly allows Security Council action to be exempted from it⁵⁷. The question as framed within the Bangladesh case, however, is action by a third party other than one acting with the UN Security Council Chapter VII mandate since the Indian action was clearly unilateral and went ahead despite attempts by the Security Council to block it⁵⁸. In view of all that is mentioned above about the use of force under the Charter based system, it needs to be stated emphatically that such action is illegal. There is very little justification in international law for a neighbouring country using force to determine the outcome of a domestic issue within a sovereign state. However, what confuses this otherwise clear-cut norm are developments over the years immediately following the signing of the UN Charter, of the concept of human rights which have begun to erode the norm of domestic jurisdiction and make state action more questionable than before⁵⁹. One specific other factor that perhaps influences the legality of the action is the signing of the Genocide Convention in 1948⁶⁰. In recognition of the abhorrent nature of the crime, genocide was declared a crime against humanity by this convention and states were obliged to protect its citizens from it. Thus realistically, if genocide had occurred, UN Member States would be required to act to rectify the situation. While that is clear enough and would perhaps warrant some intervention, what remains contentious is whether the police action mounted by Pakistan and carried out by the Pakistani army, actually amounted to genocide in the strict sense of the term.

⁵⁷ See Article 2(7)

⁵⁸ See Harris (1997) *op.cit.* 5 p.892- as discussed earlier. No resolution was passed due to the Soviet defence of the Indian action and by use of the veto, the Soviets managed to stave off the Security Council resolution long enough for the Indian army to complete its action, thereby further highlighting the utility of the use of force.

⁵⁹ See Chapter Three on the erosion of 2(7) also see Blum Y.Z. *Eroding of the UN Charter* (1993)

⁶⁰ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948

5.2.4 Indian Action as Self-defence⁶¹

Despite the arguments made above, which were less tenable at the time of the crisis, the Indian government did not use them and justified its use of force instead as being an action of self-defence and therefore justified under Article 51 of the Charter. The abuse of Article 51 has been mentioned earlier but it also needs reiterating that this remains the best way to justify use of force by a sovereign outside an international boundary. India argued that the flow of refugees placed financial strains on the impoverished economy of the Indian state of West Bengal which accepted most refugees, and on this basis claimed the right to action in defence of its sovereignty. Despite attempts at pacific settlement,⁶² the international community was not prepared to face the crisis, allowing Pakistan protection under the domestic sovereignty clause. The Indians urged the international community to work towards a peaceful political solution creating pre-conditions for the return of refugees⁶³ and saw failure to heed this request as leaving her no choice but to take unilateral action to safeguard her own regional security. Hence, Indian action in Bangladesh was 'self-defence' although legalistically no 'armed attack' had occurred that 'immediately threatened'⁶⁴ Indian frontiers. The idea of economic threats justifying self-defence were arguably not included in the Charter, casting serious doubt upon this clause to justify such action.

On the other hand, if the spirit of the Charter is to be invoked, it may be argued that the people of Bangladesh had the right to self-defence which it exercised aided by India.

This argument would rest primarily on two grounds:

Firstly, Pakistan was legally constituted as a 'federal' state with two autonomous wings according to the 1940 Lahore Resolution. Without considering the constituents of federalism, we could simply use the idea of it as being a form of non-Centrist government.

⁶¹ See generally Palit, D.K., *The Lightning Campaign* (1972)

⁶² See Rose & Sisson (1990) *op.cit.* 26 pp. 177-203

⁶³ See Mrs Gandhi's address to Parliament in *XI ILM* (1971)

Therefore Bangladesh was to be an autonomous unit with an inherent right to self-defence of its own. This is a contentious statement but is backed up to some extent by Shaw who argues that internal boundaries are non-violable in the break-up of sovereign states. He suggests that in cases such as this the doctrine of *uti possidetis* translates into acceptance of the new state within its original federal boundary⁶⁵.

Secondly the Charter arguably gave the right of self-defence to 'all peoples'⁶⁶. It was also opposed to genocide and the use, or the threat of use of actual force within the international community. The Pakistani use of force though not technically within the international community, (having occurred within sovereign boundaries of a state) was, nonetheless, significant enough to affect the international community. This was due to humanitarian concern in light of the flow of refugees, and that genocide was alleged to have occurred. Of course, the second of these reasons it needs to be admitted remains problematic since, as mentioned earlier, the question of whether police action by the Pakistani military amounted to genocide is not accepted by all as genocide despite the apparently conclusive work of some⁶⁷. Be that as it may, it remains that if the risk of being wiped out by an army intent on gaining control of the country by any means was real, then a real right to self-defence for the entity threatened would exist under any law. This right would correspond to the right of an individual to self-defence under municipal law. The paradox this thesis would like to raise is that the rights of an individual to self-defence are protected under domestic law and the rights of a state to self-defence under international law.

⁶⁴ See article 51, UN Charter 1945

⁶⁵ See Conference paper, Shaw M.N. 'Self-determination, Autonomy and International Boundaries' at the *Symposium on Autonomy and Self-determination: Theories and Applications* held by the International and European Law Unit, University of Liverpool and jointly organised by the Israel Colloquium and the S.P.T.L. International Law Group on the 27th of May, 1997.

⁶⁶ According to the Preamble, UN Charter, 1945

⁶⁷ Contrast Sisson and Rose (1990) *op.cit.*26 which does not admit the action as genocide, though pointing out

Therefore, the rights of a 'people' to self-defence too ought to be protected. First, since a 'people' though problematically defined remains a legal entity within International Law; and second, in view of the illegality of genocide within the international system. Thus it is suggested that the rights of a people to self-defence too ought to exist which may/may not manifest itself in the form of secession from a state.

5.2.5 *Precedents set*⁶⁸

The Indian army violated the sovereign territory of its neighbour in aiding a separatist movement. It also forcefully supported 'disorderly' forces within the international community. This raises the interesting question of whether it is internationally acceptable for a state to aid a self-determination movement against another by use of direct force. This question is even more interesting if examined in light of the Biafran situation that preceded the Bangladesh crisis,⁶⁹ in the years immediately following the Bangla crisis and in the current climate of UN intervention on humanitarian grounds.⁷⁰ As discussed earlier, the 1970 Declaration does call on member states to help peoples to exercise rights of self-determination however it was arguably aimed at peoples under the subjugation of white colonial foreign rule. This is tenuous since it would suggest that a different set of rules apply to rather similar situations. Bengalis argue that East Pakistan was a colony of West Pakistan⁷¹. This coupled with the fact that legitimate autonomy demands were drowned out, legal elections annulled and a campaign of genocide unleashed, arguably gave the Easterners the right to defend themselves. The objective of this action had to be successful since failure would result in bloodshed without apparent reason. In a bid to succeed therefore, the Bengalis had to rely on

atrocities, to Mascarenhas (1971) *op.cit.* 29 which clearly formulates the genocide argument.

⁶⁸ See Crawford J, 'Criteria for Statehood in International Law,' in 48 *BYIL* (1976-77) 170

⁶⁹ See Chapter Two Section 2.4

⁷⁰ See generally Ramsbotram, O 'Humanitarian Intervention in Conflict: A Reconceptualisation (1996); also Bull, H *Intervention in World Politics* (1984)

logistics from another state in fighting the Pakistani state-driven mechanism. The tiny rebel forces would not have been able to defend themselves without Indian aid, thereby raising the possibility of Indian aid being legal.

The problem with this argument is that it could be held true for every self-determination movement no matter its merits. Separatist forces will always be disadvantaged in fighting state armies and will need aid from sympathetic states in their quest. If the international community endorses these actions it would lead to annihilation of Charter based values. Further, with the international community more representative today than in 1945⁷² and with the Charter still legally endorsed, it may be argued that the international community of states is in favour of the system as it exists *per se*. Thus, allowing Bangladesh to be precedent setting would go against the votes of UN members who accept the Charter as law giving.

5.3. Bangladesh & State Sovereignty⁷³

5.3.1 Internal matter of Pakistan: Applicability of 2(7)

State sovereignty is one of the most basic foundations of the UN Charter-based system⁷⁴. The founders of the UN were wary of creating a form of world government superseding the state since there was no evidence that the international polity of states desired this, especially in light of the implications of that to state sovereignty. Instead they created a system of international relations that recognised the importance of the state and attempted to regulate actions in the international arena within the framework of the state. This led to the complex system of sovereignty discussed in Chapter Three, the best exponent of which is

⁷¹ See Mascarenhas (1971) *op cit.* 29 pp. 6-24. Also see Nanda (1972) *op cit.* 18 p.326

⁷² In terms of the sheer numbers of member states of the UN

⁷³ See generally Brownlie, *State Responsibility* (1983)

Article 2(7). This Article is one of the vital cogs of the Charter-based system and perhaps the most important of all the clauses of the UN Charter. It basically lays down the right of a State to exercise exclusive sovereignty over its domestic arena. This would be the only way to regulate the influence of outside states on the affairs of a given state. Without Article 2(7) it may be argued that few states would have truly endorsed the Charter since it would mean that forces outside the state would be able to decide policy on issues within domestic jurisdiction thereby significantly weakening the powers of smaller, less powerful states. During the Bangladesh crisis, the Pakistani Government argued that the affairs leading up to the deployment of the army in the east were matters strictly within the internal jurisdiction of the Pakistani state and deemed Indian attempts to internationalise⁷⁵ the issue as illegal. The international community endorsed this view since the affairs basically arose out of the 1970 domestic elections. The Pakistani Government argued that the Bengalis were trying to secede from the state of Pakistan with the help of India and that Mujib-Ur-Rehman's victory in the elections was induced by India. This claim if proved, would place India on weak ground in international law since it would be up against Article 2(7) - a clause that India herself has used many times in a bid to curb super power interference⁷⁶.

5.3.2 Affecting International Peace and Security

One more angle that needs to be explored is whether the issue affected international peace and security. If it did the justification for outside 'interference/intervention' becomes stronger. From a Pakistani point of view, internationalisation of the issue was the work of a hostile neighbour. What was at stake in the domestic politics of Pakistan was a struggle for a constitutional system with no direct international implications. However, once the Pakistani

⁷⁴ See Chapter Three Section 3.2; also the preamble of the UN Charter

⁷⁵ See n.63

⁷⁶ See similar situations in the Nicaragua Case or the Haiti Intervention; also Fenwick CG 'Dominican Republic:

Army moved in to quell separatist forces and refugees fled across the boundary into India, the issue moved out of the realm of domestic politics, since it arguably pushed the unwanted population of one state into another, violating the latter's right to territorial sovereignty. But it needs to be stressed that India did not have to accept the refugees. Pakistan could argue that India in point of fact, encouraged the refugee flow and then provided them with arms to fight against the sovereign Pakistani state. Besides, India does not always accept refugees, having refused to take in the fleeing Nepalese from Bhutan. Thus it is plausible that in accepting refugees India violated Article 2(7) by harbouring separatist forces set to destroy the foundation of a sovereign member state of the UN.

This argument breaks-down for general refugee issues since any refugees fleeing persecution could then be considered 'forces disruptive to a state' and would defeat evolving international law with regards to protection of refugees. With increased flight amongst people subject to wars, it is debatable whether this is a direction that the international community would desire to move towards. But it still does highlight the problematic nature of important questions such as where 'humanitarian aid' ends and where 'interference in domestic affairs' begins. Arguably by the time the refugee flow thickened to nearly 10 million, the case was definitely affecting regional, if not international peace and security. The crossing of the borders by the refugees thus gave the issue an international dimension, taking it away from the ambit of Article 2(7)⁷⁷.

International & Collective Self Defence,' in *60 AJIL (1966)* 64

⁷⁷ For a detailed analysis on the start of the refugee flow see Feldman (1975) *op cit.* 20. pp.46-65

5.3.3 Right to Police Action

With settlement of the domestic conflict having failed, the Pakistani government decided to use force to curb the separatists. This was a sovereign act and cannot really be questioned within the ambit of international law since it concerns domestic politics. Even an 'imagined community'⁷⁸ such as a state, has an inherent right to protection under international law, in its relations. Sending the army into sections of a state is not without precedent and is used by many countries in the world to quell domestic violence and protest⁷⁹. While in some cases the international community has been outraged, the actions have always been considered within the scope of article 2(7), therefore technically beyond the reach of international law. This was definitely true in Pakistan too, until perhaps, the refugee flow began affecting the peace and security of India.

5.3.4 Protection Within International Law

To sum up, the international system is based on the premise that states are sovereign. The Charter protects this right of states to sovereignty by placing a veil between domestic and international activities of a state. Despite the role of UN agencies such as UNICEF, ECOSOC and UNDP, amongst others, the primary role of the UN is the promotion of *international* peace and security. Even within this meaning neither the UN nor any of its member states are by any means allowed to interfere in the domestic affairs of another state unless recommended under Chapter VII by the UN Security Council. However, once the veil is lifted by the escalation of the conflict outside the boundaries of the state, the validity of Article 2(7) is limited since the effects leak over an international boundary. Ideally, if the Charter works as it is intended to, the Indian government would then have the right to approach the Security

⁷⁸ See Anderson, B. *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983)

⁷⁹ E.g. the RUC in Northern Ireland, the Tianamen Square Massacre in China, Russian action in Chechnya & the problematic Yugoslav action in Kosovo.

Council for action in collective self-defence. However, with the Security Council unhinged due to Cold War politics, it was unable to act and in this restricted light the Indian right to action was arguably legal as an act of self-defence under Article 51, since it was facing a threat to its peace and security. However, on broadening this to include a plausible scenario of India having instigated the separatists to destabilise a hostile neighbour, the case weakens in direct confrontation with Article 2(7). It may thus be argued that allowing the Bangladesh incident as precedent setting could sound the death-knell for the system of protection of states' inherent right to domestic sovereignty. This would leave the state unprotected against separatist forces and all kinds of foreign influences bent on influencing events to suit their national interests and would thereby constitute a defeat of the UN Charter-based system.

5.4. Recognition of the Sovereign State of Bangladesh

5.4.1 Effects of Recognition

India was the first country to recognise Bangladesh in December 1971⁸⁰ paving the way for Indian action in assisting the Bengalis. The act of recognition was vital, since it transformed the Awami League from a separatist movement to an aspiring full-fledged international actor. Other states followed, and within a year Bangladesh was accepted by many as a sovereign state⁸¹. Pakistani recognition of Bangladesh in 1976 and UN membership finally confirmed Bangladesh as an international actor. However, the recognition of Bangladesh raises several interesting questions within the international law discourse. Prime amongst these is whether recognition of a new state wipes out the actions involved in its creation. Because Bangladesh is an actor in international relations now, does that automatically disqualify questions regarding the legality of its creation? Does it mean that any

⁸⁰ See Bangla proclamation of independence (April 10, 1971) and Indian recognition (December 6, 1971) in *XI ILM (1971)* pp. 119 & 307 respectively

⁸¹ By the end of February 1972, 31 countries had recognised the state of Bangladesh as sovereign state.

struggle attains legality as long as it is victorious? In the context of Biafra, this would reduce the international system to one where primacy and effectiveness of force once more determine the outcome of international conflict⁸². There are other questions that could be raised too: at what point does a struggle for secession become a cause that can be backed by another state? What levels of assistance is a UN member state entitled to provide against the sovereignty of another member? Does recognition *de facto* confer legality upon a fledgling state? These issues are extremely problematic and there are no clear answers forthcoming.

5.4.2 *De Jure & De Facto Recognition*⁸³

In addition, is the issue raised by the action of the Indian Government in recognising Bangladesh and its relevance to the case. It clearly changed the prevalent situation but what needs to be challenged is how such recognition, had it come any earlier or later could have affected the situation. Towards the first question the answer will have to be that Indian recognition was a significant step forward for the fledgling state. If it managed to get itself a strong backer like India willing after long covert support,⁸⁴ to overtly support its cause in the international arena, further progress would come easier. Within a month of Indian recognition Bhutan followed suit⁸⁵ and by February 1972 thirty-one countries had recognised the state of Bangladesh.

As for the second question, early Indian recognition was likely to be denounced by the international community. This has happened with the so-called 'Turkish Republic of Northern

⁸² See Crawford, J. (1976-77) *op.cit.* 67 p. 93.

⁸³ Crawford (1976-7) *ibid.* p. 99 - discussing the Montevideo Convention, 1933; also see Dugard J *Recognition & the UN* (1987)

⁸⁴ See Feldman (1975) *op.cit.* 20 pp. 157-171

⁸⁵ Bhutan at the time was an Associate State of India

Cyprus⁸⁶. The international community avoids hasty decisions of recognition since it compromises the domestic jurisdiction of the state from whom the group/groups are seceding⁸⁷. Early recognition of Bangladesh would have been seen as undue interference in the affairs of Pakistan within the scope of Article 2(7)⁸⁸. However, it needs to be established that early in March prior to the military action, the Awami League was the *de facto* government in Bangladesh⁸⁹ demonstrating its effective control of the region by a high-visibility successful civil disobedience movement. Recognition at that stage would surely have been premature yet at the time the reigns of government were arguably in the hands of the Awami League who already exercised effective *de facto* control over the territory. Had the international community recognised this, it would have saved at least 3 million lives in addition to preventing the worst refugee crisis of the time. Yet, states were helpless to act owing to the veil of Article 2(7) being firmly in place. It needs to be questioned why 3 million people needed to be killed and a further 10 million displaced, before the situation of mid-March could be repeated to the satisfaction of the 'international community'. Especially since this 'community' consisted of an amorphous group of people far removed from the front-line of the crisis and with limited interest in resolving the issue. Yet in the interest of international order, peace and security this was the only way forward. The lesson learnt from Biafra only a few months earlier had reiterated a Hegelian concept of the nature of sovereignty⁹⁰: a nation can only mature into political manhood if it can successfully mobilise its people in its

⁸⁶ See the Cyprus v Turkey Case *ICJ Reports* (1975)

⁸⁷ E.g. the unravelling of Yugoslavia see Weller M 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia,' in 86 *AJIL* (1992)569-607

⁸⁸ A similar debate took place with regards to the early recognition of Croatia against Article 2(7) of former Yugoslavia in 1991.

⁸⁹ See Mascarenhas (1971)*op cit.* 29 pp. 61-89

⁹⁰ See Elshtain, 'War, Identity and Sacrifice,' in 20 *MIJS* (1991) 395-406

defence⁹¹. Similarly, recent history suggests that a separatist movement must defend itself successfully against force, if it is to stake claim for recognition as a state.

5.4.3 *Difference from Biafra*

The Biafran Civil War remained a *civil war* for the prime reason that the Nigerian Government was strong enough to subjugate the forces of separatism. This leads to the question of whether this in itself constitutes the defeat of the international system intent on outlawing violence. The Biafran crisis was unique for the levels of indifference it drew from international institutions such as the Organisation of African Unity (OAU) and the UN with both entities merely watching nervously as the struggle unfolded. In the end, superior arms of the Nigerian army prevailed and the Biafrans were shelved in history. This would suggest that there is a *prima facie* case for interference in freedom struggles since without the aid of an army to fight another army there will be little hope of victory. If recognition only comes at the end of a 'successful' war as far as the nationalist liberation movement is concerned then hopes of pacific settlement of disputes and norms of representation and self-determination will be significantly compromised. It has been argued that another important difference between Biafra and Bangladesh was that the loss of East Pakistan would in no way compromise the Pakistani state while the loss of Biafra would have drained Nigeria of its resources⁹². This is at best a problematic argument, since according to the International Bill of Rights the right to self-determination also includes the right of people to freely dispose of their wealth and natural resources⁹³. Besides, this is also questionable since some authors allege that West Pakistan depended on/exploited East Pakistani resources⁹⁴. Other arguments put forth have taken the shape of the geographic factors and issues of cultural proximity. Yet all these factors

⁹¹ Hegel argued that war was the achievement of political manhood of a state see Crawford (1976-7) *op cit.* 67

⁹² Also advanced in the Katanga secession; see generally Libois, *Katanga Secession (1966)*

⁹³ International Bill of Rights of Rights 1966 Article 1(3)

undoubtedly pale in the face of the decisive fact that Bangladesh won the war of secession, while Biafra failed. This renders the international system's supposed values of anti-violence and pro-peace and security mere rhetoric.

Conclusions

Thus despite having examined the issues concerning the creation of the sovereign state of Bangladesh by secession of the Awami League national liberation movement from the erstwhile state of United Pakistan, we are left with more questions than answers. Some of these questions are whether this case constitutes a watershed in international law or whether it is merely an exception to a series of rules. Also pertinent is whether the case sets out a precedent where it is legal for one state to assist break-away factions in another state in the name of self-determination. Yet, while acknowledging that the Bangladeshi case had special mitigating circumstances, care has to be exercised for self-determination norms to be restrictive enough not to allow all separatist movements through at the cost of international order and peace and security. One of the issues that remain in the background, and out of the scope of this present work is the intrinsic merit in arguments of economic colonialism. Finally, the questions in light of this case are: Is secession legal? Does the Bangladesh Incident seriously compromise the domestic sovereignty of states? Is there such a thing as humanitarian intervention in these circumstances and how is this affected by Article 2(7)? Can the mere act of recognition erase illegality of an act? Should international approval be the basis for the existence of a sovereign state? Is victory in a struggle the only dominant factor for a group to achieve statehood?

⁹⁴ Mascarenhas (1971) *op.cit.* 29 pp. 6-25

The Bangladeshi incident clearly leaves us with more questions than answers; however going by the evidence presented it would seem that allowing Bangladesh to stand as precedent-setting would upset the balance of the entire international system and render notions of peace, security and order difficult to establish. However, yet another question is whether it is legal to establish a set of rules which can be broken in one instance but not another? Surely, this would constitute a travesty of justice. After all, how can a certain action be allowable in one set of circumstances but prevented in another, similar circumstance? These are the kinds of questions that highlight the complexities of international law, and demonstrate the fallacy of incorporating simplistic *Realist* models to the realm of international law which will not succumb to such straightjackets. In attempting to answer some of the questions raised above, we shall restrict ourselves only to the case of Bangladesh in order to ascertain to what degree international law of self-determination has been strengthened by the Bangladeshi secession.

First and foremost it needs to be reiterated that Bangladesh is clearly an exception to the rule of self-determination. Under no circumstances could it be construed that the international community would allow states to be dismembered in the way that formerly united Pakistan was. In framing a modern law of self-determination, the need for order will be an important factor since it is an inherent part of the UN Charter. Nonetheless, the case study demonstrates clearly the inherent problems with making such norms rigid. There is a strong case made in the evidence presented by some authors⁹⁵ that the Bengali people were in many ways colonised by their counterparts in the west of Pakistan. It also seems clear that they had strong credentials to exist as a separate people. These extended to linguistic, racial, cultural as well as geographic factors. Thus Bangladesh is clearly an exception in this sense. To extend

this hypothesis to suggest that it would now be legal to assist break-away factions in third states in the name of aiding self-determination would be too simplistic an approach. Indian action in Bangladesh was clearly illegal in that it compromised Pakistani sovereignty. However, since this sovereignty was in dispute at the time by a people claiming self-determination, the question was clouded over. This is not an unique case with many countries facing separatist movements. To suggest, however, that all these separatist movements have the right to receive help from hostile third parties would lead to destruction of the charter-based system that abhors the use of force across international boundaries. Once again, what isolates the case of Bangladesh from the others, perhaps, is the fact that the Bengali people faced a Pakistani army that allegedly indulged in genocide. Genocide is clearly an international crime against humanity and on this count alone, it is argued here, the Indian action could be seen as being legal. The Indian argument that the flow of refugees was affecting peace and security within the region, while a good argument is perhaps limited in that the Indians ought to have obtained a Security Council mandate for their actions since they made a pre-emptive first strike. Instead, what actually transpired was a successful blockade of the Security Council option by India's ally, the Soviet Union, whilst the Indian army swiftly and efficiently decided the argument by the use of force. There is little doubt that this was not how the drafters intended the system to work.

As for the arguments of economic colonisation, they open up areas of international law that are even less defined than the areas that we are currently looking at. There is no doubt that, in looking at the issue, we need to take a comprehensive approach. However there is also an inherent danger of broadening the problem to such an extent that it gets too general and therefore escapes any kind of solution or analysis. Economic colonisation, according to

⁹⁵ Notably Mascarenhas (1971) *op.cit.* 29; Sisson & Rose (1990) *op.cit.* 26

many developing world economists arguably takes place with the stronger western nations constantly exploiting the low technology natural products that the poorer states tend to produce. However, to rule this as case enough for violent self-determination and secession, is perhaps over-stretching the argument. Besides, within countries there will always be disparities in wealth distribution in certain regions, based on natural endowments and the level of development within states. This is an avenue, that albeit interesting, is out of the scope of this thesis but an interesting case which looks into these issues in more depth would be the Katanga Secession which was based, to a large extent, on the mineral wealth of the seceding region. The right to self-determination arguably, according to Article 1(3) of both the International Covenants (for Civil and Political Rights & for Economic, Social and Cultural Rights), includes the right of peoples to their own natural wealth; to dispose off freely as they so desire. Therefore, while there are merits in these arguments, they do not form the subject matter of this study.

Thus to conclude, secession remains problematic despite the experience of the Bangla secession. There were many extenuating circumstances within this particular case that made breaking away the only option, not least of which was the alleged genocide that the Pakistani army indulged in. The main conclusion that we can draw from the case of Bangladesh is that, in certain situations secession is a right in international law which functions under the direct influence of a concept of self-defence which is a general principle of international law. The circumstance in this case, was the alleged genocide and the only way to prevent it was to create a new state to ensure the survival of the genus. Thus, it can be concluded that in the face of genocide secession is legal purely out of the self-defence argument that exists as a general principle under virtually every legal system.

CHAPTER SIX

CASE STUDY II: 'NATIONAL' IDENTITY IN THE WESTERN SAHARA

PART ONE

MODERN INTERNATIONAL LEGAL HISTORY OF THE CONFLICT OVER THE WESTERN SAHARA

Introduction

The Western Sahara is that fringe of the Saharan Desert that is on the coast of the African continent. It includes the areas of Saguiet el-Hamra in the north and Wadi ed Dahab (Rio de Oro) in the south, a total area of 284,000 kilometres. It shares borders with Morocco in the north and Mauritania in the south with a small common border with Algeria. As in the case of most African countries the borders of the state were agreed to and drawn by the colonial powers France and Spain that ruled the region. Agreements between the two powers signed in 1900, 1904 and 1912¹ gave the territory of the Western Sahara its current shape². The region is of particular interest to international lawyers studying self-determination and the decolonisation process. As established earlier, the current status of international law with respect to self-determination suggests that it is only valid in situations of 'salt-water' colonialism³. The Western Sahara is an interesting case since the colonial issue has never been resolved despite the active interest of the international community. A colony of Spain at the time of the decolonisation process, the area, known as the Spanish Sahara, was entitled to exercise the right of self-determination in the same way as other post-colonial entities in the

¹ See the *Treaty of Fes, 1912* also Rézette R, *The Western Sahara and the Frontiers of Morocco* (1975) 91-111

² For an in-depth discussion of the process leading up to this see generally Rézette, R (1975) *infra n.1*. Also see Hodges T, *The Roots of a Desert War* (1987); Shaw M, 'The Western Sahara Case' in 44 *BJIL* (1978) 118-154; Franck T, 'The Stealing of the Sahara' in 70 *AJIL* (1976) 694-721; Lawless & Monahan (eds.) *War & Refugees* (1987); Price D.L., *The Western Sahara* (1979); Woolman D.S. *Rebels in the Rif* (1969); Abun-Nasr A *History of the Maghrib* (1975); Thompson & Aldoff *The Western Saharans* (1980); Mercer, J. *The Saharawis of the Western Sahara* (1979) & Chopra, J *UN Determination of the Western Sahara Self* (1994)

region and around the rest of the world⁴. However with the national interests of three powers clashing, compounded by the fact that the actual residents of the region were a nomadic population, the situation has thus far evaded resolution. Spain as the colonial ruler was responsible for the smooth transition of the region from its own administration to that of the people of the area - a requirement under the UN charter which Spain is obliged to respect⁵. However the Saharawis have traditionally been nomads who have wandered across the region that included Morocco and Mauritania for centuries without having to worry about borders⁶. The straight-jacketing of interests within the discourse of statehood and sovereignty has forced a change in this life-style. As a result they, like other nomadic peoples such as the gypsies in Central Europe and the itinerants in the Republic of Ireland⁷, have been forced into an area that corresponds to a sovereign 'state'. However what really brings the issue to an impasse is the intricacy of the history and identities within the region, and the rival claims of Morocco and Mauritania (which has since been dropped) to the region that corresponds the Western Sahara. As early as 1966 Mauritania and Morocco both newly independent, called for the self-determination of the region of Western Sahara⁸. Both countries were certain that exercise of the right of self-determination would see the region being amalgamated into their respective states. This claim is not as surprising and irredentist as it might first seem, in view of the fact that the people of the region had traversed across the territories that corresponds to both the modern day states throughout their history⁹. This, when super-imposed upon the concept of a 'greater Maghreb identity', examined in the next chapter, throws up complications which serve to reduce the right of self-determination to one easily manipulated

³ See Chapter Two Section 2.4

⁴ See generally, Sureta R, *Evolution of the Norm of Self-determination* (1973)

⁵ See Chapter XI of the UN Charter esp. article 73

⁶ See Abun-Nasr (1975) *op.cit.* 2 pp.202-224

⁷ See generally, Farnham R *Gypsies, Tinkers & Other Travellers* (1975); Acton, T *Gypsy Politics & Traveller Identity* (1997)

⁸ Franck (1976) *op.cit.* 2, p.694

by the harnessing of shrewd political forces. These political claims arising out of specific perceptions of historic identity, are compounded by the concept of the 'prize' of the Western Sahara, which some authors claim is the prime purpose for the struggle over it¹⁰. The exploitation of the mineral wealth, suddenly an issue in the decade leading up to colonial abdication by Spain, was attractive to both Morocco and Mauritania as well as to Spain, in the years leading up to its actual withdrawal. The Western Sahara is a region blessed with an abundance of phosphates which, it is claimed has given this otherwise desolate part of the desert its importance. As mentioned earlier the self-determination of mineral wealth is also provided for in the International Bill of Rights¹¹, however it is not an issue that is addressed in this thesis, and will not therefore merit concerted attention in this case study.

