Minorities' Claims : From Autonomy to Secession

With Special Reference to Sri Lanka

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Dedicated to

Mr. John Backwell
(Former Senior Lecturer in
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Acknowledgement

The issues arising from claims for autonomy and secession by minorities have been chosen for this thesis for their contemporary relevance. Ongoing conflicts in many parts of the globe are largely ethnic in character, and there seems to be no end to such conflicts.

When I completed my LL.M at the University of London, after consulting my supervisor Dr. W.F.Menski, I immediately decided to do my PhD in this particular area. In fact, Dr.Menski encouraged, assisted and guided me to engage in research in this field further. Without him, I would never have been able to complete my LLM nor would I ever have contemplated doing a PhD.

Even though I initially registered as an external PhD student with the University of London, I decided later to transfer my registration to the University of Liverpool mainly for two reasons, a) it was difficult to do a PhD as an external student with the University Of London whilst staying at Liverpool, and b) my great admiration for the scholarship of Professor D.McGoldrick who is considered by many scholars as one of the foremost authorities in public international law. When I was attending seminars on Human Rights at the LSE in 1992-1993, the former Professor of Public International Law (now an honourable judge in the ICJ at the Hague) Rosalyn Higgins often mentioned Professor McGoldrick and his scholarly works, in particular his distinguished work on the Human Rights Committee. This has no doubt influenced me to do my PhD under his supervision. In fact, he agreed to supervise me even though

he was extremely busy as the Director of the International European Law Unit and as a research supervisor.

It should be stressed here that Professor McGodlrick has always been prepared to help, guide and encourage us. In particular his expertise on many issues discussed in this thesis has helped me enormously. I owe my heartfelt thanks to him for his assistance

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Abbreviations

A/C.3/SR	Summary Reports of the 3rd Committee of the General Assembly
AJCIL	African Journal of Comparative and International Law
AJIL	American Journal of International Law
A/PV	Preliminary Records of Meetings of the General Assembly
ASIL Proceedings	Proceedings of American Society of International Law
BYIL	British Year Book of International Law
Bull.EC	Bulletin of the European Communities
CHJ	Ceylon History Journal
CJHSS	Ceylon Journal of Historical and Social Studies
CJIL	Colombia Journal of International Law
CSCE	Conference on Security and Cooperation in Europe (now OSCE)
CYIL	Canadian Year Book of International Law
ECHR	European Convention on Human Rights
EJIL	European Journal of International Law
ESCOR	Official Report of the Economic and Social Council
Eur. Ct. HR	European Court of Human Rights
GA Res.	General Assembly Resolutions
GAOR	Official Records of the General Assembly
HHRJ	Harvard Human Rights Journal
HILJ	Harvard International Law Journal
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice

ICLQ	International and Comparative Law Quarterly
IHRR	International Human Rights Reports
IJIL	Indian Journal of International Law
ILM	International Legal Materials
ILR	Israel Law Review
IYBIL	Itatlian Year Book of International Law
IYHR	Israel Year Book of Human Rights
JAS	Journal of Asian Studies
JCPS	Journal of Commonwealth Political Studies
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
MAS	Modern Asian Studies
MCS	Modern Ceylon Studies
MLR	Modern Law Review
NDLR	Notre Dame Law Review
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NQHR	Netherlands Quarterly of Human Rights
NYBIL	Netherlands Yearbook of International Law
OAS	Organization of American States
OAU	Organization of African Unity
OHLJ	Osgoode Hall Law Journal
OSCE	Organisation for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
SC Res.	Security Council Resolutions
UBCLR	University of British Colombia Law Review
UCR	University of Ceylon Review
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
UNYBHR	United Nations Year Book of Human Rights

VJIL	Virginia Journal of International Law
YBUN	Year Book of United Nations
YJIL	Yale Journal of International Law

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Statute of Autonomy of the Basque Country, Organic Law, 1979

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African Charter on Human and Peoples' Rights, 1991

Alma Ata Declaration, 1991

Anandpur Sahib Resolution, 1973

Bangkok Declaration (Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights), 1993

Charter of Paris for a New Europe, 1990

Council of Europe Framework Convention for the Protection of National Minorities, 1994

CSCE Document of the Copenhagen Meeting of Conference on the Human Dimension, 1990

CSCE Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 1992

Declaration of Principles on Interim Self-Government Arrangements Concerning Gaza and Jericho, 13 September 1993

Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960

Declaration on Principles of International Law Concerning Friendly Relations and Coorperation among States in Accordance with the Charter of the United Nations, 1970

EC's Declaration on the Guidance on the Recognition of New States in Eastern Europe and in the Soviet Union, 1991

European Charter for Regional or Minority Languages (Council of Europe), 1992

European Charter of Local Self-Government, 1985

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

Final Declaration of the Conference on the European Charter on Local Self-Government at Barcelona, 1992

Framework Convention for the Protection of National Minorities, 1995

General Framework Agreement for Peace in Bosnia and Herzegovina, 1995

German -Polish Convention relating to Upper Silesia, 1922

Helsinki Final Act (Final Act of the Conference on Security and Co-operation in Europe), 1975.

Hungary-Romania Treaty on Understanding, Co-operation and Good Neighbourliness, 1996.

ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989

Indo-Sri Lanka Accord, 1987

International Convention on the Prevention and Punishment of the Crime of Genocide, 1948

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Lebed - Maskhadow Peace Agreement, 1996 (in respect of Chechnya)

Paris Agreement, 5 Sept. 1946 (between Austria, Italy in respect of South Tyrol/Alto Adige)

Proposal for an Additional Protocol to the European Convention on Human Rights Concerning Persons Belonging to National Minorities, 1993

Recommendation 1201 on an Additional Protocol on the Rights of Minorities to the European Convention on Human Rights, 1993,

Resolutions of the First Assembly of the Heads of State and Government of the Organization of African Unity, 1964

The Establishment of the International Tribunal to Prosecute Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, SC Res. 808/1993 and 827/1993

Treaty of Neuilly-sur-Seine, 1919

Treaty of Paris, 1919

Treaty of Saint-Germain-en-Laye, 1919

Treaty of Sevres, 1920

Treaty on Social Accord, 1994 (Russian Federation)

Treaty of Versailles, 1919

UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

UN Draft Declaration on the Rights of Indigenous Peoples, 1994

United Nations Charter, 1945

Universal Declaration of Human Rights, 1948

Abstract

We have been in the era of minority rights for quite a while now. Everyone seems to be taking an unprecedented interest in issues concerning minorities and various statements are being made about issues such as *autonomy* and the *secessionist rights* of minorities. Most prominently, some human rights campaigners and scholars have been expressing comments about the entitlement of minorities to secession by virtue of the right to self-determination. Such developments could not only give false hopes to many minority groups but also give rise to tensions between minorities and nation-States and, often create clandestine secessionist movements, armed insurrections and sporadic outbreaks of violence. Encouraged by such unexpected assistance, some minorities are now campaigning for the right to autonomy and in extreme cases, the most contentious and ambitious claim, the right to break away from the existing States and to set-up their own States on ethnic, religious and linguistic grounds.

Most States continue to believe that such claims are hazardous to the very foundation of the nation-State system and international peace. Therefore, it is not advisable, from their perspective, to deviate from the current position of international law in favour of minorities' claims. Contemporary international law appears to be struggling to cope with these new developments. As Sigler says, "there seems to be no coherent theory to account for these claims".[1] There are conflicting legal and political arguments as to the validity of such demands. Though there is much

[1] *J.A. Sigler,* Minority Rights: A Comparative Analysis, Greenwood Press: Westport: Connecticut and London, 1983, p.19.

research in this area, it is apparent that jurists and publicists are not in agreement as to the scope of application and legal validity of claims for autonomy or secession. Nor many commentators seem to have grasped the opinions of the States or the position of international law about such claims.

The focus of this thesis is an examination of the validity of such claims. It will also analyse the scenario of clashes resulting from minorities' claims from *autonomy* to *secession* and States' refusal to respond to such claims in a constructive manner. Claims, refusals and rivalries between minorities and States, and how these clashes may result in the continuation of conflicts in contemporary polities are discussed. Attention will also be paid to States' practices in dealing with claims for autonomy and secession.

Chapter One discusses the scope and objectives of the thesis, and, how deep ethnic conflicts affect contemporary multiethnic polities. *Chapter Two* examines in brief the conceptual dimension of *peoples* in terms of the peoples' right to self-determination and discusses whether *minorities* are covered by it. *Chapter Three* examines the conceptual basis of autonomy. The validity of the claim that autonomy emanates from and gains its legitimacy through the right to self-determination is examined in *Chapter Four*. Movements for an autonomy and models of autonomy are discussed in *Chapter Five*. States' attitudes towards claims of autonomy by minorities are examined in *Chapter Six*. *Chapter Seven* analyses the conceptual basis of *secession*, and its kindred concepts, *irredentism and separatism*. *Chapter Eight* discusses the legitimacy of the right to secession by examining international law and the practices of the United Nations and other regional bodies. Secessionist attempts,

based on selected case studies, are examined in *Chapter Nine*. How States generally respond to secessionist claims is analysed in *Chapter Ten*. A special case study based on the ethnic conflict in Sri Lanka is the main issue discussed in *Chapter Eleven*. The main objective of this chapter is to demonstrate how nation-States in the postmodern-tribal era are struggling to come to terms with the phenomenon of ethnic secessionist movements. *Chapter Twelve* summarises the main points raised in the previous chapters and comes to a conclusion on whether autonomy and secession can provide a meaningful answer to current ethnic conflicts and minorities' grievances.

1 Claims From Autonomy To Secession

Part I

1.1 *Focus*

The following phenomena are investigated, assessed and critically analysed:

a) Ethnic violence has been on the increase for a considerable time in almost all parts of the world, and has engulfed the current political debate both at international and domestic levels;

b) Most minority groups are either fighting for greater political power through greater autonomy or in extreme cases engaged in the building of ethno-nation-States challenging the contemporary understanding of the doctrine of the right to self-determination and or justifying their struggles in terms of the right to secession by virtue of the right to self-determination;

c) Ethnic clashes involving minority groups and nation-States are forcing the United Nations and other international bodies to modify existing laws and or to create new sets of laws to cater for the claims of minorities.

This research could be important because there is apparently no consensus as to the legitimacy of minorities' claims for autonomy and secession, and the way the international community should respond to such developments. The special case study on Sri Lanka may also be useful for researchers and commentators particularly in America and Europe,

because most reporting of ethnic clashes in Sri Lanka has been based on false statements, rumours and misunderstanding.

1.2 *Objectives*

The objectives of this thesis are:

a) To identify and examine the extent to which contemporary international law and the international community are prepared to accommodate the concerns of 'minorities';[1]

b) To analyse how the claims of minorities for political rights beyond traditionally understood limited rights clash with the concerns of nation-States and the norms of contemporary international law; and

c) To identify the extent to which 'clashes' between minorities and nation-States develop in postmodern nation-States. Analysing ethnic violence in Sri Lanka as a special case study, the clashes scenario will be examined by referring, *inter alia*, to similar cases in other parts of the world.

1.3 *Focus Groups: Minorities ?*

This thesis limits its focus to minorities as identified in article 27 of the International Covenant on Civil and Political Rights, 1966 (ICCPR),[2] and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,

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[1] This term is used in this thesis to cover ethnic, religious and linguistic minorities including indigenous communities.

[2] GA Res. 2200 A (XXI) Annex, 16 Dec. 1966.

1992[3] (Declaration on Minorities, 1992) excluding social and cultural groups. There are conflicting views amongst some scholars about whether social and cultural groups should be covered by the term *minority*. Humphrey argued that even though such disadvantaged groups may have some of the characteristics of real minorities, it would be better if another term could be found to describe them.[4] Such groups, as Sanders noted, particularly those "suffering from discrimination, have a tendency to assert a collective character, simply as part of the struggle".[5] By way of an example, he refers to the homosexual community in the USA who identify themselves as the *Queer nation*. Referring to women and homosexuals Special Rapporteur Deschenes questioned how it could be possible to identify them as minorities in term of international law.[6] Therefore, minority groups who identify themselves with ideological opinions associated with age, disability, sexual orientation are usually left out.[7] "Bald people, cat owners, and members of armed forces do not fit the standard picture of a minority group"[8] either. As is evident from present UN practices, international law does not accept each and every group which wants to be protected and identified as *minorities*. Sigler argues that international

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[3] GA. Res. 47/135, 18 Dec. 1992.

[4] *J.P.Humphrey,* No Distant Millennium: The International Law of Human Rights, UNESCO: New York, 1989, p.50.

[5] *D.Sanders,* 'Collective Rights', 13 *HRQ* 1991, p.370. See further *M.Nowak,* UN Covenant on Civil and Political Rights: CCPR Commentary, N.P.Engel. Kehl: Strasbourg, 1993, p.491.

[6] ESCOR. E/CN.4/Sub.2/1985/31, pr.20, p.5. See further *P.V.Ramaga,* 'The Group Concept in Minority Protection', 15 (3) *HRQ* 1993, p.58.

[7] *M.D.Zayas,* 'The International Judicial Protection of Peoples and Minorities', in *C.Brolmann, R.Lefeber* and *M.Zieck* (eds), Peoples and Minorities in International Law, Martinus Nijhoff: Dordrecht/Boston/London, 1993, pp. 254-5. See also *G.Gilbert,* 'The Legal Protection Accorded to Minority Groups in Europe', 23 *NYBIL* 1992, pp.69-70.

law regards many as social groups rather than minorities.[9] As Thornberry writes, international law is not concerned with "every conceivable classification of minority".[10]

1.4 *The Scope of the Investigation*

The claims of minorities for *autonomy* and *secession* are selected for this thesis since claims for such rights have been creating concern in the international community for some time. Less disputed rights, the right to life and existence, the right not to be discriminated against, and equality before the law are not analysed because, a) these rights are well recognised by contemporary international law; b) they are less controversial among international lawyers; and c) there is already extensive research on these particular issues. Nowadays, no sensible person or State disputes the right to life of an individual or a member of a minority group. Organisations or individuals who challenge these universally recognised rights are under strict scrutiny as never before by the United Nations and other international bodies concerned with such issues. International Tribunals on genocide in the former Yugoslavia[11] and Rwanda[12] are telling examples of this.

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[8] *Gilbert, ibid,* pp.69-70.

[9] *J.A.Sigler,* Minority Rights: A Comparative Analysis, Greenwood Press, Westport, Conn. London, 1983, pp.4-5.

[10] *P.Thornberry,* Minorities and Human Rights Law, Minority Rights Group: London, 1991, p.16. Ramcharan also emphasises that the United Nations are concerned and prepared to protect only "limited and defined categories of minorities". See *B.G.Ramcharan,* The Concept of Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration, Martinus Nijhoff: Dordrecht/Boston/London, 1989, p.201.

[11] The Security Council decided to established a war tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, Sc Res. 808, 22 February 1993, and Sc Res. 827, 25 May 1993.

Part II,

Ethnic Conflicts

1.5 *Conflict Scenario*

Referring to the "contours of the new era" the Secretary-General noted with caution that we have already entered into an era of realignment. At both the national and international levels, fundamental forces are at work reshaping patterns of social organization and spreading the sources of fear.[13] Ethnic conflicts[14] have suddenly resurfaced "giving rise to fierce claims of subnational identity based on ethnicity,

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[12] SC.Res. 955, 8 Nov. 1994. This tribunal was established pursuant to the request made by the Rwandan Government for the establishment of an international tribunal to prosecute individuals who had committed serious violations of international humanitarian laws. See SC Res. 935, 1 July 1994 and, SC Res. 955, 8 Nov.1994.