By the time of the Spanish withdrawal in 1974, the stage was set for a battle between the three sovereigns; in trying to engage the international community in awarding the Western Sahara itself, or parts thereof of its mineral wealth to three powers. While the three countries squabbled over the territory, the UN renewed calls for self-determination¹². However exercise of this right is such a complicated process that it is over twenty years since the first international interest in the region; and the task of ascertaining how the area might determine its political future has only recently got closer. Compounding the problem is what has been called the Green March by Moroccans who, called upon by The late King Hassan, marched 'peacefully' into the desert to take up land they believed belonged historically to them upon the vacating of it by the colonial ruler Spain. This was when the matter first began to be treated as one potentially affecting international peace and security since it involved the

⁹ See Chapter Seven Section 7.1

¹⁰ Gretton J *The Western Sahara: The Fight for Self-determination* (1976); also see Chopra J (1994) *op.cit.* 2. p.245; also Franck (1976) *op.cit.* 2 p.704

¹¹ Article 1(2) of the International Covenant for Civil and Political Rights 1966 states that: *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations...*

movement of people and troops across what had, by the doctrine of *uti possidetis*¹³ become a sacrosanct international boundary. The Security Council met and while affirming the 1960 Declaration¹⁴ appealed to the parties concerned to exercise restraint and moderation¹⁵. This was soon followed by another resolution¹⁶ which noted the gravity of the situation and while calling for the parties to prevent further escalation called for the Secretary-General to intensify his efforts in resolution of the problem. However the Green March declared by King Hassan was not one that could be easily deterred, and went ahead despite appeals of the Security Council. The relative Security Council impotence in the matter is a reflection of the power politics of the time¹⁷ and can be said to be one of the prime underlying causes in the increased complexity of the situation for reasons that we shall return to later in the chapter. The Security Council responded to the Green March with another resolution¹⁸ ‘deploring the holding of the march’ and calling for Morocco to ‘immediately withdraw from the Territory’¹⁹. It also called for the co-operation of Morocco and ‘all other parties concerned’ with the Secretary-General and the action he might take under Resolution 3293 (XXIX) of 13 December 1974.

One of the questions that needs to be established for a clearer view of the situation is whether the region could be described as *terra nullius* when the Spanish arrived. This was one of the questions addressed to the ICJ (at the behest of Morocco) by the General Assembly in 1975. It is an issue of great importance and is a theme that we shall return to and examine in depth later in the chapter.

¹² GAOR 3292 (XXIX) of 13 December 1974

¹³ As discussed in Chapter Four

¹⁴ GAOR 1514 (XV) of 14 December 1960

¹⁵ S/RES/377 (1975) of 22 October 1975

¹⁶ S/RES/379 (1975) of 2 November 1975

¹⁷ See Franck (1976) *op.cit.* 2, pp.703-7

¹⁸ S/RES/380(1975) of 6 November 1975

What this case study seeks to do is to analyse the merits of the arguments put forward in the issue of Western Saharan self-determination. We shall examine these claims of self-determination in light of the history of the region and deconstruct the arguments of both the Moroccan government as well as the Frente Popular para la Liberacion de Saguia el-Hamra y de Rio de Oro (Frente POLISARIO)²⁰ in the following chapter. In addition we shall also look at the role played by the various actors in the Western Sahara theatre. These include bodies under UN auspices including the General Assembly, the Security Council, the Secretary-General and the United Nations Mission for the Referendum in Western Sahara (MINURSO)²¹ all of whom have played a major role in the crisis²². We shall also examine the roles played by Spain, Morocco, Algeria and Mauritania and the institutional reactions of the Organisation of African Unity (OAU) which has also played a role in the continuing attempts at resolving this crisis. This should enable us to examine whether the application of the norm of self-determination to this particular case clarifies or challenges its position in the international legal discourse of self-determination. It will also give us an in-depth view of the intricacies of the norm and demonstrate how the norm breaks down when faced with actualities that highlight its lack of coherence. This will also tie-in with the theoretical chapters in the first section of the thesis. The argument presented within the two chapters that comprise this section will thus focus on the negation of the theories presented in the first half of the thesis, as well as questioning indirectly, the precedents set in the resolution of the Bangladesh crisis outlined in the previous chapter. Thus we shall try and firstly examine the norm of self-determination itself in the context of this case. Secondly the issue of who the

¹⁹ *Ibid.* S/RES/380

²⁰ Henceforth referred to as the 'Polisario Front'

²¹ Henceforth referred to as 'MINURSO'; for the implications of peacekeeping in the region see Durch W.J, 'Building on Sand: UN Peacekeeping in the Western Sahara' in *17 Int.Sec. (No.4) (1993)* 160 - 190

²² See generally Chopra J, (1994); Shaw (1978) *op.cit.*2 & Franck (1976) *op.cit.*2

'people' are in this case that are entitled to the right of self-determination. In doing so we shall encounter the problems of the discourse of statehood and sovereignty. Finally, the concept of the creation of a geographically bound identity imposed by colonial powers and maintained by the doctrine of *uti possidetis* will also be examined. The situation in the region is thus particularly interesting since it highlights the complexities of identity and its interplay with the politics of possession.

6.1 The Post-Colonial History of the Territory

The history of the region under colonial influence, from the arrival until the Spanish departure is outside the scope of this present study²³. Suffice to say that until then, the profile of the region was fairly similar to many other regions of the world that were under colonial influence. One factor that perhaps suggests that the case was likely to be different was the fact that the Saharawi people have always been nomadic. But even this is perhaps not unique in the decolonisation process with other examples of this being the Bedouins of the Kalahari Desert and their decolonisation to form the state subsequently known as Namibia²⁴. The Western Sahara though is one of the former colonies where a territorial claim was made by two newly independent countries, in tandem with the decolonisation process. This too is not unique as demonstrated by conflict in the Kashmir Valley which is disputed between India and Pakistan since their formation in 1947²⁵. What perhaps differentiates the two regions is the fact that the British, as the colonial power did not exercise any claim to try and retain possession of Kashmir, while in the case of the Western Sahara, Spain attempted just this. Besides in Kashmir, a single colonial power was involved, which had treated the two

²³ See Abun-Nasr (1975) *op.cit.2 esp.* pp. 235-376

²⁴ See the *South West Africa Cases*. Namibia was accepted as a member of the UN in 1990; also see Dugard, J 'Namibia, Southwest Africa: The Court's Opinion, South Africa's Response and Prospects for the Future,' in *11CJTL (1972)* pp.14-49

²⁵ See generally Muslim League Branch, UK *An Outline of Jammu and Kashmir State Politics - An Insight into*

emergent independent countries as a single administrative unit. The Western Sahara Case is complicated by the fact that while Morocco was under the influence of one colonial power i.e. France, the region of the Western Sahara was under the influence of another i.e. Spain. This makes the discussion of the doctrine of *uti possidetis* and the freezing of international boundaries along the lines of colonial demarcations, very interesting. In any case the combination of the two factors i.e. a nomadic colonial populations in addition to sovereignty claims from two newly independent countries, is rare and has added immensely to the complexities of the Western Sahara Case making its resolution even tougher.

The UN involvement in the Western Sahara problem can be traced back to the 1960 Declaration under which it called for the freeing of all 'colonial territories'²⁶. Direct involvement in the case was more recent and began in December 1974 with the passage of Resolution 3292²⁷. This was followed immediately by a resolution that called for an action plan for the region²⁸. The situation for the next few years remained out of Security Council debates as attempts were made within the region to arrive at a solution to the problem²⁹. One such attempt was the referral of the case to the International Court for an advisory opinion in 1975³⁰ which is dealt with in the subsequent chapter, analysing the questions put forth and their merits. One of the greatest difficulties in determining identity in the region is also the lack of written records: at the time of the Spanish exit from the Sahara the only known source of demographics in the area was a census conducted by the Spanish authorities³¹. This census,

the Kashmir Problem (1948); also see Chopra V.D, *Genesis of Indo-Pak Conflict in Kashmir* (1990)

²⁶ GAOR 1514 (XV) of 15 December 1960

²⁷ GAOR 3292 (XXIX) of 13 December 1974

²⁸ GAOR 3293 (XXIX) of 13 December 1974

²⁹ This included the development of armed resistance by the Polisario, who gained recognition within the OAU while Morocco quit the organisation in 1984 Appendix II, the interview with His Excellency Khalil Haddaoui, February 1998

³⁰ See Receuil des Arrêts and Janis, M., 'The ICJ - Advisory Opinion on the Western Sahara,' in *17 HIJ* (1976) 609-621

³¹ See Chopra *J op.cit.* pp. 9-17

besides giving an idea of the people that inhabited the land in 1974 also had the effect of democratising tribal power structures in that chiefs were for the first time required to be elected in an effort to better represent Saharawi populations. The census is to date, one of the most controversial in the process of determining the eligibility of who could be identified and considered eligible to vote in the referendum to be held for the region³². The national liberation movement in the region, (the Polisario) claim that only the people included in the census and their descendants ought to be allowed into the vote in the referendum to decide the fate of the territory. They consider the 'self' or the limits to the 'people' being called upon to determine the future of the territory as those who could demonstrate that they were part of the territory when the Spanish held the census in 1974. The Moroccan government on the other hand claims that the census could not have been accurate since many tribes living in the region were not included because they were, at the time of the census, not present in the region. This argument has special merit in view of the nomadic leanings of the people³³ traditionally resident here. We shall return to the merits of each argument later. However the Green March encouraged by The late King Hassan II complicated issues in that the people that entered the region in the process of that March are difficult to differentiate from the more original inhabitants. Besides these people have settled down in the region and have adapted to the way of life of the region over the last twenty odd years. The fact that there are few documents proving any of the claims further compounds matters. Thus the Western Sahara imbroglio has been left at the delicate point where the international community and the two parties concerned i.e. the Moroccan government authorities in Rabat and the Polisario Front operating out of Tindouf, in Algeria where they have been given refuge, agree that a referendum needs to be held to let 'the people decide the fate of the territory rather than the

³² Especially with respect to the identification of tribes H41, H61 & J51/2

³³ The use of the word people here is not to denote any aspersions on their claim to peoplehood in an international legal sense

territory the fate of the people'³⁴. The process of identifying who has a right to vote however, has been the single biggest factor in explaining why the process has not been able to be completed since the basic settlement plan came into existence in 1988. As a result despite elaborate schedules set out by the UN³⁵ the situation always returns to the same impasse as both parties to the dispute refuse to concede ground in voter identification and registration that might compromise their ability to win the ballot of self-determination.

In addition to this, is the complication of the political process of state recognition. This has seen a fair degree of support for the Polisario cause demonstrated in the recognition granted by 74 countries to the Saharawi Arab Democratic Republic which was declared by the Polisario to be an independent state 1975³⁶. The issue gained further international attention though, when the Organisation of African Unity (OAU) controversially recognised the Frente Polisario as the legitimate government of the Saharan Arabic Democratic Republic and offered it a seat within the organisation³⁷. The situation was rapidly heading towards a permanent impasse when the Secretary-General managed to convince both parties to sign a cease-fire agreement. Thereafter work began on the creation of a settlement plan that would be acceptable to both parties and that would culminate in a referendum to determine the political future of the territory³⁸. This implementation plan for a 'multi-functional transition process' included, besides the cease-fire negotiations, 'the repatriation of refugees, the organisation of a referendum and the exercise of transitional authority. On paper this placed the Special Representative of the Secretary-General in the position of quasi-governor-in-trust

³⁴ See Dillard (dissenting opinion) *ICJ Reports (1975)* p.122 also Higgins R, 'Judge Dillard and the Right to Self-determination' in *23 VJIL (1983)* 387-394

³⁵ See the initial settlement plan (S/21360) agreed to by the Kingdom of Morocco and the Polisario on 30th August 1988; also see Chopra (1994) *op.cit.* 2, *para.* 14-19

³⁶ On the 27th of February, 1975. See <http://www.arso/independence.html>

³⁷ For a recorded interview with His Excellency, the Moroccan Ambassador to the United Kingdom, who was involved in the process see Appendix II

of the territory. The plan also established an Identification Commission to determine who was eligible to vote in a referendum for self-determination'³⁹. The operative part of the Settlement plan that we shall directly focus on has been the subject of primary research undertaken in the region with regard to this thesis. This is the issue first enunciated by paragraph 61 of the implementation plan which gives the Identification Commission established under MINURSO the mandate to 'implement the agreed position of the parties, that all Western Saharans counted in the 1974 census undertaken by the Spanish authorities and aged 18 years or over will have the right to vote, whether currently in the Territory or outside as refugees or for other reasons'⁴⁰. This process was backed up by the dispatching of a UN Technical Survey Mission to the region whose mandate was primarily to assist in the setting up of the Identification Commission. The preliminary work undertaken by the Identification Commission attempted to up-date the 1974 census, taking into account deaths of persons registered in the census and also considering the application of persons claiming the right to vote in the referendum on the basis of being Saharawis excluded from the original census.

By August 1991 the government of Morocco suggested that a number of tribes that were normally resident in the territory had been excluded from the Spanish census due to their absence from the region at the time of the census. In support of this it put forward a list of 120,000 voters which it claimed were not included in the census, in accordance with the criteria enunciated above. King Hassan also suggested moving 170,000 of these inhabitants into the region to facilitate their identification. In light of the Green March a few years prior to this, it caused a storm of protest resulting in the resignation of Johannes J Manz, Special Representative of the Secretary-General to the Western Sahara. In his letter of resignation to

³⁸ United Nations Doc. S/21360 of 18 June 1990

³⁹ Chopra (1994) *op.cit.*2 para 14

⁴⁰ Para 61, as quoted in Chopra (1994) *op.cit.*2 para 15

the Secretary-General he suggested that such Moroccan action would be a 'breach of spirit of the Peace Plan'⁴¹. It was at the end of the result of these events that Secretary-General Perez de Cuellar, just before his retirement, issued his final report with the criteria that are generally considered to be the back-bone of the current process of identification⁴². He suggested a list of five criteria for determining of the eligibility of people to vote in the referendum to be held in the region. There were as follows:

- (i) persons whose names are included in the revised 1974 census list ;
- (ii) persons who were living in the territory as members of a Saharan tribe at the time of the 1974 census but who could not be counted;
- (iii) members of the immediate family of the first two groups;
- (iv) persons born of a Saharan father born in the territory; and
- (v) persons who are members of Saharan tribe belonging to the territory and who have resided in the territory for six consecutive years or intermittently for 12 years prior to 1 December 1974.

However the clear enunciation of the plan did not meet with the positive response that it was hoped it would receive⁴³. Both parties had problems with the criteria though disagreement centred mainly around the fourth and fifth criteria besides other issues such as the problem of tribal allegiance, the sources of evidence to be accepted in determining eligibility, (including the use of oral testimony). As Chopra points out both parties agreed in principle that:

- (i) a basis for voter eligibility is provided by the first three criteria: the revised 1974 census; persons resident in the territory at the time which were not counted; and the immediate families of both groups; and

⁴¹ As quoted in Chopra (1994) *ibid.* para 17

⁴² United Nations Doc. S/23299 of 19 December 1991

⁴³ See Chopra J paras 20 to 27

(ii) that authentic documents issued by the Spanish colonial authorities are acceptable sources of evidence attesting to the identity of an individual⁴⁴.

However the disagreements stemmed from, on the one hand, a Moroccan wish to be an inclusionary as possible, against the Polisario wish to be restrictive in the fear that non-Saharawis would be given a vote to influence the referendum. The Polisario fear the referendum process being overwhelmed by 'Moroccan votes'. They also argue that the 1974 census remains the only accurate statement of the *status quo ante belum* and hence insist that that is the only people who ought to be allowed the right to self-determination in the Western Sahara context.

In the face of these disagreements the Secretary-General reacted by suggesting the continuation of the process along three possible lines. Firstly he suggested the intensification of talks between the parties; secondly, the option of going ahead with the Settlement Plan agreed to by the parties irrespective of their consent; and thirdly, the negotiation of an alternative plan. After much discussion the option of more talks was seen as the best way forward. It needs to be pointed out that the latter two approaches would have not been preferable in this situation. For one, going ahead with the plan irrespective of the parties wishes would have needed, legal action by the Security Council under Chapter VII, since that is the only allowance in the Charter to over-ride the concerns and legal effects of the domestic sovereignty clause discussed in Chapter Two. Such an action was always unlikely, since it would have required the Security Council to decide unanimously that there was a threat to international peace and security that merited forceful action against a sovereign state. Viewed in the historical light of Security Council action this plan was a non-starter due to the narrow

⁴⁴ Chopra (1994) *op.cit.* 2 para 20

interpretation of a 'threat to international peace and security' by the members of the P5⁴⁵. As for the other option of re-negotiating the plan, it would have negated all action up to that point and was therefore not one that was keen to be pursued by any of the parties to the dispute, or by the UN itself.

The initial criterion agreed to in the Settlement Plan were however soon challenged as ground realities threw up hosts of problems that were not foreseen. The UN too, was forced to concede that it had not anticipated the complexities that they were faced with⁴⁶ the Secretary-General admitting to the 'time-consuming' nature of such an 'unprecedented experience involving a tribal nomadic society'⁴⁷. What follows is a history of UN involvement in attempting to hold the referendum in the region. It is a history that is viewed through UN documents, mainly through the lens of the Secretary-General's Reports beginning with his first report (Perez de Cuellar) including the efforts of Boutros Boutros Ghali and culminating in the present input of Kofi Annan. The view below has also been supplemented by the reaction at various times to the situation by the Security Council and, when appropriate the General Assembly.

6.2 Direct UN Involvement in the Western Sahara

Security Council attention to the developing problem in the Western Sahara remained sporadic between the years of 1975⁴⁸ until 1988⁴⁹ with no resolutions passed on the subject. This is rather surprising, owing to the fall-out after the ICJ Opinion. It also illustrates however, the gap that exists within the legal and political mechanisms of the international

⁴⁵ The P5 consist of the five permanent members of the Security Council i.e. USA, (then) USSR, France, Britain and China

⁴⁶ See S/1994/819 of 12 July 1994 - Secretary-General's Report

⁴⁷ See S/1994/819 *ibid.* para 57

⁴⁸ S/RES380(1975) of 6 November 1975

system, highlighting the need for what Boutros-Boutros Ghali referred to as greater co-operation between the two UN mechanisms⁵⁰. Resolution 621 was in response to a report by the Secretary-General 'on his mission of good offices pursued jointly with the current Chairman of the Organisation of African Unity, in conformity with General Assembly Resolution 40/50⁵¹ of 2 December 1985, with a view to settling the question of the Western Sahara'⁵². It is the report that for the first time, suggests action beyond the 'good offices of the Secretary-General which had up to that point not yielded anything beyond the original settlement plan. In Resolution 621 the Security Council states its keenness to support the process of holding a referendum in the region, to be supervised by the UN in co-operation of the Organisation of African Unity (OAU). It also authorised the Secretary-General 'to appoint a special representative for Western Sahara' and called for him to submit a report on the proceedings as soon as possible. In his report⁵³ the Secretary-General suggested deployment of a Mission in the Western Sahara with the purpose of creating pre-conditions for the successful implementation of the Settlement Plan; which was duly approved by the Security Council⁵⁴. By the resolution passed on the 29th of April, the Security Council finally established the United Nations Mission for the Referendum in Western Sahara, otherwise referred to as MINURSO⁵⁵. This resolution was backed up by the end of the year despite the difficulties brought up by the Secretary-General in his report⁵⁶. While expressing concern at the difficulties and delays encountered in the implementation of the Settlement Plan the Security Council reiterated its support to the Secretary-General and its commitment to a

⁴⁹ S/RES/621(1988)

⁵⁰ B.B.Ghali *An Agenda for Peace* (1992) also 'Setting an Agenda for the UN,' in *46 JIA* (1992) 289-298

⁵¹ GAOR 40/50 of 2 December 1985

⁵² *Ibid* S/RES/621

⁵³ Report of the Secretary-General on the Situation Concerning Western Sahara (S/21360)

⁵⁴ S/RES/658 (1990) of 27 June 1990

⁵⁵ S/RES/690 (1991) of 29 April 1991

⁵⁶ See Report of the Secretary-General S/23299

solution⁵⁷. Throughout the following year MINURSO appears to have continued its task of trying to implement the Settlement Plan making little headway amidst the complexities. The matter however did not come up before the Security Council again until March 1993. Once again in response to the Secretary-General's Report⁵⁸, the Security Council expresses concern at delays but continued its support of the implementation of the Settlement Plan⁵⁹. By March 1994⁶⁰, the situation had not improved significantly due mainly to impasse with regards to the criterion for voter identification. The initial Settlement Plan had outlined the five categories of voters (discussed above) without regard to any hierarchy amongst them. However, in application there seemed to be a clear-cut hierarchy of which category was more 'Saharawi' than the other, which was in contravention of the plan. The Secretary-General, in a bid to overcome the impasse had suggested a compromise proposal concerning the interpretation and application of the criteria for voter eligibility⁶¹; a suggestion also backed up by an explanatory note⁶² and a subsequent letter⁶³ from the Special Representative. By his report of 10 March 1994 the Secretary-General had outlined 3 plausible approaches that could be adopted - the second of which was approved by the Security Council in its resolution of 29 March 1994⁶⁴. Basically what this option involved was the setting of a new deadline for the Identification Commission to complete its work. Thus the process of analysis of all applications received and the identification of potential voters was approved to be completed by the 30th of June 1994 a process which of course stalled once more with the question of voter eligibility and subsequent identification still unresolved. The main reason for the continuous stalling of the process remained that while the extending of the mandate of

⁵⁷ S/RES/725 of 31 December 1991

⁵⁸ See Secretary-General's report on the Situation Concerning the Western Sahara S/25170

⁵⁹ S/RES/809 of 2 March 1993

⁶⁰ S/RES 907 of 29 March 1994

⁶¹ See Secretary-General's Report on the Situation Concerning the Western Sahara S/26185

⁶² S/26185 of 27 September 1993

⁶³ Letter dated 4 February 1994 - annex to Secretary-General's Report of 10 March 1994

MINURSO was useful to the peace and security (i.e. status quo) in the region, the UN and the two parties concerned needed to come to an agreement about the basic problem that was hindering the process - the issue of voter criterion and identification, before the process would proceed. The constant extensions of mandate for the Mission and the attempt to get the parties to negotiate directly continued to fail thereby compromising the entire mission.

It is necessary at this stage to analyse the nature of the problems faced by the Identification Commission and the involvement of the UN regime. While the Settlement Plan had been agreed to on the 30th of August 1988 it was by no means a Plan that was beyond question. There remained within the document many questions that lacked clarity. Prime amongst these was the issue of the eligibility of voters. This remains a central issue to the case and unless it is tackled thoroughly the process is bound to stall after every few steps of progress. The chief problem of course remains that it is extremely hard in the Western Sahara Case to realise exactly who 'the people' of 'the territory' are, to use Judge Dillard's⁶⁵ phrases. Since the itinerant peoples of the region moved across the expanse of the Sahara Desert, without the obstruction of national boundaries or having to lay claim to fixed territory, making them stake a coherent claim for territory within the discourse of statehood is a mission fraught with difficulty. For a start is the question of whether the whole area might not simply be one territory. We shall refer to this argument as the 'greater Maghreb' question⁶⁶ the justification for which will be looked at in the next chapter. The next question to ask is whether the Western Sahara is a separate entity both in terms of history and in the current post-colonial scenario. Once this has been established the next question to be analysed is one that was posed to the International Court by Morocco i.e. whether ties existed between the

⁶⁴ S/RES/907 of 29 March 1994

⁶⁵ See *ICJ Reports (1975) Dissenting Opinion* p. 122

⁶⁶ See Chapter Seven Section 7.1

region and the entities of Morocco and Mauritania⁶⁷. The Court tackled this question and we shall examine the merits of this further⁶⁸. It is only after we have come to a basic understanding of these issues that we can attempt to understand who ‘the people’ in the region are that ought to be allowed to decide their fate. Since the Moroccans and Polisario answer these questions from entirely different perspectives, there is a divergence in the solution they see as ideal for the region. For example to the prime question of voter eligibility on which this entire case hinges, Morocco insists that all Saharawis ought to be given a vote⁶⁹. For this purpose they define Saharawi identity broadly making it difficult to differentiate those peoples of the desert who were in the region prior to the Green March and those who could be referred to as ‘planted populations’. The Polisario too is keen that all Saharawis vote in the referendum however they define Saharawi identity narrowly and point to the Spanish census of 1974⁷⁰ as one of the main sources of identity in the region in 1974. They thus insist that it is these people and their descendants primarily, who are eligible to decide the fate of the territory. This fails to take into account the Moroccan counter-argument that the itinerant lifestyle of the Saharawis may be responsible for the exclusion of some who were absent from within the confines of Spanish Sahara at the time of the census. A failure to take this into account will leave a certain section of the Saharawi population nation-less. However the Moroccan broad definition of people eligible means that the people that have resided in the territory since the Green March would be allowed to determine the fate of a territory that technically they were not a direct and natural part of. The question of voter identification will be looked at when analysing the merits of each side in the next chapter, however for the time being it is simply necessary to point out this, the main complexity in the referendum process.

⁶⁷ See *ICJ Reports (1975)* p.6

⁶⁸ See the discussion in Chapter Seven Section 7.2

⁶⁹ See Chopra (1994) *op.cit.* 2 paras. 18-41

Thus in calling for 'strict compliance' with the time-table for the option suggested by the Secretary-General and the holding of the referendum by the end of 1994, the Security Council seemed to fail to appreciate this vital component of the implementation of the Settlement Plan⁷¹. Of course one of the constraints on the Security Council was the funding of the Mission in the Western Sahara. States had already failed to deliver on promised funds and the Security Council was wary of getting involved in a case that would deny solution and remain hard to justify in terms of budget allocations. It was this concern that caused the Security Council to first voice its reservation about the continued involvement of MINURSO in the Western Sahara⁷². Up to 1994 though MINURSO, while having failed to make a big impact of the voter identification and registration front had nonetheless achieved some success. The military mandate of the Mission had performed admirably in the face of limited resources. Its mandate was restricted to monitoring and verifying the cease-fire and with both parties co-operating to a large extent in this process, the military component of the MINURSO could report more or less complete success in this field. The civil police deployed too succeeded in their brief; which was the maintenance of law and order around the voter identification booths in particular and in the region in general. Thus from the point of view of the maintenance of regional peace and security the Mission was clearly contributing hugely to the process. However it was in the preparatory work for the identification and registration of voters that the problems were inevitable. Security Council Resolution 907 required the swift completion of the voter identification and registration process. Ground level logistics however and the realities highlighted above prevented this from being put into practice despite the best efforts of the Secretary-General and his Deputy Special Representative and Chairman of Identification Commission, Mr. Erik Jensen. Intensive meetings were held between Mr.

⁷⁰ See Interview with Kamel Fadel, Appendix III

⁷¹ See S/RES/907 (29 March 1994) para 5

⁷² *Ibid.* 907 para 8

Jensen and the Polisario leadership as well as the authorities in Rabat. Both sides agreed to Resolution 907 and agreed to open additional offices to enable distribution of application forms. This agreement was also extended to and was supported by the authorities in Algiers (Algeria) and Nouakchott (Mauritania) where there remained a large amount of Saharawi people. Algerian support was especially vital to the process since the refugee camps of the Saharawis supporting secession and currently under the Polisario administration, are situated in Tindouf which is in the Algerian jurisdiction of the Saharan desert.

Thus, the distribution of forms had commenced in April and by May 1994 both sides had begun delivering completed forms to the Identification Commission in a bid to start the analysis of these forms by early June. The task faced by the Identification Commission though was extremely complicated and despite being briefed and given clear procedures and guidelines they were to come up against the historical and cultural barriers to identity as will be demonstrated during the course of the next chapter⁷³. The procedure agreed to required every applicant to be photographed and finger-printed prior to appearance before the Identification Teams. The teams themselves had to include relevant sheikhs from both sides (since they were the only ones who could actually verify the identity of the applicants) besides official observers from the OAU and the Commission itself. According to the procedures agreed upon, the Commission members were empowered with the right to view all the evidence and testimony provided at the interview before having the final say on acceptance or rejection of a candidate's eligibility. However before the process could actually begin one more issue surfaced which once again, stalled the process. Originally slated to begin on the 8th of June simultaneously at the refugee camp in Tindouf (Algeria) and Laayoune⁷⁴

⁷³ See Chapter Seven Section 7.4

⁷⁴ The Polisario spell this as 'El-Ayoun' while Morocco spells it as 'Laayoune.' We will use the latter since that is the usage in UN Documents.

(Moroccan capital of the territory of Western Sahara), the process was halted due to questions raised by the Moroccan Government about the credentials of the OAU observers. At this stage it is necessary to clarify the role played by OAU politics in the matter of the Western Sahara.

6.3 OAU Involvement

The Organisation of African Unity (OAU) is responsible, on a regional level under Chapter VIII of the UN charter for the maintenance of peace and security in Africa⁷⁵. Traditionally this body has always been against the idea of threatening the sovereignty of colonial boundaries⁷⁶. In two earlier episodes of secession and self-determination, the OAU had sided with the sovereign states: with Nigeria in the case of the attempted Biafran secession⁷⁷, and with the Congo in the attempted secession of Katanga⁷⁸. African leaders like a number of leaders of other developing countries, are extremely wary about extending the mandate of self-determination beyond the colonial context since it poses an undeniable threat to their states, the boundaries of which were often drawn arbitrarily by colonial powers⁷⁹. They argue that self-determination beyond the colonial context is highly destabilising to order and are therefore rarely in favour of it⁸⁰. However when viewed in the context of the Western Sahara, the OAU had a completely different opinion. One of the main reasons for this was that Western Sahara had not been one unit with Morocco in the sense that the authorities in Rabat had not extended their sovereignty over the region, in addition to the fact that the two units had been under different colonial rules⁸¹. Thus to the OAU the case was similar to clear-

⁷⁵ See Chapter VIII 'Regional Arrangements' United Nations Charter, 1945

⁷⁶ See Jackson R., 'Juridical Statehood in Sub-Saharan Africa' in *46 JIA (1992)* 1-17; also see Heraclides *Self-determination of Minorities in International Politics* (1991)

⁷⁷ See Kaladharan Nayar M.G, 'Self-determination Beyond the Colonial Context: Biafra in Retrospect' in *10 TILJ (1975)* 321-45

⁷⁸ See generally, Gerard -Libois J, *Katanga Secession*, (1966)

⁷⁹ See article 20 of the African Charter on Human and Peoples' Rights 1981 and the doctrine of *uti possidetis* discussed in Chapter Four of this thesis

⁸⁰ See generally Jackson R *Quasi-States, Sovereignty, International Relations and the Third World* (1996)

⁸¹ This argument is analysed in depth see Chapter Seven Section 7.2

cut ‘salt-water’ colonialism⁸² in that the Saharawis were fighting for independence from the colonial rule of Spain. Thus while Morocco viewed the Saharan independence movement as a threat to its sovereignty, the OAU questioned whether this sovereignty had been exercised. In this light the OAU clearly demonstrated itself to be biased in the matter which was further revealed by its acceptance and recognition of the ‘Saharan Arab Democratic Republic (SADR)’ as a state and the extension to it, of membership within the OAU. Thus Moroccan claims about the OAU as an organisation not being not being objective enough in the struggle, does have significant merit. Thus when faced with having to go through the identification process in the presence of the OAU observers, the Moroccan government perhaps justifiably voiced deep concern. Admittedly these objections could have been raised at an earlier stage since it had been a part of the agreement signed by both parties.

This new impediment to the start of the process was brought to light in a letter dated 19 August to the Secretary-General⁸³ from the Minister of Foreign Affairs of Morocco. He ‘noted that the OAU observers had been designated from among officials of the Secretariat of an organisation which, in admitting the ‘pseudo SADR’ as a member, had already prejudged the outcome of the referendum’⁸⁴. Morocco suggested that it would only acquiesce to the process if the OAU adopted a ‘rational position with regard to the right of the population of Western Sahara for self-determination, by at least suspending the participation of the ‘pseudo SADR’ in the activities of the OAU’. The alternative suggested by Rabat was that the designation of the observers be made by the President of Egypt, Hosni Mubarak as personal representatives to follow the work of the Identification Commission. After much negotiation between the Secretary-General and the Moroccan government, the situation was resolved by

⁸² See Chapter Two Section 2.4

⁸³ *Ibid.* S/1994/819 para 30

⁸⁴ *Ibid.* S/1994/819 para 30

action on the part of President Ben Ali of Tunisia. Then Chairman of the OAU, he provided a “unique and indivisible’ list of four observers, comprising the two observers previously designated and two others’⁸⁵. This compromise was finally accepted and the identification and registration operation was finally launched on the 28th of August 1994 with a simultaneous opening ceremony at Laayoune (Morocco) and the El-Ayoun⁸⁶ camp in the Tindouf area. Thus despite the various problems that beset the process, the Identification Commission did commence the job of verification of application forms by interviews in the time scale put forth by the Secretary-General in his report of 12 July 1994⁸⁷.

6.4 Who Are the People ?

According to that time-table, the transitional period was slated to begin by October 1 1994. During this period the combatants were to be confined to designated locations. Other aspects of the Settlement Plan were to be dealt with immediately after the start of this period. They included the exchange of prisoners-of-war with amenities for political prisoners, and the release of all political detainees. Besides this, Moroccan troops in the region would need to be reduced and the pre-conditions set for the repatriation of refugees from the camps in Algeria back to the region. According to the time-table set in S/1994/819 this process was to begin on the 15th of December 1994 and completed by the 25th of January 1995 with the active help of the United Nations High Commission for Refugees (UNHCR). Immediately after the completion of the repatriation process campaigning was meant to begin for the referendum lasting until February 14th 1995 at which point the referendum was to take place, followed by the withdrawal of the MINURSO by March 1995 after monitoring the responsibilities arising from the referendum.

⁸⁵ Report of the Secretary-General on the Situation Concerning Western Sahara S/1994/1257 of 5 November 1994 para 9

⁸⁶ Named after the capital of occupied Western Sahara, referred to in official documents as Laayoune

Thus by July 1994, the idea of the referendum which was first mooted by the international community as early as 1974⁸⁸ was committed to a date in 1995 more than twenty years later. This time period is important since within international law it could be argued that the disputed area was fast achieving a *status quo*. This is an important concept for two primary reasons. First, in a Charter based system that values international peace and security above all else, as long as the region remained relatively free from violent strife the problem would find itself relegated off the agenda of the international community. The Western Sahara had remained free of such violent strife since the monitoring of the cease-fire began on the 6th of September 1991. Admittedly the presence of MINURSO was a prime reason for this maintenance of the cease-fire but that could arguably be achieved with a reduced deployment of personnel and with the commitment to hold a referendum reneged upon. The second reason that concerns the importance of the twenty year phase is that during this period identities and loyalties within the region were beginning to get increasingly crystallised around newer structures, while the referendum process was geared up toward determining identity based along older paradigms⁸⁹. Thus the longer the process avoided solution, the harder it would get to isolate the original inhabitants from less original ones. The logistical difficulty of such identification would also be coupled with the question of the justification of a process that could uproot populations that had lived and identified with the region during the past twenty years. One of the arguments being set forth here is that international law always seems to favour the *status quo* for the two reasons elaborated above. Thus it could be argued from the point of view of the Polisario, that the longer it was forced to operate from camps outside the region, the harder it would find to support its claim for self-determination. An example that

⁸⁷ S/1994/819 annex

⁸⁸ See GAOR 3292 (XXIX) of 13 December 1974

⁸⁹ See Chapter Seven Section 7.1

would bear out this argument is the case of the Palestinian people who are similar in that they are designated a people without a territory. In the early years after Israel annexed territories beyond its international mandate the case for the Palestinians was arguably stronger than it is today when successive Israeli settlers have lived and settled down in the region⁹⁰. That is not to suggest that the Palestinian case is any weaker in terms of international law, nor is it a suggestion that the case of the Polisario, were it considered on equal footing with the Palestinians, is technically hampered by the passage of time. This merely serves as an admission that with the limitations of international law the momentum of the *status quo* always seems harder to break due to the formation of newer identities and ties within the disputed territory. In most of the cases of disputed territory this is true whether it be Northern Ireland, Cyprus, Kashmir or East Timor. In all of these cases settled populations over time complicate matters and make a 'solution' to the original problem much more complicated.

This perhaps highlights the difficulty in the Western Sahara where the process of holding the referendum has been repeatedly postponed. Nevertheless the start of the identification process on the 28th of August 1994 was viewed optimistically by the Secretary-General who called it a 'significant step towards the fulfilment of the UN mandate in the Western Sahara'⁹¹. In the same report the Secretary-General also admitted that the operation was more logistically complex than had been expected. One of the factors contributing to the complexity of the process was the fact that 'members of the same tribal sub-groups must be identified individually with the assistance of their respective sheikhs...'⁹². To make matters worse these peoples were dispersed in different locations across the entire region and means of communication with them was extremely limited. One of the other issues of note

⁹⁰ See generally, Chomsky N, *The Fateful Triangle: The United States, Israel and the Palestinians* (1983)

⁹¹ S/1994/1257 para 17

⁹² *Ibid.* S'1994/1257 para 19

mentioned in the report was the receipt of a large number of applications that flooded in just before the deadline for the receipt of applications on the 25th of October. The deadline was originally set for the 15th of October but heavy rainfall and unprecedented flash flooding led to the granting of a ten day grace period⁹³. It was during this time in the latter half of October, that a deluge of applications was received that exceeded all the applications received up to that point. The Polisario view this deluge suspiciously and they suspect foul play. It needs to be pointed out that these last minute applications could easily swing the referendum one way or another if they are in fact a tactic by either side, and assuming that they are all identified and registered.

The Security Council meanwhile welcomed the start of the identification process but stressed that it strongly believed that 'there should be no further undue delay in the holding of a free, fair and impartial referendum for self-determination of the people of Western Sahara in accordance with the Settlement Plan'⁹⁴. By the time of the next Secretary-General's report in December 1994, intensive negotiations with the parties concerned had revealed that the Polisario had begun to be concerned with impediments to the process of voter identification and registration. Key amongst these impediments were some of the criterion for eligibility. They called for direct talks with the Moroccan side to enable discussion of outstanding issues including post-referendum period agreements. They also once again stressed their concern about the large number of applications submitted at the last minute⁹⁵. The Secretary-General reassured them of the fairness of the Identification Commission and observed, in his report that to speed up the process more Identification Centres would be needed, spread across the territory to ensure a quicker turn-over of applications. In a new time-table, he expressed hope

⁹³ *Ibid* para 14

⁹⁴ Statement by the President of the Security Council of 15 November 1994 S/PRST/1994/67

⁹⁵ Progress Report of the Secretary-General on the Situation Concerning the Western Sahara S/1994/1420 of 14

that the transitional period could commence on June 1st 1995 with the referendum slated for October 1995⁹⁶. By this stage though the Security Council was beginning to question its commitment to the process and by Resolution 973⁹⁷ declared that ‘in the circumstances the mandate of MINURSO, like the other UN operations, should be subject to periodic consideration by the Council’⁹⁸. Thus a system of regular review of MINURSO was begun by the initial extension of its mandate until 31st of May 1995, a day before the scheduled commencement of the transitional period. However the time frame suggested was already beginning to be derailed by the time of the Secretary-General’s next report on the 30th March 1995⁹⁹. He elaborated the constraints facing the process in terms of the occasional late or non-arrival of a sheikh and the reciprocity observed at the centres on either side by which if work stopped or was held up at one centre, the other party would hold up work at the corresponding centre on the other side. He also voiced concern at the tediousness of the process and the degree of attention needed to be paid to each and every applicant as further factors slowing down the process¹⁰⁰.

One development in favour of the identification process was the provision by the Government of Spain, at the request of the Deputy Special Representative, of important archival material. This material consisted of 48 volumes of birth certificates, 19 volumes of marriage certificates, and 11 volumes each of divorce and death certificates which constituted the *Registro Civil Chermanico del Sahara Occidental*. These documents were expected to be highly significant in the identification process since it was one of the first official records that the Identification Commission could use to be able to verify various cases. However despite

December 1994

⁹⁶ *Ibid.* S/1994/1420 para 21, 22

⁹⁷ S/RES/973 of 13 January 1995

⁹⁸ *Ibid* 973

⁹⁹ The Situation Concerning Western Sahara Report of the Secretary-General S/1995/240 of 30 March 1995

this, the greatest obstacle as described by the Secretary-General, remained the issue of tribal leaders. ‘The settlement plan gave tribal leaders the responsibility for identifying applicants as being the persons they claim to be and as belonging to a particular tribal group (sub-fraction); the sheikhs were also to provide oral testimony relevant to the eligibility criteria. Most sheikhs, elected as they were in 1973, were already of mature years at the time and many have since died or become incapacitated. There are, in consequence, a large number of sub-fractions, one third of the total, without a recognised tribal leader on at least one side. Until last year, this unresolved issue had been the most intractable obstacle to identification’¹⁰¹. This was an issue that had obstructed the process since the outset and was to become even more vital just as the process began to get into full flow.

6.5 The issue of the Tribal Chiefs

The Spanish census in 1974 was one of the documents that was considered sacrosanct in determining the identity of the people that were present in the Western Sahara. This census is what the Polisario movement suggested should be the basis of identification and registration of potential voters. However the validity of the Moroccan argument - that at the time of the census it is possible that a number of tribes were not present in the territory¹⁰² - needs to be borne in mind. In addition the Spanish census was important to the process in that it identified and democratised the tribes of the region with elected leaders for the first time in their history¹⁰³. This was intended to enable easier identification and representation within the Spanish colonial rule for the people of the Western Sahara. Thus the Polisario argument that the only way to avoid manipulation of the selection of sheikhs was to rely on the Spanish census, was countered by the Moroccan argument that the 1973 election of sheikhs under

¹⁰⁰ *Ibid.* S/1995/240 paras 4-6

¹⁰¹ *Ibid.* S/1995/240 para 8

¹⁰² See Section 6.1

Spanish rule was the only one ever held in the territory. They argued that local customs and traditions within the region had required that sheikhs were co-opted and not elected. Besides, the Moroccan Government argued that the terms of the sheikhs were only meant to last for five years and had therefore expired in any case¹⁰⁴. The problem was resolved by the formation of a compromise plan by the Deputy Special Representative who outlined a proposal by which there was to be a hierarchy of who was to be considered the appropriate sheikh in the identification procedure. A surviving sheikh from the 1973 process was to be preferred to any other; failing that his eldest son would be accepted and failing that a candidate from the 1973 elections normally by order of a descending number of votes polled. Finally if that were not to yield a candidate each party would be required to put forth a list of three candidates to be considered as sheikhs, from which the Chairman of the Identification Commission would, after consultation with the other party, select one. The candidates put forward by the parties were required to be of 'recognised standing within their community, of appropriate age, without any official position and themselves included in the census lists of 1974. With the parties agreeing to the process and providing names, one more impediment to the problem was resolved and credit needs to be given to the Deputy Special Representative in this regard. Thus by mid-March 1995 as many as 21,300 persons had been identified. The Secretary-General reported that the progress had been steady and incremental which he found encouraging. In his words: 'Less than a year ago, very few believed that the identification process would even start. Last autumn, after it began at last, the pace was such as to inspire little faith in its being completed within the foreseeable future. Now the Security Council has adopted resolution 973 (1995), the additional resources necessary for its implementation have been promised and agreement has been reached on how identification might be carried

¹⁰³ Also see the original concept of the *jama'a* within the Bilad Shinguitti Chapter Seven Section 7.2

¹⁰⁴ *Ibid.* S/1995/240 para 10

forward. The holding of the referendum has thus become a real possibility¹⁰⁵. At the same time, he also admitted that the 1st June deadline for the beginning of transitional period would need to be moved to the 1st of August with the referendum date being moved to January 1996. He also urged commitment to the maintenance of the mission and commitment to the process of implementation of the Settlement Plan¹⁰⁶. Of course one of the problems with the maintenance of the Mission in the Western Sahara was the issue of finances. States had promised to pay certain sums of money for MINURSO and had yet to fulfil these financial obligations which was to be a constant constraint to the working of the mission. This is not an area that we shall focus on, but needs to be kept in mind throughout the working of MINURSO in the Western Sahara. Thus while the will to achieve the holding of the referendum was strong within the organisation, financial constraints were often limiting the possibilities of continued UN involvement.

6.6 United Nations Fact Finding Mission

One of the factors that did move the identification process forward was the opening, at regular intervals during the process, of an increasing number of centres for identification and interviewing of applicants. This was a significant factor and while it meant that the turn-over of applications could be much faster it also added to the financial demands made upon the limited resources available to the mission. Security Council Resolution 973 had made available additional resources¹⁰⁷ but it was clear that these were not unlimited. The Secretary-General dealt with the issues of the financial aspects of the plan in depth in his report of 19th of May¹⁰⁸ including the need for additional resources as the Identification process picked up speed. He also pointed out that it had been five years since the settlement plan and MINURSO

¹⁰⁵ *Ibid.* S/1995/240 para 45

¹⁰⁶ *Ibid.* S/1995/240 para 51-52

¹⁰⁷ See S/RES/973 of 13 January 1995

came into effect and that while progress was slow, the mission had nonetheless played a vital role in it. On these grounds he requested an extension of the mandate of MINURSO for another 4 months (i.e. from 31st May 1995 to 30th September 1995)¹⁰⁹. The Security Council agreed to this and while reiterating its commitment to the process nonetheless expressed concern at the continued obstruction of it by various factors¹¹⁰. In addition the Council decided to send a fact-finding mission of the council to the region. This council was ready to depart for the region by the 3rd of June 1995 from New York with a specific mission:

- i) to impress upon the parties the necessity of co-operating with MINURSO in the implementation of all aspects of the Settlement Plan and to underline the fact that any further delay would put the whole future of the mission at risk
- ii) To assess progress and identify problems in the identification process, bearing in mind the deadline for the referendum in January 1996
- iii) To identify problems in other areas relevant to the fulfilment of the Settlement Plan (including the reduction of Moroccan troops, the confinement of Polisario troops, the release of political prisoners and detainees, the exchange of prisoners-of-war and the return of refugees)¹¹¹.

The Mission returned and submitted a report to the Security Council on the 21st of June 1995¹¹² which involved a detailed report¹¹³ of the meetings held with the parties concerned in the process including the authorities in Rabat, Algiers, Nouakchott and the Polisario leadership in the Tindouf area. In addition to this the mission also met with the then Deputy

¹⁰⁸ The Situation in the Western Sahara - Report of the Secretary-General S/1995/404 of 19 May 1995 para30-40

¹⁰⁹ *Ibid.* S/1995/404 para 38

¹¹⁰ See S/RES/995 of 26 May 1995

¹¹¹ See Note by the President of the Security Council S/1995/431 of 30 May 1995

¹¹² See Report of the Security Council Mission to the Western Sahara From 3 to 9 June 1995 S/1995/498

¹¹³ For a history of the proceedings upto this point and the considerations before the Fourth Committee also see 'Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of

Special Representative of the Secretary-General for Western Sahara Mr. Erik Jensen, the sheikhs from both sides, the OAU observers and the Force Commander and the Civilian Police Commissioner of MINURSO. The mission reported that lack of trust on both sides continued to hamper the process and that the time scale estimated to complete voter identification and registration had been underestimated. In conclusion the mission acknowledged that 'some progress has been made in the identification process in recent weeks and underscored that, while fairness must be guaranteed, such progress will have to be sustained and improved significantly to allow the referendum to take place early next year'¹¹⁴.

One interesting point to be considered at this stage is that during the whole process conducted through the good offices of the Secretary-General and using MINURSO, the matter was also before the General Assembly Fourth Committee which had been set up to look into the territories that were seeking decolonisation. This Committee submitted a working paper on the Western Sahara on the 22nd of June 1995¹¹⁵. This is interesting simply because it demonstrates that the region being considered in some quarters, as a problem of independence from traditional colonial rule rather than one of conflicting sovereignty. What had transpired in the region effectively was the departure of Spain in 1975 and the subsequent Green March of Moroccan people. The *colonial* in terms of 'salt-water' type of occupation was clearly at an end by 1975. An interesting question to pose at this stage is whether the inclusion of the Western Sahara question under the Fourth Committee proceedings in any way prejudices the case. An answer to this question would of course need to return to the basic definition of what exactly self-determination entails and whether it includes the concept of secession and non

Independence to Colonial Countries and Peoples' A/AC.109/2029 of 22 June 1995

¹¹⁴ *Ibid.* S/1995/498 para 56

¹¹⁵ *Ibid.* A/AC.109/2029

salt-water colonisation. These are questions that are dealt with in Chapter One ¹¹⁶ it will therefore suffice to merely flag these issues up at this stage.

The Mission Report of 21st June was accepted by the Security Council which finally extended the mandate of MINURSO until 30th September 1995 and suggested that it would continue to consider extension of its mandate beyond that date subject to the Secretary-General's report at that time. This is perhaps an indication that the Council had begun to realise that the early 1996 referendum plan was likely to be postponed further and was taking appropriate steps to ensure completion. Despite this however the Council once again reiterated its commitment to holding an impartial referendum for the people of Western Sahara in accordance with the Settlement Plan accepted by the two parties.¹¹⁷ Meanwhile on the 23rd of June 1995 the process ran aground again with the halting of the identification process. In a letter addressed to the Security Council dated 23rd June 1995 the Polisario announced its decision to suspend its participation in the identification process and withdraw its observers. The decision was taken out of protest at the Moroccan military tribunal's sentencing on 21 June 1995 of eight Saharans to prison terms of 15 - 20 years for having participated in a demonstration in Laayoune on 11 May 1995. This was also compounded by the objection of the Polisario to the announcement made by Morocco to the Security Council to present for identification 100,000 applicants residing outside the territory¹¹⁸. This decision of the Polisario was met by Morocco calling on the Security Council to take all measures necessary to ensure the resumption of the process with a view to holding the referendum on schedule¹¹⁹. After negotiations the Secretary-General of the Polisario addressed a second letter

¹¹⁶ See Chapter One

¹¹⁷ S/RES/1002 of 30 June 1995

¹¹⁸ See The Situation Concerning Western Sahara: Report of the Secretary-General of 8 September 1995 S/1995/779

¹¹⁹ *Ibid.* S/1995/779 para 4

to the President of the Security Council and the Secretary-General of the UN in which he reiterated the view of the Polisario with respect to the importance of the 1974 Spanish census. The letter states that 'the 1974 Spanish census constitutes the only basis recognised in the settlement plan as accepted by the two parties and endorsed by the UN'. The letter went on to state that 'the participation of a substitute population, sought by the occupying Power, whose most recent manoeuvre was to attempt to include 100,000 of its nationals in the voter list'¹²⁰. The process was renewed only after Morocco had reduced the sentence of the prisoners to one year via Royal edict. The issue of the 100,000 applicants sought to be entered into the process by the Moroccan government though, remained and once again opened up the issue of eligibility.

6.7 Hierarchies of Disputed Identities

The problems that re-surfaces are ones that were never resolved in the discussions about the hierarchies within the five eligibility criteria. As mentioned earlier, there seems to be a differing on the process of identification within these categories. While the Polisario viewed them as being hierarchical, the Moroccan government argued that this would make the process discriminatory and therefore strongly contested the Polisario view that the applicants under criterion one to three were more legitimate Saharans than those considered under categories four and five¹²¹. The Moroccans also constantly put forward the danger of relying too much on the Spanish census which they argued, could not have been complete owing to the nomadic nature of the Saharans. The Polisario though was deeply suspicious of Moroccan motives in broadening the category of Saharans to allow the Green Marchers a vote in the referendum. It was in light of this that the Polisario conveyed its unwillingness to participate

¹²⁰ *Ibid.* S/1995/779 para 6

¹²¹ Chopra *ibid.* para 20-27

in the identification of groups that fell under the categories of 'Chorfa' as well as the Northern (Tribus del Norte) and Southern (Costeras y del Sur) tribes until certain conditions had been met. The conditions stipulated were a) a complete list of all people applying under these three categories, b) their classification by sub-fraction, the criteria under which they were applying and their actual current residence. It explained that when it had signed acceptance to the agreement it had understood that these groups were a minority and was now concerned that they might overwhelm the process. One way of ensuring this was also to leave identification of applicants of this group to the end after the less contentious cases had been completed. As pointed out by the Secretary-General's report¹²² the identification of these tribal groupings presented a core problem. There were 88 categories of tribes included in the Spanish census of 1974 nearly all of them relating to tribal groupings. Of those 88 categories only three were different in that they placed different tribal groups under one heading. This was done ostensibly because these groups were not, at the time of the census represented in the territory by a large number of people. This therefore bears out the Polisario argument that they were minorities. However as pointed out by the Moroccan authorities it does not necessarily suggest that they were minorities owing to the fact that they could merely have been away from the region during the time of the census. The issue is thus extremely complicated and highly contentious since it could swing the referendum one way or another. The identification process continued to move forward as the 85 other groups' identification and review procedure continued. Yet the difference in perception between the two sides was maintained with the Polisario continuing its call for strict application to the plan's reference to tribal 'sub-fractions belonging to the Territory' while the Moroccan authorities stressed the danger against discrimination within such a procedure¹²³. It needs to be mentioned at this stage that

¹²² *Ibid.* S/1995/779 para 15

¹²³ *Ibid.* S/1995/779 para 16

the group classed as northern tribes (Tribus del Norte) is sparsely represented in the camps around Tindouf¹²⁴ but has many thousand members on the Moroccan administered side. Similar problems exists with the groups classed as *Costeras del y Sur* and *Chorfa*. In most cases the Polisario has no sheikhs for these groups and often cannot propose any member of standing to oversee their identification. To complicate matters further, nearly 50 percent of the applicants residing in Southern Morocco belong to this contested group of tribes. This naturally raises the spectre for the Polisario, of Moroccans posing as these tribes who seek to gain admission to the referendum process and they argue that this can not be fair to the process of self-determination. With all these problems that beset the process the Secretary-General was forced to admit that 'progress in the last three months had been disappointing'¹²⁵. His report suggested that up to 40 per cent of the applicants in the Territory and more than 51 percent of those in refugee camps had been identified with the likelihood that the remainder could be completed in the following five weeks pending the resolution of the problems with the three tribal classifications. Yet as he pointed out, the obstacles seemed to have overwhelmed the process and even at that late stage the process was in danger of falling through. The Security Council resolution in response to the Secretary-General's report contained an extension of MINURSO's mandate until the 31st of January 1996 but went little beyond calling on the two parties to co-operate with the process¹²⁶.