[13] The report of the Secretary-General on the work of the organization, GAOR, 52nd session, suppl. no.1, A/52/1, pr.1, p.1, 1997, New York: UN.

[14] *D.L.Horowitz,* Ethnic Groups in Conflict, University of California Press: California, 1995; *T.R.Gurr,* Minorities at Risk: A Global View of Ethnopolitical Conflict, Institute of Peace Press: Washington, 1993; *D.P.Moynihan,* Pandaemonium: Ethnicity in International Politics, Oxford UP: Oxford, 1994; *A.James* and *R.H.Jackson* (eds.), States in a Changing World: A Contemporary Analysis, Clarendon Press: Oxford, 1995; *G.Gottlieb,* Nation Against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty, Council of Foreign Relations Press: New York, 1993; *T.R.Gurr* and *B.Harff,* Ethnic Conflict in World Politics, Westview Press: Boulder com. 1994; *S.Olzak,* The Dynamics of Ethnic Competition and Conflict, Stanford UP: Stanford, 1992; *K.M.De.Silva* and *R.May* (eds.), Internationalization of Ethnic Conflict, Frances Printer: London, 1991; *R.Stephen,* Ethnic Conflict and International Relations, Dartmout Publishers:Brookfield, 1990; *R.Stevenhagen,* The Ethnic Question, Conflicts, Developments and Human Rights, UN UP: Tokyo, 1990.

religion, culture and language, which often resulted in armed conflicts".[15] One of the main reasons has been the democratisation and liberalisation which have swept through Central and Eastern Europe and later some African states. The process intensified, in particular in Europe, with the fall of the Berlin Wall thereby giving rise to new issues arising from violent ethnocentric campaigns. Politically and ethnically motivated minority groups have emerged and or been rejuvenated despite being virtually suppressed since the second World-War. Many of these groups have intensified their campaigns for controversial political claims for autonomy or in extreme cases for secession, as will be shown in chapters 5 and 7 respectively. It is not now uncommon for even small minority groups to be engaged in clandestine and often destructive and violent activities with a view to achieving either greater autonomy or post-modern tribal States.[16] Hannum argues that many ethnic groups use violence as a "convenient vehicle for channeling political dissatisfaction into political organisation".[17] Separatist ethnic movements believe that the time has come, "now or never".[18] Nakhichevan, Nagorny Karabakh, Chechnya, Tatartsan, Kosovo and Jaffna, most of them previously unheard of names in international politics, are emerging out of obscurity as new candidates for post-modern tribal-States. It has

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[15] Secretary-General *B.B.Ghali*, 'Introduction', in The Blue Helmets: A Review of United Nations Peace Keeping, 3rd ed. UN: New York, 1996, p.4 (Blue Helmet).

[16] See details *R.Mullerson*, 'Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection', 56 *MLR* 1993, pp.793-811. See also *I.Bremmer* and *T.Taras* (eds.), Nations and Politics in the Soviet Successor States, Cambridge UP: Cambridge, 1993.

[17] *H.Hannum*, Autonomy, Sovereignty and Self-Determination, University of Pennsylvania Press : Philadelphia, 1990, p.6.

been said that more than half of all major armed hostilities in multiethnic polities between 1989-1995 were conflicts involving minority groups.[19] These developments have shattered the conventional belief that the UN system would eventually be able to achieve peace in the post-war era by respecting and guaranteeing individual rights on a universal basis.

Even politicians in Western countries have been taken by surprise. Former US President George Bush addressing the UN General Assembly stated, "revival of ethnicity ushers in a new era teeming with opportunities and perils".[20] The major milestone of this new era, in the view of Franck, can be seen since 1990,[21] or perhaps, as Mullerson suggests, with the fall of the Berlin Wall in Autumn 1989.[22]

Conflicts are more or less centred around religious, ethnic, racial and nationalist identities, which are often exploited for political ends.[23] As Granoff says,

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[18] *R.Mullerson,* International Law, Rights and Politics: Developments in Eastern Europe and the CIS, LSE and Routledge: London, 1994, p.19.

[19] *Kjell-Ake Nordquist,* 'Autonomy as a Conflict-Solving Mechanism, An Overview', *M.Suksi* (ed.), Autonomy: Applications and Implications, Kluwer Law International: The Hague/London/ Boston, 1998, p.60. See also *S.Lawson,* 'Self-Determination as Ethnocracy: Perspectives from the South Pacific', in *M.Sellers* (ed.), The New World Order, Sovereignty, Human Rights and the Self-Determination of Peoples, BERG: Oxford / Washington, 1996.

[20] 'The Revival of History Poses a Great Challenge', in *The Independent,* 24 Sept. 1991.

[21] *T.M.Franck,* 'Postmodern Tribalism and the Right to Secession', in *Brolmann, Lefeber* and *Zieck* (eds.), *supra,* 7, p.2, 1993. See further *W.Kymlicka,* The Rights of Minority Cultures, Oxford UP: Oxford, 1995, p.1.

[22] *Mullerson, supra,* 18, p.1.

[23] See the statement issued by the UN High Commissioner for Human Rights 'On the Eve of the Twenty-First Century', The Paris Meeting, 7 Dec. 1998, http:www.europa.eu.int. See also *Prosecutor* v Dazen *Erdemovic,* No. IT -96-22-T, 29 Nov. 1996. In this case a soldier of Croat ethnic origin having being recruited by the Serb militia was then forced to kill

with the demise of the Cold War these differences are becoming increasingly pronounced and wars continue to be fought over these identities".[24] In addition, claims to lands, water, air space, natural resources, language policies, national anthems, national symbols, flags, public holidays etc., are increasingly becoming contentious issues which often give rise to modern tribal-wars. Many of these movements gradually develop into secessionist campaigns. The sources of many of these conflicts "are pervasive and deep".[25] The perceived wisdom seemed to be that only in the third world and in under-developed countries do such movements emerge. Such notions no longer have any credibility as Moynihan correctly pointed out.[26] Franck writes that ethnic conflicts are now "openly flaunted everywhere, unapologically, with zealously raised arms and firearms".[27] The most poignant contemporary case is that of the Yugoslav crisis. However, these conflicts are not confined to Yugoslavia or the Balkans, they continue to become a worldwide phenomenon. Minority groups are no longer deprived of weapons which have become the method of negotiation between the participants involved in those conflicts. It has been explained that:

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hundreds of Muslims civilians. See on this *D.Turns*, 'The International Criminal Tribunal For the Former Yugoslavia: The Erdemovic Case', 47 (2) *ICLQ* 1998, pp.461-474.

[24] *J.Granoff*, 'A Unity Beyond Religious and Ethnic Conflicts', in New Realities: Disarmament, Peace Building and Global Security, UN: New York, 1993, p.24.

[25] Agenda for Peace, GA Res. A/47/277, 17 June 1992, pr.5.

[26] *Moynihan, op.cit.* 14, p.21.

[27] *Franck, supra*, 21, p.3.

"Nation-states no longer have a monopoly over so-called conventional weapons. Proliferation in the global arms-bazaar are available to dissident minorities and terrorists as long as they have the money to pay for them or can persuade dealers to give them credit. The result is a proliferation of devastating civil wars that reduce once visible states and communities to near anarchy".[28]

Most minority groups are extremely concerned about maintaining their identity and the differences between themselves and others and are prepared to compete as such. According to Jackson, most minority groups seem to be "lacking the craft of mastering the art of living in harmony with communities different to themselves".[29] "It is no surprise, therefore, that the term 'balkanized' has become synonymous with recurrent instability rooted in ethnicity".[30] Internal stability prevails whilst the State and ethnic communities co-exist harmoniously and with proper understanding. When this collapses, tension is "liable to arise leaving scars".[31]

As observed by a leading political commentator, minorities dissatisfied with existing power arrangements, particularly in the developing world, are challenging

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[28] *J.McLellan* and *H.A.Richmond*, 'Multiculturalism in Crisis: A Postmodern Perspective on Canada', 17 (4) *Ethnic and Racial Studies* 1994, p.670.

[29] *R.H.Jackson*, Quasi-States: Sovereignty, International Relations and the Third World, Cambridge University Press: Cambridge, 1994, p.66. Jackson's comments are made in respect of the Eastern and Central European minority groups. Yet they are equally applicable to modern day societies.

[30] *Ibid.* p.66.

[31] *R.C.Van.Caenegem*, An Historical Introduction to Western Constitutional Law, Cambridge University Press: Cambridge, 1995, p.13; see also *W.Soyinka*, The Open Sore of a Continent, Oxford UP: Oxford, 1996.

the political structures of the global State system thus turning volatile Latin America, Africa and Asia into a gigantic laboratory in which contemporary and future ethnic politics will be tested day in and day out.[32] The former Secretary-General said, "Armed conflicts today, as they have through history, continue to bring fear and horror to humanity... ."[33] He further noted:

> "New assertions of nationalism and sovereignty spring up, and the cohesion of states is threatened by brutal ethnic, religious, social, cultural and linguistic strife. Social peace is challenged on the one hand by new assertions of discrimination and exclusion and, on the other, by acts of terrorism seeking to undermine evolution and change..."[34]

1.6 *The UN's Concerns*

The UN is now deeply concerned about the growing frequency and severity of contemporary tribal-wars,[35] because these disputes have often had a spill-over effect in international politics.[36] Threats of fragmentation and assertions of differences are on the rise with horrific violence engulfing many regions of the world. The break up

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[32] *F.Parkinson,* 'Ethnicity and Independent Statehood', in *Jackson* and *James* (eds.), *op.cit.14*, pp.336-340.

[33] Agenda for Peace, *supra,* 25, pr.13.

[34] *Ibid.* pr.11.

[35] GA Res. 52/109, 12 Dec. 1997 ('Measures to Combat Contemporary forms of Racism, Racial Discrimination, Xenophobia and related Intolerance'), preamble. See also GA Res. 52/132,12 Dec. 1997 ('Human rights and mass exodus').

[36] *A.A.Said* and *L.R.Simmons,* 'Ethnic Factors in World Politics', in *A.A.Said and L.R.Simmons* (eds.), Ethnicity in an International Context, New Jersey, 1976, p.16.

of multiethnic polities spreads as many continue to suffer from instability.[37] Conflicts within States, says the United Nations High Commissioner for Human Rights, "are proving as bloody as conflicts between States in the past".[38] In 1975, Isaac stated that ethnic violence, since the Second World War, had claimed more than ten million lives.[39] Since then, this number has continually increased as ethnic clashes have flared up in many parts of the world.[40] It is reported by the UN that in the first half of the 1990s, nearly 5 million peoples died world wide as a result of wars and armed conflicts. Of this, in Africa alone, at least 3.5 million people died as a consequence of ethnic conflicts and tribal wars.[41] In fighting in Bosnia 200,000 people were killed.[42] In ethnic conflicts in Rwanda, it is estimated that between 500,000 and 1 million people were slaughtered,[43] the second largest genocide after Cambodia since the Second World-War. The Pol Pot

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[37] The report of the Secretary-General on the work of the organization, *supra,* 13, pr.1, p.1.

[38] Statement issued by the Commissioner on Human Rights on the Eve of the Twenty-First Century, The Paris Meeting, 7 Dec. 1998. See http://www. Europa. eu.int. 8 Dec. 1998.

[39] *H.R.Isaacs,* Idols of the Tribes, Hamper and Row: New York, 1975, p.3, cited by *Horowitz, supra,* 14, p.xi; See also *R.Lemarchand,* Burundi: Ethnocide as Discourse and Practice, Woodraw Wilson Centre, Cambridge University Press:Cambridge, 1994; *M.L.Richard,* Final Solutions, Biology, Prejudice and Genocide, Penn State Press: Pennsylvania, 1992.

[40] For example, Democratic Republic of Congo, Burundi, Rwanda, Sri Lanka, Iraq, Turkey, Kashmir, Punjab, Afghanistan, Nigeria, South Africa, Lebanon and Sudan are well known places where ethnic clashes are rampant.

[41] United Nations Standing Advisory Committee on Security Questions in Central Africa, United Nations Concern for Peace and Security in Central Africa: Reference Document, UN: New York, 1997, p.1.

[42] See details The United Nations and the situations in the Former Yugoslavia, UN publication, New York, DPI/1312/Rev.4, July 1995.

[43] See The United Nations and the Situations in Rwanda, UN, New York, UN publication, DPI/1484 /Rev.1, April 1995, p.21.

government of Democratic Kampuchea (DK) was responsible for killing 1 million civilians.[44] In recent fighting in Kosovo more than 2,000 people of both Kosovan Albanians and Serbs were killed whilst more than half of the Kosovar Albanians in the province were expelled by the Serb militia.[45] Tribal fighting in Somalia claimed the lives of 300,000 civilians.[46] The Middle East, Tajikistan,[47] Abkhazia,[48] Sudan,[49] the Central Africa,[50] and Afghanistan[51] are other notorious places where tribal wars claimed many thousands of civilians. Border clashes between the Eritreans and Ethiopians along the Badme Front (1,000 kilometres long) have started once again returning to their violent past. At the end of 1995, there were 35-40 million internally displaced persons due to

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[44] 'United Nations Advance Mission in Cambodia', in the *Blue Helmets*, *supra*, 15, p.449.

[45] See *S.Kiley*, 'Kosovans Lose their Homes', *The Times*, 1 April 1999. See further GA Res. 52/139, 12 Dec. 1997; UN Doc. A/52/490, 1998, the report of the Special Rapportuer of the Commission on Human Rights on the situation in the Republic of Bosnia and Herzegovina, details A/C.3/52/SR.34, 17 Feb. 1998, pr.3, p.2. See also SC Res.1203, 24 Oct. 1998 and SC. Res.1160, 31 March 1998 (both on Kosovo).

[46] See The United Nations and the Situations in Somalia, UN publication, DPI/1312/Rev.4, New York, May 1995, p.1.

[47] The United Nations and the Situations in Tajikistan, New York, DPI/1685, April. 1995.

[48] See also chapter 26, 'United Nations Observer Mission in Georgia', in the *Blue Helmets*, *supra*, 15. p.571.

[49] GA Res. 52/140, 12 Dec. 1997. The report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Sudan, Fifth Interim Report, UN Doc. A/52/510, see A/C.3/52/SR.34, 17 Feb. 1998, pr.12-16, pp.3-4.

[50] The report of the Secretary-General, A/52/PV.5, 22 Sept. 1997, pp.2-3.

[51] UN News NS/8/98, Sept. 1998. UN Doc. A/52/493, 1998, the report of the High Commissioner for Human Rights, and A/C.3/52/SR.33, 18 Feb. 1998, pp.5-6 (the number of displaced persons due to tribal conflicts are estimated at 1.2 million).

world wide conflicts.[52] Thus, the most significant violence after 1945 has found its "*casus belli* in ethnic, tribal, and racial groups."[53]

There are many reasons for the escalation of conflicts. Ethnic consciousness has been rekindled and ethnic revivalism has emerged, threatening the stability of the nation-State system by "brutal ethnic, religious, social, cultural or linguistic strife".[54] Neighbours become enemies, mistrust between minority groups and majority populations has alarmingly widened. Thus the phenomenon of ethnic revivalism "came as one of the surprises of the last thirty years",[55] threatening the nation-State system and exposing its limitations and inadequacies in accommodating the interests of ethno-national groups in contemporary societies. Most minorities are now well organised, politically as well as militarily. In extreme cases, they have been "developing into popular guerrilla movements, international coalitions and networks.[56] In many parts of the world, the resurgence of ethno-populist movements are visible.[57] Popular myths, historical achievements, and generation-old animosities

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[52] *Ghali*, Blue Helmet, *supra*, 15, p.4.