In an attempt to break the deadlock engulfing the identification of the remaining tribes the Secretary-General took an initiative which was reported to the Security Council via a letter to the President¹²⁷. One of the bottlenecks even in the identification of people under the 85

¹²⁴ See Appendix Three : Transcribed record of the interview with Kamel Fadel (Deputy Representative of the Polisario to the UK)

¹²⁵ *Ibid.* S/1995/779 para 43

¹²⁶ S/RES/1017 of 22 September 1995

¹²⁷ See Letter dated 27 October 1995 from the Secretary-General addressed to the President of the Security

agreed tribal groupings was the occasional late arrival or non-arrival of a sheikh from either party. Since the process could not go on until the presence of all the observers this inevitably led to a slowing down of the process. However the Secretary-General elaborated plans by which the process would go ahead regardless of the attendance of the various sheikhs and observers as long as sufficient notice had been given. This placed the onus of attendance upon the parties concerned and would, he believed, be significant in alleviating the slow pace of identification. In the case of the three disputed tribal groupings the option suggested by the Secretary-General was that the identification would go ahead even if a sheikh or OAU observer was absent, and would be based strictly upon the presentation of documentary evidence. The documents requested would be first, 'a birth certificate issued by the competent authorities in the country of the applicant's birth to substantiate that he or she is the child of a father born in the Territory or has other links with the Territory. And secondly, a document issued by the competent authorities within the internationally recognised frontiers of the Territory before 1974 to substantiate the father's birth in the Territory'¹²⁸. The proposal was met with willingness on the part of the Polisario but the Moroccan authorities declared that it would be unwilling to accept a process that would 'differentiate between different groups and reiterated its insistence on oral testimony'¹²⁹. The Moroccan Government stated that a change in the procedure at this stage would discriminate against others who had been through the process without the aid of such documentary evidence. In a proposal put forward by the Secretary-General in his report, he suggested that both parties 'will be invited to present a sheikh, or alternate, of a sub-fraction concerned, to be represented during the identification process with an OAU observer being also expected to attend. When two sheikhs, or alternates, are present, one from each side, identification would take place on the basis of appropriate

Council S/1995/924

¹²⁸ *Ibid.* S/1995/924

¹²⁹ See The Situation Concerning Western Sahara: Report of the Secretary-General of 24 November 1995

documentation, with the assistance of the sheikh present. In the case that neither party is willing or able to make available a sheikh or alternate, identification will be based on documentary evidence only'¹³⁰. The tone used by the Secretary-General is indicative of the change in the perception of the process by him. While in earlier reports there was clearly a decision to solicit agreement and work on the basis of consensus, at this stage the Secretary-General's tone seems to have become more authoritative. This is also perhaps, a reflection on the role of the financial implications of keeping MINURSO going and the catastrophe of it having to pull out with the finish line of the referendum as it were, in sight. However the two parties still failed to compromise and as the Secretary-General notes in the closing paragraphs of his report, 'neither party is likely to be satisfied with my proposal to proceed with the identification in the manner described.'¹³¹ The reasons for this were the Moroccan Government's desire to limit reliance on documentary evidence giving privilege instead to oral testimony, in the indigenous traditions of the people of the region. The Polisario, were concerned that the new approach would allow for the introduction of applicants with dubious ties to the Western Sahara. The Secretary-General ends his report suggesting that he believes this remains nonetheless the only way forward and the alternative would have to be withdrawal of MINURSO from the region.

In response the Security Council responded with Resolution 1033 reiterating its commitment to holding the referendum but called for intensification of consultations between the parties. It also took on board the Secretary-General's suggestion that should the compromise fail MINURSO withdrawal would need to be considered and requested of him, a

S/1995/986 para 6

¹³⁰ *Ibid.* S/1995/986 para 7

¹³¹ *Ibid.* S/1995/986 para 17

programme for orderly withdrawal¹³² of MINURSO. With the approach of the referendum date of January 1996 though, little headway had been achieved and the report of the Secretary-General of 19 January reflected this clearly¹³³. Wide ranging discussions were entered into including all the parties concerned with the process in a bid to break the impasse. However while both main parties continued to stress their commitment and desire to hold the referendum they were both unwilling to compromise in the identification procedure. The Polisario still insisted that it would only participate in identifying those people of the sub-groups that had been included in the 1974 census, while the Moroccan government still refused to back down from its position. Meanwhile authorities in Nouakchott and Algiers expressed concern at the withdrawal of MINURSO suggesting that it would threaten the peace and security of the entire region¹³⁴. The Secretary-General also suggested that even if the obstacles facing the process were removed it would not be until May 1996 that the referendum could be held at the earliest¹³⁵. The report ends with the Secretary-General expressing concern at the possibility of the Security Council considering a phasing down and eventual closing down of MINURSO which he feared would have a destabilising effect on the region¹³⁶. In direct response to this fear the Security Council responded by once again extending the mandate of MINURSO until the 31st of May 1996. It expressed 'deep concern' though at the 'stalemate which has been hindering the identification process and the consequent lack of progress towards completion of the Settlement Plan'¹³⁷.

¹³² S/RES/1033 of 19 December 1995

¹³³ See Report of the Secretary-General on the Situation Concerning the Western Sahara of 19 January 1996 S/1996/43

¹³⁴ *Ibid.* S/1996/43 paras 13 & 14

¹³⁵ *Ibid.* para 20

¹³⁶ *Ibid.* para 37

¹³⁷ S/RES/1042 of 31 January 1996

This development was followed by a spate of letters from the various parties including the Secretary-General's report of 8 May 1996¹³⁸, the Government of Morocco of 10 May 1996¹³⁹, the Polisario Front¹⁴⁰ and the OAU¹⁴¹ wherein each reinforced and clarified its position. It was clear that theoretically at least, all parties remained committed to the holding of a referendum. In response the Security Council reaffirmed its commitment to 'assist the parties to achieve a just and lasting solution to the question of Western Sahara'¹⁴². At the same time it agreed with the Secretary-General for the suspension of the identification process and renewed calls for the parties to reach a compromise. In recognition of the inherent dangers pointed out by the various parties of the withdrawal of MINURSO, the Security Council also extended the mandate of the Mission until the 30th of November 1996 as requested by the Secretary-General in his 8 May report. However it warned the parties that 'if significant progress is not achieved during this period, the Council will have to consider other measures, including possible further reductions in the strength of MINURSO, but stresses its readiness to support the resumption of the identification process as soon as the parties have demonstrated the necessary political will, co-operation and flexibility...'¹⁴³. As mentioned earlier, the main concern of the UN and the Security Council in particular was the funding for the operation in the Western Sahara. The General Assembly considered this matter in a resolution at the end of October pointing out that as much as \$49,014,872 remained outstanding of the promised contributions and calling for Member states with dues to duly fulfil them¹⁴⁴.

¹³⁸ Situation Concerning Western Sahara: Report of the Secretary-General of 8 May 1996 S/1996/343

¹³⁹ Letter addressed to the Secretary-General by the Government of Morocco of 10 May 1996 S/1996/345

¹⁴⁰ Letter addressed to the Secretary-General by the Frente Polisario of 23rd May 1996 S/1996/366

¹⁴¹ Letter addressed to the Secretary-General by the Chairman and Secretary-General of the Organisation of African Unity S/1996/376

¹⁴² S/RES/1056 of 29 May 1996

¹⁴³ *Ibid.* S/RES/1056 clause 11

By November 1996 the situation had not altered significantly although both parties had reiterated their commitment to the Settlement Plan¹⁴⁵. Thus after considering the report of the Secretary-General¹⁴⁶, the Security Council once more stressed its commitment to the holding of the referendum in accordance with the Settlement Plan.¹⁴⁷ In addition the Council urged the continuation of the process of dialogue pursued by the Acting Special Representative and welcomed the demonstration of political will by both sides. This political will was expressed in the manner of the release of political prisoners and other outstanding issues which were integral to the Settlement Plan. Prime amongst these was also the issue of the repatriation of refugees into the Territory, on which work had begun under the aegis of the UNHCR. As far as the main disagreements were concerned dialogue continued and this, along with the imminent danger of withdrawal was primarily what motivated the Security Council to extend once more, the mandate of MINURSO until 31st of May 1997 as proposed by the Secretary-General in his report¹⁴⁸. However by the time of the interim report of the Secretary-General in February the impasse had still not been resolved. Meetings had continued at the highest level between the parties and Mr. Erik Jensen, to little avail in the identification process. It is interesting to note though, that by the time the identification process had stalled in the latter half of 1995 as many as 77,058 persons had been convoked with as many as 60,112 identified. The Secretary-General points out that this roughly corresponds to the number of inhabitants registered under the Spanish census of 1974 which put the population of the Western Sahara at 73,497¹⁴⁹. Of course these figures have little significance in the absence of accurate demographic figures of birth rates and death rates, despite the release of such material by the Spanish authorities. The problem though was that further progress on the

¹⁴⁴ GAOR A/51/2 of 20 October 1996

¹⁴⁵ See S/RES/1084 of 27 November 1996

¹⁴⁶ Situation Concerning Western Sahara: Report of the Secretary-General of 5 November 1996 S/1996/913

¹⁴⁷ *Ibid.* 1084 clause 1

¹⁴⁸ *Ibid.* S/RES/ 1084 clause 6

identification front seemed nearly impossible. Morocco continued to insist that every person who had presented an application within the deadline had a right to be considered and in addition refused to compromise on the issue of documentation in the case of the three sub-fractions¹⁵⁰. The Polisario meanwhile insisted that in accordance with the compromise proposal, only individuals whose names appeared in the Spanish census and members of Saharan sub-fractions included in the census had the right to be identified. It considered all other groups and sub-fractions as non-Saharan and therefore insisted on the denial to them of a vote in the referendum¹⁵¹.

The Secretary-General commenting on the impasse suggested that 'it is entirely possible to resume and finish identification' on the condition that both sides co-operate. An interesting question that needs to be considered in the matter is whether the Security Council could have acted under Chapter VII mechanisms in this matter. An argument justifying this could be the threat to international peace and security that the withdrawal of MINURSO would have undoubtedly posed. Were this possible of course, the Security Council is entitled to take whatever measures are necessary to quell the situation at hand. Implementation of the Settlement Plan could perhaps be seen to be one such measure although admittedly it would be questioned in light of the narrow interpretation of Security Council action in the past, which has come to be either sanctions or the military option. Other aspects of the Settlement Plan were going ahead smoothly including the release of political prisoners and the repatriation of refugees. With the main issue of the referendum process in doubt however, and consequently the operations conducted by MINURSO, the merits of this were highly questionable in view of their obvious short-term gains before an inevitable return to violence

¹⁴⁹ Report of the Secretary-General on the Situation Concerning Western Sahara of 27 February 1997 S/1997/166

¹⁵⁰ For a transcription of the Moroccan view of the situation in the Western Sahara, see Appendix II the interview with His Excellency Khalil Haddaoui, London, February 1998

were the situation not resolved in a referendum. The Secretary-General in his report suggests that the following questions needed to be reviewed:

- a) Can the settlement plan be implemented in its present form?
- b) If not, are there adjustments to the settlement plan, acceptable to both parties, which would make it implementable?
- c) If not, are there other ways by which the international community could help the parties resolve their conflict?¹⁵².

Perhaps the final word on whether the Security Council could use Chapter VII mechanisms should go to the Secretary-General who at the end of his report suggests that ‘the United Nations cannot compel parties to honour their commitment to co-operate in implementing the settlement plan’. Highlighting the situation with regard to finances he points out that ‘the international community cannot continue to spend its scarce resources on the Western Sahara in the absence of any progress in the implementation of the plan that the two parties freely accepted nine years ago’¹⁵³. However there was still no breakthrough as was reported in an exchange of letters between the Secretary-General and the President of the Security Council¹⁵⁴. In an attempt to break the deadlock the Secretary-General also decided to appoint James Baker III as his Personal Envoy to help him assess the situation and make recommendations on further action with respect to the renewal or otherwise of MINURSO. This was welcomed by the President in his corresponding statement. The Polisario reacted to the appointment of Baker as Special Envoy favourably. A letter from Mr. Bachir, ‘Minister of Foreign Affairs’ of the ‘SADR’ addressed to James Baker drew parallels between the

¹⁵¹ *Ibid.* S/1997/166 para 4

¹⁵² *Ibid.* S/1997/166 para 17

¹⁵³ *Ibid.* S/1997/166 para 19

¹⁵⁴ Letter dated 17 March From the Secretary-General Addressed to the President of the Security Council S/1997/236 and Statement by the President of the Security Council dated 19 March S/PRST/1997/16

situation of the invasion of Kuwait and the one faced by the Polisario and the Saharawis both of whom, the letter claimed had powerful ‘brothers’ as northern neighbours¹⁵⁵. The reference to Kuwait was due to the fact that James Baker III was Secretary of State under President Bush from 1989 to 1992 and presided over the US-led coalition of United Nations forces that fought against, and defeated Iraq in Operation Desert Storm in 1991.

6.8 Direct Negotiations

Meanwhile the Human Rights Committee at its 53rd session continued to deliberate the Western Sahara situation under the right to self-determination. The committee adopted a draft resolution on the region affirming the implementation of the settlement plan. However it also noted the deterioration in the human rights conditions in the region¹⁵⁶. A snippet in the Saharawi press¹⁵⁷ claimed that: ‘The Polisario Front condemns the inclusion of the occupied territories of the Western Sahara in the next Moroccan elections which will take place in September of this year. In a letter addressed to the Secretary-General the Saharawi co-ordinator with the MINURSO, M. Khaddad asked for measures to prevent a negative effect of this new violation of the peace plan. The Polisario qualified the Moroccan decision as a provocation that the UN could not tolerate. The Secretary-General in his report of May 1997¹⁵⁸ reported on the progress made by James Baker III who had intensive consultations with the two parties and also with the authorities in Algiers, Nouakchott and OAU observers. The deadlock however could not be broken though Mr. Baker had arranged for another round of intensive talks. While these negotiations continued the Secretary-General requested the

¹⁵⁵ See WESTERN SAHARA - weekly news 1997 week 12 <http://www.arso.org/01-e97-12.html> accessed on 23rd September 1997

¹⁵⁶ See WESTERN SAHARA - weekly news week 13 & 15 <http://www.arso.org/01-297-13.html> and <http://www.arso.org/01-e97-15.html>

¹⁵⁷ See <http://www.arso.org/01-e97-17.html>

¹⁵⁸ Report of the Secretary-General on the Situation Concerning Western Sahara of 5 May 1997 S/1997/358

extension once more, of the mandate of MINURSO until 30th September 1997¹⁵⁹. This request was met by Security Council approval on the 22nd of May¹⁶⁰ with the urging of the parties to co-operate with James Baker III. The involvement of James Baker has in recent months raised the spectre of direct talks with the parties having met each other three times to discuss substantive issues; first in Lisbon and subsequently in London and Houston. Throughout the process James Baker expressed continued optimism that the dead-lock would be broken and it appears that this enthusiasm was not ill-founded. With the mandate for MINURSO set to expire on the 30th of September 1997, the Secretary-General's report of 24th September some progress was visible¹⁶¹. For a start the parties had agreed to meet in London on the 10th and 11th of June 1997 in all party talks that included the Polisario and Morocco but also representatives from the Governments of Algeria, Mauritania, OAU observers as well as officials under UN auspices¹⁶². They agreed after discussion of the various outstanding issues that private talks¹⁶³ would be held in Lisbon on the 23rd of June 1997 where suggestions and ideas to re-start the process would be examined in depth¹⁶⁴. The talks were also highly significant since the direct talks envisaged between the Polisario and the Moroccan authorities would be talking place for the first time ever, in Lisbon.

The Lisbon talks did not really take off however, due to an adjournment on the second day while the parties considered proposals set forth by Mr. Baker. However with the responses of both the parties back within 48 hours, new talks were agreed to for the 19th and 20th of July 1997 in London. It is during these talks that the first signs of a break-through

¹⁵⁹ *Ibid.* S/1997/358 para 22

¹⁶⁰ S/RES/1108 of 22 May 1997

¹⁶¹ Report of the Secretary-General on the Situation Concerning Western Sahara of 24 September 1997 S/1997/742

¹⁶² Among those present were: the Acting Representative Mr. Eric Jensen and Mr. Chester Crocker (former US Assistant Secretary of State for African Affairs) and Mr. John R. Bolton

¹⁶³ In deference to the Moroccan government for since an 'international conference' might have suggested

were imminent since the parties agreed to, amongst other things, various issues of identification and the repatriation of refugees¹⁶⁵. Further talks were held in Lisbon on the 29th of July where agreement was reached between the parties on the issue of troop confinement and the release of prisoners-of-war¹⁶⁶ and political detainees with a code of conduct also agreed to, to govern conduct during the referendum period. A fourth round of talks was also planned, to take place in Houston, Texas from the 14th to the 16th of September during which the outstanding issues were resolved and ‘practical measures’ were adopted to ensure the resumption of the identification process¹⁶⁷. These talks did finally signify a significant breakthrough in the process and raised for the first time in a number of years, the prospect of the completion of the identification process. In addition, the compromise by the parties with regard to the troublesome groupings was significant in moving the process on. It was also instrumental in demonstrating that the political will existed for the solution of the case. This was particularly timely owing to UN reluctance to keep funding a mission that was not leading to any concrete solution. As the Secretary-General observed: ‘With these agreements, and the goodwill and spirit of co-operation shown during the talks, the main contentious issues that had impeded the implementation of the plan have thus been satisfactorily addressed...¹⁶⁸’. This achievement had helped create the conditions to proceed towards the full implementation of the settlement plan, starting with the resumption of the stalled identification process. On these grounds he requested extension of MINURSO until 20th October 1997 with further extensions until 20th April 1998¹⁶⁹. The Security Council agreed to this request and added a condition that the Secretary-General would require to regularly

recognition of the Polisario

¹⁶⁴ S/1997/742 *ibid* para 5

¹⁶⁵ See Annex I (S/1997/742)

¹⁶⁶ Annex II of S/1997/742

¹⁶⁷ *Ibid.* S/1997/742 para 12 and Annex III

¹⁶⁸ *Ibid* S/1997/742 para 26

¹⁶⁹ *Ibid* S/1997/742 para 27 and 31

monitor the progress and submit reports to the Council¹⁷⁰. With these basic issues ironed out the identification process did finally resume and by the 13th of November, the Secretary-General reported considerable success. This enabled him to table a new plan with details including the authority of the UN during the transitional period, the suspension of laws potentially affecting a free and fair referendum and the repatriation of refugees. The actual organisation of the referendum itself was also mentioned as was the campaign leading up to it and issues regarding the proclamation of results. All of this led him to state that this was the first time since the formation of the settlement plan that it was 'possible to undertake an exhaustive and concrete view of the practical steps required to fulfil the UN mandate in the Western Sahara'¹⁷¹. Thus new time-tables have been set which aim to see the referendum campaign start on the 16th of November culminating in the actual referendum on December 7 1998¹⁷². While these plans are based on best-case scenarios, the process has moved on a long way to enable such a concrete time-table being set. When the earlier time-tables were set, the UN seemed to have failed to understand the obstacles that prevented them being fulfilled. Now, with MINURSO personnel having been in the region for nearly ten years, the understanding of the situation has been considerably enhanced. They are fully aware of the hurdles to the successful holding of the referendum and viewed in this light, the new plan is a call for optimism and renewed hope for the process¹⁷³. The Secretary-General admits that a lot of work needs to be done if 'D-Day' is to be declared on schedule (7 June 1998) but the tone of his report to the Security Council is one of optimism that could not be detected in earlier reports¹⁷⁴. In his subsequent report the Secretary-General reports that the identification

¹⁷⁰ S/Res 1133 (1997) of October 20, 1997

¹⁷¹ S/1997/882 para 49

¹⁷² See S/1997/882

¹⁷³ This is also the view of the R. Stanforth, Manager, *Western Sahara Campaign*

¹⁷⁴ See S/1997/882 *ibid.* 'Observations' para 49-57

process had begun smoothly¹⁷⁵ and also had progress to report on the identification of members of the disputed tribal groupings (H41, H61 and J51/52). Also since the process re-started as many as 18,688 persons were convoked with 13,227 of them identified - a three-fold increase in the weekly rate of identification (between 28 August 1994 and December 1995 77,058 persons had been convoked with 60, 112 of them identified)¹⁷⁶. Thus the Secretary-General remains optimistic that the time-table set in his report on November 13 1997 would be adhered to as far as possible which suggests that an end to the crisis in the Western Sahara might finally be winding down to a close.

Conclusion

Thus, having understood the background to how the entire process in the Western Sahara developed, we shall proceed in Chapter Seven to look at specific arguments in international law which relate to both sides of the case. The relevance of this case to general international law of self-determination is enormous since it is one that falls between the two categories of 'salt-water' colonialism, and the issue of possible neo-colonialism. At the same time it also questions the restrictions on identity and the facilitation of a structured and rigid interpretation to something that defies general theoretical structures. The issue of the Western Sahara can be viewed like other cases of modern self-determination, as a conflict between territorial integrity and self-determination. However there is also a strong case to be made for the fact that territorial sovereignty in this case is not a central issue since Morocco clearly does not possess the territory. The only way it could legally do so, is if it succeeded in the referendum. In either case, whatever the result, it remains a fascinating case for the

¹⁷⁵ S/1998/35 para 4-13

¹⁷⁶ S/1998/35 para 27

international law of modern self-determination and we shall examine these aspects of it in the following chapter.

CHAPTER SEVEN

CASE STUDY II: 'NATIONAL' IDENTITY IN THE WESTERN SAHARA

PART 2: THE WESTERN SAHARA CASE AND THE FALLACY OF THE SELF-DETERMINATION DISCOURSE

Introduction

Having examined the history of the region through general assembly resolutions, security council documents and Secretary General reports on the progress of the identification process, it is now time to address the more substantive issues affecting the Western Sahara Case. Our prime quest in this chapter will be to try and determine the influences that have shaped the identity of the 'people' or 'peoples' in this region, beginning from the experiences of the Sherifian State and the Bilad Shinguitti, and through to the colonial influence, in a bid to examine the question and importance of ethnicity. This chapter is not offered as a historical account of the region of North Africa. Nonetheless, for depth of understanding of the issues being analysed, there are aspects of history that need to be noted and understood. Thus the history of the region, as well as its sociology, which will form an integral part of this chapter is drawn from research that has already taken place¹. What this chapter will attempt is to draw together these aspects of the case and try to examine them in their totality. In so doing we shall also draw on the rich material that was offered by the parties concerned in their case before the International Court of Justice².

The Western Sahara case proves to be extremely complicated, and rather than unravel

¹ Notably by sociologists such as Gellner et al. There is also a degree of personal observation involved in the process, since the author was funded by the University to carry out field work in the region of North Africa; and the observations that are expressed within this chapter were formed by discussion and observation of life in the region over the period of one month (July 1998)

² *The Western Sahara Case [Advisory Opinion] ICJ Reports (1975)*

every complexity, this chapter will seek to isolate a few and pursue them in depth. What we are seeking to do primarily, is to demonstrate the nuances that form an identity, and then to examine this complexity against the rather single dimensional backdrop of the right of self-determination as presented in international law. Thus, at the end of the chapter we shall try to show that the concept of self-determination, which in the case of the Western Sahara is fairly well defined, and entails according to the International Court's Judgement in this case and more generally, Resolution 1541, the three options discussed in Chapter One, nonetheless break down on the criteria used to determine identity. One point that needs to be stated at the outset, is that despite the territorial claims put forth by Morocco and Mauritania, and their relative merits, the issue of governance of a territory is to be decided by the consent of the governed, as required by the notion of self-determination. The intractable problem remains the difficulty in determining who the governed are, or indeed ought to be, and the parameters within which they exist.

7.1. Historical Background

North Africa is a fascinating place for a study of ethnicity and identity and its expression within the form of the state. It presents us with a host of different forms of organisation that really challenge the idea and system of sovereign states so central to international legal discourse. At the heart of this challenge is the notion of two entities then prominent in ancient north-west Africa. Without attempting to provide a historical account of the progress of the forces that shaped this part of North Africa, this section will try to present a 'photograph'³ (to use the terminology referred to by the ICJ in the Burkina Faso-Mali Case), of the organisation of political allegiances in the region. For this purpose we will focus on the three big influences on the region; first introducing the concept of the Sherifian State

that is the pre-cursor to modern Morocco, then the Bilad Shinguitti⁴ which is arguably the precursor to the Islamic Republic of Mauritania, and culminating with the analysis of the effect of colonisation by France and Spain on the region. This will then enable us to try and consolidate a view of ethnicity in the region, and will also enable a better view of the theory and application of the concept of *terra nullius* with the greater Maghreb as North Africa was referred to in Arabic⁵.

7.1.1. Sherifian Society

North African society is distinctive in its political culture since societies can be classified according to the extent and manner in which the central government can impose its will on their members⁶. The system that prevailed under the Sherifian Empire is a classic case in point. It presented to the European viewer, who was the first to highlight this to the outside world, a picture close to anarchy⁷, but had in fact a complex system of allegiances and vassalages in constant movement which led to a relatively stable equilibrium. Of course, in light of the argument made in Chapter One about the nature of the current international system and its reliance on the concept of order, this led to one of the first attempts to 'civilise' the territory.

The Sherifian State however, came into being after a series of Berber and Arab kingdoms were formed and dissolved with great rapidity on the Tunis-Kairouan-Tlemcen-Fés

³ See *ICJ Reports (1986)* p.554

⁴ Spelt by some authors as 'Blad Shinqit' as in Stewart, C.C, 'Political Authority and Social Stratification in Mauritania,' in *Arabs and Berbers: From Tribe to Nation in North Africa* Gellner & Micaud (eds.) (1972) pp. 375-393. We shall use the spelling used in the ICJ judgement which refers to it as Bilad Shinguitti or 'Shinguitti country'.

⁵ Maghreb in Arabic simply means 'the West' see Gellner E, 'Introduction' in *Arabs and Berbers: From Tribe to Nation* in Gellner & Micaud (eds.) (1972) p.11

⁶ Gellner (1972) *ibid.* p. 16

⁷ See Spanish argument in referring to the tribes of the Sahara *ICJ Reports (1975)* pp. 44-5 paras 96-7; also see Burke III 'The Image of the Moroccan State in French Ethnological Literature,' in Gellner (1972) *op.cit.* 4 p. 177

axes. These struggles are documented elsewhere⁸ but it will suffice for our purposes to conclude that the Sherifian Empire came to be built on the ashes of the dynasties of the Almoravids and Almohads. The Sherifian Empire was different from the 'states' in existence in Europe, at the time since it was built on a system of allegiance to the Sultan who was considered the spiritual head of the region. Under this spiritual head myriads of tribes functioned more or less autonomously, with the Berber tribes in the distant hinterland regions and the Arabic tribes closer to the centres of power and the imperial cities of Fés, Marrakech and Casablanca⁹. As pointed out by Dunn¹⁰, 'migratory movement of pastoral populations has been a continuous theme in the history of Morocco and the western Sahara for almost a thousand years. Beginning with the Almoravid expansion out of the Mauritanian desert in the XIth century, the major thrust of these movements has been from the fringes of the Sahara northward into the Atlas and beyond to the fertile Atlantic coastal plains. The Saharan environment was a constant factor in setting in motion tribal migrations. Extended periods of drought, famine, and epidemic, alternated with population growth to seek new homes. The more abundant pastures on and beyond the slopes of the Atlas invariably attracted them towards the north'. Thus, the indigenous Berber population of the region was prone to migration from south to north due to harsh Saharan climate, but began to be tempered by a counter-movement from north to south in the face of Arab expansion that was gradually spreading to the region.

⁸ See Rézette, R., *The Western Sahara and the Frontiers of Morocco* (1975) and Abun-Nasr *A History of the Maghrib* (1975)

⁹ Dunn R ' Berber Imperialism: the Ait Atta Expansion in Southeast Morocco' in *Gellner & Micaud* (1972) pp. 85-107

¹⁰ Dunn *ibid.* p 85

This movement of people made for a certain ‘lack of unity’ in the system¹¹ which was however counterbalanced by the spread of Islam in the entire region. The Islamic faith arrived with the Arabs but gradually spread to the Berber tribes as well. There are suggestions by some authors that the Berber tribes were only superficially Islamised¹² -- which we shall examine in depth later in this chapter. Suffice to say that the entire region of the Maghreb was Islamic (with the exceptions of small pockets of Jews and Europeans who came much later, with the colonial drive). The brand of Islam practised here though was unique in that it encompassed a ‘complex and ramified network of religious brotherhood and saint cults, with regular pilgrimages and loose but extensive hierarchies’ which were primarily tribal¹³. The maintenance of order was left to local tribes people themselves, ‘generally (though not universally) self-defined in kin terms, in which virtually all adults males were warriors and which maintained order by a complex system of ... balances, operating simultaneously at various levels of size’¹⁴. This is particularly interesting in light of the Spanish statement about the political status of the region and about it being anarchic, which we shall discuss later in the context of the case before the International Court of Justice. Not only did these balances and counter-balances work externally i.e. between one tribe and another, but there were also internal balances that regulated life within the tribe. The system provided for a number of mediators and arbitrators, usually under the umbrella of Islam. These consisted of holy lineages or personages exempted from the warring and feuding ethos of the tribes. According to Gellner, the lineages were the nearest the system had to an aristocracy. Thus there prevailed a certain weakness of the state as the Sherifian Empire was ‘perched precariously on top of a

¹¹ Gellner (1972) *op.cit.* 4 p.17

¹² Notably Burke III *op.cit.* 7 quoting Terrasse *Historie du Maroc des Origines a l'etablissement du Protectorat Francais* (1950), Vol.2, pp.356-8

¹³ Gellner (1972) *op.cit.* 4 p.17

¹⁴ Gellner (1972) *ibid.* p.18

mass of tribal communities which resembled each other, and which indulged, in such qualitative diversity as existed only with restraint and discretion, as indicated'¹⁵.

The most interesting aspect of the Sherifian State from the point of view of the modern right to self-determination, was the relationship between the Centre and the peripheral regions. For a start, it is difficult to define the territory that can be considered 'peripheral' owing to the indeterminate nature of the allegiances. However the basic state structure is generally accepted by scholars, as being divided into two broad and fairly distinct sections known as the *Blad el-Makhzen* and the *Blad es-Siba*. The payment of tax was essentially what differentiated these two sections of the Sherifian society. The lands immediately surrounding the urban areas, and the predominantly Arab tribal lands around them were all part of the *Bled el-Makhzen* or 'the land of governance'; they paid taxes to the Sultan and provided the backbone of his army. The *Bled es-Siba* on the other hand, translated literally in Arabic as the 'land of dissidence and disorder', was 'the reverse side of the coin' of the *Bled el-Makhzen* composed mainly of Berber tribes who refused to pay taxes to the Sultan yet had no problem in accepting him as the spiritual head of the region. This distinction in the comprehension of the Sultan's role as being spiritual rather than temporal is what forms the basis of Moroccan arguments with regard to the territory of the Western Sahara. Hart makes an interesting parallel in comparing the two regions which fits in well with this current discourse:

The difference between *makhzen* and *siba* was essentially one of payment or withholding of taxes; and the polar relationship between these two concepts is, without any doubt, the central fact of the political sociology of pre-Protectorate Morocco¹⁶.

¹⁵ Gellner *ibid.* p. 18

¹⁶ Hart, D 'The Tribe in Modern Morocco: Two case Studies,' in Gellner (1972) *op.cit.* 4 p.25

He also quotes the parallel made in the work of Lahlabi, who compares the whole question to the Rousseausque idea about the Social Contract, with its related concepts of 'opting out' of the contract, since the issue hinged, in the words of Hart solely on the 'consent of the governed'¹⁷. According to Hart, the *siba* partially opted out of this contract, in that while recognising the Sultan as the spiritual head of the territory they did not recognise him as the temporal head. Besides, the Sultan, himself recognised this partial opting out, and while there were military expeditions undertaken into the *Bled es Siba* for rent collection, these were not regular owing logistical difficulties of access.

The entire structure arguably held together on the premise that the Sultan of the Sherifian State was considered a direct descendant of Prophet Mohammed and, therefore theoretically the head of the entire Muslim community in the region. Besides, according to one author, the entire region belonged to the Sultan according to *sharia'a* law¹⁸. With the whole region of the Sherifian state being Islamic, this was a vital link that held the components together. Also, Islam is one of the strongest threads in the identity of the peoples of the region, who subscribe to the common beliefs of the Orthodox Sunni Islam school of faith and the Maliki rite. Of course, one factor that needs to be established before we go on to the nature of the division between the *Blad el-Makhzen* and the *Blad es-Siba* is the external boundaries of the Sherifian State, since that affects us in the case concerning the Western Sahara. This is extremely difficult to determine since vast amount of contradictory data abounds. The Spanish have fiercely defended the proposition that the Sherifian State extended only upto the River Draa and not any further south, while the Moroccans claim that the

¹⁷ Lahlabi as quoted in Hart *ibid.* p. 28; also see Hart, 'The Social Structure of the Rgibat Beduins of the Western Sahara in *XV Middle East Journal* (1962) pp. 515-27

¹⁸ See Burke quoting Terrasse in Gellner (1972) *op.cit.* 4 p. 177

Western Sahara and even parts of Mauritania and Algeria were included in the larger *Bled es-Siba* that has been recognised as being part of the Sherifian State. Indeed, even today, modern maps in Morocco fail to clearly demarcate the interior boundary of the country (i.e. between Morocco and Algeria to the east or Mauritania to the south-east). We shall return to these contentions in analysing the external ties Morocco had with other states in Europe based on which recognition was granted or withheld. Another interesting factor in the case that we shall also flag up at this stage, to discuss later, is that the seat of the Sultan was not territorial in that His court moved around the region, though restricted primarily to the territory that consisted the *Bled es-Makhzan*. In the words of Gellner ‘...the Sultan was surrounded by a large court and numerous ministers, and by a standing army which also served as a tax collecting force’¹⁹.

Terrasse presents an interesting view of what he calls the ‘Moroccan Vulgate’ and in explaining this, suggests that the *Bled el-Makhzen* was not a firm bloc or a coherent force, but a coalition maintained by the force of profiting elements such as the *makhzen* itself as well the *guich* – warring military tribes that formed for the greater part, the backbone of the Sherifian army²⁰. He contrasts this against the *Bled es-Siba* portrayed as being ridden by ancient clan rivalries, tribes and moieties marked by feuding and in-fighting which prevented them from presenting a coherent and united opposition to the *makhzen* forces. He thus likens Moroccan politics before the arrival of the French as ‘ceaseless efforts of the *makhzen* to impose its authority upon the rebellious tribes of *siba* land, and their constant defence of their independence’²¹. According to him not even Islam could bring political unity to the country. He also views the divide as being ethnic in that the *siba* consisted of mainly Berber tribes -

¹⁹ Hart in Gellner (1972) *ibid.* p. 26

²⁰ Terrasse as quoted by Burke III *op.cit.* 12 in Gellner (1972) *op.cit.* 4 p. 177

²¹ *Ibid.* p. 177

which he sees as the original inhabitants of the region, while the *makhzen* consisted of Arabic tribes. One of the reasons why, according to Terrasse, Islam failed to provide a unifying effect was that the Berbers were, he suggested only superficially Islamicised, and still practised their old natural paganism²². He claims they opposed Islamic law, and the establishment of the *makhzen* administration; settling their internal disputes by use of customary laws regulated by tribal councils and *jama'as* marked by a democratic spirit. This facet of the Berber tribes manifesting their democratic spirit in the form of *jama'as* is also a factor within the present territory of Western Sahara. As mentioned in the previous chapter, the Spanish gave representation to the Saharawi peoples by legitimising their organisation into *jema'as* thereby including them within the mechanisms of the colonial state²³. Before we examine the questions of the ties between this entity and the territory defined as the Western Sahara today, it is important to examine the nature of the other entity that laid claim to the territory of the Western Sahara i.e. the Bilad Shinguitti that was presented by Mauritania as the pre-cursor of the Mauritanian state.

7. 1.2. *Bilad Shinguitti*

The Bilad Shinguitti presents, within international legal discourse, a very interesting platform to question the validity of the principle of self-determination. For a start, Mauritania could not be considered a state in the context described in Chapter Three, at the time of the Sahara's colonisation by Spain. It did not have a defined territory, a fixed population, a sovereign government, or the capacity to enter into relationships with other states²⁴. In addition it did not even conform to the requirements of statehood of the time, and unlike the

²² *Ibid.* p. 177

²³ The word *jema'a* has been spelt differently by different authors but one imagines that the words *jema'a* and *jama'a* derive their meaning from the same root. For the sake of accuracy we shall use the two separate words in appropriate places with the caveat that they mean one and the same.

²⁴ As given by the Montevideo Convention, 1933, see chapter Three, Section 3.1

Sherifian state of which Morocco is considered a successor, could not be identified as having a single authority that tribes swore allegiance to (Makhzen) or contested taxes against (Siba). The Mauritanian entity functioned differently and while the Mauritanian argument, was negated by the Court in this case, it throws up a direct challenge to the perception of identity within international legal discourse. For a start, it questions the very validity of rigidly structured international law, and shows up its territorial requirement in interesting terms. The Mauritanian arguments, however, while proving illuminating in the demonstration of the nature and complexities of identity in the region are no longer as weighted a factor, in the Western Sahara equation since, by a process of political manoeuvring between powers in the region, Mauritania has dropped its claim to the Western Sahara. However it is still important to delve into the nature of the Bilad Shinguitti and the arguments presented in its favour.

At the time of the colonisation of the Western Sahara (i.e. the period in question), the Islamic Republic of Mauritania defined itself, i.e. the 'Mauritanian entity' as it was referred to in the case, in the following terms:

(a) Geographically, the entity covered a vast region lying between, on the east, the meridian of Timbuktu and, on the west, the Atlantic, and bounded on the south by the Senegal river and on the north by the Wad Sakiet El Hamra. In the eyes of both its own inhabitants and of the Arabo-Islamic communities, that region constituted a distinct entity.

(b) That entity was the Bilad Shinguitti, or Shinguitti country, which constituted a distinct human unit, characterised by a common language, way of life and religion. It had a uniform social structure, composed of three 'orders': warrior tribes exercising political power; marabout tribes engaged in religion, teaching, cultural, judicial and economic activities; and client-vassal tribes under the protection of a warrior or

marabout tribe. A further characteristic of the Bilad Shinguitti was the much freer status of women than in neighbouring Islamic societies. The most significant feature of Bilad Shinguitti was the importance given to the marabout tribes, who created a strong written cultural tradition in religious studies, education, literature and poetry; indeed its fame in the Arab world derived from the reputation acquired by its scholars²⁵.

Mauritania also enunciated that there were two types of political systems in existence within the entity of Bilad Shinguitti, one consisting of emirates and the other of independent tribes which did not form part of the emirates. In the pleadings before the Court, Mauritania argued that one of the Emirates, the Emirate of Adrar, around the town of Shinguitt, was a centre of Shinguitt culture and proved an attraction for the nomadic Saharawi tribes. The argument presented to the Court in the case was that at the time of colonisation of the Western Sahara by Spain, the Emir of Adrar was the most important political figure of the north and north-west Shinguitt country [which by implication in the Mauritanian pleadings, included the Western Sahara]. It also mentions the testimony of Captain Cervera who concluded a treaty with the Emir at Ijil, by which Spain would have recognised the Emir as the sovereign over the stated lands²⁶. The parties to that treaty, according to Mauritania included not just the Emir but also several tribal chiefs, not only from the Adrar but also from the west of the Emirate. It is these tribal chiefs that allegedly represented the tribes that existed within the Western Sahara, and hence the origin of the claim of a territorial link between the Emir of Adrar and the nomadic tribes that traversed the desert immediately north of the Emirate. This brings us to the political structure of the Bilad Shinguitti which is also extremely interesting: it appears that the four emirates were completely independent of each other. However in addition, the

²⁵ *ICJ Reports (1975)* pp. 57-8 para 132

²⁶ It appears that this treaty was never ratified, and thus is not of legal standing in the procedures. Nonetheless it is advanced by Mauritania as an indication of the custom encountered by the explorer on reaching the territory

tribes outside the Emirates also had an independent political structure. According to Mauritanian pleadings before the Court, none of these groupings bore any tie of territorial allegiance to the Sultan of the Sherifian state although he might have been acknowledged as the spiritual head. One parallel that could be drawn in this given situation is the relationship between the Vatican City and a theocratic Catholic state such as the Republic of Ireland where the recognition of the Pontiff as spiritual head does not grant him any territorial rights²⁷. The Emirates and independent tribes could not be considered individual 'states' within the meaning discussed in Chapter Three, which begs the question as to the nature of their personality within international law. This question was perceived as being vital to the evaluation of the claims to self-determination since it would present the Mauritanian argument with historic legality. The larger question which needs to be posed, but which we shall not endeavour to answer within this thesis, is whether this implies that the definition and understanding of the concept of statehood is too narrow or whether such groups cannot indeed be considered, in the modern world, legitimate allegiances from the leash of the state²⁸. It is clear from the uncontested evidence presented in the case, that the Emirates and tribal groupings were autonomous; they signed treaties with explorers without 'higher consent' of the Sultan of the Sherifian state. Nonetheless, 'the emirs, sheikhs, and other tribal chiefs were never vested by outside authorities and always derived their powers from the special rules governing the devolution of power in the Shinguitti entity'²⁹. Each emirate or tribal group was 'autonomously administered', and interestingly the rulers derived their power from the *Juma'a* which was the locally elected participatory system that functioned as a governing council for each tribe. This is particularly interesting in view of the discussion in Chapter One

subsequently known as Mauritania. *ICJ Reports (1975)* p.58 para 133

²⁷ This comparison is intended merely as an analogy and is not meant to compare what was an inherently different system of allegiance to one that exists within Christianity between the Pope and his subjects. Vice President Ammoun in a separate Statement also suggests a similar analogy *ICJ Reports (1975)* p. 98

²⁸ Refer the discussion in Chapter Three Section 3.1

about the spirit of self-determination which is said to be drawing on the American Declaration and the idea that only the consent of the governed could make government legitimate. It appears from the evidence presented by the Mauritanian entity as well as by the work undertaken by Gellner and others on the subject, that the Saharan tribes³⁰ had a degree of autonomy that would have fulfilled these conditions. The relationship between this fact, and the norm of self-determination as it evolved from the Wilsonian era is perhaps a demonstration of the limitations of international law. It gives international law the appearance of being extremely rigid, since it seeks to define values and parameters it perceives as being important; but usually does so with reference to a specific cultural context whilst being unaware of other traditions that perhaps embrace similar values with alternative approaches delivering a similar result. When faced with a scenario that is inherently different to the one perceived as being ideal, it seems to categorise the Other in the noble quest of attempting to understand better. However in doing so it also tries to subjugate and conquer the Other, thereby running the risk of missing the intricacies within the Other. In this case for example, if the largely uncontested evidence about the tribal governance structures within the Bilad Shinguitti presented in the case by Mauritania is to be taken at face value, it would put a completely different interpretation on the perception of the pre-colonial state, and would be difficult to locate it within the international law in existence at that time, or indeed within modern international law.

Mauritania itself, recognised that the tribes were not in any hierarchical structure and stated: ‘... the Shinguitti entity could not be assimilated to a State, nor to a federation, nor even to a confederation, unless one saw fit to give that name to the tenuous political ties

²⁹ *ICJ Reports (1975)* p.59 para 134

³⁰ This is used to mean the tribes that existed in this part of the Saharan Desert, rather than the *Saharawi* tribes - which is used in this thesis to refer specifically to the tribes that claim to be represented by the Polisario, and that

linking the various tribes³¹. But it then bows to the assimilatory process of international law by stating that this was not, in itself sufficient basis for saying that ‘ the Shinguitti entity was endowed with international personality, or enjoyed any sovereignty as the word was understood at that time³²’. This quote whilst showing the extent to which Mauritania understood international legal discourse of the time, also demonstrates the manner in which the rigid role of the discourse straight-jackets systems that do not fit within its ambit. Clearly, Mauritania feels that the tribes and the four emirates was a ‘community having its own cohesion’ and ‘special characteristics’ along with a Saharan law that governed the use of water-holes, grazing lands and the sparse agricultural land available. In addition, it also had mechanisms which regulated inter-tribal hostilities and a process for the settlement of disputes. However according to international legal discourse of the time such a structure was perceived by the explorers and colonialists as being threatening to order. It clearly was threatening since instead of functioning as one whole that represented all the different parts within the structure of the colonial state governed from Europe, it attempted to re-fragment into different structures and systems, dynamically, rather than statically. This brings us back to the theme of the Euro-centric nature of international law that some authors talk about³³. But without going into the merits of the arguments of cultural relativism, it perhaps needs to be acknowledged here, that the state which is at the heart of international legal discourse of self-determination, is located within a fixed European context, but is not the only entity capable of guaranteeing that the consent of the governed makes for legitimate government. The Saharan region was unique in the conditions it presented to the people hardy enough to live there. The arid desert life and the paucity of water resources, dictated a way of life that was different

seek to be universally recognised as the Saharawi Arab Democratic Republic. (SADR)

³¹ See Pleadings, also quoted *ICJ Reports (1975)* p.59 para 135

³² *Ibid.* para 135

³³ Mazrui, A., *Cultural Forces in World Politics (1975)*. Also see Ali S.S ‘Conceptual Foundations of Islam’ in *3 EPL (1997)* 261 -282

from the life pursued by European nations around whom international law, as we know it, developed. In the desert, tribal groups could not live in the same proximity as the peoples within Europe. In addition they had to face different climatic conditions that dictated their culture and way of thinking. Life often centred around the quest for suitable pastures and watering holes; ‘and each tribe [had] a well-defined migration area with established migration routes determined by the location of water-holes, burial grounds, cultivated areas and pastures’³⁴. These factors rather than territoriality dictated by artificial concepts such as latitude and longitude, had a great say in dictating concepts of identity and allegiance. However in the process of colonisation, all these conditions were ignored, and the Westphalian state was super-imposed loosely and in arrogance over a region where it seemed ill-suited. In the words of the Court’s ruling, in discussing Mauritanian pleadings: ‘ The colonial Powers... in drawing frontiers took no account of these human factors and in particular of the tribal territories and migration routes which were, as a result, bisected and even trisected by those artificial frontiers. Nevertheless, the tribes, out of necessity, continued to make their traditional migrations, traversing the Shinguitti country comprised within the territory...’³⁵. Further, the facts of nomadic life were recognised by Spain and France at the time, and were even the subject of an administrative agreement between them in 1934³⁶. But typically, from an international legal perspective, these agreements while acknowledging the existence of such life on the one hand, and promising not to affect it, nonetheless forced it within the straight-jacket of a boundary regime on the other.

³⁴ *ICJ Reports (1975)* pp. 59-60 para 137

³⁵ *ICJ Reports (1975)* p.64 para 152

³⁶ See *ICJ Reports (1975)* para 137

7.1.3. Colonial Influence

This leads us to the influence of colonisation in the Maghreb. It needs to be stated at the outset, that the drawing of boundaries was a colonial phenomenon, which were put in place primarily, and as discussed in Chapter Four, to regulate the sphere of influence of each power. What we shall do within this section, is to examine the effect of colonisation first on the Sherifian state, then on the Mauritanian entity, and conclude by drawing a symbiosis of the effect of this force on identity in the Western Sahara.

As far as the Sherifian state was concerned, the main effect of colonisation was the transformation of the internal structure of the entity from its original form to the form of the independent state of Morocco in 1956. Its close proximity to Europe meant that the region was influenced strongly by events in the north. One of the first events to bring Europeans to the Atlantic coasts of the region was the 'Reconquista' when Christian forces pursued Andalusians into the Maghreb³⁷ in the seventeenth century. This process was accompanied by the expulsion by Philippe III from Spain, of 500,000 Mohammedan "Morisques", Mohammedans and Jews who remained there (1609-1612). It was thus under the pretext of protection of these peoples that Portugal and Spain began to exert influence on the north-west tip of Africa. This has to be accompanied by the established fact that European vessels had been fishing south of the Iberian peninsula for centuries prior to this - but had refrained from launching themselves along the Atlantic coast, 'despite the desire to appropriate at the source, the "gold of the Sudan" monopolised by the Mohammedans³⁸'. Rézette suggests that Christian and Arabic chronicles described the Atlantic in the XIIIth century as 'a shadowy ocean, peopled by monstrous animals and subject to terrible tempests; from which no one ever

³⁷ For a historical account see Rézette R, (1975) & Abun-Nasr (1975) *op.cit.* 2

³⁸ Rézette (1975) *op.cit.* 2 p.51

returned³⁹. With the discovery of Lanzarote between 1312 and 1335, the Canary Islands became a source of constant pillage from European forces which included the Portuguese, Catalans, Majorcans and Norman expeditions. But it was only after the fall of the kingdom of Granada in 1492 that Spain and Portugal first began to land on the coasts of north-west Africa.

By 1912 France and Spain had established respective protectorates over Morocco cutting the territory up into three segments along different axes⁴⁰. These included an Arab Berber axis, an urban tribal axis and the *makhzen-siba* axis. Thus the two powers signed the Treaty of Fés in 1912 which effectively set the boundaries of the three states that were to come into existence on withdrawal of the colonial powers. The main effect of colonisation on the Sherifian empire, was that it united the territories subsequently known as Morocco, into a single unit. The French colonial protectorate ensured that the *Blad es-Siba* was absorbed into the *Blad -el-Makhzan* and thus within a period of less than fifty years the very nature and structure of the Sherifian state was successfully altered by the French. According to Seddon, this revolution took twenty two years in the making, but its net result was to 'render anomalous the traditional patterns of government. The *makhzan* no longer needed an army to collect taxes, and, in any case, it was not permitted⁴¹'.

As for the Bilad Shinguitti, the main effect of colonisation there too, was the demarcation of what would become the present state of Mauritania. Inhabited by people referred to as Moors in popular literature⁴², they derived their very identity from the French

³⁹ As quoted in Rézette *ibid.* p. 51

⁴⁰ See Gellner (1972) *op.cit.* 4 p. 13

⁴¹ J. David Seddon 'Local Politics and State Intervention: Northeast Morocco from 1870 to 1970,' in Gellner & Micaud (1972) *op.cit.* 4

⁴² The term Moor comes from Latin and has been applied at various times to Muslim peoples from Andalusia to

colonisation of the territory of the Bilad Shinguitti. It was after the conquest by France of parts of the western Sahara that the term 'Moor' was formally used to describe people of the region. So in terms of the crystallisation of identity the French influence was significant. The distinction of *bidani* v *sudani* that was inherent within internal pre-colonial 'Mauritanian' life⁴³ was replaced at 'national' level by the creation of a supervening identity that papered over the differences and 'united' them under the sobriquet of Moorism. The parallel here between the Moroccan experience and the experience of the Mauritanian entity is striking: in both cases the colonial power super-imposed a state and an identity to go along with it, that was not indigenous to the region. In doing so, it created an all-encompassing category into which the differences would form a single unit. Thus the biggest direct impact as mentioned above, remains the drawing of the frontiers of the region. In the words of Stewart: 'Prior to the carving out of the territory which is known today as Mauritania, the Moors inhabited an area vaguely known as the Shinqit, and the lands to the south of the Shinqit, inhabited by Wolof, Toucuolots, Bambara, and Sarakolès, marked the beginning of the *Bled es-Sudan* which was beyond the pale of Moorish politics and only marginally involved in the historical traditions of the Shinqit⁴⁴. He goes on to point out that the 'emergence of modern political parties in Mauritania may be considered as a last contribution of the French colonial effort toward the creation of a viable political entity in that country'⁴⁵. But even at the time of independence of Morocco in 1956, Mauritania was the subject of irredentist claims from Morocco voiced at the time by Asllal el-Fassi who suggested that Mauritania, Algeria, Mali and all of the Rio de Oro constituted integral parts of Morocco. According to Stewart, these claims were taken up within Mauritania by Humra Ould Babana who was supported by some of the tribal groups in the north of Mauritania. Babana was finally expelled from the territory

the Senegal Basin.

⁴³ See Stewart in Gellner (1972) *op.cit.* 4 pp. 375 - 398

⁴⁴ Stewart. *ibid.* p. 377

and after visits to Paris and Cairo finally settled in Rabat to champion the irredentist movement which sought to unite the entire region of north-west Africa under the aegis of the Maghreb⁴⁶. This reveals the influence of colonial powers in the region and the irrelevance of boundaries in the formation of identity. There seems to be a clear indication that identity was much more localised, especially in the case of Berber tribes which followed ideals that could be identified as being democratic in spirit; where contact between governed and governing was much closer than in any larger entity. However with the arrival of the colonial powers and their need to demarcate the respective spheres of influence in the territory, identity began to take on a more centralised role. While in the past allegiance mainly focussed on the tribe, with little awareness of the central power involved, the emphasis was now forcibly shifted to the central administrative power. What colonial presence did, was to remove the more local aspects of identity in a bid to try and 'unite' differences under the umbrella of the sovereign state. In the words of Stewart, 'the colonial experiment in Mauritania reflects many of the same features of colonial administration and politics which are found in other countries in North and West Africa. These include indirect rule, a policy of divide and rule, the creation of new, broader political entities by the incorporation of minority groups under a single administrative unit, the introduction of the metropolitan language and culture, the consolidation of colonial administration and the undermining of traditional authority. Also relevant is the nurture of political parties which are likely to co-operate with the metropolitan country, while at the same time building up a more or less effective apparatus for the administration of an independent state'⁴⁷.

⁴⁵ Stewart *ibid.* p. 379

⁴⁶ For a deeper reading on the issues of the Greater Maghreb and the politics within the formation of such a customs union see generally Rézette (1975) *op.cit.* 8 pp. 36-90 & generally, Abun-Nasr (1975)

7.2. *The Case before the International Court of Justice*

The events leading up to the referral of the Western Sahara Case to the International Court of Justice have been detailed in the previous chapter. What we shall seek to do in this section is to show the factors and considerations that international law examines in determining the validity of the claim to the international legal right of self-determination for the peoples within the geographically determined territory of the Western Sahara.

The questions asked of the Court were as follows:

- I. Was the Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?

If the answer to the first question is in the negative,

- II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?⁴⁸

One of the first problems that arose in the course of the case concerned, was whether the questions presented were of a legal nature or not. Spanish objections to the Court's jurisdiction was mainly that the issues being considered by the Court were not technically legal. However, the Court ruled that the issues were a mixture of 'law and fact', and supported its argument by reference to the Opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*⁴⁹ where the Court also discussed the relationship between law

⁴⁷ See Stewart in Gellner (1972) p. 382

⁴⁸ ICJ Reports (1975) p. 6

⁴⁹ See ICJ Reports (1971)

and fact⁵⁰. Spain however, believed that the Court did not have at its disposal, the material it would require to be able to satisfactorily deal with the issues raised by these questions. The Spanish saw this problem arising out of the obligatory nature of the advisory proceedings which it suggested did not compel parties to present evidence in the same manner as they perhaps would have to, were the decision binding. The Court firmly dismissed these claims and asserted its right to give an advisory opinion in the case, drawing parallels with the *Eastern Carelia Case*⁵¹. During the initial considerations to the case, the Court also reiterated in the strongest terms the legal right to self-determination which suggested that the case had considerable legal content.

In the discussion of substantive issues, the Court first sought to define and limit the terms used within the questions posed. We shall briefly examine this discussion especially in light of three critical phrases within the questions which are significant to the understanding of the context of the case. In the first question, the idea of the time frame: the question is based “at the time of colonisation by Spain”. The second problematic phrase is as to whether the territory constituted “terra nullius” and finally in the second question asked of the Court, the exact meaning of the term “legal ties.”

7.2.1. ‘at the time of colonisation’

According to the Court, the question refers specifically to a particular time frame which it considered to be 1884 when Spain officially proclaimed a protectorate over Rio de Oro. However in the pleadings Spain claimed that it had exercised acts of sovereignty as early

⁵⁰ ICJ Reports (1971) p.27. Similar questions were also posed in the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* ICJ Reports 1947-8 p. 61

⁵¹ The decision in this case was not to have a judicial conclusion due to the absence of the consent of one of the parties and their refusal to present the necessary evidence (*PCIJ Series B, No.5, 28*)

as the fifteenth and sixteenth centuries⁵². This argument was later rescinded by Spain as being outlined only to demonstrate to the Court the remote antecedents of Spanish presence in west Africa. This nonetheless serves to demonstrate how difficult it is to show evidence of exercise of sovereignty. Thus while Spain originally claimed to have performed acts that proved its sovereignty as early as the fifteenth or sixteenth century, international law recognises 1884 as the date when the Spanish officially declared a protectorate over the Western Sahara. Even this remains contentious. According to Rézette and others for example⁵³, it was not until the middle of the twentieth century that Spain managed to exercise any control over the territory. Indeed many authors point out, very emphatically, that Spanish interests in the region were merely to have a safe coast opposite the Canary Islands for the protection of their fishing interests; and they showed little interest in the people or the territories towards the hinterland. This was particularly true in the fifteenth and sixteenth centuries when a number of Spanish vessels were captured by Berber tribes and held for ransom. This led to the Spanish signing a highly disputed treaty⁵⁴ with the Sultan in order to protect their seamen, and perhaps later prompted the Spanish to declare a protectorate over the region. It is claimed that this protectorate was declared after agreements were signed with independent tribes. However this information is not entirely free from contention, since some authors claim that the Berber tribes continued to be autonomous, refusing to be subjugated by the Spanish.