[53] *Said*, and *Simmons*, in *Said* and *Simmons* (eds.), *supra*, 36, p.16. See also *R.Cohen* and *F.M.Deng*, 'Exodus Within Borders: The Uprooted Who Never Left Home', 77 (4) *Foreign Affairs* 1998, pp.12-16.

[54] *B.B.Ghali*, Confronting New Challenges: Annual Report on the Work of the Organisation, UN: New York, 1995, p.6.

[55] *Sanders*, *supra*, 5, p.372.

[56] *K.Rupasinghe*, 'Democratization Process and Their Implications For International Security', in Peace and Conflict Issues After the Cold War, UNESCO, 1992, pp.38-9.

[57] See A/R/Pub/91/3, Report of the Seminar on the Political, Historical, Economic, Social and Cultural Factors Contributing to Racism, Racial Discrimination and Apartheid, UN: New York 1991, pr.97, pp.19-20,

are contributing to the "exhumation of buried antagonism"[58] between the main population and minorities in many contemporary societies. These new ethnic movements differ from national liberation movements which were prominent during the 1950s and 1960s, and class-based proletarian militant organisations[59] which can normally be seen active in western industrial cities. They are also significantly different in terms of organisational structure, political aims and in their national and international impact.

This is increasingly causing concerns to many States because, "the cohesion of societies is being increasingly threatened and, in some cases, destroyed by ethnic or religious strife".[60] In practice this has "often led to the establishment of dictatorship and (been) accompanied by bloodshed and violations of the rights of individuals".[61] As some States admit, present ethnic conflicts often lead to instability in many areas of the world, notably in the multiethnic polities in the developing countries.[62] In fact, many States such as Rwanda, Somalia, Liberia, the former Yugoslavia and the

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[58] *P.Thornberry*, 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations', in *A.Phillips* and *A.Rosas* (eds.), The UN Minority Rights Declaration, Turku/Abo: London, 1993, p.11.

[59] See further *N.Glazer*, 'From Class-Based to Ethnic- Based Politics', in *J.E.Daniel* (ed.), Governing Peoples and Territories, Institute for the Study of Human Issues: Philadelphia, 1982, pp.47-56.

[60] A/C.3/48/SR.22, 30 Nov. 1993, pr.18, p.5 (Sri Lanka). See also A/C.3/49/SR.6, 31 Oct. 1994, pr.54, p.10 (Albania).

[61] A/C.3/49/SR.8, 25 Oct. 1994, pr.9, p.4 (Russian Federation).

[62] A/50/PV.18, 4 Oct. 1995, p.8 (Nigeria).

former USSR collapsed, whilst others survived but as 'failed States',[63] or as Jackson describes 'quasi States'.[64] Conflicts caused by ethnic and religious groups, however exaggerated and illogical, have been equated with the "threat of nuclear weapon".[65] This may be largely due, *inter alia,* to:

a) exploitation of unsuspecting masses against other sectors of the population by xenophobic movements;[66]

b) "frustration of groups within societies";[67]

c) a lack of respect for the principle of self-determination and non-interference in the internal affairs of States particularly by powerful States which encourage secessionist movements for their own purposes;[68]

d) provocation of racial hatred[69] and religious and ethnic intolerance;[70]

e) fear of diversity;[71]

f) most importantly, confusion in the appreciation of the actual dimension of the right to internal self-determination as opposed to the right to external self-determination.[72]

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[63] *Ghali,* Blue Helmets, *supra,* 15, p.4.

[64] See generally *Jackson, supra,* 29.

[65] A/C.3/49/SR.6, 31 Oct. 1994, pr.30, p.6 (Russian Federation).

[66] A/C.3/50/SR.5, 27 Oct. 1995, pr.9, p.4 (Mauritania).

[67] A/C.3/48/SR.21, 26 Nov. 1993, pr.16, p.5 (Equador).

[68] A/C.3/49/SR.6, 31 Oct. 1994, pr.8, p.3 (Libyan Arab Jamahiriya).

[69] A/C.3/49/SR.6, 31 Oct. 1994, pr.57, p.10 (Turkey,).

[70] A/C.3/47/SR.6. 21 Oct. 1992, pr.18, p.6 (Malaysia). A/C.3/51/SR.26, 18 Sept. 1997, pr.2, p.2 (Nepal).

[71] A/C.3/51/SR 28, 19 Sept. 1997, pr.2, p.2 (Slovenia).

[72] A/C.3/48/SR.21, 26 Nov. 1993, pr. 14, pp. 4-5 (the Philippines).

In addition, scarcity of resources and the deterioration of socio-economic conditions have contributed to the growth of ethnic conflicts.[73] Sigler writes: "Minorities are conflict groups. They are sources of unrest and social dissatisfaction. Unless suppressed or discouraged, they help precipitate social change. Minorities often form their own political parties or join dissident factions of a ruling party. They hope to improve their lot by agitating from within the government, when permitted, or against the government, if need be".[74] It is often assumed that minorities are disruptive, a threat to the integrity of the State, and unwilling to accept the society in which they live".[75] Thus, minorities were and still to a greater extent are seen as a 'question',[76] 'problem',[77] or a 'fifth column'.[78] As Thornberry points out many commentators still are of the view that minorities are a "permanent threat to the people"[79] and to nation-States in general. Even today, writes

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[73] A/C.3/50/SR.5/ 27 Oct. 1995, pr.1, p.2 (Mauritania).

[74] *Sigler, supra,*9, p.9.

[75] *D.McGoldrick,* 'The Development of the Conference on Security and Coorperation in Europe', in *B.S.Jackson* and *D.McGoldrick* (eds.), Legal Visions of the New Europe, Graham and Trotman/Martinus Nijhoff: London, 1993, p.156.

[76] Negative attitudes were prevalent even during the period of League of Nations which was said to be favourable to minorities, see, *P.De.Azcarate,* The League of Nations and National Minorities, Preface, Carnegie Endowment for International Peace: Washington, 1945. See further *C.S.Leff,* 'Democratiszation and Disintegration in Multinational States : The Breakup of the Communist Federations', 51 (2) *World Politics* 1999, pp.205-235.

[77] See further *E.Eddison,* The Protection of Minorities at the Conference on Security and Co-operation in Europe, in Papers in the Theory and Practice of Human Rights, no.5, Human Rights Centre: University of Essex Publication, 1993, p.31.

[78] See details, *Sigler, supra,* 9.

[79] *P.Thornberry,* 'The Democratic or Internal Aspects of Self-Determination', in *C.Tomuschat* (ed.), Modern Law of Self-Determination, Martinus Nijhoff: Dordrecht/Boston and London, 1993, p.126.

Sohn, "they lead to friction between States, intervention by one State in another, or to an appeal to the United Nations for international intervention".[80] Their *claims* are rightly or wrongly regarded with suspicion. Any preferential treatment has often been seen as morally wrong.[81] Not only minorities, but also the term 'minorities' was rejected, even by prominent politicians. Former American Under Secretary Sumner Wells contemptuously referred to it as "that accursed term, racial or religious minority".[82] In such an environment, it is therefore not surprising that minorities were identified as a complex and delicate problem by the United Nations General Assembly in its early formative years. Similar attitudes were prevalent in Europe. The discussion of minority rights, in particular in the European view, was "likely to do more harm than good".[83]

On the other hand persecution of minorities is a continuing phenomenon. Minorities are "increasingly marginalised",[84] "disadvantaged or otherwise the object of prejudice and discrimination".[85] Even some States now admit that "acts of terrorism against minorities" are perpetrated in some parts of the world.[86] A survey by 1989 concluded that out of 126 larger countries, 261 minority groups or 913,812,000 minority individuals are at risk.

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[80] See *L.B.Sohn*, 'The Rights of Minorities', in *L.Henkin* (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights, Colombia University Press: New York, 1981, p.270.

[81] *J.Raikka* 'On the Ethics of Minority Protection', in *Suksi* (ed.), *supra*, 19, p.33.

[82] *Sigler, supra*, 9, p.77.

[83] See Res.136/1975 of Council of Ministers of Council of Europe, cited in *W.McKean*, Equality and Discrimination under International Law, Clarendon Press: Oxford, 1985, p.212.

[84] *M.Monshipouri*, 'Comments on Minorities at Risk', 16 *HRQ* 1994, p.580.

[85] Canada's statement to the Human Rights Commission supporting the proposed Declaration of minorities, ESCOR, E/CN.4/1984/42.

[86] A/C.3/50/SR.8, 30 Oct 1995, pr.9, p.4 (Libyan Arab Jamahiriya).

Analysing these figures, Roth says that the actual figures should be more than that since the survey did not include blacks in South Africa, Palestinians in Israeli-occupied territories or the Baltic people in the USSR.[87] These numbers indicate how far minority groups are vulnerable in many contemporary States. Nevertheless, it is apparent that many minorities are not taking matters lying down. Some minority groups, as current developments suggest, are fighting not only for their survival, but also for their own ethnic States.

1.7 *Ethnic Conflicts and Ethnic Cleansing*

The resurgence of ethnic revivalism and the ubiquitous nature of ethnic conflicts[88] has now become a threat, as the Senegal representative to the UN stated, to the stability and security of various parts of the world,[89] and mainly the territorial integrity of newly independent States, "leading to enormous suffering and grief".[90] It is based on the ideology of 'ethnocentrism'. Levine and Campbell suggest this much abused word was introduced to modern social science by William Graham Sumner as far back as 1906. It is still a good basis for a comprehensive analysis of modern ethnocentric claims and resulting clashes. According to Sumner, the basic ideologies of ethnocentrism are:

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[87] *S.J.Roth,* 'Towards a Minority Convention: Its Need and Content', *Y.Dinstein* and *M.Tabory* (eds.), The Protection of Minorities and Human Rights, Kluwer : Dordrecht, 1992, p.87.

[88] A/C.3/49/SR.6, 31 Oct. 1994, pr.54, p.10 (Albania). See also *N.Manning,* The Cauldron of Ethnicity in the Modern World, Chicago UP: Chicago, 1989.

[89] A/C.3/49/SR. 4, 26 Oct. 1994, pr.16, p. 4.

[90] A/C.3/52/SR.37, 3 Dec. 1997, pr.44, p.5 (Azerbaijan).

"Loyalty to the group, sacrifice for it, hatred and contempt for outsiders, brotherhood within, warlikeliness without...all group together, common products of the same situation...It is sanctified by connection with religion. Men of other groups are outsiders with whose ancestors the ancestors of the we-group waged war. The ghosts of the latter will see with pleasure their descendants keep up the fight, and will help them. Virtues consists in killing, plundering, and enslaving outsiders. Ethnocentrism is the technical name of this view of things in which one's own group is the center of everything...Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders..."[91]

Ethnocentrism has found its natural partner, "the shameful phenomenon of ethnic cleansing",[92] the notorious catchword of our time. This most inhuman, gruesome and horrendous experiment has recently been and is being carried out in Eastern Europe and in many States of Asia and Africa. People are being "murdered, tortured, not because of what they do but because they belong to one ethnic group or another"[93] and to get rid of undesirable ethnic elements. Notorious examples are nowadays provided by majority and minority groups alike. For example, Chechens against the Russians in Chechnya, the Croats against the Serbs in Croatia, the Tamils against the

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[91] See *W.G.Sumner*, Folkways, Ginn: New York, 1906, pp.12-13, cited in *R.A.Levine and D.T.Campbell*, Ethnocentrism, Theories of Conflict, Ethnic Attitudes and Group Behavior, John Wiley and Sons: New York, 1971, p.8.

[92] A/C.3/49/SR.6, 31 Oct. 1994, pr.54, p.10 (Albania). A/C.3/51 SR.28, 19 Sept. 1997, pr.17, p.5 (Guyana); A/C.3/50/SR.6, 20 Oct. 1995, pr.1, p.2 (Malaysia). A/C.3/50/ SR.7, 30 Oct. 1995, pr.9, p.4 (Japan).

[93] *Chicago Tribune*, 24 May 1992, cited in *Moynihan, op.cit.* 14, p.18.

Sinhalese and the Muslims in the Northern and Eastern provinces of Sri Lanka.[94] In Bosnia-Herzegovina, the Serbs against the Muslims and Croats; under the former (now disposed) military regime in Rwanda, minority Hutu against the Tutsi. This strategy is normally used by the majority community against minorities, for example, the persecution of the Kurds in Turkey, Iraq and Iran; the Indonesians against the East Timorese, the Muslims against the Hindus in Kashmir, the Hindus against the Muslims and the Sikhs in India. It happened in Kampuchea when the Polpot regime started to annihilate Vietnamese ethnic groups in that country.

The term 'ethnic cleansing' is relatively new, although the practice is not a new phenomenon.[95] Modern tribal wars in Bosnia-Herzegovina and Croatia have contributed to the introduction of the term to the "vocabulary of international relations".[96] Are ethnic cleansing and genocide two different concepts as some States seem to think ?[97] Or is the term 'ethnic cleansing' complementary to genocide?

Genocide is a crime under international law.[98] According to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such:

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[94] *T.McGrik*, 'Separation by Suicide', *The Independent*, 30 Nov. 1995.

[95] *J.J.Preece*, 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms', 20 (4) *HRQ* 1998, pp.817-842.

[96] *D.Petrovic*, 'Ethnic Cleansing: An Attempt at Methodology', 5 *EJIL* 1994, p.343. See further *Bell-Fialkoff*, 'Brief History of Ethnic Cleansing', 72 *Foreign Affairs*, 1993, p.110.

[97] A/C.3/50/SR.6, 20 Oct. 1995, pr.1, p.2 (Malaysia).

[98] Article I and preamble paragraph of the Convention on the Prevention and Punishment of the Crime of Genocide, 1949.

"Killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group".

Ethnic cleansing is "totally incompatible with universally recognized human rights and fundamental freedoms",[99] international humanitarian law, and with other major human rights treaties and declarations.[100] Policies and ideologies of ethnic cleansing promote racial hatred in the belief that one racial, ethnic, or religious group is superior to that of others. This will inevitably be an obstacle to friendly and peaceful relations among nations whilst seriously undermining peace and security among peoples living side by side within the same State.[101] Its ultimate object is to exert control over a given territory by terminating or expelling members of other ethnic groups.[102] As Judge Cassese (ICTY) points out, ethnic cleansing is "a pinnacle of

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[99] GA Res. 47/80, 16 Dec. 1992, pr.3 ('Ethnic Cleansing and Racial Hatred'). See also GA Res. 46/242, 25 Aug. 1992.

[100] Ethnic cleansing violates the principles embodied in the UN Charter, the Universal Declaration of Human Rights (UDHR), Res. 217 A (III); the International Convention on Civil and Political Rights (ICCPR), Res. 2100 A (XXI) Annex; the International Convention on the Elimination of All Forms of Racial Discrimination Res. 2106 A (XX) Annex; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments, Res. 39/46; International humanitarian law, including the Geneva Convention of 12 Aug. 1949 (UN Treaty Series, vol.75, nos.970-973) and the Additional Protocol thereto of 1977 (UN Treaty Series, vol.1125, nos. 17512 and 17513).

[101] GA Res. 47/80, 16 Dec. 1992 ('Ethnic Cleansing and Racial Hatred').

[102] UN Special Rapportuer Tadeusz Mazowieck, The report of the situation of human rights in the territory of the former Yugoslavia, SC Res. 24809, 1992.

human criminality".[103] It involves killings, torture, beatings, systematic rape, arbitrary searches, disappearances, destruction of houses and property, threats of violence aimed at forcing individuals to leave their homes, mass expulsions of defenseless civilians from their homes, etc. In addition, systematic destruction and profanation of mosques, churches and other places of worship,[104] as well as other places of cultural heritages,[105] the torturing of leading citizens such as religious and political leaders and intellectuals belong to the 'enemy ethnic group', etc are also vital elements of ethnic cleansing Violent as well as non-violent methods are used to achieve ethnically pure, homogenous territory consisting of individuals belonging only to one ethnic group.[106]

The prohibited acts which constitute genocide as mentioned in the above article are identical to the crimes recognised by the UN resolutions on ethnic cleansing.[107] Ethnic cleansing may therefore violate, *inter alia*, the provisions of the Genocide Convention. Individuals or groups responsible for committing ethnic cleansing can be prosecuted under the Genocide Convention in conjunction with a crime against humanity, and a violation of the laws or customs of war, as has been seen in the

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[103] On behalf of the International Tribunal for the prosecution of persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia since 1991, A/52/PV.44, 4 Nov. 1997, p.2.

[104] GA Res. 49/196, 23 Dec. 1994, pr.6 ('Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia'). See also GA Res. 47/147, 18 Dec. 1992, pr.4, p.3.

[105] GA Res. 49/196, 23 Dec. 1994, preamble.

[106] *Petrovic, supra*, 96, pp.342-359.

[107] See also *R.Stavenhagen*, Ethnic Conflicts and the Nation-States, Macmillan: London, p.195, 1996.

Prosecutor v *Anto Furundzija* case before the International Criminal Tribunal for the former Yugoslavia (ICTY).[108] The General Assembly recognised the "abhorrent policy of ethnic cleansing"[109] as "a form of genocide".[110] However, ethnic cleansing, unlike genocide, involves both physical and non-physical destruction of peoples and properties. A far greater range of activities is covered by ethnic cleansing than by genocide. For example, the systematic rape of women and forced pregnancies are some of the practices used as "weapons of war and instruments of ethnic cleansing".[111] Charges of rape have been made against some of the accused tried before the ICTY on the grounds that they had violated the laws or customs of war, and committed outrages upon personal dignity.[112] On the other hand, the ultimate goal in ethnic cleansing appears to be the military occupation and conquest of a territory with a view to achieving ethnic cleansing of it. Ethnic cleansing might be

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[108] The Trial Chamber, Press release, JL-PIU-372-E, The Hague, 10 Dec. 1998. A similar charges were leveled against *Radislav* v *Krstic*, see Office of the Prosecutor, Press release, JL/PIU/368-E, The Hague, 2 Dec. 1998, the statement by the Prosecutor regarding the detention of Radislav Krstic.

[109] GA Res. 47/147, 18 Dec. 1992, pr.3; and GA Res. 49/196, 23 Dec. 1994 ('Situation of human right in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia').

[110] GA Res. 47/121, 18 Dec. 1992, preamble ('The Situation in Bosnia and Herzegovina'). GA Res. 47/147, 18 Dec. 1992, "abhorrent and odious practice" (the Situation of Human Rights in the Territory of the former Yugoslavia).

[111] GA Res. 49/205, 23 Dec. 1994, pr.2 ('Rape and abuse of women in the areas of armed conflict in the former Yugoslavia').

[112] *Furundzija*, *supra*, 108.

resorted to as a defence of one's own ethnic group against another ethnic, racial or religious group or groups.[113]

Ethnic conflicts demonstrate that attempts to suppress minorities can be an illusion and may end in failure. It seems that minority groups do not disappear for ever;[114] at the most they may fade for a while, only to be reborn on a later occasion.[115] Ours is an era in which nationalistic and ethnic consciousness are the determining factor in deciding whether and with whom we should go to war or make peace. There is no doubt that we are at a turning point in this new postmodernism where things seem increasingly to be judged in ethnic, religious and linguistic terms. The process of dismantling what we have achieved during the past few decades since World War II is unfolding with unprecedented haste. Peretz, perhaps with a little exaggeration, says:

> "What we are experiencing ...is not the shaping of new coherence but the world breaking into its bits and pieces, bursting like big and little stars from exploding galaxies...each one straining to hold its own small separate pieces from spinning off in their turn".[116]

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[113] A/C.3/48/SR.9, 16 Nov. 1993, pr.61, p.13 (Japan).

[114] A.D.Smith and J.Hutchinson expressed rather optimistic view on this. They write, "ethnic conflicts and nationalism are becoming a secondary concern and increasingly irrelevant. They may trouble the surface of world developments for a time, but they will soon disappear as people come to appreciate the massive problems of planetary survival". See *A.D.Smith* and *J.Hutchinson* (eds.), Nationalism, Oxford UP: Oxford, 1994, p.11.

[115] *G.Malinverni,* 'The Draft Convention for the Protection of Minorities', 12 (6/7) *HRLJ* 1991, p.265.

[116] *M.Peretz,* New Republic, 1992, cited in *Moynihan, op.cit.* 14, p.65. However some scholars are not so pessimistic. For example, Rein Mullerson is optimistic about the future

1.8 *Article 27 of the ICCPR*

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides some protection and guarantees limited rights for persons belonging to minority groups. It states:

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language"

This article has generated heated debate about its exact meaning and its implications for minority groups. Many scholars are of the view that the 'article holders' are at the mercy of the modern nation-State system. There are also various interpretations offered by scholars as to how the article might be applied. As Nowak points out, this article is formulated in an extremely cautious and vague manner. It thus leaves many questions open. Referring to the historical background of article 27, Nowak argues that it has collective elements.[117] This "modest and rather negative" article, in the view of Shaw, is centred on persons belonging to minorities rather than on minorities as such.[118] According to Thornberry, article 27 rights are a "hybrid between individual and collective

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world even though there is chaos or disorder at present. He argues that the world has become too small to be fragmented. *Mullerson, supra,* 18, p.41.

[117] *Nowak, op.cit.*5, pp.485 and 497-505.

[118] *M.N.Shaw*, 'Peoples, Territorialisms and Boundaries', 8 *EJIL* 1997, p.485.

rights because of the community requirement".[119] Capotorti has cautiously and carefully tried to interpret article 27 by giving the benefit of the doubt to minorities. He states that minorities can enjoy these rights in collectively because they are the ultimate beneficiaries.[120] According to Special Rapportuer Eide, Article 27 constitutes only a 'minimum' right.[121] Dinstein is positive. He states that these rights are conferred on minorities on a group basis and can therefore be exercised by minorities as such.[122] Ermacora's view is that the article contains both an individualistic and a collective element,[123] the position also adopted by the Human Rights Committee.[124]

The majority of States' opposition to claims by minorities for greater political powers was evident during the UN debate on the Liechtenstein proposal that autonomy at a regional level as an *optional mechanism* be granted as a solution to minorities' problem.[125] This proposal was criticised by many Asian and African States as a ploy to extend the scope of the principle of self-determination at the expense of the territorial integrity and sovereignty of States. These States were not convinced of the practicability

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[119] *P.Thornberry*, International Law and the Rights of Minorities, Oxford UP: Oxford, 1991, p.173.

[120] See Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1, prs.206-210 and 217.

[121] E/CN.4/Sub.2/1990/46, 20 July 1990, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution to the Problems Involving Minorities, pr.17, p.5 and pr.24, p. 7.

[122] *Y.Dinstein*, 'Collective Human Rights of Peoples and Minorities' 25 *ICLQ*, 1976, pp.111-118

[123] *F.Ermacora*, 'The Protection of Minorities before the United Nations', 182 *Recueil Des Cours*, 1983, p.274.

[124] See *Sandra Loveless* v *Canada*, Final Views of the HRC, Communication no. 24/1977, UN Doc. A/36/40; *Ivon Kitok* v *Sweden*, HRC, Communication no. 197/1985, UN Doc. A/43/40. More details in chapter 7.

[125] UN Doc. A/48/147/ Add. 1, 1992.

of treading such a delicate path. Greater autonomy at regional level, considered reasonable by some academics, is regarded as a recipe for disaster by many States who argue that the erosion of the power of the State may give rise to the encouragement of secessionist movements.

What are the underlying reasons for these new developments in the 1990s? Is it wrong for minorities to seek their ethnic, religious and linguistic identities and go their own ways? To what extent, are the claims of minorities compatible with the norms of contemporary international law? Need such claims necessarily contribute to the escalation of ethnic conflicts in modern societies? Above all, what are the implications for international peace and security? Can the UN or the international community accommodate another 5000-6000 new nation-States?

2 Peoples, All Peoples, Nations and Minorities

Introduction

Even during the early years of the United Nations regime some States declared that the right to self-determination entitled *peoples* and *nations* to constitute independent States and to determine the form of governments they wished to adopt.[1] This right does not, as stated by the UK delegate during the debate on the Recommendation Concerning International Respect for the Self-determination of Peoples end with the formation of free and independent sovereign States. It is a continuing process.[2]

Interestingly, it was also argued to mean, "the right of *individuals within a nation* to preserve their ethnic, cultural or religious characteristics".[3] It is a right which can be

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[1] The debate on the Recommendations concerning International Respect for the Self-determination of Peoples, E/2256, Annex V, A/2165, A/2172, Chapter V, s.1, see A/C.3/SR. 444, 13 Nov. 1952, pr.34, p.157 (Brazil), and A/C.3/SR. 397, 21 Jan. 1952, pr.5, p.300 (Syria). See also GA Res. 545 (vi) 5 Feb. 1952 ("fundamental human rights of peoples and nations").

[2] E/2256, Annex V, Resolutions A and B, 1952, *ibid*, see A/C.3/SR.456, 26 Nov. 1952, pr.3, p.229. See also the Helsinki Final Act, 1975, Principle VIII ("by virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right..."). The term, "always" indicates the continuity of the right. See *A.Cassese*, Self-Determination of Peoples: A Legal Reappraisal, Cambridge University Press: Cambridge, 1995, pp.284-285. *R.McCorquodale*, 'Negotiating Sovereignty : The Practice of the United Kingdom in Regard to the Right to Self-Determination', *BYIL* 1995, pp.283-331.

[3] Emphasis added. A/C.3/SR. 450, 20 Nov. 1952, pr.43, p.199 (Israel).

enjoyed in an independent State.[4] However, there has been confusion not only amongst States but also amongst jurists since the 1950s as to the exact social or political unit to which this right has been attributed. For example some States' understanding was that "every people", whether or not they constituted independent nations, had a right to decide independently by invocation of the right to self-determination what manner of State they wished to have.[5]

Even after the adoption of the UN Charter, the Covenants on human rights, and the various General Assembly resolutions, the opinions of States are not in consensus as to the exact political or social groups which come under the category of *peoples* or *nations*. For example, in the view of both Czech Republic[6] and the former USSR,[7] the right of self-determination belongs to *nations*. Some identified *Independent peoples,*[8] or *all peoples*[9] as right holders. It was also pointed out that both *all peoples* and *individuals* could enjoy this right.[10] However, most States are in consensus on one important issue, that is, that *minorities* are not intended by *peoples* or *all peoples*.

This apparent confusion was further augmented by new claims by some minority groups that they are also entitled as separate political or social units to exercise the *peoples' right* to self-determination, and most importantly, if they wish to secede and set

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[4] A/C.3/SR. 447, 18 Nov. 1952, prs.6, 7 and 8, p.172 (the Netherlands).

[5] A/C.3/SR.931, 16 Nov. 1966, pr.19, p.186 (USSR), and see also A/C.6/SR.935, 22 Nov. 1966, pr.26, p.211 (Mongolia).

[6] A/C.3/49/SR. 8, 25 Oct. 1994, pr.4, p.3.

[7] A/C.3/45/SR 7, 30 Oct. 1990, pr.71, p.17.

[8] A/C.3/49/SR.8, 25 Oct. 1994, pr.16, p.5 (The Sudan).

[9] A/C.3/47/SR.9, 27 Oct. 1992, pr.40, p.10 (Egypt).

[10] A/C.3/47/SR.4, 19 Oct. 1992, pr.25-26, p.7 (Australia).

up independent States by virtue of this right.[11] These groups tend to identify themselves with *peoples, all peoples* or *nations*, the words continually appearing in the UN treaties, declarations, resolutions and general documents as the repositories of the right to self-determination.

Before embarking upon a discussion on autonomy or of the legitimacy of the secessionist rights in terms of the peoples right to self-determination, I will now examine whether minorities come under *nations, peoples* or *all people* in the context of the right to self-determination as understood in the UN resolutions, declarations and other documents. A brief reference to other regional human rights documents will also be made where appropriate.

2.1 *Peoples and Nations' Right to Self-Determination, Who are the Right Holders?*

Robert Lansing's question whether "the bearer of the right of self-determination was to be a race, a territorial area, or a community"? [12] is still a valid one given the ambiguous nature, "slogan like quality" and "potentially explosive character..." of the doctrine of the right to self-determination.[13]

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[11] See *L.Brilmayer,* 'Secession and Self-determination: A Territorial Interpretation', 16 (1) *YJIL* 1991, p.179.

[12] *R. Lansing,* The Peace Negotiations: A Personal Narrative, New York and Boston, 1921, p.97.

[13] See for example A/C.3/SR. 444, 13 Nov. 1952, pr.29, p.157 (UK). See *Y.Dinstein,* 'Collective Human Rights of Peoples and Minorities', 25 *ICLQ* 1976, p.25 ("which is loaded with political and psychological gun-powder"); *Cassese, supra,* 2, p.5 ("The concept of self-determination is both radical, progressive, alluring and, at the same time, subversive and threatening"); President Wilson's close associate, Robert Lansing also severely criticised

Since the League of Nations, the most controversial[14] and romanticised terms have been 'peoples' and 'peoples' right to self-determination'.[15] Although it is repeatedly said that it is *peoples* who can exercise the right to self-determination, it is difficult to find the legitimate standard bearers of the right to self-determination without knowing who

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Wilson's theory on self-determination. He wrote: "The phrase is simply loaded with dynamite. It will raise hopes which can never be realised. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What a calamity that the phrase was ever uttered! What misery it will cause!". See, *Lansing ibid.* pp. 97-98, cited in *Cassese, op.cit.* 2, p.23.

[14] *D.McGoldrick,* The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights, Clarendon Press: Oxford, 1991, p.14, ("the most controversial provision included in the ICCPR was the provision on self-determination"). Further see similar comments, *H.Wilson,* International Law and the Use of Force by National Liberation Movements, Clarendon Press: Oxford, 1988, p. 55 ("one of the most controversial issue in international law"). *J. Crawford,* The Creation of States in International Law, ("popular catchword") 1979, p.85. *P.Sinha,* 'Is Self-Determination Passe? ' 12 (3) *CJIL* 1973, p. 263. *R.Higgins,* Problems and Progress: International Law and How We Use It, Oxford UP: Oxford, 1994, p.111.