It was also during this time that the Sherifian State was in existence in North-west Africa, and the Bilad Shinguitti existed in what is now Mauritania. As pointed out earlier, it is difficult to determine the boundaries of these two entities, the prime difficulty being in the determination of the end of the territory that could be considered the *Bled es-Siba*. Within the

⁵² ICJ Reports (1975) p.38 para 77

⁵³ Rézette (1975) *op.cit.* 8 pp. 54-69; also Separate opinion of Vice President Ammoun ICJ Reports (1975) p.85

⁵⁴ The Treaty of Marrakech 1757 also see Section 7.3

context of the case, it was common ground between the three parties i.e. Morocco, Mauritania and Spain that the *Bled es-Siba* was considered to be part of the Sherifian State, and that the area to the immediate north of the Western Sahara formed part of the *Bled es-Siba*. The dispute arises as to where exactly the seam appears between the *Bled es-Siba* that formed the territory of the Sherifian State and Bilad Shinguitti country, and whether there existed between these two entities a space that corresponded to the territory of the Western Sahara. This primarily is the dispute that we shall discuss under the concept of the phrase 'legal ties'. Suffice to say that 'at the time of colonisation' was taken as accepted by the Court and the parties as being in 1884 when Spain declared its protectorate over the Rio de Oro.

7.2.2. 'terra nullius'

A much more complex issue within the case was that of *terra nullius* which the Court seemed to resolve with considerable ease. *Terra Nullius* or 'territory belonging to no one' referred to 'a legal term employed in connection with occupation as one of the accepted legal methods of acquiring sovereignty over territory'⁵⁵. In an interesting discussion during the pleadings, the Algerian delegate referred to the theory enunciated by Vattel that set out three major epochs of *terra nullius*. These can be briefly summarised as the sixteenth century Roman law concept where *terra nullius* referred to all territory that was non-Roman; the seventeenth and eighteenth century - where non Christian territory was considered *terra nullius*; and finally the nineteenth century where territory not belonging to a 'civilised state' could be considered *terra nullius*⁵⁶. This discussion seemed lost on the Court, since it determined in a very forthright manner that the territory of the Western Sahara was not *terra*

⁵⁵ ICJ Reports (1975) p.39; also see Shaw 'The Western Sahara Case,' in 44 BYIL (1978) pp.118-154 esp. 127-134

⁵⁶ See the Pleadings CR.75/19 pp.2-23 also see Shaw (1978) *ibid.* pp. 128-9 ; also see Dissenting Opinion of Judge Ammoun ICJ Reports (1975) pp. 83-101

*nullius*⁵⁷. While not contending this, it is interesting to note the reasons given by the Court for this emphatic declaration: ‘In the Western Sahara case at the time of Spanish colonisation the nomadic tribes of the region were clearly organised politically and socially under chiefs competent to represent them’⁵⁸. What is particularly interesting in this declaration is that while agreeing that the territory did indeed belong to somebody i.e., the tribes of the region under the auspices of representative chiefs, the Court did not rule emphatically in favour of local governance. Rather, it queried at length, whether it belonged to any of the claimants; thereby suggesting that the territory, as a physical possession, despite the aforementioned tribes, could belong either to Morocco or Mauritania. It is suggested here that in declaring that the tribes were organised under chiefs that were competent to represent them, the Court would have negated completely, the need to provide an answer to the second question which could have become irrelevant. One of the aspects that the Court admitted to being aware of, was the context in which the opinion was sought: namely the process of trying to allow self-determination for the territory. Thus, if it ruled that the territory was not *terra nullius* but was populated by tribes that were ‘socially and politically organised’ with chiefs that represented them, then the need to examine the ties that this entity had with the Sherifian state or the Mauritanian entity in the narrow context of the right to self-determination discourse would be rendered irrelevant since the territory would clearly belonged to those tribes and those chiefs themselves and any question of ties of sovereignty with any other entity need not rise at all. This is particularly true in the scope of self-determination as understood in Chapter One, since the consideration of the second question raises all kinds of issues that need to be answered before a comprehensive legal right to self-determination can be developed. For example, if the nineteenth century caveat of *terra nullius* referred to territories that were non-civilised, could

⁵⁷ *ICJ Reports (1975)* pp. 38-40 where the Court seem to deal with the issue summarily.

⁵⁸ *ICJ Reports (1975)* p.39 para 81

it be that the twentieth century equivalent would be territories of people who were non-sedentary? Modern international law, expressed within rigid state structures has no way of coping with people/peoples that are nomadic since the crossing of frontiers is no longer as easy. Instead territory that was traditionally traversed by nomadic peoples has become part of a sovereign state while the lifestyle of the people that lived and traversed across it has been rendered *nullius*. This would have interesting ramifications for the modern discourse of self-determination.

7.2.3. 'legal ties'

Another issue that needs to be clarified within the context of the questions posed to the Court was the exact implication of the phrase 'legal ties'⁵⁹. This issue was not dealt with by the Court in much depth. Although paragraph 84 of the Judgement admits that the 'scope of this (the second) question depends upon the meaning attached to the expression "legal ties" in the context of the time of the colonisation of the territory by Spain⁶⁰. The Court sought to deal with this issue by reference to General Assembly Resolution 3292 (XXIX) which it suggests makes it plain that the 'legal controversy' arose out of the 'pretensions put forward, on the one hand by Morocco that the territory was then a part of the Sherifian State and, on the other, by Mauritania that the territory then formed part of the Bilad Shinguitti or the Mauritanian entity'⁶¹. And it was in this context that the Court ruled that the words "legal ties" between this territory and the Kingdom of Morocco and the Mauritanian entity" must be understood 'as referring to such "legal ties" as may affect the policy to be followed in the decolonisation of Western Sahara'. The Court also rejected the view that the scope of the term was limited to ties that were established 'directly with the territory and without reference to

⁵⁹ Also see Shaw (1978) *op.cit.* 55 pp. 134-144

⁶⁰ ICJ Reports (1975) p.40 para 84

⁶¹ *Ibid.* para 84

the people who may be found in it'⁶². Thus, within this context, the Court understood its mandate as trying to determine the kind of ties that existed between the territory of the Western Sahara and the Kingdom of Morocco in the north and the Bilad Shinguitti in the south⁶³.

However at this point it is important to once again refer to the nature of the territory in question to examine what kinds of ties existed that could prove to be legal. Being a nomadic population, with a religious allegiance to the Sultan, but with a fairly autonomous political structure made it extremely difficult to determine any clear manifestation of legal ties which could be considered to have existed. The territory was sparsely populated and the population consisted largely of these nomadic Berber tribes which traversed the region following definite migratory routes largely dictated by the presence of watering holes. The relations between tribes was governed by certain accepted customs and traditions which could be considered as indications of a legal regime⁶⁴. Included within this parameter were issues such as the use of migratory routes, use of watering holes, burial grounds and agricultural land. It is also important to note that the tribes themselves did not restrict their existence to the territory currently known as the Western Sahara but also traversed parts of southern Morocco, Mauritania and indeed, parts of Algeria⁶⁵. This continued through the colonial period when boundaries ascribed to the region were more permeable than in post-colonial states. Thus, in ascertaining the relationship of the Western Sahara with the two claimants to the territory the first problem faced is that the Western Sahara was not a self-contained unit, but rather functioned as a frontier-less entity whose peoples had close relations with the two entities that neighbored it. Of course the key question within this case is the relationship between the

⁶² *ICJ Reports (1975)* p. 41 para 85

⁶³ *Ibid.* para 85

⁶⁴ See generally, Gellner, E. *Saints of the Atlas (1969)* esp. pp. 41-68

peoples of this area and the two entities in question. Any number of possible scenarios arise. Firstly, the region could be part of the *Bled es-Siba* which extended all the way north towards the imperial cities of the Sherifian State. There is a fair amount of evidence presented for this view which we shall come to in the following section⁶⁶. Were this the case though, it still leaves open the larger question of whether being part of the *Bled es-Siba* necessarily means that modern Western Sahara should form a part of Morocco. Such a line of argument would be based on the historic fact of territorial possession which the nomadic peoples by their very lifestyles seem to have little respect for. The second plausible scenario is that the territory and the tribes within it were part of the culture of the Bilad Shinguitti which extended southward encompassing modern day Mauritania and towards the *Bled Sudan* the land of Sudan where 'Black Africa' could be said to commence⁶⁷. Were this the case, and once again the evidence will be examined in the following section, the legal ties that existed in the Bilad Shinguitti would need to be demonstrated as existing in the region of the Western Sahara as well. Of course it needs to be pointed out that this option in the current climate of the case does not now exist - Mauritania having withdrawn its claim to the region after signing an agreement with Morocco which saw the latter drop its irredentist claim to the region. A possible third scenario is that the tribes of the region were completely independent of both the entities they were surrounded by. Thus, they did not form a part of the *Bled es-Siba* of the Sherifian State, although they did acknowledge the Sultan's spiritual leadership. They did not therefore accept any temporal leadership over their lands from the Sherifian State. Nor did they have any links to the Bilad Shinguitti from whom they functioned independently. This scenario is not difficult to imagine since the Bilad Shinguitti in any case consisted of tribes that were fairly autonomous. Within this scenario though the tribes would be required to be completely

⁶⁵ See esp. Rezette (1975) *op.cit.* 8 pp. 111-126

⁶⁶ This is primarily the argument presented by the Government of Morocco in the Pleadings to the Case

⁶⁷ This is the argument presented by Government of the Islamic Republic of Mauritania in the Case

politically independent of both entities while perhaps subscribing to various facets of culture that emanate from a common heritage (namely Berberic) and a common religion (namely Islam)⁶⁸. In the context of 'legal ties' it sought to be proved by the two claimants involved, that the legal ties that existed between itself and the territory of Western Sahara were stronger than the ties that existed between itself and its rival. In doing so, the claimants also sought to discourage any view that the peoples of the Western Sahara could have functioned independently of the two claimants, a role that was ostensibly represented in the case, by the Spanish. Thus, due to the very structure of the International Court's adjudication, the Polisario were not given a voice within it. To be fair it has to be admitted that, at this stage, there was perhaps insufficient evidence to suggest that the Polisario was the sole representative of the Saharawi people notwithstanding the Security Council Mission's Report which clearly states that this was the case. Thus while the two claimants sought to convince the Court of their respective rights to the territory, Spain sought to prove that its title to the territory was pure. In doing so, it thus represented by default, the view of the Polisario that the territory was not part of either of the two empires which existed in the region at the time. As the case progressed an idea seemed to develop, which focussed on bifurcation of the territory between the two claimants. Thus, the northern tribes would be accepted by Mauritania to a certain extent, as being part of the Sherifian State and the *Bled es-Siba* while the southern tribes were conceded by Morocco to being part of the Shinqit culture. With this compromise it would have seemed that the homogeneity of the territory as a unit was now being questioned. Thus the issue of 'legal ties' is a vital question within the context of this case since it could prejudice the claims of either party. Some authors have questioned the wisdom of trying to ascertain the existence of legal ties and their nature in the region⁶⁹. For them the territory of

⁶⁸ This argument by default, was presented by the Government of Spain

⁶⁹ Notably Judge Dillard (Dissenting Opinion) *ICJ Reports (1975)* pp.116-126; Franck, T 'The Stealing of the Sahara', in *70 AJIL (1978)* pp. 694-721; and Shaw (1978) *op.cit.* 55 p.134

the Western Sahara, as a unit of colonial rule ought to have had the option, in a referendum of opting for one of the three options presented by the international law of self-determination i.e. to either

- i) emerge as a sovereign independent State
- ii) freely associate with either Morocco or Mauritania
- iii) integrate with either Morocco or Mauritania⁷⁰

For these authors, the legality or otherwise, of historic ties would be subjugated to the process of the people of the territory deciding which of these three options they would prefer. However it is suggested here that such oversimplification would mis-understand the complexities of identity.

While modern law of self-determination is clear in that the people of the region ought to be given a choice, it does not lay down the parameters of defining these people. The theoretical discussion in Chapter One, on the evolution on the norm of self-determination left us with the open ended question of 'who' the people were. We then examined the place of minorities within the right of self-determination, since it was along the axis of minorities that the right first came to be developed. Next we examined the idea of the state and its role in self-determination, before concluding the theoretical section by looking at the fallibility of boundary regimes. It is to this we must now turn.

A Wilsonian conception of the international law of self-determination would have required a plebiscite in the region for minorities. In the Western Sahara, the nomads would perhaps have qualified under these conditions and would have been given the right to vote in the referendum. However the question of legal ties would have still been of importance since

the territory was not demarcated and there were different tribes that owed allegiance to different lifestyles. It is perhaps not wholly convincing that the tribes in the Western Sahara existed completely independent of the Sherifian State as well as the Bilad Shinguitti. The works of Gellner and other sociologists and anthropologists suggests that there are significant links in the culture of the Berbers, which spreads across the width of the entire region that could be recognised as the Maghreb. These scholars emphasise this unity in Berber culture which spreads beyond twentieth century externally imposed state boundaries. At the same time, the discourse of statehood is openly challenged in this case since even though the Berbers may have had a relatively uniform culture, they nonetheless did not function as a single entity⁷¹. It is an uncontested fact in the context of the case that, during any given period in pre-Spanish Sahara, inter-tribal conflict was fairly frequent. This conflict between different tribes of the mainly Berber population took place frequently suggesting few external allegiances of any kind between the different tribes. Nonetheless as far as internal governance was concerned, each tribe had its own internal mechanisms overseeing life within the tribe. Thus, the idea of a supreme power that united the peoples of the region is arguably flawed. And the imposition of statehood on different tribes has not been a process that was accepted without great resistance⁷². Of course it needs to be stressed that this particular phenomenon is not peculiar to the Western Sahara but is fairly common in most post-colonial territories. In the Western Sahara case what adds to the complications is the theoretical issues discussed in Chapter Four i.e. the problematic drawing of boundaries. In the case of sedentary populations the drawing of boundaries will have a greater effect on a solidification of identities within particular boundary regimes. However in the case of nomadic populations that constantly traverse these boundaries as a way of life, the drawing of boundaries proves to be even more

⁷⁰ As given by GAOR 1541 (XV) discussed in Chapter One Section 1.7

⁷¹ See Dunn R. *op.cit* 9 in Gellner (1972) pp. 85-108

⁷² This remains true to this day for the Berbers of the region. A recent Economist article outlines the resistance of

artificial. The fact that the boundaries were also drawn purely for the convenience of the colonialists did not help matters. Thus the whole concept of asking the Western Sahara to vote as a unit for self-determination could be problematic for the simple reason that there is a possibility that the more southerly of tribes would be quite different from the more northerly Sherifian State influenced tribes. While it is true that the option of self-determination as it can be logistically managed today, clearly underlines the need for the population to express its will as a unit, it also needs to be highlighted that this legitimises colonial structures that were imposed in the first place.

Having discussed the importance of the concept of 'legal ties' in general to the understanding of the problem let us now turn to the relative merits of the respective arguments put forth by the two claimant states on behalf of the Sherifian and Shinguitti entities.

7.3. 'Legal ties' between the Sherifian state & Western Sahara

The Moroccan case towards the demonstration of the legal ties between itself and the territory of the Western Sahara was argued on two fronts⁷³: 1) a demonstration of recognised internal acts of sovereignty of the Sultan⁷⁴; 2) international recognition of Moroccan rights in the area⁷⁵. We shall look at these two aspects separately.

Morocco argued that the internal manifestations of its authority in the Western Sahara could be gauged by a number of factors which included:

- a) the appointment and allegiance of the caids to the Sultan
- b) the successful imposition of Koranic taxes and law

the Algerian Berbers to the imposition of Arabic as the national language. *Economist Highlights 17th July, 1998*

⁷³ See generally *ICJ Reports (1975)* pp. 45-57

⁷⁴ Specifically pp. 45-49

- c) military resistance to foreign penetration
- d) allegiances between the tribes of Morocco with tribes in the region
- e) the allegiance of Ma ul-Aineen to the Sultan
- f) the visits of Sultan Hassan I to the region
- g) common ethnological, cultural and religious ties

The main Moroccan arguments which underlie points a) and b) above is the role of the Sultan in the region as the spiritual head. It is not disputed that the Sultan in this role would have appointed the religious caids of the various tribes. Dispute however arises as to exactly where these tribes were based. Spanish counter arguments suggest that the caids appointed by the Sultan relate to the area of the *Bled es-Siba* which it claims was north of Rio de Oro and Sakiet el Hamra (which forms the Western Sahara) in any case. Besides the Spanish argue that the role of the caids was merely honorary and does not necessarily translate to any political power⁷⁶. The Moroccan argument about the aid to counter foreign penetration, is countered by arguments put forth by the other two parties of the relative independence of the tribes of the region. This is also backed up by the agreement they signed with the Spanish government in negotiating their rights under the Spanish protectorate in 1884. It is to be noted that this treaty was claimed to have been signed by independent tribal chiefs, which suggests that rather than assist in resisting foreign penetration, the chiefs aligned themselves to the Spanish protectorate⁷⁷. This evidence remains controversial, in light of an earlier claim that the Spanish contingent in the Western Sahara never really exercised any degree of effective control over the interior parts of the region⁷⁸. One of the most interesting arguments put forth by Morocco concerns the existence of a relationship between the Tekna Confederation and the

⁷⁵ Specifically pp. 49-57

⁷⁶ *Ibid.* p.46 para 100

⁷⁷ *Ibid.* pp. 46-7 paras 101-2

nomadic Tekna tribe in the Western Sahara. The Tekna Confederation can be indisputably demonstrated as existing within the *Bled es-Siba* of the Sherifian state. These tribes of the Draa Valley were relatively autonomous but came within the ambit of the 'land of dissidence' and were therefore accepted as being an integral part of Morocco. There also exists within the region, a nomadic tribe by the same name, which is largely based in that part of the Sahara Desert currently recognised as within the territory of the Western Sahara. Morocco suggests that the tribes were, in fact, one and that there subsisted a definite relationship between the sedentary Teknas and the transitory ones⁷⁹. This argument is also, it appears, conceded by Mauritania⁸⁰. However the Spanish refute this, arguing that there was no link between the tribes. The other Moroccan argument about Ma ul-Aineen, a central figure among the Saharan tribes at the time, is harder to prove or disprove: Morocco insists he was a personal representative of the Sultan⁸¹, Spain claims that he was independent and dealt with the Sultan on the basis of equality⁸², while Mauritania claims that he was a Bilad Shinguitti personality who dealt with the Sultan on the basis of equals⁸³. There is also some controversy about the expeditions claimed to have been conducted by Sultan Hassan I, with Spain claiming that they did not get further south than the Sous and Noun Valley, which is not even as far south as the Draa Valley⁸⁴ - the currently accepted frontier between Morocco and the Western Sahara. Once again, lack of accurate evidence hinders conclusive proof of either claim. In any case, the Spanish suggest that the expedition conducted by the Sultan was more to prevent the tribes of the *Bled es-Siba* from trading with Europeans which is once again, hard to prove. There is a lot of merit in the final argument [g) above] about the similarities between the

⁷⁸ See Rezette (1975) *op.cit.* 8 p.14

⁷⁹ ICJ Reports (1975) p.45 para 99

⁸⁰ *Ibid.* p.47 para 102

⁸¹ *Ibid.* p.45 para 99

⁸² *Ibid.* p.46 para 100

⁸³ *Ibid.* p.47 para 102

⁸⁴ *Ibid.* p. 47 para 101

peoples: with common ethnological, cultural and religious ties. This would hold true, albeit in a limited sense only. While the people of the Western Sahara, mainly Berber in origin, are ethnically similar to people in the Atlas Mountains⁸⁵ (an integral part of modern Morocco), they are also similar to peoples in Algeria. They, therefore, share a culture common to the entire Maghreb region of which both Morocco and Western Sahara are a part⁸⁶. The religious ties, cannot be disputed since the Sultan was accepted as the spiritual head of the region through his being a direct descendant of the Prophet and the head of the Maliki Rite professed by the people of the entire region. Thus, while there clearly exists, similarities between the people of the two regions, the question that needs to be addressed is whether these entities form part of the Maghreb or whether Morocco is the successor to the Maghreb and therefore all Maghreb territory belongs to it⁸⁷.

The Court took an interesting view of the arguments presented and suggested that 'the information and arguments invoked by Morocco cannot, for the most part, be considered as disposing of the difficulties in the way of its claim to have exercised effectively internal sovereignty over Western Sahara'⁸⁸. This conclusion was reached despite acceptance by the Court that the Sultan had a unique position in the region as its spiritual head. It suggested lack of evidence towards the appointment of caids, collection of taxes, doubts over the relationship of Ma ul-Aineen and the extent of the Sultan's expeditions as hindrances towards an effective conclusion. It therefore suggested that the information set before it was not enough to conclude that Morocco exercised territorial sovereignty over Western Sahara. The ruling further admitted that there were clear ties of a legal nature between the two entities, displayed

⁸⁵ See generally Gellner (1969) *op.cit.* 64

⁸⁶ See generally Abun-Nasr (1975) *op.cit.* 8

⁸⁷ A similar argument is discussed in Chapter Four with regard to the Brazilian claim to being the successor of the Portuguese state in Latin America.

⁸⁸ *ICJ Reports (1975)* p.48 para 105

classically as between the two separate sections of the Tekna Confederation. This was based on the fact that the routes adopted by the nomadic Tekna tribes were clearly included within the territory of the Tekna caids in Morocco and therefore that it was not inconceivable that some authority could have been exercised since the caids of the Tekna Confederation (sedentary) were clearly accepted as being appointed by the Sultan. Thus, based on this reasoning, the Court ruled that there was evidence to show the display of sovereignty of the Sultan through the Tekna caids, over the nomadic Tekna septs in the Western Sahara. It then concluded by stating emphatically that: ‘...even taking into account the specific nature of the Sherifian State, the material so far examined does not establish any tie of *territorial* sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive state activity in Western Sahara. It does however provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but *only some* of the nomadic peoples of the territory’⁸⁹.

This section of the judgement is perceived as being unnecessarily controversial by some authors⁹⁰ and borne out by some of the dissenting statements appended to the Judgement⁹¹. For these observers, the Court was asked to make a specific judgement about the ties between the region and the two claimants, in the context of the self-determination discourse; a fact that is also admitted by the Court earlier in the text⁹². However, the Court felt compelled to admit that there could have been certain relations between the nomadic septs of the Tekna tribe and the ones that existed within the *Bled Siba* of the Sherifian State⁹³. It seems a relatively undisputed fact within the case, that the Sultan exercised sovereignty over parts of

⁸⁹ *ICJ Reports (1975)* p. 49 para 107 [emphasis added]

⁹⁰ See Shaw (1978) pp. 134-135 & 140-144

⁹¹ See notably Declaration by Judge Nagendra Singh, & Judge Ignatio Pinto *ICJ Reports (1975)* pp. 79-82 & 78-9 respectively

⁹² *ICJ Reports (1975)* p.23 para 29

the *Bled Siba* despite there being little actual evidence of acts of sovereignty by the Sultan in this region. This is partly due to the fact that the demonstration of effective control that the Court sought, seems to neglect the nature of the Islamic state that existed and the kind of political power structure that existed in the region. The *Bled es-Siba* fiercely resisted the Sherifian state and registered their protest by withholding taxes. These people however, came within the ambit of what sociologists Dunne calls the Moroccan Vulgate⁹⁴ - which he claims was partly a simplification of the inherent structure of the region by the colonising power viz. the French⁹⁵. While the territorial sovereignty of Morocco over the tribes of the Draa Valley is not disputed today, it seems fallacious to suggest that similar effective control of the Moroccan state existed at the time of colonisation of the western Sahara by Spain. Thus, a problem with the Court's judgement, it is submitted here, is that it reflects a rather Eurocentric vision of the demonstration of effective sovereignty and the politics of possession. This is further manifested in the reasoning, discussed above, that the sedentary nomads could have exercised some form of authority over the nomadic Tekna. In the words of the Judgement:

The mere fact that those Tekna septs in their nomadic journeys spent periods of time within the territory of the caids of the Tekna confederation appears, however, to the Court to lend support to the view that they were subject, at least in some measure, to the authority of Tekna caids⁹⁶.

There is little evidence presented to prove the exercise of authority by the sedentary Tekna over the nomadic Tekna. The mere fact that the migratory route of the latter traversed through territorial limits of the former, could not be construed as proof of exercise of

⁹³ *Ibid.* p.48 para 105

⁹⁴ Dunn in Gellner (1972) *op.cit.* 4 p. 89

⁹⁵ Dunn *ibid.* p. 90

sovereignty, unless the nomads needed explicit permission to traverse it. The work of sociologists such as Gellner, suggest that the concept of the ownership of property was not the same as is recognised today, in the western world⁹⁷. Indeed the nomads had been traversing these territories for centuries and therefore could conceivably have continued to do so leading up to the time of the colonisation by the Spanish and the drawing of firm frontiers. The assumption that the crossing of migratory paths of a nomadic population over land cultivated by a sedentary population would automatically lead to the latter exercising a degree of sovereign control over the former seems highly problematic in a society that does not appear to respect property laws as understood today. However this judgement belies the point made earlier in discussing boundaries⁹⁸ viz. despite there being ‘unsatisfactory’ evidence linking the *Bled Siba* to the Moroccan state, it is nonetheless accepted as an integral part of Morocco; the region of the Western Sahara though, which may or may not have had a similar relationship, is rejected as falling within the same ambit of the display of Moroccan sovereignty since it falls within the boundary drawn by a different colonising power. While the evidence at the time of colonisation by Spain remains unconvincing, the fact that during the time of the colonisation by Spain, the Western Sahara came to be recognised as a single unit, is unquestioned and raises further questions about the ruling. In addition, the Court cited lack of accurate evidence as a mitigating factor, to arrive at the conclusion that Morocco had failed to demonstrate its exercise of sovereign power in the territory corresponding to the Western Sahara. However in conjecturing about the nature of the relationship between the two Tekna tribes, the judgement reflects the possibility that the sedentary one could have exercised sovereignty over the transitory one, in the face of no evidence of this being the case. Thus on the one hand the Court rejects evidence presented by Morocco as being inaccurate and based

⁹⁶ *ICJ Reports (1975)* p.48 para 105

⁹⁷ See generally Gellner & Micaud (1972) *op.cit.* 4 & Gellner (1969) *op.cit.* 64

⁹⁸ See Chapter Four

on this it rules against Morocco, while on the other hand in its judgement about the relationship between the Tekna tribes it does not feel compelled to rely on the same criterion of the need for incontrovertible evidence.

The other manifestation of sovereignty offered by Morocco to the Court was international recognition of the territory as being within the ambit of the Sherifian state. This by itself would be of great importance. If Morocco could demonstrate that within international law the region was recognised as being part of the Sherifian state, there could be a good case since the Court could reasonably rule that externally recognised ties of a sovereign nature did exist between the Western Sahara and Morocco. This would nonetheless have limited utility since the region, as a post-colonial unit, would still have had the right to self-determination; i.e. the right to choose whether it wished to maintain separate status, associate with the Moroccan state or be integrated into it. Nevertheless, Morocco sought to plead external recognition of its sovereignty over the region, by reference to a number of treaties which fall under the following categories:

- (a) a series of Moroccan treaties towards the protection and return of shipwrecked mariners on the coast of Wad Noun and its vicinity
- (b) a Moroccan Treaty signed with Great Britain in 1895 allegedly defining the territorial limits of Morocco
- (c) Diplomatic correspondence with regard to implementation of Article 8 of the Treaty of Tetuan, which it is claimed, shows Spanish acceptance of Moroccan sovereignty as far south as Cape Bojador

(d) a Franco-German exchange of letters allegedly suggesting the extent of Morocco's territorial sovereignty⁹⁹

The first category includes treaties such as the Treaty of Marrakech which concerned a fishing project by Canary Islanders, and was signed between the King of Spain and the Sultan of the Sherifian state in the Imperial city of Marrakech in 1767. Article 18 of the treaty, according to Morocco, refers to the setting up of a trading and fishing post by the islanders on “the coasts of Wad Noun”. The Spanish, however, based on their text of the treaty claim that the operative clause in their treaty reads: “to the south of the river Noun”. Reading of the actual texts¹⁰⁰ show significant differences.

According to the Arabic text presented by Morocco, Article 18 reads as follows:

His Imperial Majesty warns the inhabitants of the Canaries against any fishing expedition to the *coasts of Wad Noun and beyond*. He disclaims any responsibility for the way they may be treated by the Arabs of the country, to whom it is *difficult to apply decisions*, since they have no fixed residence, travel as they wish and pitch their tents where they choose. The inhabitants of the Canaries are certain to be maltreated by those Arabs¹⁰¹.

Thus, this text suggests that the Sultan was concerned about the well-being of the Canary Islanders during expeditions to the coast and beyond the coasts of the Wad Noun. He warns that they may be mistreated by the Arabs there and that in the event of such mistreatment, remedies may not be available. The reason cited for this difficulty is that the inhabitants have

⁹⁹ See *ICJ Reports (1975)* p.49 para 108

¹⁰⁰ English translation of the Arabic and Spanish texts; accepted by the ICJ

¹⁰¹ *ICJ Reports (1975)* p. 50 para 108 [emphasis added]

no fixed abode and wander across the region. The implication in the text does not suggest that the Sultan *cannot* apply his decisions to them in the event of maltreatment, but merely that it is difficult to do so in view of their nomadic leanings. Another interesting feature in the text of the treaty is the reference to the people 'on the coasts and beyond' the Wad Noun as Arabs. From a reading of the anthropologists studying the area, it would appear that migratory movements in the region suggest that the Arabs in the north gradually pushed the Berbers further southward and into the Atlas mountains on the one hand, while the harsh Saharan conditions forced Berbers from the south further northward. While it seems generally true in modern day Morocco that the Berbers villages exist primarily in the Atlas mountains, at the time of the treaty in 1767, it is unclear as to whether they would have retreated that far. Thus, there remains some doubt about the use of the term 'Arab' in the text and also the fact that these Arabs are referred to as 'Arabs of the country' thereby implying a kind of identity as to where they lived.

The Spanish text however differs considerably from the Arabic text and reads:

His Imperial Majesty refrains from expressing an opinion with regard to the trading post which His Catholic Majesty wishes to establish *to the south of the River Noun*, since he cannot take responsibility for accidents and misfortunes, because *his domination (sus dominios) does not extend so far...* Northwards from Santa Cruz, His Imperial Majesty grants to the Canary Islanders and the Spaniards, the right of fishing without authorising any other nation to do so¹⁰².

Thus, according to this text, there is clear apprehension allegedly expressed by the Sultan with regard to the population that inhabits the area. For a start even the area under

consideration is disputed since the Spanish text allegedly indicates clearly that the area to the 'south of the River Noun' was beyond the control of the Sultan. It goes beyond the Arabic text of merely a lack of powers to enforce decisions (due to the nomadic nature according to the Arabic text), clearly suggesting that his domination did not extend as far. Thus, the difference between the two texts is considerable. Further, the contrast between the situation 'south of the River Noun' and 'northward from Santa Cruz' is also striking in that in the case of the latter region the Sultan seems to clearly act in the role of the sovereign of the territory by granting the Canary Islanders and the Spaniards fishing rights to the exclusion of all other nations.

Thus the controversy in the case arose since Spain disputes the meaning of the crucial words in the Arabic text and held that the meaning found in the Spanish text was authoritative and backed up by subsequent diplomatic correspondence between the Sultan and King Carlos III, as well as by the Hispano-Moroccan Treaty of 1799. For the Spanish therefore, Article 18 is clearly read to mean that the Sultan disavows any pretensions to authority in the area. Morocco, on the other hand, questions the meaning attributed in the Spanish text, and holds that the Arabic text is the official version. The Court failed to rule on this difficult issue and instead avoided the matter completely on the premise that the treaty was not altogether pertinent since it was not close to the period in question, namely 'at the time of colonisation by Spain in 1884'¹⁰³. It nonetheless did not consider Morocco to have established beyond doubt that it extended sovereignty to the region under dispute, also suggesting that the Treaty of Marrakech would be superseded by the later Hispano-Moroccan Treaty of Commerce and Navigation signed in 1861¹⁰⁴.

¹⁰² *Ibid.* p.50 para 110 [emphasis added]

¹⁰³ *ICJ Reports (1975)* p.50 para. 111

¹⁰⁴ *Ibid.* para 111

Article 38 of this treaty reads:

If a Spanish vessel of war or merchant ship get aground or be wrecked on any part of the coasts of Morocco, she shall be respected and assisted in every way, in conformity with the laws of friendship, and the said vessel and everything in her shall be taken care of and returned to her owners, or to the Spanish Consul-General... If a Spanish vessel be wrecked at Wad Noun or any other part of its coast, the Sultan of Morocco shall make use of his authority to save and protect the master and crew until they return to their country, and the Spanish Consul-General, Consul, Vice-Consul, Consular Agent, or person appointed by them shall be allowed to collect every information they may require¹⁰⁵.

According to the arguments presented by the Moroccan government this clearly entails recognition of Moroccan authority in the area of Noun as well as further southwards in the Western Sahara. It suggests that since the Sultan could call upon effective action through his appointed governors in the region, it clearly demonstrates evidence of the exercise of some sovereign authority. This authority is considered by the Government to be spreading southwards to include the Sahara since even in cases of shipwrecks in this area the Spanish authorities 'receive permission to enquire into the fate of shipwrecked mariners and derive that permission from the Sultan'¹⁰⁶. The Moroccan argument is buffeted by the presentation of diplomatic documents relating to a particular incident that occurred on the coast in 1863. A Spanish vessel the *Esmeralda* had been captured while fishing, by so called 'Moors of the frontier coast'. The incident according to documents is said to have occurred 180 miles south

¹⁰⁵ As quoted in the *ICJ Reports (1975)* p.51 para 112

¹⁰⁶ *Ibid.* para 112

of Cape Noun. Therefore it could be considered to have occurred within the realms of what is considered as the Western Saharan coast. In the incident, the Spanish Minister of State instructed his Minister in Morocco to approach the Sultan with the necessary request towards the recovery of men and material as governed under Article 38 of the Hispano-Moroccan Treaty. The Sultan was meant, according to the text of the Article quoted above, to 'use his powers to rescue the captive sailors'. The Court's Judgement reveals that in 'due course the sailors were reported to have been freed and to be in the hands of Sheikh Beyrouk of the Noun'¹⁰⁷.

The controversy between the two parties over this issue stems from a different reading of the situation. The Spanish claim that the shipwreck was caused by the specific lack of control of the Sherifian Makhzen over the Siba, and more specifically the tribes residing in and around the Noun region. Spain then reads the treaty as giving birth to two separate systems for the protection and return of shipwrecked mariners along the north African coast¹⁰⁸. This, it suggests was the real understanding of the situation that existed in the lands under direct control of the Sultan, and the rest of the lands that disputed his rule. The 'general section' as Spain referred to it (i.e. the first part of the article), was valid in areas where the direct authority of the Sultan prevailed. Under this part of the agreement the Sultan would be required to use his normal powers to ensure protection of foreign nationals from harm within his territorial jurisdiction. However, the second part of the article is alleged to refer to a different kind of mechanism, referred to by Spain as the 'special regime' applied exclusively to Wad Noun and further south. Under this mechanism within the treaty, the Sultan was to *try* to liberate the shipwrecked persons, rather than 'order' or 'protect' them¹⁰⁹. For this purpose

¹⁰⁷ *Ibid.* p. 51 para 113. Sheikh Beyrouk was the sheikh for Wad Noun

¹⁰⁸ *ICJ Reports (1975)* p.52 para 115

¹⁰⁹ *Ibid.* para 115

he was required to do what he could, and use ‘his influence with the peoples neighbouring on his realm and negotiate the ransoming of the sailors, usually with the local authorities’¹¹⁰. Spain strongly disputed this ‘special regime’ as being an exercise of the Sultan’s sovereign authority, but considered it rather as the use of his good offices. In addition, the Spanish authorities claim that evidence in the form of diplomatic correspondence suggests that the Minister of Spain in Morocco negotiated the release of the mariners directly; between the Spanish Consul at Mogador and the Sheikh Beyrouk (Sheikh of Wad Noun) in whose hands the mariners were delivered and who is alleged to have exerted great influence in these parts that were out of the reach of the Sultan’s authority. Towards this end, the Spanish also provided diplomatic evidence which suggested that, on one occasion, Sheikh Beyrouk informed the Spanish authority of his resistance to the efforts of the Sultan to gain control of the prisoners, as he preferred to negotiate directly with the Spanish nation. It is indeed questionable, however, whether the decision of the Sheikh to negotiate the release of the mariners directly with Spain is a suggestion of a different sovereignty over this part of the north African coast, especially in view of the existing scenario where tribes within the Bled Siba withheld taxes from Makhzen forces in any case; and the financial reward from dealing with the Spanish in this case would have been considerable. Nonetheless it perhaps dents the display of effective sovereignty of the Sultan over Wad Noun.

The Court also contended the implicit assertion in Moroccan claims that phrases such as ‘to the south of Wad noun’ and the ‘coasts of Wad Noun’, refer to the Western Sahara and claimed that the matter was open to a narrow and broad interpretation: the former would suggest a strict reading where the events were located in the Wad Noun itself, which was accepted as being part of the *Bled Siba* and thereby as part of the Sherifian State but not

¹¹⁰ *Ibid.* para 115

including the region of Sakiet El Hamra; the latter interpretation, on a broad reading would refer to a wider area covering not just the Wad Noun but also the Draa and the Sakiet El Hamra which is integral to the western Sahara region. Spain contested the latter and suggested that from accounts of travellers and explorers there as no evidence of the broader use of the term¹¹¹. Spanish arguments centred around evidence it claimed to have that the Sultan only asserted direct sovereign rule northwards of Agadir. From the south of Agadir onwards to the Noun, Sous and Draa, they allege that the Sultan could only act by negotiation with local powers and his capacity to 'order' in these parts was questionable¹¹². Nonetheless, this is borne out by the understanding of the Moroccan Vulgate as being split along the lines of the *makhzen-siba* divide What also needs to be pointed out at this stage is that the geographic part referred to above, falls within the purview of modern day Morocco, and the disputed region of the Western Sahara lies further south with the Draa valley forming the frontier between the regions.

The Court rightly ruled that the onus of proving the special meaning of the term and evidence for the broader rather than narrower interpretation of the phrases remained on Morocco - a decision that it pointed out was parallel with the judgement in the *Eastern Greenland Case*¹¹³. The Court also stated categorically that Morocco had failed to demonstrate this beyond reasonable doubt and that therefore could not be considered as being sufficient evidence. Nonetheless it recognised the condition implicit in the treaty, that had Spain not believed the Sultan exerted any influence in the territory at all, it would not have had this special provision in the first place. Nonetheless, the Court ruled that 'it is a quite

¹¹¹ See Burke III *op.cit.* 7 in Gellner (1972) *op.cit.* 4 p. 177

¹¹² ICJ Reports (1975) p.52 para 116

¹¹³ PCIJ Series A/B, No. 53 p.49

different thing to maintain that those provisions implied international recognition by the other State concerned of the Sultan as territorial sovereign in Western Sahara'¹¹⁴.

Another treaty suggested by Morocco which remained controversial in the case was the Anglo-Moroccan Agreement of 13 March 1895 which was cited by Morocco as evidence of British recognition of Moroccan sovereignty as far south as Cape Bojador. The treaty dealt with the purchase by the Sultan of a trading company from the North West African Company at Cape Juby¹¹⁵. According to the Court's Judgement, 'the treaty of 1895 provided *inter alia* that, if the Moroccan Government bought the trading station from the company, 'no one will have any claim to the lands that are between Wad Draa and Cape Bojador, and which are called Terfaya above named, and all the lands behind it, because this belongs to the territory of Morocco'¹¹⁶. A further clause suggests that the Moroccan Government under this contract also undertook not to give away any part of the land without the concurrence of the English government'. This treaty is once again controversial in light of differences of opinion between the Spanish reading and the Moroccan reading, and also in the view of the Dissenting Opinion of Judge Ammoun who suggests the existence of a conspiracy between the colonial powers¹¹⁷. However, one aspect that seems rarely questioned is the legal propriety of the title held by the English government to these lands that would transfer to Morocco on purchase of a trading company. Even taking into account intertemporal law of the time with regard to colonisation, it is highly problematic that one type of customary law is met with scepticism i.e. the presence of the non-territorial based allegiances of Bilad Shinguitti and the Sherifian State while customary law applicable to colonial occupation and title to territory seems unquestioned or commented upon. This is especially of concern in a case where regional custom, whilst being

¹¹⁴ *ICJ Reports (1975)* p. 53 para 118

¹¹⁵ This contract was also negotiated by Sheikh Beyrouk, who seems to demonstrate effective rule over the area immediately south of Wad Noun

¹¹⁶ *Ibid.* p. 53 para. 119

¹¹⁷ See Dissenting Opinion Judge Ammoun *ICJ Reports (1975)* pp. 83-101

negated to a certain extent, might appear best placed as far as an international judicial decision is concerned. As far as the treaty was concerned though, it appears that the Court felt that other documents provided suggested that Britain did not view Cape Juby as being within the jurisdiction of the Sherifian State. As a result, the ruling suggested that the treaty demonstrated that Britain understood the interests of the Sultan in the area, rather than his sovereignty over it. This once again remains a rather contrived reading of the situation of substance of an international treaty which does not seem to have any room for contentious interpretation.

Morocco, though, in further support of its claims to the territory being recognised externally also cited the Treaty of Tetuan of 1860, and an alleged agreement in 1900 vide a diplomatic note of October 19, 1900 from the Spanish Ambassador in Brussels to the Belgian Foreign Minister which deals with similar issues of Moroccan sovereignty¹¹⁸. The Court dismissed these documents on the basis that both Spain and Mauritania doubted the validity and possible existence of any Protocol to the treaty that Morocco based its claims upon. Other documents that were considered by the Court in its ruling and found not to be conclusive enough included the exchange of letters between France and Germany (4 November, 1911) which allegedly sought to define the territorial limits of Morocco which, while clearly stating that Rio de Oro was part of the Spanish colony, did not specify the same for Sakiet el Hamra¹¹⁹. Spain countered this by quoting from Article 6 of a Franco-Spanish Convention of October 3 1904, which sets out the geographic limits of Morocco¹²⁰. One would have to question this particular treaty for a number of reasons though, not least because of the conclusion of a treaty between two colonial powers over territory that did not, by rights

¹¹⁸ See para 121-3

¹¹⁹ *ICJ Reports (1975)* p. 55 para. 124

¹²⁰ *Ibid.* para 125

belong to them, but also in view of the critique expressed by Gellner in the shaping of western discourse and stereo-typing that took place in the definition and understanding of Morocco by French officials at the turn of the century. It also needs to be questioned whether these officials were competent to understand and define tenets of culture that were so different from their own (as discussed in Chapter Four), and then allocate and legitimise territory they believed merited separation. In addition, the validity of definition of territory by geographic tools of latitude and longitude, without respect for natural features on the ground, needs to be questioned. Latitude and Longitude while being vital tools in navigation, can not be considered ideal guidelines in the definition of territorial allegiance, especially in light of the complexities of ethnicity and history that have intermingled for centuries within this region. Another important aspect of such treaties was also highlighted by the Court in its judgement (para 126) which discussed the purpose of the treaties: ‘Their [the treaties] purpose, in their different contexts, was rather to recognise or reserve for one or both parties a “sphere of influence” as understood in the practice of that time. In other words, once a party granted to the other freedom of action in certain defined areas, it effectively promised non-interference in an area claimed by the other party. Such agreements were thus essentially contractual in character which explains why one party might be found acknowledging in 1904, vis-à-vis Spain, that the Sakiet el Hamra was “outside the limits of Morocco” in order to allow Spain full liberty of action in regard to that area, and yet employing a different geographical description of Morocco in 1911 in order to ensure complete exclusion of Germany from that area¹²¹. In light of this, one has to question the validity of any of the treaties cited here in proof of international boundaries since they would clearly remain open to abuse by some of the parties concerned as a political tool for exerting or preventing the exertion of power within a given region. Thus, after having examined the documents relating to the external recognition

¹²¹ *ICJ Reports (1975)* p.56 para 126

of Moroccan frontiers by the various treaties, the Court concluded that it had insufficient evidence to draw any inference towards those boundaries in question. It therefore ruled that no tie of territorial sovereignty could be suitably established, while at the same time admitting that there were indications 'of international recognition at the time of the colonisation of authority or influence of the Sultan, displayed through Tekna caids of the Noun, over some nomads in the Western Sahara'¹²².

7.4. Identity in the Western Sahara - The View of the Polisario

Having looked at the arguments portrayed by the two claimants and Spain, in the case, it is now time to turn to the arguments put forth by the people resident in the region. The Saharawi people¹²³, or the nomads that wander through this part of the Saharan desert could not present their case before the ICJ since they were not a state. This remains the inherent problem in cases of self-determination before an international court such as the ICJ since its adjudication procedures are only open to states. One of the key problems in the examination of any case of self-determination is the viability of the national liberation group that heads the movement. It is important to, via some process, try and establish whether the group that champions the cause for separatism does so with the mandate of the people they represent, or whether they, by the use of arms are trying to destabilise a state for their own interests. The group that allegedly represents the view of the Saharawi people is the Polisario Front, as discussed in the previous chapter. This group has been declared by the UN as the voice of the Saharawi people as early as the First Fact Finding Mission undertaken under the aegis of the Security Council in 1978¹²⁴. As pointed out in the earlier chapter, this group has been at the

¹²² *Ibid.* p.57 para 128

¹²³ The word 'people' here is used more to denote a group, and without prejudice to its meaning within article 1(1) of the International Bill of Rights

¹²⁴ See Damis J, 'Morocco & the Western Sahara,' in *89 Current History (1990)* p.165. Also 'The Western Sahara Conflict: Myths and Realities,' in *17 MEJ (1983)* pp. 173-4

forefront of the 'war of liberation' against Moroccan forces, and has also declared the independent state of the Saharawi Arab Democratic Republic on February 28, 1976, one day after the official withdrawal of the Spanish. It is to this group that we shall now turn for the final section of this case study: i.e. the argument for the self-determination of Saharawi people¹²⁵.

The genesis of the group has been discussed earlier, but it has been a long road for the Polisario from its early days as a student movement, to a group that could fight an armed war against an enemy close to NATO's interests in Europe¹²⁶. This road has been through acquisition of arms to physically resist Moroccan troops as well as diplomatic jostling which has gained it the recognition as a state, by as many as 74 countries, and importantly the Organisation of the OAU¹²⁷. The Polisario currently operates the refugee camps in Tindouf, Algeria and has received considerable help from the government of Algeria¹²⁸. They claim that the Saharawis are a separate people in the sense required under article 1(1) of the International Bill of Rights (ICCPR and ICESCR) and on this basis have demanded their right to self-determination. After a struggle for nearly twenty-five years the process still depends on the results of a referendum scheduled, according to the latest Secretary General Report, in the first half of 1999. The following is an explanation of the Polisario belief that the Saharawi people are a 'people' deserving the right to self-determination.

¹²⁵ Research for this section involved field-work as well as bibliographical sources. Special thanks are due to Mr. Brahim Mokhtar and Mr. Kamel Fadel, (see Appendix III) Head and Acting Head respectively of the Polisario, UK who have been invaluable in clarifying doubts as they arose and arranging for the trip to the camps in Tindouf, Algeria which however failed due to technical hitches with the research visa to Algeria, and the last minute ban on non-UN personnel flying on UN transport planes from El Ayoune (Laayoune) to Tindouf as had kindly been consented to by Robert Kinloch, Head of Identification Commission, UN

¹²⁶ For a discussion of American involvement in the Western Sahara struggle on the side of the Moroccan government see generally, Leo Kamil *Fuelling the Fire* (1987)

¹²⁷ For a transcript of the Moroccan version of events at the OAU meeting in Nairobi, see Appendix for transcript of the interview with His Excellency Khalil Haddaoui, Ambassador for Morocco to the UK.

¹²⁸ This has been alleged by Morocco see the interview with the Ambassador, but has also been confirmed by the Polisario sources interviewed.

Experts point to a number of factors of differences between different peoples. These have been discussed in Chapter Two. Thornberry, for instance, lists seven factors that led to differences in groups of people¹²⁹. He did not intend these to be definitive and indeed, it is extremely difficult to suggest that they might be. They are merely indicators to various stress-points of differences in identity. Some of the factors we shall briefly examine now, are:

- a) language
- b) customs
- c) history
- d) culture
- e) religion
- f) ethnicity

a) Language: The Maghreb, as a whole, has been highly influenced by the spread of Arabic as the main language. In addition, colonialism brought with it, the language of the respective metropolitan states that were in power in a given region. However despite this, original Berber languages survive in many parts. The Berbers have constantly resisted Arabisation, and many groups of Berbers in Morocco still preserve their own languages. However, the fact remains that to survive in Moroccan cities, fluency in Arabic is essential. One of the observations made in the course of field work in Morocco is that urban Moroccan culture was essentially Arabic, despite the claims in Morocco that Berbers and Arabs are equal; (Islam treats all men as equal), the cities clearly veer towards Arabic as the main language. The Polisario, fierce proponents of their indigenous identity, suggest that their

¹²⁹ See Thornberry in Lowe & Warbrick (eds.) *The United Nations and the Principles of International Law: Essays in Memory of Professor Michael Akehurst (1994)*

language 'Hassaniya', is clearly different from Arabic, and is in fact a separate language spoken by Saharawis and not understood by Arabic speakers. The official counter-suggestion from the Moroccan government is that Hassaniya is no more than a dialect¹³⁰. Interestingly enough the etymology of the word Hassaniya, translates as 'the language of the followers of Hassan', which has strong Arabic undertones. This can be explained by the importance of Islam within the overall identity of the people of the Maghreb, and undoubtedly, Islam spread to these parts via the Arabs. Thus, though the Arabic links are strong, as the Polisario suggests, that does not make the people necessarily Arabic.

b) Customs: This difference, the Polisario claims, arises primarily out of the difference between Arabs and Berbers. Official sources in Morocco usually dismiss this as irrelevant since such differences exist in Morocco too; between the Arabs and Berbers resident in the state. However, as pointed out by the Polisario, differences in custom in the case of the Saharawi people arise basically from their practice as nomadic people. The inherent difference between a settled and sedentary population has given rise to distinct customs, unique to the Saharawi people, not just in comparison to Arabs, but also in comparison to other Berbers.

c) History: This remains one of the strongest signifiers of identity, and the differences between the Polisario and the government of Morocco in the reading of history is the prime cause of difference in the case. These arguments are central to the case and have been discussed above. Essentially, the Polisario read history of their region, as one of independence from both the Sherifian state in the north and the Bilad Shinguitti in the south. They agree that the Saharawi nomads did wander across tracts of land of these two entities; however, they

¹³⁰ See interview with the Moroccan Ambassador as appended

strongly resist the suggestion that this ever implied an exercise of sovereignty over them. This argument has also been discussed in the light of the settled Tekna tribe and the sedentary Tekna tribe above. Thus the Saharawi claim to self-determination is based on a reading of history similar to the Spanish one. They claim that the independent tribes formed most of the population of this part of the Saharan desert; functioning autonomously, and dealing independently, on their own behalf, with the Spanish. These tribes embraced a democratic spirit and their leaders spoke on behalf of the tribe since they represented the peoples of the tribe in the *Jema'a*. The Polisario reading of history thus strongly refutes any territorial sovereign connection or allegiances either to the Sultan of the Sherifian state or to the Emir of Adrar.

d) Culture: Differences here, as in customs, arise out of the basic differences between a settled and sedentary population. The Saharawis fiercely protect their identity as nomads, and this essential ingredient to the Saharawi identity has led, over centuries, to the formation of a culture that is different from that of the settled Berbers living within Morocco, Mauritania and Algeria. It is clear that Berber culture can be isolated and identified in all of these countries. Moroccan guide books are awash with examples of 'Berber culture' and 'Berber villages' that are today portrayed as tourist attractions¹³¹. Within Morocco too, subtle differences exist between the two peoples; however when coupled with centuries of a lifestyle completely dictated by the terrain of the Saharan desert, irreconcilable differences in culture arise. Thus the Saharawi argument of huge cultural differences is extremely hard to ignore.

e) Religion: This is an interesting and vital link within the whole case. Most of the region of the Maghreb (used in the literal Arabic meaning of 'the great west') professes

Orthodox Sunni Islam of the Maliki rite. This rite comes out of the son of Prophet Mohammed after the splitting of the four Caliphs in Mecca. It is a rite followed mainly in this part of the world. Interestingly, as the direct descendant in line with this rite, the Sultan of Morocco (and the newly crowned King today) is considered as the spiritual head of the rite. However the key difference between Moroccan and Saharawi views are that the king is recognised as a spiritual and temporal head in Morocco while in the region declared as the SADR, he is merely the spiritual head. In recent years the late King Hassan's has also been tarnished for some people in the Western Sahara by what they perceive as his firm refusal to relinquish territorial claim to their region. The other issue that needs to be highlighted is differences in the religious practices of the Saharawis, commented upon by Seddon suggesting that southern Berbers were Islamicised without being Arabised, in the sense that they still clung on to their indigenous customs and applied Islam in a manner that was congruent to these customs. He claimed that women, for example, were freer than their Arab counterparts, and this is also borne out in modern Morocco where the difference is still clear.

f) Ethnicity: Despite the claim that ethnicity is not a cleavage and that Islam treats all men and women as equals, definitive ethnic undertones exist. Morocco is often portrayed as a fascinating mixture of ethnicity in that Arabic, European, Berber and Black blood has intermingled to form a unique culture¹³². Notwithstanding that there has been contact between different peoples on this territory for centuries, it is important to note that the Berbers have isolated themselves and strong Berber identity frowns upon inter-marriage outside the tribe never mind the clan. Saharawi identity remains primarily Berber since the Arabs coming from the north had little incentive to push as far south as the Desert. Amongst Berber tribes, inter-

¹³¹ See e.g. *Morocco: The Lonely Planet Guide (1997)*

¹³² See the interview with the Ambassador, Appendix II

marriage is still rare and in this sense an 'ethnic purity', dangerous concept as it is, has been maintained.

From the foregoing, there can be a compelling case for a separate identity, independent of Morocco, for people that reside in this section of the Saharan desert. Nonetheless, this discussion remains subject to the ultimate test of the result of the referendum, and in that sense arguments for and against universally recognised statehood that the Polisario demands and Morocco resists will recede into oblivion. There is now a sense of expectancy for the actual holding of the referendum which will allow people resident in the area to choose the option of endorsing a separate state or integrating with Morocco. But the process of holding the referendum, as underlined in the previous chapter, still depends on the political processes that hinder or encourage the identification of the people that will be allowed to vote. It is only when the process of identification has been completed that the actual referendum can be held. This, more than anything else highlights the problem associated in defining who exactly the people are.

Conclusion

Thus, in conclusion to this case study, two questions remain to be asked: firstly, what does self-determination mean in the context of the Western Sahara Case? And secondly, what can we glean from the complexities of identity in the Western Sahara that is relevant to the general development of the international law of self-determination? It is to these questions that we shall turn, in the conclusion of this thesis. Suffice to reiterate at this point, that the research conducted, especially with regard to the Western Sahara, seems to point clearly to one fact. The model of self-determination enunciated by Wilson in the aftermath of the First World War does not provide us with apt solutions on the verge of the twenty-first century.

While that particular model was significant in colonial emancipation post World War II, it has failed to be as cohesive in situation like the Western Sahara which are beyond the pale of salt-water colonialism. Indeed it needs to be questioned whether a model of self-determination such as the current one could ever be suited to answer the questions raised by the Western Sahara imbroglio.

The process in the Western Sahara has, of course, now been removed from the realms of the law and is subject to the political process of the referendum. The legal norm of self-determination which ought to have been at the forefront of the transfer of power to the governed could not be applied in any significant manner due to the overpowering political circumstances. Instead the situation is to be 'resolved' by the referendum. This process seems simple enough: let the people determine the fate of the territory. However, this echoes the question raised by Jennings and discussed in Chapter One: Who is to determine who the people are, that should be allowed to determine the fate of the territory? The suggestion was that *Law* or the *legal discourse* be given this task to resolve, on the basis of justice and equity. However, the law, in its ambiguity, has failed to provide guidelines to determining who a people ought to be. While this should not be held up as a defeat for the international law of self-determination, it nonetheless highlights the subjugation of legal norms to political processes that has become part of the practice within international relations. Also, perhaps more importantly it raises the question of whether international law is the right medium for determining the intricacies of the diverse situations that modern 'self-determination' conjures up.