[15] There is a widely published literature on the right to self-determination. See *A.Cobban,* National Self-Determination, Oxford UP: London/New York and Toranto, 1945; *U.O.Umozurike,* Self-Determination in International Law, Archon Books: Hamden, Connecticut, 1972; *M.Pomerance,* Self-Determination in Law and Practice, The New Doctrine in the United Nations, Martinus Nijhoff: The Hague/Boston and Lancaster, 1982; *C.Tomuchat* (ed.), Modern Law of Self-Determination, Martinus Nijhoff : Dordrecht/ Boston/ London, 1993; *Casses, op.cit.* 2; *T.D.Musgrave,* Self-Determination and National Minorities, Oxford University Press: Oxford, 1997; *A.Rigo-Sureda,* The Evolution of the Right of Self-Determination, AW Sijthoff: Leiden, 1973, *H.Hannum,* Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights, Philadelphia: University of Pennsylvania Press, 1990; *M.H.Halperin* and *D.J.Scheffer with P.L.Small,* Self-Determination in the New World Order, , Carnage Endowment: Washington, 1992.

these *peoples* are. Sir Ivor Jennings said, "on the surface it seemed reasonable: let the people decide. It is in fact ridiculous because the people cannot decide until somebody decides who are the people".[16] Some argued that a precise definition of the term *people* cannot be found. This could therefore "present very complex problems".[17] Politically biased various interpretations given to *peoples* do not help either. Often *peoples* and peoples' right to self-determination has been used in a very vague and uncommitted way.[18] A wide interpretation of the word *peoples* left enough room for ethnonationalists to further their cause, i.e., secessionist rights. However, as will further be discussed in chapters 7 and 8, it is worth mentioning that there is no strong or reliable evidence to suggest that minorities as *peoples* or *nations* can proclaim independence by virtue of the right to self-determination. Although a few States advanced the theory that self-determination should be granted to "all peoples and all national groups"[19] it has never been clear whether it was intended that a section of a population, for example an ethnic or religious group operating as *peoples*, should be granted the right to secede by virtue of the peoples' right to self-determination.

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[16] *I.Jennings*, Approach to Self- Government, Cambridge University Press: Cambridge, 1956, p 56.

[17] A/C.3/47/SR.9, 14 Oct. 1992, pr.88, p.18 (Cyprus). A/C.3/SR.361, 7 Dec. 1951, pr.10, p.84 ("Moreover the concept of a people or nation was difficult to define", Belgium). See also *Y.Dinstein, supra,* 13, p.104 ("it is exceedingly difficult to define the term people"). See also *R.McCorquodale,* 'Self-Determination Beyond Colonial Context and its Potential Impact on Africa', 4 *AJCIL* 1992, p.594.

[18] A/C.3/SR.401, 24 Jan. 1952, pr.2, p.327 (Byelorussia, now Belarus).

[19] Statement of Mr Lannung, the delegate of Denmark, A/C.3/SR. 401, 24 Jan. 1952, pr.21, p.329.

The UN has not spelt out the beneficiary of the right though some earlier UN resolutions identified *inhabitants* in non-self-governing territories and the trust territories.[20] The inference can be drawn, as far as the earlier resolutions are concerned, that by *inhabitants* was intended the whole native population of a territory with foreigners being excluded. This assumption is supported by the UN resolution on Eritrea which specifically mentioned that rights should be "exercised as citizens",[21] by the citizens of the whole territory. It is not surprising that in certain situations UN practice has been that a certain segment of a population may not be considered a *people* who can exercise the right to self-determination.[22] The position adopted by the pre-sixties UN resolutions as to the right holders does not demonstrate a great deal of variation. For instance, GA Res. 421 D (V) 4 Dec. 1950; GA Res. 545 (vi) 5 Feb. 1952; GA Res. 637 (viii) 16 Dec. 1952,[23] GA Res. 1314 (xii) 12 Dec. 1958[24] recognised *peoples* and *nations* as the right holders whilst *all*

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[20] For example see GA Res. 9/1, 9 Feb. 1946, ('political aspirations of peoples', 'the interests of the inhabitants', 'to assist the inhabitants in the progressive development of their free political interests'). 'Inhabitants' right to self-government was again emphasised in numerous subsequent resolutions. See GA Res. 185 (S-2), 26 April 1948, Protection of the City of Jerusalem and its Inhabitants: Reference to the Trusteeship Council; GA Res. 387 (v) 17 Nov. 1950, 307th plenary mtg. ('inhabitants of Libya'); GA Res. 390 (v) 14 Dec. 1950 ('inhabitants of Eritrea').

[21] GA Res. 390 (v) 14 Dec. 1950, 325th plenary mtg. pr. 6 (c).

[22] *Western Sahara (Advisory Opinion)*, order of 3 Jan. 1975, *ICJ Report*, pr.59, p.33.

[23] 'The Rights of Peoples and Nations to Self-Determination'.

[24] 'Recommendation Concerning International Respect for the Right of Peoples and Nations to Self-Determination'.

peoples and *all nations* were identified as the right holders by the proposal on the draft Covenant submitted by the Commission on Human Rights.[25]

In the early 1950s, the phrase, 'the nations and peoples right to self-determination' appeared in many statements made by various States.[26] Both the West and the Communist countries also followed a similar approach.[27] In subsequent debate on the subject of the right to self-determination this has been used by many States, perhaps without giving any serious consideration to the likelihood of minorities misappropriating the term, in particular by equating *nation* with *minorities* to justify their claims. Generally there is a tendency for *minorities* to desire to be identified with *nations* since this status gives them greater protection and political identity.

It is clearly evident from UN practices that the terms *nations* and *inhabitants* (except indigenous peoples), had gradually disappeared or been intentionally dropped to avoid situations which might otherwise have been misused by ethno-nationalists.[28] The

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[25] E/2256, Annex V, Resolutions A and B, pr.91, cited in A/C.3/SR.443, 12 Nov. 1952, pr.6, p.149.

[26] GAOR, Agenda Item 58, 9th session, 1954, Doc. A/2808 and Corr. 1, Report of the 3rd comt. pr.42, p.11. See A/C.3/L 186 Add 1, the resolution, which was popularly referred to as the Thirteen Power Resolution which was later instrumental in the formation of article 1 (2) of the International Covenant on Civil and Political Rights was presented by the following States. Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, The Philippines, Saudi Arabia, Syria and Yemen.

[27] A/C.3/SR. 360, 5 Dec. 1951, pr.52, p.81 (Israel); A/C.3/SR.359, 4 Dec. 1951, pr.7, p.74 (USSR); Byelorussia, *ibid.* pr.21, p.75; A/C.3/SR.361, pr.10, p.84 (Belgium); A/C.3/L.29/ Rev.1, pr.3 (US), GAOR, 7th session, Annexes, Agenda Item 30, 1952-53, p.3.

[28] For example UN GA Res. 2181 (xxi) 12 Dec. 1966, has dropped 'nation' in preference of States ("friendly relations and co-operation among States"). And also see GA Res. A/6799, 26 Sept. 1967, pr. 182 ("the development of friendly relations and co-operation among States").

term *nation* was replaced by States from the latter part of the 1950s. Gradually, *peoples* or *all peoples'* right to self-determination became the popular catchword in international and human rights documents. The UN Charter (*peoples*), GA. Res. 1514 (XV) 14 Dec. 1960 (*all peoples*), GA. Res. 2160 (XXI) 30 Nov 1960 (*peoples*), GA. Res. 2625 (XXV) 24 Oct 1970 (*peoples*), the Helsinki Final Act 1975 (*people* and *all peoples*) and Article one of both the Covenants on human rights (*all peoples*), and the Arab Charter on Human Rights (*all peoples*).[29] The African Charter on Human and Peoples' Rights, 1981[30] identified *all peoples* and *colonised* or *oppressed peoples* as right holders of the right to self-determination. I submit that the UN's practice strongly indicates that *peoples* or *all peoples* were used to identify a totality of peoples organised as a political unit in a State. Ethnic, national or other minority groups are not intended by *peoples, every people* or *all peoples* as will be shown below. There is no credible evidence to infer from the UN documents that *minorities* comes under the category of *peoples. Peoples* are the totality of *peoples* living in a State.

2.2 *No Ethnic Connotations Were Meant in the Charter by 'Peoples' and 'All Peoples'*

The UN Charter is regarded as "the first authoritative legal document to uphold the principle of self-determination".[31] Article I (2) states:

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[29] Reprinted in 4 (3) *IHRR* 1997, pp.850-857.

[30] *I.Brownlie*, Basic Documents on Human Rights, 3rd ed. Clarendon Press: Oxford, 1992, pp.551-558.

[31] *A.Cassese*, 'Political Self-Determination- Old Concepts and New Developments', in *A. Cassese* (ed.), UN Law / Fundamental Rights: Two Topics in International Law, Sijthoff and Noordhoff: Alphen aan den Rijn, 1979, pp.137-165, and 138.

"To develop friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples,* and to take other appropriate measures to strengthen universal peace" (emphasis added).

Article 55 states:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*, the United Nations shall promote..." (emphasis added).

Under article 73 of the UN Charter, *peoples* of the Non-Self-Governing Territories and Trust Territories were to achieve the status of self-government or independence as the situation warranted with the close co-operation of the administering powers and to a certain extent with the assistance of the other States.

The discussion on the GA Res. 2625 (xxv) 24 Oct. 1970 (Friendly Relations Declaration) reveals that some argued by referring to arts. 1 (2), 55 and 73 of the UN Charter, that when reading these articles together "the principle seemed to mean that substantial groups with a national character desiring to govern themselves and able to do so should be accorded self-government".[32] However, by close examination of how these terms *peoples* and *nations* are used in both articles 1 (2) and 55, only one conclusion can be safely arrived at. That is that two different notions are intended. The wording in the Preamble in the UN Charter also supports this position. For example, in comparing the

[32] GAOR, 21st session, Annexes (xxi) Agenda Item. 87, 1966, Report of the Special Commt. A/6230, pr. 478, p. 94.

phrase, "...the equal rights of men and women and of nations large and small..." with "...We the peoples of the United Nations determined ...", it is clearly evident that the word *nations* was used for both small and large States. One should not forget the fact that in the 1940s, during the Second World-War and its aftermath, the allied powers had not been enthusiastically engaged in the promotion of the rights of minorities and thereby putting the territorial integrity and political unity of the nation-State at risk. It was a time during which both small and large States, having fought to protect or restore the sovereignty of their respective countries against the Axis aggressors, were anxious to protect their political unity against both external and internal enemies in the aftermath of war.

It is noteworthy that the Dumbarton Oaks Proposals, which initiated the proceedings for founding the United Nations, continuously emphasised how "to develop friendly relations among nations and to take other appropriate measures to strengthen universal peace".[33] In fact the Dumbarton Oak documents were silent about the peoples' right to self-determination. The origin of both these articles goes back to the San Francisco Conference, 1945 (officially known as the United Nations Conference on International Organisation).[34] Purposes no. 2 of Chapter One and no. 2 of Chapter Nine - 'Purposes and Relationship' were[35] adopted verbatim in the present articles 1 (2) and 55 of the UN Charter.

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[33] See Chapter 1, 1 (2) of the Dumbarton Oaks Proposal, 1944, reprinted in the *YBUN*, 1946-1947 Published by the Department of Public Information, UN: New York, 1947, p. 4.

[34] See United Nations Documents 1941- 1945, publication by Royal Institute of International Affairs (1946), London : New York, pp. 145-176.

[35] See the San Francisco Conference document, 1945, chapter 1, Purposes, nos. 2 and 1 of the Chapter IX, Section A, Purpose and Relationship. See YBUN 1946-1947 resepectively, 1947, pp. 14 and 16.

The word *peoples* (proposed by the USA and subsequently approved by the USSR, Ukrainian SSR, China, France and the Latin American countries) was preferred to 'High Contracting Parties' (which was proposed by South Africa) in the San Francisco documents. This was because it was principally agreed that the UN Charter must, by its nature, be an agreement between the Governments of the United Nations. Thus, *peoples* was used for the nation-State. The San Francisco debates reveal that the representatives of participant States repeatedly used *peoples* and *nations* interchangeably. However, the preferred word for the nation-State was *nations*.[36] During the debate on the Friendly Relations Declaration at the 6th Committee of the General Assembly, the representative of the UK referring to *peoples* in the UN Charter said:[37]

> "What was meant by people ? That was the principal difficulty which the Committee would have to overcome in elaborating the principle of self-determination. In the context of the Charter, '*peoples' meant essentially those who were so organized as to constitute a State in the territory which they occupy*. That was clear from the Preamble, which declared that the Charter had been concluded in the name of the 'peoples' of the United Nations".

Indeed, it has been continually emphasised since the 1950s that *peoples* referred to in the UN Charter (in both articles 1 (2) and 55) were those found in the Trust territories, the

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[36] Commenting on 'nations' Verzijl said that the word 'nation has nothing to do with national groups, in the ethnical sense, within the State...". *J.H.Verzijl,* International Law in Historical Perspective, vol. 1, A.W.Sijthoff: Leiden, 1968, p.322.

[37] Emphasis added. A/C.3/SR. 890, 3 Dec. 1965, pr.19, p.303.

Non-Self-Governing Territories, and peoples living in colonies as a whole,[38] or "those living under the authority of other nations".[39] It was correctly pointed out by some States that the authors of the UN Charter had not been thinking of minorities when they included the peoples' right to self-determination in articles 1 (2) and 55.[40] In its context, the word *people*, it was argued, "clearly meant the multiplicity of human beings constituting a nation, or the aggregate of the various national groups governed by a single authority".[41]

In fact, as Claude correctly points out, the Charter did not focus on minorities or problems associated with them.[42] This was largely because most leading States representatives's attitudes towards minorities were "largely negative in character".[43] On the

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[38] See for example, A/C.3/SR. 366, 12 Dec. 1951, pr.25, p.115 (Liberia). Also see A/C.3/SR. 398, 22 Jan. 1952, prs.34, 35, 36, 37, pp. 309-310 (Saudi Arabia).

[39] A/C.3/SR. 399, 23 Jan. 1952, pr.2, p.311 (India). Venezuela, Colombia and Belgium had similar views, see Microfilmed minutes of the debates of the First Committee of the First Commission of the Sanfrancisco Conference, 14-15 May and 1 and 11 June 1945, unpublished, Library of the Palais des Nations, Geneva, cited in *Cassese, supra,* 2, p.39. See also *P.Thornberry*, 'Self-Determination, Minorities and Human Rights : A Review of International Instruments', 38 *ILCQ* 1989, pp.871-875.

[40] A/C.3/SR. 399, 12 Dec. 1951, pr.29, p.116 (Liberia).

[41] A/C.3/SR. 397, 21 Jan. 1952, pr.5, p.300 (Syria).

[42] *I.L.Claude*, National Minorities: An International Problem, Cambridge, Mass: Harvard UP, 1955, p.113.

[43] *Thronberry, op.cit.*39, p.872. *T.van.Boven*, 'Human Rights and Rights of Peoples', 6 (3) *EJIL* (3) 1995, p.470. In fact, one representative was quoted as saying during the San Francisco Conference that "What the world needs now, is not the protection for minorities, but protection from minorities". See details *J.Helgesen*, 'Protecting Minorities in the Conference on Security and Co-operation in Europe (CSCE) Process', in *A.Rosas* and *J.Helgesen* (eds.), The Strength of Diversity, Human Rights and Pluralist Democracy, Martinus Nijhoff: Dordrecht/Boston/London, 1992, pp.159-186.

other hand, in both Articles 1(2) and 55, these references were made in the context of development of peaceful and friendly relations amongst nations which is central to the Charter and upon which the new world order was to be built up.[44] *Nations* was used in both articles in the Charter to identify *nation-States* so adhering to the early practices of the League of Nations.[45] The UN Secretariat concluded that, "The word 'nation' is broad...enough to include colonies, mandates, protectorates and quasi-States as well as States... and 'nation' is used in the sense of all political entities, States and non-States, whereas 'peoples' refers to groups of human beings who may, or may not, comprise States or nations".[46] It was argued that these two terms are identical in the context of the right to self-determination.[47]

It was also suggested that peoples right to self-determination was related to the future of any territory constituting a distinct geographical entity.[48] Juridically, the world was not made up of peoples, argued the US delegate, but rather of political entities called States,[49] therefore it is States which become the ultimate beneficiary of this right. To define

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[44] See UN Doc. A/6799, 26 Sept. 1967, pr. 181 ("the principle was regarded as the foundation upon which the peaceful and friendly relations among nations was to be achieved by the UN"). See also GAOR, Agenda Item 90-94, Annexes (xxii), 22nd session, 1967, pr.181, p.30.

[45] During the debate on the naming of the new League of Nations after the first world-war, it was suggested by the British delegate that the difference between 'nations' and 'States' was a very small one. Later, instead of the League of States, the League of Nations was confirmed. See *D.H.Miller*, The Drafting of the Covenant, vol. 1, G.B.Putnam and Sons: New York and London, 1928, p.135, cited in *Cassese, supra*,2, p.27.

[46] UNCIO Docs. vol.xviii, pp.657-658, cited in *Thornberry, op.cit*.39, p.871.

[47] A/C.3/SR. 396, 21 Jan. 1952, pr.58, p.297 (Afghanistan).

[48] A/C.6/SR. 892, 7 Dec. 1965, pr.24, p.320 (Cyprus).

[49] A/C.6/SR. 893, 8 Dec. 1965, pr.16, p.329.

these two terms, *peoples* and *nations*, the Commission on Human Rights was required to examine them fully.[50] But there is no evidence that the Commission ever fulfilled this obligation. This has in effect created difficulty and confusion whenever these two terms have appeared in UN treaties or resolutions.

2.3 *'All Peoples' instead of 'Peoples'* and *'Nations' in the Covenants ?*

In compliance with some early resolutions of the General Assembly, most notably with the GA Res. 545 (VI) 5 Feb. 1952 and the Draft Resolution, E/2256, Annex V, Draft Resolutions A and B (adopted by the Commission on Human Rights and submitted by the Economic and Social Council to the Third Committee) the following terms was proposed for the human rights conventions:[51]

> "Member States should: (1) uphold the principle of self-determination of peoples and nations and respect their independence; and (2) recognise and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories who were under their administration and grant that right on a demand for self-government on the

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[50] Resolution 586 (xx) Report of the Commission on Human Rights, 889th plenary mtg. 29 July 1955, ESCOR, 20 session, supplement no. 1, Res. 586 (xx) p. 12.

[51] E/2256, Annex V, Draft Resolution A and B, GAOR, 7th session, Annexes, Agenda Item 30, 1952- 1953, p.9. This was criticised by many States. For example, the delegate of Bolivia criticising the Draft Declaration submitted by the Economic and Social Council said that it was concerned only with "one aspect of the problem, the peoples of the Non-Self-Governing and Trust Territories, not with the problems of self-determination as a whole". See A/C.3/SR. 459, 29 Nov. 1952, pr.51, p.255.

part of those peoples, the popular wish being ascertained in particular through a plebiscite held under the auspicious of the United Nations".

The Western powers and their allies on the one hand were not pleased with the phrase, "peoples and nations" believing that the proposed article on the right to self-determination would be applied only to peoples in the Non-Self-Governing Territories, Trust Territories and the peoples living in the colonies, which was in their view, (i) discriminatory against the powers which controlled those territories; and (ii) instigated by the Socialist countries of Eastern Europe with the tacit approval of the newly independent countries of Asia, Africa and the Middle East to create problems for the West. The insistence of the Western powers, i.e. the UK,[52] USA,[53] Belgium, Netherlands, Australia,[54] and France, that the right

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[52] The UK in its resolution, A/C.3/L.299, 25 Nov. 1952 urged that "Whereas every member of the United Nations, in conformity with the Charter, should respect the maintenance of the principle of equal rights and self-determination of peoples everywhere". See GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, pp. 5-6. Paragraph 2 of the same resolution included, "The States Members of the United Nations shall recognize this principle and promote its application in relation to the peoples of all territories and nations under their control: shall do so in a manner appropriate to the particular circumstances of each territory or nation and the interests of the peoples concerned; and shall respect its application in other States".

[53] The USA wanted to include, "all peoples and nations". See UN Doc. A/C.3/L.294/Rev. 1, 28 Nov. 1952, revised amendment to the draft Resolution A, E/2256, Annex V. The US amendment proposed that "the States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations". See GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p.3 (this amendment was adopted by 33 votes to 6 votes with 11 absentees). See US delegate Mrs Roosvelt's statement, A/C.3/SR.457, 28 Nov. 1952, prs.32 and 34, p.240.

to self-determination be applied universally won the argument. *All peoples* in all territories, including independent States[55] has finally been adopted instead of *peoples.* The Western powers' amendments received significant help from the Fifteen Power's resolution which called for the "self-determination of all peoples" to be recognised by the United Nations.[56]

On the other hand, some Asian and a few Latin American and Arab countries were concerned about the possible consequence for independent States if the phrase "all peoples and nations" right to self-determination were to be included in the proposed human rights covenants. Their fear was based on the possibility of a scenario in which *minorities,* sheltering behind the cloak of *all peoples* and *nations* might exploit it to make their own claims to self-determination and independence. Therefore, another resolution was submitted suggesting that "all peoples and nations right to self-determination" be replaced with "the rights of peoples to self-determination".[57] Iraq and Pakistan again presented a similar resolution making amendments to India's resolution by proposing that "of all

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[54] A/C.3/SR.458, 28 Nov. 1952, prs.13, 14 and 15, p.246 ("universal application of the principle of the right to self-determination").

[55] US resolution, A/C.3/L.297/Rev.1, 25 Nov. 1952, the revised amendment to the amendment submitted by the USA, A/C.3/L.294.

[56] The following Latin American countries presented this resolution, A/C.3/L.304, 28 Nov. 1952, (amendment to the Resolution submitted by India A/C.3/L. 297/Rev. 1). Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Equador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Uruguay and Venezuela. See, GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p. 6.

[57] This was proposed by Afghanistan, Argentina, Chile, Guatemala, Iraq, Lebanon, Mexico and Pakistan. See A/C.3/L.317, 3 Dec. 1952, GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p. 9.

peoples right to self-determination" be replaced with that "of the peoples".[58] It is worth mentioning that even though in India's amendment, the phrase "the right of self-determination of all the peoples" was included to recognise the universality of the principle, it had never been intended to infer that minorities as *peoples* or as segments of *all the peoples* had any legitimate claim to self-determination as a political units.[59] Such an admission, as the delegate of India said, "was fraught with dangerous consequences".[60] The Twenty Power regarded in their proposal the right holders of the right to self-determination as "peoples and nations",[61] yet, none of them admitted, implicitly or explicitly that, this phrase had any ethnic connotations.

The majority of Western powers and emerging nation-States in Latin America, Eastern Europe, the Middle East and Asia were unanimous in not wanting the phrase "all peoples or peoples" to be identified with *minorities*. It was also argued that a segment of a population of the State occupying a particular area could not claimed to be the *peoples*.[62] The UK delegation was concerned about the uncertainty surrounding *peoples*, and did not apparently want a minority population of foreign origin or indigenous race, or irredentist factions, to be identified as *peoples*. Its delegate further questioned: [63]

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[58] See A/C.3/L309 Rev.1, Dec. 1952, GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p.97

[59] See India's view in support of its resolution A/C.3/L.297/Rev.1, in A/C.3/SR. 457, 28 Nov. 1952, prs.51, 52 and 53, p. 241.

[60] *Ibid.* prs.51, 52 and 53, p.241.

[61] Afghanistan, Bolivia, Burma, Chile, Egypt, Greece, Haiti, India, Indonesia, Iraq, Lebanon, Liberia, Pakistan, the Philippines, Saudi Arabia, Syria, Thailand, Uruguay, Yemen and Yugoslavia, A/C.3/L.427, Add. 1. GAOR, 7th session, Annexes, 1952-1953, Agenda Item 30.

[62] A/C.3/SR. 400, 23 Jan. 1952, pr.23, p.321 (New Zealand).

[63] *Ibid.* pr. 26, p.156

> "Could any group of people, however small or scattered, regardless of the territory it occupied and of its geopolitical locality, of the political unit to which it belonged and of the interests of other peoples and other States, claim to exercise that right in full? It was obvious that the recognition of such an unbridled right would be a potent cause of friction and would be one of the very first things to upset friendly relations among nations and to threaten the domestic peace of the States themselves".

Many feared that this right might be misused in the future by minority groups within sovereign States if care was not properly observed.[64] Therefore, it was urged that member States must make sure that there would only be "the smallest number of problems"[65] when the principle of the right to self-determination of all peoples was to be included in the covenant.

The Netherlands representative expressed his fear that the resolutions A and B presented by the Third Committee on the right to self-determination to be included in the Covenant might arouse unrealistic expectations amongst certain segments of the population.[66] It was emphasised by Austria that if *peoples* meant ethnic or racial groups, a strict interpretation would imply a fragmentation of existing States. The difficult question of minority groups, as argued by the Austrian delegate, could not be solved by a facile

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[64] A/C.3/SR. 401, 24 Jan. 1952, pr.28, p.329 (UK) and A/C.3/SR.358, 30 Nov. 1951, pr.35, p.70 (Mexico).

[65] A/C.3/SR. 402, 24 Jan. 1952, pr.12, p.336 (Sweden).

[66] A/C.3/SR.447, 18 Nov. 1952, pr.8, p.172.

reference to the principle of self-determination.[67] Many States were in consensus that the draft resolutions A and B did not identify minority groups in the context of peoples' right to self-determination.[68]

Finally, the word *peoples* in article 1 of the Covenants was understood to mean "peoples in all countries and territories, whether independent, trust or non-self-governing".[69] The inference is obvious, *minorities* are not meant by *peoples* or *nations.*

2.4 *Peoples in the 'Friendly Relations Declaration'* (GA Res.2625 (xxv) 1970)

When the contents of the first paragraph in the Friendly Relations Declaration[70] were discussed, the phrase "all peoples to self-determination" was proposed by many Afro-Asian countries with the help of some eastern European countries.[71] State representatives' statements during the debate on the Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States (which lead to 2625 GA Resolution, Friendly Relations) followed the approach taken by their

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[67] UN Doc. A/2309 and Corr. 1, Report of the Third Committee, pr. 40, p. 163, printed in GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953.

[68] A/C.3/SR. 446, 17, Nov. 1952, prs.16 and 17, p.166 (Belgium).

[69] See ESCOR, E/CN.4/SR.253, p.4.

[70] See generally *R.Rosenstock*, 'The Declaration of Principles of International Law Concerning Friendly Relations', 65 *AJIL* 1971, pp.713-735.

[71] Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia proposed this amendment. See the text, GAOR, 21st session, Annexes (xxi), Doc. A/6230, Report of the Special Commt on Friendly Relations, 1966, Agenda Item. 87, pr.458, p.91, A/AC.125/L. 31 and Add. 1 to 3. See also, UN Doc. A/6799, 26 Sept. 1967, pr.190.

predecessors in earlier UN treaties and resolutions. Some States opposed the formulation of the concept as a right of peoples primarily because of the difficulty of defining the repository of the right.[72]

There appeared to be a consensus that *peoples* or *all peoples* did not have ethnic connotations.[73] Otherwise, as one representative argued, territorial integrity and political independence would be endangered. It is clearly evident from the statements of State delegates that many were afraid of the revival of secessionist movements similar to that of Katanga within the territories of an independent States. As with the arguments raised during the debate on the proposed Covenants on human rights it was pointed out if *peoples* was not properly understood, "there would be some danger that peoples could be misled into attempting to invoke such rights to justify the dislocation of a State within which various ethnic communities had been successfully living together for a long time".[74] Therefore, *peoples* meant "peoples of a territory as a whole",[75] or those still living under colonial domination. Thornberry correctly argued that the Friendly Relations Declaration's focus was on 'whole territories' or 'peoples' rather than 'ethnic groups'.[76]

The approach taken by the above UN documents has been followed by other regional human rights mechanisms, such as the African Charter on Human and Peoples Rights, 1981 (African Charter) and the Helsinki Final Act, 1975. Even though Article 20

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[72] GAOR, Agenda Item 87, Annexes (xxii) 22nd session, 1967, pr. 192, p.32.

[73] *Ibid.* pr. 194, p. 32.

[74] UN Doc. A/6799, 26 Sept. 1967, pr. 221.

[75] A/C.3/SR. 938, 23 Nov. 1966, pr.22, p.231 (Cyprus). See also GAOR, 21st session, Annexes (xxi) Agenda Item. 87, 1966, Special Comt Rept. Doc. A/6230. pr.69, p.127.

[76] *Thornberry, op.cit.*39, p.877.

(II) of the African Charter[77] used the term *all peoples*[78] and *colonized* and *oppressed peoples'*[79] right to self-determination, as Gittleman says, *minorities* are not meant to be synonymous with *all peoples, oppressed* or *colonized peoples.*[80]

The Helsinki Final Act, 1975 excluded national minorities from the principle of self-determination as enshrined in Principle VIII ("...all peoples always have the right" to self-determination). Cassese points out that Eastern and Western European States are unanimous on this. The main reason for the omission of minorities from Principle VIII, according to Cassese, was to avoid any secessionist movements fighting for the division of the territories of independent States in the European countries.[81]

The opinions of international jurists reflect the difficulty in finding what 'people' meant in the above mentioned treaties, declarations etc. This difficulty arose because there was still no text or guidance provided by UN organs to determine what a *people* meant.[82] As noted by McGoldrick even the Human Rights Committee failed to address this issue despite being well placed to do so.[83]

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[77] Reprinted in *Brownlie, supra,* 30, pp.552-566.

[78] See article 20 (I). It states: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."

[79] See article 20 (II). It states, "Colonial or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community".

[80] See *R.Gittleman,* 'The African Charter on Human and Peoples Rights: A Legal Analysis', 22 (4) *VJIL* 1982, p. 679.

[81] *Cassese, op.cit.*2, p. 283. Boven, *op.cit.*43, p.471.

[82] *Ibid.* pr.194, p.32.

[83] *McGoldrick, supra,* 14, p.250.

However, opinions of international jurists on *peoples* in the UN practice support the above conclusion, that is, any ethnic connotations are absent in 'people' in the context of the right to self-determination. Eide, the Special Rapporteur, analysing the conceptual background of the term, *people* came to the conclusion that *people* is used to identify "...the permanent, resident population of the territory concerned, not the separate ethnic or religious groups, whether dominant or not in the territory. It refers to *demos*, not to *ethnos*. During the process of decolonization, the word *people* was consistently understood as the population as a whole".[84] Higgins rightly observed:

> "The emphasis in all the relevant instruments, and in the State practices (by which I mean statements, declarations, positions taken) on the importance of territorial integrity, means that 'peoples' is to be understood in the sense of *all* the peoples of a given territory. Of course, all members of distinct minority groups are part of the peoples of the territory. In that sense they too, as individuals, are the holders of the right of self-determination. But minorities *as such* do not have a right of self-determination. That means, in effect, that they have no right to secession, to independence, or to join with comparable groups in other States".[85]

Clearly 'minority' and 'people' are two different concepts in international law. The full beneficiaries of the right to self-determination are the people of a territory. However, there may be instances in which minority may be considered 'a peoples' for the purpose of the right to self-determination,[86], if that minority constitutes a people in a given territory.[87]

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[84] ESCOR, E/CN.4/Sub.2/1993/34, pr. 76, p.17 and pr.82, and p.18.