CONCLUSION

The logistics faced in the determination of the Western Saharan 'self' would come as no surprise to Wilson. For a true picture of 'who' a people are, he would have little hesitation in calling in the anthropologists and sociologists, in order to determine the realms of the boundaries of identity. This is exactly what transpired in the plebiscites post World War I when the Wilsonian conception of self-determination was first expounded¹. However there are two important issues to be noted here. Firstly as discussed in Chapter One, the concept of self-determination was informed by the spirit of the 'consent of the governed' that formed the basis of the American Declaration of Independence. This suggests that what Wilson really had in mind, was that a people govern themselves rather than be governed by a non-representative ruler. These noble ideas were translated by the political rhetoric of the time into the norm of 'self-determination'. Post World War II the norm was interpreted as the focal point around which forces against colonisation could mobilise. In the process of this emancipation, very much within the realms expressed in the American Declaration, the norm was at first reinforced, and then metamorphosed. It was reinforced since the spirit than informed it saw the lifting of the colonial burden from the peoples of Africa and Asia in particular. The forces of colonialism had, by a combination of material exploitation and a genuine belief in attempts to 'civilise' the rest of the world, managed to affect the indigenous development of territories far-removed from their own Metropolitan State. As a result these territories were moulded and shaped to fit models that were strange to them. Over the colonial period, new identities were

artificially forged which sat uneasily on the older more indelible ties that hitherto existed. With the development of the norm of self-determination being instrumental in unleashing anti-colonial feelings, these empires began to crumble. However history in the shape of World War II had taught the victorious powers to abhor disorder and anarchy. Informed by the Christian doctrine of peace and security, they built a world order around a UN system that venerated these values above all others.

As a result, decolonisation and ‘self-determination’ took place keeping in mind the need for order and to ‘save succeeding generations from the scourge of war...’². This process revealed itself and shaped the agenda of decolonisation. Henceforth ‘self-determination’ came to mean the decolonisation process with the added stringent conditions of the imposition of statehood on entities emerging from this process. A further condition was that these new ‘states’ had to respect the boundaries drawn for them by colonial masters. The theoretical doctrine that justified this process was that of *uti possidetis juris*.

As a result the post-colonial state, as a ‘self determined’ unit was deemed a triumph for forces of self-determination and self-rule. Ideas of ‘Nation-Building’³ were stressed and post-colonial states set about on the mission of building national identity. However this process is not easy and manufacturing identity in the face of untold poverty and corruption has proved a difficult process. As a result these ‘states’ have begun to come apart usually following ethnic fault-lines within new ‘national’

¹ See Whelan A., ‘Wilsonian Self-Determination & the Versailles Settlement,’ in 43 *ICLQ* (1994) 99-115

² The UN Charter, Preamble, 1945

³ See Deutsch K & Foltz W., (eds.) *Nation-Building* (1963)

identity. Separatist forces with disfranchised minorities in the vanguard are forcing a rethinking of 'national' identity within the state. The international legal discourse of self-determination, considered closed with the end of the colonial process, is suddenly being re-opened by smaller and smaller sub-state entities seeking 'nationalist' agendas. And while all this is taking place, the international legal discourse has been left behind with an idea of self-determination that is clearly dated to the decolonisation period. As a result political forces have governed these struggles and as happens in political processes - they were resolved on the basis of the power of the vested interests involved in the various struggles. Thus the situation in Bangladesh was resolved with the entity of East Pakistan being allowed to form a separate state while Biafra remained a part of Nigeria.

If a legal discourse of self-determination is to be re-formulated, based on principles of justice and equity rather than merely highest-bidder political forces, then we will need to take into account the diversity of the system that we have inherited. As proven in the Western Sahara Case there is no one true 'self' that can be identified and categorised to the liking of an international community ever ready to classify 'the Other'. The conditions in every single case of self-determination vary significantly based on a host of factors that may or may not be apparent to the outsider. International law needs to take into account the fact that the 'one size fits all' that has characterised the discourse of self-determination has limited utility.

This brings us to the second issue mentioned above in discussing Wilson's perceived reaction to the process in the Western Sahara. While he would have been

appreciated the intricacies in determining the Western Saharan 'self', he would have also probably favoured a return of the region to the system that it originally had. In the *jema'a* the Saharawi tribes clearly had a sophisticated form of self-governance that was capable of providing effective governance. While this *jema'a* was artificially legitimised under colonial aegis towards the end of the Spanish reign in the region, it clearly had a pedigree inherited through centuries from the original inhabitants of the land. These tribes also had a different conception of belonging and ownership reflected succinctly by their nomadic lifestyle. To straightjacket and parcel them within a sovereign state is always going to be problematic.

The heart of the problem in the Western Sahara lies in the defeat of legal values by the political forces that allowed the Green March to go ahead in 1975⁴. Had the international community been guided by clear-cut legal virtues at that time, the *jema'a* which had dissolved itself would have been at the forefront of the transfer of power from the coloniser to the people. Those 'people' could have been Moroccan, Mauritanian or Saharawi and there is little evidence towards knowing which it would have been. However by allowing the entry of the Green Marchers, the international community, by political inaction, affected the process of true self-determination in the region. Be that as it may, today there is little point in re-iterating the situation of 1975. It is more important to press on with the task of ascertaining afresh 'who' the people are. And once again, this will be done by an approach to a crude plebiscite, the participants of which are extremely problematically chosen. But there is no other plausible alternative at this stage.

⁴ Shaw 'The Western Sahara Case,' in 44 *BYIL* (1978) 118-154

This thesis does not offer any answers to the Western Sahara problem. It does not even attempt to offer any solutions towards the formulation of laws of self-determination. It merely seeks to demonstrate the intricacies that are present in the current discourse of self-determination and the fallacious assumptions that these are based upon. To create a new legal norm of self-determination is clearly a priority for an international system that values international peace and security above all else. To create a norm of self-determination that is just and equitable is an even greater need if the goals of true emancipation are to be achieved. This is imperative in a world that is increasingly wracked by forces of post-modern tribalism that severely threaten the state⁵. These forces are being unleashed in places that in recent history have been artificial, rather than within the more established states of Western Europe. In this lies a lesson in itself. The state is well established in Western Europe having been in place since the Peace of Westphalia at the least. However in most other places it has been grafted either through colonialism or by the equally artificial and authoritative regimes of 'socialism'. These are the entities that are now facing the wrath from fragmentary forces and it is with these forces that a modern law of self-determination will have to cope. Since in the interests of peace and order it is vital that such forces are contained, it is equally imperative that they are contained within norms of justice that can provide an equitable solution that respects short as well as long term peace and stability. Within this it also needs to be re-iterated and recognised that the norm of self-determination, if it is to remain true to the virtues it professes, cannot merely include merely the accommodation of peoples within states (euphemistically known as 'internal' self-determination). It has to also take on board the option of secession or

⁵ Franck T., 'Post-Modern Tribalism & the Right to Secession,' in Brölmann C *etc.* *Peoples and*

external self-determination. Without this option 'self-determination' cannot truly be considered to deliver the emancipation that it promised when presented as a modern international legal right. Failure to address this will only serve to bolster problematic short-term 'peace and security' while failing to address the larger and more relevant aspects that threaten this peace and security.

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Appendix I

Diary of a Nation: Background to the Crisis

1948

11 Mar Mujib arrested in language demonstration

1950

6 Oct Aziz-Ul-Haq denounced Constitution drafting committee's report, accused Liquat Ali Khan regime of a dictatorship in guise and feel.

14 Nov 13 members of the Muslim League issue joint statement calling for autonomy of East Pakistan

1954

15 Mar Section 92A applied in East Pakistan on expiry of Provincial Legislative Assembly.

19 Mar United Front created with H S Suhrawardy (Awami League) and Fazlul-Ul-Haq (Krishak Smarik Party) to lead a majority government.

17 May Pak premier Mohammed Ali describes language disturbances as 'foreign conspiracy'

29 May United Front dismissed, Governor's rule imposed, Iskandar Mirza dispatched to Dhaka as Governor.

1958

24 Jun President's Rule imposed in Pakistan

20 Sep Speaker of Provincial Assembly declared mentally unsound, Deputy Speaker Shahid Ali beaten to death.

7 Oct Unveiling of martial law. All political parties banned.

12 Oct Mujib, Bhashani, Han Abdul Ghaffar Khan arrested.

1960

12 Sep Mujib convicted on criminal misconduct

1961

21 Sep Police firing on student demonstrators shouting anti-Ayub slogans

24 Sep HS Suhrawardy demands return to democracy

1962

9 Jun Lifting of Martial law. Formation of a new constituency based on basic democracy. East Pakistan opposes.

1966

Feb Mujib enumerates the *Six Point* demand
20 Mar Mujib arrested
7 Jun Rioting in Dacca, Chittagong, Narayanganj and Taragaon. Police fires on 1000s of people for breaking the peace.
17 Jun Awami League and Krishak Party form a shadow government.

1967

2 Feb Opposition unites to call for autonomy of East Pakistan
27 Apr Mujib arrested for a 'prejudicial speech'

1968

5 Jan Dacca students exhibition demonstrating economic disparities
6 Jan 28 arrested for planning the secession of East Pakistan
18 Jan Mujib arrested in Agartala Conspiracy Case (allegedly independence for East Pakistan with the help of India)
7 Dec Anti Ayub demonstration in Dacca, Chittagong and Jessore

1969

25 Mar Ayub replaced by General Agha Yahya Khan.
26 Mar Broadcast to the nation -- promising to bring sanity
28 Mar Mujib releases plans for a federal set-up.
10 Apr Yahya promises election based on adult franchise
28 Nov Yahya declares Oct 5 1970 as election day

1970

1 Jan Political activity begins
1 Apr Dissolution of one unit of West Pakistan into 4 provinces
2 Sep election postponed due to floods in East Pakistan

- 7 Dec elections held. Result: Awami League 169/313 , Bhutto's People's Party 81/313
- 9 Dec Mujib declares that Government will be based on the Six Point demand

1971

- 14 Jan Yahya refers to Mujib as future prime minister
- 29 Jan Talks between Yahya and Bhutto fail
- 13 Feb March 1 fixed as date for the meeting of the National Assembly
- 15 Feb Bhutto threaten to boycott Assembly unless Mujib compromises on Constitution basis
- 16 Feb Mujib elected leader of the Awami League
- 28 Feb Bhutto seeks postponement of National Assembly meeting
- 1 Mar Yahya postpones assembly meeting, sacks Governor of East Pakistan Ashar. Mujib calls for a general strike to be observed.
- 2 Mar Resentment flares in Dacca army deployed to curb violence
- 3 Mar Awami League launches non-co-operation & non-violent movement based on demands for autonomy.
- 5 Mar 300 Awami Leaguers killed.
- 6 Mar Yahya declared new date for Assembly meeting -- 25 March
- 7 Mar Mujib calls for holding back on taxes, civil disobedience movement. East Bengal Rifles regiment refuses to shoot on civilian populations.
- 8 Mar Civil Disobedience movement launched
- 9 Mar East Pakistan judge refuses to swear in new Governor, Martial law convenor - General Tikka Khan
- 15 Mar Mujib issues unilateral declaration for autonomy continues to negotiate with Yahya who arrives in Dacca.
- 21 Mar Bhutto arrives in Dacca
- 22 Mar Yahya postpones assembly session indefinitely.
- 25 Mar Awami League announces Constitutional deadlock. Yahya and Bhutto leave for West Pakistan. Army goes on the rampage. Alleged genocide begins.

Appendix II

Interview with His Excellency, Khalil Haddaoui, Ambassador to the United Kingdom. Moroccan Embassy, and 49, Queen's Gate Gardens, London

[The Ambassador consented to speak after a three hour meeting the previous day with Mr. Ariad, First Secretary to the Moroccan Embassy in London. The Ambassador was unwilling to be recorded on tape but allowed me to take extensive notes. His reason for not going on tape was that he would then have to speak as the Moroccan Ambassador rather than this way, in which he spoke as a Moroccan Diplomat who had been personally involved in the situation since it developed in the mid-seventies. For this particular interview, I handed His Excellency, via Mr. Ariad, a list of questions which I would have liked him to address, to consider, overnight. The meeting took place the following day, on the 17th of March, 1998 in his office in the Moroccan Embassy, Queen's Gate, London. Mr. Ariad, the First Secretary was the other person present throughout the duration of the meeting which began at 11:30 and terminated at 14:45.]

Q: Your Excellency, I am conducting research within International Law into the issues of sovereignty and the threat that Self-determination poses to it. One of my case studies for my thesis is the situation in the Western Sahara. Sir, how do you view the situation - and how do you react to the politics of identity and difference as we have been discussing?

A: It is important to understand the Western Sahara issue by looking at the history of the region of North Western Africa. Too many people fall into the mistake of looking at this particular situation in isolation of the culture and history of the region.

If you look at the period immediately following the decolonisation process you will find that the Western Sahara issue is another extension of the historic misunderstanding between Kingdom of Morocco and Algeria.

Let's go back in history first to look at the colonial aspects of the presence of colonial powers in the region. Algeria was occupied and colonised by France in 1830. This presence remained until its independence in 1957. Morocco on the other hand is the *'only* real state in the area. This has been so for the last twelve centuries.' It is important to remember that the Kingdom of Morocco at some points in history included parts of what is now Spain, in the north and extended as far as west as Tripoli in Libya. In fact looking at the broader sweep of history you will find that it was a Moroccan (Maourabadeen) who prevented the further extension of the Ottoman Empire - which extended all the way up to the Moroccan borders. Algeria on the other hand has never existed as a state. It is a manufactured entity - manufactured solely by the authority of the French colonial rulers. Its boundaries are artificial and the lack of internal cohesion today can be traced back to French rule. Moroccan colonisation did take place however it took a very different format from what could have been

witnessed in Algeria. *Moulay Hafidh* signed, with the French, the *Treaty of Protectorate* in 1912. However the ruler of Morocco was constantly at odds with the French and it took superior French arms to restore their order after the treaty was brought down within weeks of being signed. But even this serves to demonstrate that the French negotiated with a Moroccan sovereign -- unlike in Algeria which was always treated as a possession. In 1947, the King of Morocco made a speech calling for an end to the Treaty of Protectorate by 1953 - which required the King of Morocco to counter-sign legislation in the region. Trouble brewed when the King refused to sign one of the bills put before him, and was exiled to Madagascar with his family -- which included the current King -- then Crown Prince Hassan; and signalled the beginning of a civil movement. But I would like to highlight once again the fact that the King was required, even under the so-called occupation by France, to counter-sign all laws -- which is further proof of the existence of the Moroccan state. The French had begun to test nuclear bombs in the Western Sahara, and by this time had begun to re-draw Algeria with Moroccan territory within it. A look at the map of the region shows very clearly that many of these boundaries have been drawn with little regard to the ethnicity and history of the region.

By 1955, the Royal Family returned to the Kingdom, and the Treaty of Protectorate of 1912 was soon rescinded, and the Kingdom of Morocco once more, granted independence. A few years later (1958) saw the Algerian revolution. The movement and call for independence in neighbouring Algeria was supported by Morocco which through the 1960s, attempted to give the Hassani led national liberation movement in Algeria the support they needed to overthrow colonial rule. France called on the Kingdom of Morocco to stop supporting the Algerians in return for the territories that it had drawn within the Algerian frontiers. The King however refused, believing that the matter could be resolved between Algerians and Moroccans instead. There is a letter, which proves this -- one from Farhat Abbas - the head of the Algerian movement which thanks King Mohammed V for his support in the matter of Algerian independence. However when the Algerians did achieve independence, Farhat Abbas was ousted and Ben Bella, his successor refused to stand by the word of Abbas. As a result the *War of Sands* ensued in the south. The problem was also the fact that the OAU had included, in its charter, respect for the norm of *uti possidetis* - which required Members to recognise the borders recognised by colonial countries. But the rule was ridiculous in this situation since for centuries the governor of Tindouf (in Algeria) was appointed by the King of Morocco. In fact, Mauritania too, was a completely colonial manufactured entity... .

That brings us to the Western Sahara Question. The presence of Spain in the Sahara was the result of a gentlemen's agreement with France. Spain had no concern for the region -- it merely wanted a coast opposite the Canary Islands which it had gained possession of. By gaining control of the coast opposite the Islands, Spain believed it could strategically restrict Moroccan influence. At the time of decolonisation of the Sahara, instead of returning the property to Moroccan sovereignty, the matter changed complexion with Algerian intervention along with Ould Daddah - the President of Mauritania.

The matter could only be resolved by the signing of the *Madrid Accords* in 1975. And for that it was required for us to make a tactical decision to take Mauritania with us, in the larger interests of preventing Algerian intervention in the matter, and allow the Spanish to succeed in their divide-and-rule policy. The claim by the so-called Polisario that the people living in the western Sahara have their own culture and language is mere propaganda to give itself credibility. "People living in the Spanish Sahara are the same as the people in Tarfaya, Ifni, Tindouf and Mau -- there are differences between all of these people -- due to standard of living and conditions, they adopt different dress, speak different dialects of the language - of which Hassaniya is one. Ironically Hassaniya is a derivation which means 'of Hassan' which is Moroccan. We have to realise that conditions impose certain living conditions upon people - and the tribes of the Sahara merely reflect this. Besides there are huge numbers of these tribes that live in Morocco and have done for centuries. It would be ridiculous to affect the unity of Morocco based on these claims. The Almoravids have been ruling the whole region for centuries and they originate in the South -- and would therefore be Saharawi in origin -- if this logic is to be followed. Besides if you look at the differences in the populations making up the Moroccan population you will find other differences that are as stark in the Rif Mountains, the Mid-Atlas... the Berbers -- they speak a different language too, have different clothes -- adapted to the natural conditions they live in. It is important to understand that Morocco is a mixture of cultures and ways of life. As Leopold said a Moroccan is a Negro-Berber-Arab -- that is a mixture between Berbers, Arabs and peoples from Black Africa in the south. As King Hassan II points out there is no Moroccan who can deny that there is black blood in his veins... And the Berbers -- they originate in Yemen -- can they ask for self determination too?

The population, according to the Spanish census was 74,000. Polisario propaganda, 10 years ago called for the people allowed to vote in the election, being close to 800,000 people. Now they have reduced their claim to 74,000 -- and base it only on the census figures. We, the Moroccan Government accept the Spanish census -- which has the big advantage in that it exists -- as a basis - but we must take into account people who fled to the North from, Spanish pressure.

As the King said if someone is defending a culture and civilisation of the Sahara desert, they must do so as a whole they must be logical and understand that the culture ought to cover the whole of the region of the Desert -- all the way from the Red Sea to the Atlantic -- and not just one portion of it. So we think the differences between the so-called Saharawis and other Moroccans is a creation of Polisario propaganda.

Q: Your comments please, sir, on the OAU participation in the issue...

A: It is important to understand the role of Algeria once again. Algeria is a country rich in oil and gas and has taken the title of being a 'socialist' country. This is a crux is the basis of support for Algeria amongst African countries. A lot of the former Portuguese colonies, too have adopted similar socialist/communist identities -- they are all anti-imperialist, have been supportive of the Soviet Union, and have actively supported Algeria within the OAU.

The issue of recognition, it needs to be said is a matter that ought not to be political but legal. Certain norms need to be fulfilled before an entity is declared a state. Article 4 of the OAU Charter talks about criterion for Member states which are that they must be African countries, and they must be independent and sovereign. Does the so-called SADR fulfil this? The mere presence of the SADR within the OAU is an indicator of the violation of the Charter. It has made the issue of recognition a political one - while the Charter suggests that it is a legal issue - and by the norms the so-called SADR cannot be granted recognition. The fact that it has is a 'shame for Africa.' But overwhelming support for Algeria for the reasons mentioned earlier saw this situation come to pass, as the countries strongly imposed their view on the summit in Addis Ababa. It is also interesting to note that most of the regimes who recognised the SADR in those days have today disappeared. Among those that have survived, the Congo has changed - and many others have withdrawn recognition. Efforts are still on as well, to try and get Morocco to return to the OAU fold, but we will refuse to do so. As a founding member of the OAU we cannot go back to an Organisation which has compromised itself by going back on something as basic as the Charter.

I was personally present when we walked out of the OAU. I still remember at the press conference called that evening, the Secretary General of the OAU suggesting that Morocco had a margin of one year within which it could return to the fold. This statement outraged the King, who called his own press conference and declared that the withdrawal of Morocco was immediate and it not need the one-year margin. Normally, the proceedings of the OAU are conducted away from public access. It is only the opening statements to which the press are allowed. However we made our move, here in the eyes of the press since we had nothing to hide. Requesting permission to speak at the OAU summit, we declared that we had to withdraw from the OAU due to a compromise of its norms of foundation. It is interesting to note that neither Zimbabwe (under the Ian Smith regime) nor Namibia (during South African occupation) were given early recognition. And even the ANC and SWAPO were given 'liberation movement status' which allowed it to be observers. What basis then, other than the political support of Algeria, did the granting of membership as a state - to the Polisario have?

Later in negotiations with Perez de Cuellar, Morocco conceded to allow OAU involvement - since the United Nations Charter calls for regional organisations to be involved in cases such as this. However, in Moroccan eyes, the OAU had lost its credibility. The King, noting this called initially for representatives of the OAU Chairman, rather than of the OAU itself, to stand as observers in the identification process. Later we conceded to letting this condition lapse since it was only slowing up the identification process -- and we were happy as long as the United Nations played the major part and the OAU were merely there as observers.

Q: ...And a comment on United Nations involvement, if you will...

A: We have always welcomed United Nations involvement in this process since we believe that is the only way that some consensus can be reached. Our position now is that we want to see a free and fair referendum organised under United Nations auspices. My personal opinion is that there will continue to be obstacles to the holding

of the referendum. The Polisario will never allow the process to go through to the end, since the Polisario know full well the support that Morocco has from within the tribes in the Sahara. If they allow the people in the camps that they are holding prisoners, their freedom to move --- they know that they will leave immediately and return to the territory.

Q: What is your opinion, Your Excellency, on the issue of the Dispute Tribes?

A: As for these tribes, in 1992 Resolution 725 was passed by the Security Council which endorsed the criterion for voter eligibility agreed to by the parties in the Secretary General's report which was at the time, a compromise between the parties. However Algeria has constantly been placing obstacles in the path of its completion. We accepted the stalemate and were willing to compromise. However the Polisario and Algeria were not happy. However since the adoption by the Security Council, this has taken full legal force -- and the Identification Commission has to work within the agreements agreed.

Q: Finally, how do you view the issue of Self determination?

A: Self determination is a norm that has been used and abused. It was initially expressed in the words of Resolution 1514, which was aimed to oblige colonial powers to give countries their independence. But it is not, and was never meant to be an excuse for Balkanisation. Self-determination has to be accepted within the limits of 1541 which was passed in the same year. To except one, and reject the other, (as Algeria does) is not to understand and apply fully the conditions sought to be created.

Q: You have been extremely helpful, thank you for your time, Your Excellency...

A: Your Welcome - and all the best with your research.

Appendix III

Interview with Mr. Kamel Fadel (Deputy Head Polisario UK) [*excerpts*]
17th of March 1998
Pimlico, London

Q: State you name for the record please...

A: My name is Kamel Fadel Deputy Representative Polisario London

Q: I have got some questions for you which we have discussed earlier as well. First of all -- how do you view the territory of the Western Sahara?

A: The Western Sahara was a Spanish colony since 1884. It is located south of Morocco, north of Mauritania and west of Algeria. It is a separate territory from Morocco and from Mauritania because it was a Spanish colony and was never under the control of any of these two countries or any other country. Before, these two other countries were French colonies, and it [the Western Sahara] was called a Spanish colony...

Q: ...the Spanish Sahara ?

A: ...the Spanish Sahara - yes and now since 1975 it became known as the Western Sahara and we call it the Saharawi Republic....

Q: Yes, and you declared independence...

A: ...in 1976 and the Saharawi Republic is a full member of the OAU, and is recognised by 76 countries all over the world.

Q: And have you applied for UN membership as well?

A: Not yet.

Q: But do you intend to do that?

A: Yes.

Q: The other question I wanted to ask you is ... why do you think that the Saharawi people deserve statehood?

A: Well the Saharawi people are all former colonial people. People who are under colonialism in Africa and various other [parts of the world]. We believe they deserve the right of self-determination at least, and to feel that they have gone through the colonialism period. We deserve statehood because we have fought against the Spanish colonialists when Spain was there [in the territory] and also since that time we have been asking for one thing -- and that is to be able to exercise that right which is enshrined in the UN Charter and also in the OAU Charter and we deserve the right to be separate from Morocco because we *are* a separate people, it is a *separate* territory and the people of this territory have been calling for this, I think since the beginning of the 1950s.

Q: ...and the group that voices this opinion is the Polisario? Now does the Polisario represent the Saharawi people would you say?

A: Well the Polisario - if there was no Saharawi people it would not have existed! The Polisario was formed by genuine Saharawis, indigenous Saharawis from the territory and also by Saharawi students studying in Morocco... and it has been able to protect the Saharawis since its inception in 1973.... and the proof to that is that when the UN visited the territory in 1975 they found that the Polisario is very popular...

Q: ... as is proved by the fact - finding mission as well...

A: yes... there were spontaneous demonstrations in all of the territory and also in Algeria and Mauritania in support of the Polisario. The fact that it has existed and survived for more than twenty years means that it has fought against Spain and against two other countries Mauritania and Morocco and was able to achieve a lot of success because of the support and the ability to represent the Saharawi people and now the Polisario objective is to enable the Saharawis to exercise their right to self determination and after that to dissolve itself.

Q: What is the history of the region and how do you personally react to Moroccan claims in this situation?

A: The history of the region -- I think we can talk about since the Spanish colonialism period -- if that is what you want

Q: that's fine...

A: So Spain colonised the territory in 1884 and France colonised Morocco, Mauritania and Algeria...

Q: That was in 1912 was it - France colonising Morocco?

Yes. All these territories were divided in the Berlin Conference. But neither the Spanish or the French were able to exercise....

Q: Effective control... ?

A: yes... until even later in the Western Sahara.... in 1936. For all this period and particularly since the Moroccan independence Morocco really did not claim Western Sahara or did not launch any struggle or any objection to Spanish colonialist until they saw that the Polisario was in the process of being created. So they started to stake a claim to the share of the stake I think the Moroccan claims are baseless because we - the Saharawis people...? It basically comes down to the cultural differences - which we have been talking about -- our peoples are different like in the language, in the clothes, in culture and even in looks. We are ... were mainly nomadic people and that also we have also lived around the Sahara and in Western Sahara itself. We have had our own system of government -- representation. Morocco, according to all the documents and according to all the people who have visited this country in the 15th and 16th century, never really exercised any authority or sovereignty or effective control -- beyond the Draa river which is in the south of Morocco.

Q: South of Morocco and north of Western Sahara...

A: ... that's right. And this is well documented by French travellers who visited the area and the French people who were captured by the tribes in the Western Sahara and by the documents which the Moroccan Kings has had in correspondence with the Kings in Spain and other kings such as in Britain -- saying that 'I can't issue any

decisions in the Western Sahara because I do not control it'... Tony Hodges speaks about these documents very clearly in his book *Roots of a Desert War* and they have also been discussed in the Western Sahara Case in the ICJ. So we feel that for Morocco to claim the Western Sahara one has to have a basis -- on an archaic -- just they say that there was this allegiance thing between some of the tribes in the Western Sahara and Morocco. Even if this was true it does not comply with the current modern view of the state or of the modern conception of the right to self-determination. If any country even in Europe or African or Asia starts basing its claims to other state's territories on a historical basis and it just sends some people to this territory, then there will be chaos. Britain can claim parts of France, you know -- India can claim parts of Pakistan or parts of Afghanistan -- so it is not very solid -- or strong...

Q: It is not conducive to order... ?

A: ...and according to international law, according to the UN, these people have the right to self-determination. Moroccan claims for me are just a joke..(laughs)

Q: I wish it was a funny joke - though... that's the point. So coming back to this idea of a different people; who is a Saharawi according to you? How would you define a Saharawi? I understand it is very difficult to define a people... but...

A: A Saharawi is a person who is a member of the tribes who used to be in the Western Sahara -- we have to go to the roots. A person who can prove that his/her roots in the territory or in the -- according to ... I mean the Saharawi tribes are well known... everybody knows them -- they know each other. A person who speaks Hassaniya or behaves in the Moors way of life -- and a person who is included in the Spanish census...

Q: ... right -- so the Spanish census is the key to determining who a modern Saharawi is...? How do you then react to this idea of the disputed tribes? Firstly, what are the disputed tribes -- if you could tell us please?

A: The disputed tribes - or the so-called disputed tribes are tribes who had very few people in the Spanish census -- they were a minority, who were included in the Spanish census as parts but not as factions -- as a group of tribes -- given numbers -- such as H41 or 42 - who counted a few -- very few hundreds in the Spanish census. The Moroccans have targeted them particularly; especially because a lot of these people used to live in ... came from the south of Morocco; or from the West of Western Sahara; or from the south ... the coastal people; and because their number was very small -- limited in the Spanish census - they wanted to infiltrate them -- and put in as many people as they could ... Moroccan people, to be included in these tribes as Saharawis. So in this case, they wanted these Moroccans as voters -- to determine the fate of the Saharawi people in a referendum which is meant only for Saharawis -- to be determined by Moroccans who have nothing to do with the territory. -- who would have no choice but to vote for Morocco - because they are Moroccans...