[85] *Higgins, op.cit.* 14 , p.124.

[86] See also *B.Simma* (ed.), The Charter of the United Nations, Oxford UP: Oxford, 1994, pp.64-65.

[87] *McGoldrick, supra*, 14, p.251.

Most jurists are of the view that article 1 of both the Covenants refers to the whole people of an established State.[88] It implies the universal character of people' right to self-determination.[89] It cannot therefore have any racial or ethnic character. However, some scholars see a somewhat weak interrelationship between self-determination and minorities in particular in the context of the Friendly Relations Declaration.[90] In certain situation, some inference can be drawn from paragraph 7 of this Declaration, that is, a minority may be considered or termed 'peoples' and as such they can benefit from the right to self-determination. According to the obligations imposed by this paragraph it is essential that the protection of paragraph 7 be conferred only on States 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[91] If a segment of a peoples within a territory "are treated in a grossly discriminatory fashion by an unrepresentative government" then their claim to self-determination "cannot be defeated by arguments about territorial integrity".[92] Examples of such a scenario are that of the Bangladesh insurrection and perhaps the present Kosovo Albanians' struggles for independence. Thus, in boph these instances, it can be argued, that East Pakistan Bangladeshis and Kosovo Albanians can claim legitimacy by virtue of 'peoples' right to self-determination'. Oppressed groups, in such a case can legitimately operate as 'peoples', but not as 'minorities'.

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[88] *Simma, supra*, 86, p.2.

[89] *Cassese, op.cit.* 2, p.62.

[90] See *Thornberry, op.cit.*39, p.875.

[91] See *Rosenstock, supra*, 70, p.732. See *infra* chapter, 8.

[92] *Thornberry, op.cit.*39, p.876.

Conclusions

In conclusion, p*eoples* as used in the above discussed UN documents, the African Charter and the Helsinki Declaration should not be confused with ethnic, religious or linguistic minorities. *Minorities* are not intended by *peoples* or *all peoples.* It is the *peoples* of one territorial unit who become the ultimate repository of the right. Indeed, *minorities* are an important unit of *peoples* and in that sense they too are beneficiaries.

3 Claim for Autonomy With Shared-Sovereignty

Introduction

Former Secretary-General, Boutros Ghali reporting in pursuance of the statement adopted by the Summit Meeting of the Security Council said that the international community was entering an era compounded by one of the greatest political upheavals which was "marked by uniquely contradictory trends". He focused on the "new assertions of nationalism and sovereignty", and their resultant detrimental effects on the cohesion of the nation-States.[1] Though minority groups' claim for greater political power with shared-sovereignty in the form of autonomy is not a new development, a sudden burst of such claims by 're-energised and contesting ethnic groups'[2] in recent times has surprised many statesmen and jurists alike. Such claims are political in nature and more controversial than traditionally understood 'minority rights', some of which, i.e., religious, linguistic and cultural rights, are now enunciated in Article 27 of the ICCPR. Nor is such a right enshrined in the UN Declaration on Minorities, 1992,[3] though the Draft

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[1] An Agenda For Peace, UN Doc. A/47/277; S/24111, 17 June 1992, pr. 11.

[2] *P.Thornberry,* 'Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities', in *M.Suksi* (ed.), Autonomy: Applications and Implications, Kluwer Law International: The Hague/London/Boston, 1998, p.97.

[3] See generally *P.Thornberry*, 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religous and Linguistic Minorities: Background, Analysis and

Declaration on the Rights of Indigenous Peoples, (draft Declaration on indigenous peoples) recognizes indigenous peoples' right to autonomy.[4]

Given the seriousness and the controversial nature of such claims, a majority of States are opposed to any enlargement of 'minority rights' to accommodate greater autonomy with 'shared sovereignty', particularly when this has territorial implications. The conceptual aspects of autonomy are analysed in this chapter which examines their relevance to minorities' claims for greater political power.

3.1 *Autonomy*

Autonomy is not a new phenomenon. Autonomous territories or arrangements have existed since the late 19th century.[5] International treaties, the League of Nations and the constitutional practices of States have been instrumental in moulding the notion of autonomy as an important element in democratic governance which, as many argued, can be operated in pluralist societies more effectively. Some of these were formulated to accommodate individuals belonging to minority groups and others were created in collective terms taking into consideration ethnic, religious and linguistic characteristics. Extensive power for

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Observations', in *A.Phillips* and *A.Rosas* (eds.), The UN Human Rights Declaration, Turku/Abo/London, 1993, pp.11-71.

[4] ESCOR, E/CN.4/Sub.2/1994/56, 28 October 1994.

[5] *L.B.Sohn*, 'The Concept of Autonomy in International Law and the Practice of the United Nations', 15 (2) *ILR*, 1980, p.181. *P.Thornberry*, International Law and the Rights of Minorities, Clarendon Press: Oxford, 1991, chapter 2. See further *R.Robinson*, Were the Minorities Treaties a Failure? Institute of Jewish Affairs: New York, 1943.

self-governments as well as for local administrative units were also amongst the earlier autonomous models.

Elements of autonomy can be seen in pre-UN treaties, for example, the Treaty of Versailles, 1919 (Treaty between Principal Allied and Associated Powers and Poland), the Treaty of Saint-Germain-en-Laye, 1919 (between Principal Allied and Associated Powers and Czchoslavakia), the Treaty of Paris, 1919 (between Principal Powers and Roumania), the Treaty of Lausanne, 1923 (between Turkey and the Principal Powers), and the Treaty of Neuilly- sur-Seine, 1919,[6] (between Bulgaria and Principal Powers). The Memel Territory under the sovereignty of Lithuania in 1924,[7] the German-Polish Convention on Upper Silesia, 1922, the Mosquito Indian Territory in Nicaragua (under a treaty with the UK), Catalonia, Sanjak of Alexandretta, and the Bolzano and Trento provinces in Italy, the Walachs in Pindus (Greece)[8] were other prominent experiments. In addition, the Aaland Islands[9] created in 1921 under the aegis of the League of

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[6] See League of Nations, Protection of Linguistic, Racial and Religious Minorities by the League of Nations, 1927 cited in Special Protective Measures of an International Character for Ethnic, Religious or Linguistic Groups, UN Publication: New York, 1967, part II, p.47. *Thornberry, op.cit.* 5, pp.41-42. See also Robinson, *supra*, 5, pp. 164-165.

[7] Lithuania was given sovereignty over Memel upon the advice of the League of Nations. Great Britain, France, Italy, Japan and Lithuania were the parties to the Treaty which was signed on 8 May 1924. The main aim was to give self-rule to the German speaking people. Memel Territory did not survive the Second World War. See *R.Lapidoth,* Autonomy, Flexible Solutions to Ethnic Conflicts, United States Institute of Peace Press: Washington DC, 1997 p.78.

[8] *Ibid.* p.102.

[9] The Aaland Islands were granted autonomy first on 6 May 1921 by *Guarantee Law* by Finland. Later, a resolution adopted at its thirteenth secession by the League Council

Nations (Agreement between Sweden and Finland), the Eritrean autonomous region within the sovereignty of the Ethiopian Crown in 1952,[10] the Faeroe Islands,[11] Greenland,[12] the Cook Islands under New Zealand, Kurdistan in Iraq,[13] and the Catalan and Basque regions of Spain[14] are other prominent autonomy models which came into force since the 1920s.

Sovereignty and Self-Determination, University of Pennsylvania Press: Philadelphia, 1990, p.371 (Autonomy and Sovereignty).

[10] The UN has initiated a federal solution to the Eritrean problem by the *Federal Act of 1952* in pursuance of its resolution GA Res. 390 (V) 2 Dec. 1950. On 3 May 1952 the UN Commission in Eritrea presented a draft constitution which was adopted by the Eritrean Assembly on 10 July 1952 with some amendments. On 11 August 1952 the Emperor of Ethiopia ratified it. The Eritrean Constitution came into force on 11 Sept. 1952. See *B.B.Ghali*, 'Overview', in The United Nations and the Independence of Eritrea, Department of Public Information, UN: New York, 1996. See further *T.Meron* and *A.M.Pappas*, 'The Eritrean Autonomy: A Case Study of a Failure', in *Y.Dinstein* (ed.), Models of Autonomy, Transaction Books: New Brunswick and London, 1981, p.183.

[11] See *infra* footnote 85, and footnote 38 and 62 in *infra* chapter 5.

[12] See *infra* footnote 28 and 84. See also footnote 61 and 62 in chapter 5 for further details.

[13] The Kurds in Iraq were granted autonomous status by *The Law of Autonomy in the Region of Kurdistan*, Act no. 33 of 11 March 1974 (as amended in 1983) even though it has never been fully implemented as promised by the Iraqi regime. See generally *P.G.Kreyenbroek* and *S.Sperl*, The Kurds: A Contemporary Overview, Routledge: London and New York, 1992. See further *H.Hannum* (ed.), Documents on Autonomy and Minority Rights, Martinus Nijhoff: Dordrecht (Documents on Autonomy), 1993, pp.317-24. *Sohn*, *supra*, 5. p.182. English text is included in Settlements of the Kurdish Problem in Iraq, Ath-thawra Publication: Baghdad, pp.185 -198.

[14] See *infra* chapter 5, footnotes 34 and 35.

'Autonomy' derives from two Latin terms, '*auto*' (self), and '*nomos*' (law, or rule),[15] and was originally used by sociologists.[16] It expresses the idea of one's own right to make rules and regulation over one's own affairs, or according to Jellinek, "authority to govern, to administer, and to judge".[17] Autonomy as a legal concept is, however, vague and imprecise. Thornberry states that autonomy is a protean term which is a somewhat flexible notion, "Coming apart at the seams, lacking a definite shape. Shapeless or not, it is, like collective rights in general, a site of polemics in the fields of international law, despite the number and scope of domestic examples".[18] Therefore, argues Thornberry, "a preliminary rush to judgment suggest that autonomy is hardly there in the minority rights texts, but close examination discovers strands and whispers of autonomy or something like it".[19] He confesses his 'uneasiness' about extended meanings in the light of the many adjectives offered to qualify the term. "It could be that the

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[15] See *Lapidoth, supra,* 6, p.29; *Y.Dinstein,* 'Autonomy', in *Dinstein* (ed.), *op.cit.* 10, p.224. See further *M.Ostwald,* Nomos and the Beginning of Athenian Democracy, Oxford University Press: London, 1969; same author, Autonomia: Its Genesis and Early History, American Classical Studies, vol. 11, 1982, cited in *Lapidoth, ibid.* footnote.1, p.219. See also *L.Hannikainen,* 'Self-determination and Autonomy in International Law', in *Suksi* (ed.), *supra,* 2, pp.79-95; *A.Eide,* 'Cultural Autonomy: Concept, Content, History and Role in the World Order', in *Suksi* (ed.), *supra,* 2, p.251.

[16] *F.Harhoff,* 'Institutions of Autonomy', 55 *NJIN* 1986, p.31.

[17] *G.Jellinek,* Allgemeine Staatslehre, 3rd ed., Hermann Gentner Verlag: Bad Homburg, Germany, reprinted in 1960, cited in *Lapidoth, supra,* 6, p.30 and footnote 5, p.220.

[18] *Thornberry,* in *Suksi* (ed.), *supra,* 2, p.98.

[19] *Ibid.* p.98.

manifold uses of autonomy do not grasp an essence, but express only the fiercest nominalism".[20] He further writes:

> "In the context of minority rights, autonomy appears as hortatory or pragmatic politics, refusing to convert itself into a coherent norm and perhaps dissolving into conceptual sub-constituencies before our eyes. It is too little for indigenous peoples. Suggestions that they should adopt the concept of autonomy as a general focus for their claims do not appeal. Autonomy is seen as a grant, not a right; it is viewed as static, not dynamic".[21]

This conceptual confusion is highlighted by Hannum and Lillich. They state that "autonomy is not a term of art or a concept which has a generally accepted definition in international law". Quoting John Chapman they point out that it is due to "so much loose writing and nebulous speculation by jurists without properly interpreting the term and its application in modern nation-states".[22] Sohn suggests that the concept of autonomy is in between the concept of a non-self-governing territory and an independent State, i.e., 'short of independence', enabling the inhabitants of the territory to control its economic, social and

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[20] *Ibid.* p.122.

[21] *Ibid.* p.123.

[22] *J.Chapman*, The Nature and Sources of the Law, 1909, cited in *H.Hannum* and *R.B.Lillich*, 'The Concept of Autonomy in International Law', in *Dinstein* (ed.), *op.cit.* 10, p.215. See further *H.Hannum* and *R.Lillich*, 'The Concept of Autonomy in International Law', 74 *AJIL* 1980, p. 885.

cultural affairs.[23] It indicates a certain degree of independence, or as noted by Heintze, "a partial independence from the influence of the national or central government",[24] for a group or a delineated region in dealing with defined areas of activities agreed by both the centre and the province.

Various terms are used in documents dealing with autonomy of which 'self-government',[25] or 'self-rule', 'local administration' or 'autonomous administration',[26] 'local government', 'self-management',[27] 'home rule'[28] are the ones frequently found in international and bilateral treaties and constitutions dealing with minorities and indigenous peoples. Since autonomy has not yet been established as a principal in international law, researchers therefore have to rely on the analysis of jurists and publicists to understand the concept of autonomy and its application to minority groups.

Autonomy is a political tool often used both by minority groups and States to strengthen their respective claims and power bases. It has therefore been

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[23] *Sohn, supra,* 5, p.189.

[24] *Hans-Joachim Heintze,* 'On the Legal Understanding of Autonomy', in *Suksi* (ed.), *supra,* 2, p.7.

[25] *Lapidoth, supra,* 6, pp.52-54.

[26] See paragraph 35 of the CSCE Copenhagen Meeting on the Human Dimension of the Conference on Security and Corporation, 29 June 1990 ("appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances"), reprinted in 29 *ILM* 1305 [1990].

[27] An attempt by the Minority Rights Group to include a separate provision on 'self-management and autonomy' in the Declaration on Minorities was not successful. See *Thornberry,* in *Suksi* (ed.), *supra, 2,* footnote 64, pp.109-110.

[28] Greenland autonomy is mentioned as home rule for Greenlanders, see *Greenland Home Rule Act*, no. 577, 1978. It entered into force on 1 May 1979.

identified in terms of the protection of minority rights which within a democratic environment enables the people of a given territory to participate effectively in cultural, religious, social, and economic life at regional or personal level. In this context, the right to 'independence' is not envisaged[29] though a degree of independence from the central or federal government for a region or particular ethnic group is clearly evident.[30]

3.2 *Autonomy Means Self-government* ?

Although autonomy is not a well defined legal concept,[31] in a legal and political sense, autonomy means, according to Dinstein, self-government,[32] which is seen as government by consent of the people of a given territory. Sohn, Thornberry, and Elazar also see an analogy between self-government and autonomy.[33] Autonomy, in the view of Heintze, in a democracy is part of the self-government which enables the "authority to regulate their own affairs by enacting legal rules".[34] According to Nordquist, self-government is embedded in any

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[29] ESCOR, E/CN.4/Sub.2/1990/46, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, pr.23, p.6.

[30] *Hannum* and *Lillich*, *op.cit.* 22, p.885.

[31] *Hans -Joachim Heintze*, *supra*, 24, in *Suksi* (ed.), *supra*, 2, p.7.

[32] *Dinstein*, *op.cit.* 15, in *Dinstein* (ed.), *op.cit.* 10, p.291.

[33] See *Sohn*, *supra*, 5, pp.180-190. *D.J.Elazar* (ed.), Federal Systems of the World, A Handbook of Federal, Confederal and Autonomy Arrangements, Longman: London, 1991, Introduction, xvii. *Thornberry*, in *Suksi* (ed.), *supra*, 2, pp.98-124.

[34] *Hans-Joachim Heintze*, *supra*, 24, in *Suksi* (ed.), *supra*, 2, p.7.

arrangement of autonomy.[35] Self-rule and self-government are related concepts according to Sohn.[36] Suksi says autonomy culminates in the achievement of self-government.[37] Often constitutions dealing with autonomous arrangements employ the term 'self-government' to imply autonomy. For example, the Constitution Act of Finland, 1994[38] (new chapter iv, a), the Constitution of Spain, 1978 (articles 143 (1) and (2), and the Southern Provinces Regional Self-Government Act, 1972 (Sudan) all employ 'self-government.' On the other hand, some international treaties[39] and UN documents, notably, the UN Draft Declaration on Indigenous Peoples uses autonomy and self-government interchangeably.[40] 'Self-government' is what is sought by many minority groups and indigenous peoples to identify greater autonomy in territorial terms. It can be, in their view, used to take control

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[35] *Kjell-Ake Nordquist*, 'Autonomy as a Conflict -Solving Mechanism: An Overview', in *Suksi* (ed.), *supra*, 2, p.79.

[36] *Sohn*, *supra*, 5, pp.180-190.

[37] *M.Suksi*, 'The Constitutional Setting of the Aaland Islands Compared', in *L.Hannikainen and H.Horn* (eds.), Autonomy and Demilitarisation in International Law, The Aaland Islands in a Changing Europe, Kluwer Law International: The Hague/London/Boston, 1997, p.104. See further, *Hannam* and *Lillich*, *supra*, 22, in *Dinstein* (ed.), *op.cit.* 10, p.249.

[38] *S.Palmgren*, 'The Autonomy of the Aaland Islands in the Constitutional Law of Finland', in *Hannikainen* and *Horn* (eds.), *ibid.* p.86.

[39] See the Declaration of Principles on Interim Self-Government Arrangements Concerning Gaza and Jericho, 13 Sept. 1993, 32 *ILM* 1525 [1993], pp.1525-1544.

[40] See article 31 which states, "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land

over their own affairs effectively without interference from the centre and to preserve their cultural identity, their customs and traditions, and their institutions in the way they like. For instance, Chief Mercredi argued that what Canadian Indians (notably his tribe, Mohawk) sought was 'self-government' to protect their way of life in a collective sense through their own institutions. He was not asking simply for local government or municipal units with a few decentralized powers.[41] A similar view was expressed by the Aboriginal and Torres Strait Islander Commission to the UN Working Group on Indigenous Population in 1993 ("self-government by indigenous peoples of their own communities or lands").[42] In *Delgamuukw* v *British Colombia*,[43] Mr Justice Wallace said that a claim of self-government by the Gitksand and Wet'suwet'en tribes was a right to govern the territory themselves in accordance with their laws and customs. Many other tribal groups also prefer 'self-government' to regain control over their affairs.[44]

However, some scholars see a significant difference between self-government and autonomy. Willemsen argues that if autonomy is a house, then

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resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions".

[41] *Chief O.Mercredi*, 'First Nations and Self-Determination', in *K.E.Mahoney* and *P.Mahoney* (eds.), Human Rights in the Twenty-first Century: A Global Challenge, Martinus Nijhoff: Dordrecht/ Boston/London, 1993, p.163. Mercredi is the National Chief of the Assembly of the First Nations, Ottawa.

[42] *Thornberry*, in *Suksi* (ed.), *supra*, 2, p.119.

[43] 104 *DLR* (4th) BCCA (1993) pp.591-92, cited in *P.W.Hutchins, C.Hillind* and *D.Schulze*, 'The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine', 29 (2) *UBCLR* 1995, p.259.

[44] See *infra* chapter 4, 4.3.

self-government is only one room in it.[45] Malberg refutes the suggestion that these two concepts, autonomy and self-government, have the same meaning. In his view, 'autonomy' as an entity may be considered autonomous only when it has its own non-derivative original powers of legislation, administration and adjudication, whereas self-government is an inferior form of legislative power subordinate to a superior entity which can effectively control it.[46] Lapidoth also points out that even though there is similarity between autonomy and self-government to a greater extent, differences between these two concepts cannot be overlooked. "The term self-government implies a considerable degree of self-rule, whereas autonomy is a flexible concept, its substance ranging from limited powers to very broad ones. In addition, self-government usually applies to specific region, whereas autonomy can be personal".[47] This semantic debate is of little value. All these terms suffice, as pointed out by Alfredson, as long as the central government agrees to a meaningful shared sovereign power in the form of autonomy.[48]

Form of self-government vary in different territories, from extensive legislative and executive powers entrenched in a constitution or statute to a limited delegated power exercised by local government (sometimes called 'local

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[45] For details *Lapidoth, supra,* 6, p.53.

[46] *R.C.de.Malberg,* Contribution a la Theorie generale de l'Etat Specialement d'apres les donnees fournies par le Droit Constitutionnel Francais, vol. 1, Sirey: Paris, 1920, pp.169-70, cited in *Lapidoth, ibid.* p.30.

[47] *Ibid.* pp.53-54.

[48] *G.Alfredson,* Discussion Paper on Minority Rights and Democracy, Third Strasbourg Conference on Parliamentary Democracy, Published by Parliamentary Assembly of the Council of Europe, Strasbourg, 1992.

autonomy'). The latter is essentially an inferior institution,[49] which is therefore not attractive to minority groups. For example, *'collectivite territoriale'*, a self-governing sub unit operated in Corsica is perceived by Corsicans to be no more than local government.[50] Cultural autonomy for national minorities in Finland, Estonia, Latvia, Lithuania, Croatia, Slovenia, Norway, Finland and Sweden operates at local self-government level.[51] For instance, many local authorities in Portugal are not fully autonomous, but they contain elements of autonomy having democratically decentralized administrations.[52] However, they lack any significant political powers. Instead, they may be useful to central government by integrating the whole system of State institutions so as to reach the local population more effectively. A close political integration between local governments and central government is clearly visible where greater autonomous powers are not conferred upon the region, that is, where no significant diffusion of constitutional power is involved.[53] Often, 'localism' is the criteria taken into consideration when local-self-governments are created irrespective of minority identities. Whilst they are

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[49] *E.C.Page*, Localism and Centralism in Europe: The Political and Legal Bases of Local Self-Government, Oxford UP: Oxford, 1992, p.1.

[50] *Suksi* in *Hannikainen* and *Horn* (eds.), *supra*, 37, p.111.

[51] *Ibid.* footnote 11, pp.104; *R.Bernhardt*, 'Federalism and Autonomy', in *Dinstein* (ed.), *op.cit.* 10, p.27.

[52] Article 6 of the Constitution of Portugal says that the State is a unitary one organised to respect the principle of the autonomy of local authorities. See *Suksi* in *Hannikainen* and *Horn* (eds.), *supra*, 37, footnote 1, p.120.

[53] It should be noted that diffusion of power is not always done by way of constitution in the creation of autonomous regions. For instance, Greenland and Faeroe islands' autonomous status was created through ordinary legislations.

more likely to be vulnerable,[54] local self-governments display some elements of models of autonomy in the sense that they are representative democratic institutions which the local people can participate in.

In Europe the idea of local self-government as an alternative to autonomy is emerging. For example, the European Charter of Local Self-Government, 1985 advocated the idea that local self-government (elected assemblies with meaningful powers) through local authorities can be used to further the interests of the local population.[55] "Appropriate local or autonomous authorities" was one of the options suggested in the Recommendation 1201/1993.[56] Similarly, the Documents of the Copenhagen Meeting on the Human Dimension of the CSCE, 29 June 1990 suggested that "appropriate local or autonomous administrations" could be used to "create conditions for the promotion of ethnic, cultural, linguistic and religious identity of certain minorities".[57]It was further recognised that such arrangements can be implemented on a territorial basis. Most importantly, the CSCE Meeting of Experts on National Minorities in their recommendation promoted the idea of "local bodies and autonomous administration" in terms of "decentralised or local forms of government".[58]

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[54] *Page, supra,* 49, p.2.

[55] Council of Europe, Conference on the European Charter of Local Self-Government, Studies and Texts, no. 27, 1993, see articles 3.2 and 4.8, p.7.

[56] Reprinted in 16 (1/3) *HRLJ* p.112.

[57] Principle IV, pr. 35. 29 *ILM* 1305, 1990.

[58] 30 *ILM* 1692 [1991], pp.1692-1702

3.3 *Categories of Autonomous Models*

There are two categories of autonomous models in the scope and application of autonomy, i.e., personal or cultural autonomy and territorial autonomy. According to Eide, cultural autonomy is different from territorial autonomy in three different ways; a) the management of affairs in cultural nature is allocated to culturally different groups as opposed to a territorially defined group; b) it applies only to cultural aspects; and c) it applies only to those who belong to that cultural group.[59] Commenting on the term 'cultural autonomy', Eide says that "the phrase cultural autonomy is doubly vague: it carries with it the ambiguity of autonomy and adds to it the elusive term 'culture', so much more difficult to define than territory". Nonetheless, Eide provides the following definition: [60]

> "Provisionally, cultural autonomy will here be understood as the right to self-rule, by a culturally a defined group, in regard to matters which affect the maintenance and reproduction of its culture".

Cultural autonomy is a very restricted one which allows minority groups a certain degree of independence to regulate areas such as traditional way of life, i.e., hunting, fishing and farming, minority symbols, protection of monuments and memorial places, languages, education, religious and marital affairs, birth and death registration, and the like not involving or directly affecting the territory or State's authority. Personal laws, customs and religious practices are the main elements of personal autonomy which, according to Steiner, "can provide an

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[59] *Eide, op.cit.* 15, in *Suksi* (ed.), *supra,* 2, p.252.

[60] *Ibid.* p.252.

important degree of autonomy and cohesion even for minorities that are territorially dispersed".[61]

Personal autonomy (cultural autonomy) was introduced as a radical theory by Austrian Social Democrat Karl Renner and Otto Bauer[62] at the beginning of the 20th century mainly to protect minority groups in the Austro-Hungarian empire.[63] Renner rejected centralization of power around the State (*atomistische- Zentralistische Schule*) arguing that it would not reflect the proper structure of the society. In his view, the State is a 'federation of nations' (*nationalitatenbundesstaat*) which is based on a dual principles, territorial and cultural. Cultural groups are free to administer their own cultural matters which the State should not interfere with. He was confident that by granting personal autonomy to minority groups, States could solve so-called minority problems. It was experimented with in Eastern Europe in particular, with a view to promoting minorities' rights after the first world-war,[64] but without notable success. Maintenance of educational and charitable, religious and social institutions was the focus of this system. This also promised "to grant adequate facilities to enable

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[61] *H.J.Steiner*, 'Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities', *66 NDLR* 1991, p.1542. See also *Lapidoth*, *supra*, 6, pp.37-40.

[62] *O.Bauer*, Die Nationalitatenfrage und die Sozialdemokratie (The Nationalities Question and the Social Democracy), 1907, cited in *Eide*, *op.cit.* 15, in *Suksi* (ed.), *supra*, 2, p.267.

[63] *K.Renner*, *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Österreich*, Leipzig and Vienna: Franz Deuticke, 1918, cited in *Lapidoth*, *supra*, 6, pp.33, and 38-39. *Dinstein*, *op.cit.*15, in *Dinstein* (ed.), *op.cit.* 10, p.291. Also see *Eide*, *op.cit.* 15, in *Suski* (ed.), *supra*, 2, p.266.

[64] See details in *Eide*, *ibid.* pp. 271-272.

nationals whose mother tongue was not the official language to use their own language, orally or in writing, before the courts".[65] One of the reasons for such a glaring failure, in addition to States' reluctance to honour such arrangements,[66] was the reluctance of minority groups to accept such limited rights, which in their view, were no more than glorified individual rights derived from western liberal political philosophy. This was vividly explained by the founding father of Israel, David Ben Gurion, when the offer of personal autonomy to the Jews living in Palestine was made. His main argument was that "in the absence of territorial autonomy, personal autonomy is groundless".[67] But, personal autonomy might be a practical solution in the promotion and protection of minority rights where ethnic and other sub-groups are interspersed throughout the State, because territorial autonomy involving any form of constitutional diffusion or other ordinary legislation is inconceivable or impractical in such cases.[68] This was also the view expressed by observers during the debate on the Working Group on Minorities. It was emphasized that cultural autonomy could be a valuable regime to accommodate the needs of minorities and ensure the preservation of their characteristics.[69] However, personal autonomy applies only to people "who opt to be members of the group" living in a State irrespective of their place of

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[65] *Thornberry, op.cit.*5, p.24. See further *Robinson, op.cit.*5, p.91; *Minority Schools in Albania, PCIJ*, Ser. A/B, no. 64, 1935, pp.4 -36

[66] *Thornberry, ibid.* chapters 2 and 3.

[67] *B.Gurion,* 'National Autonomy and Neighbourly Relations', 9 *Kuntress*, 1924, cited in *Dinstein, op.cit.*15, in *Dinstein* (ed.), *op.cit.* 10, p.293.

[68] *Ibid.* p.292.

[69] ESCOR, E/CN.4/Sub.2/1996/2, 30 Nov. 1995, pr.61, p.15.

residence.[70]

One of the successful experiments in cultural autonomy under the Ottoman Empire was that of the *Millet* system which, according to Cobban, was practised and developed by the Iranian and Arab Empires.[71] *Millets* empowered the non-Islamic religious communities, i.e., Christians, Jewish, Armenian and Roman Catholics to organise and manage their personal life. In fact it enjoyed "considerable degree of self-government" in the administrative and judicial fields, in particular control of properties, education, church affairs, marriages, records of birth, death and wills, and civil rights.[72] Even tax imposing powers were granted provided a portion of tax be given to the Sultan. The operation of personal autonomy should, however, be "within the limits of the law of the State".[73] Contemporary personal autonomy models in Estonia (Law on Cultural Autonomy for National Minorities, 26 Oct 1993), Latvia (Law on the Free Development of National and Ethnic Groups of Latvia and Their Right to Central Autonomy, 19 March 1991), Russian Federation (Law on National-Cultural Autonomy, 25 June 1996), Croatia (Constitutional Law of Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia, 4 Dec. 1991), Slovenia (Law on Self-Managing Ethnic Communities, 5

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[70] See details *Lapidoth, supra,* 6, p.39.

[71] *A.Cobban,* The Nation State and National-Self-Determination, T.Y.Crowell: New York, 1969, p.238.

[72] *Ibid.* p.238. See *Thornberry, op.cit.*5, p.29. *J.A.Laponce,* The Protection of Minorities, University of California Press : Berkeley and Los Angeles, 1960; *F.Capotorti,* Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/ 1979, pr.6.

Oct. 1994), Canada, and Sami assemblies in Nordic countries (Norway, Sweden and Finland) provide examples of modern cultural autonomies.[74]

Territorial autonomy may be the result of a direct response to the demands of ethnic or other sub-groups of the population of the State (the proposed autonomy for the Kosovo province by the Six-Nation-Contact group, Southern Sudan autonomy in 1972, autonomous provincial councils for the northern and eastern province in Sri Lanka under the 1987 constitutional amendment),[75] or by recognition of geographical differences, or due to historical reasons (the Swiss model). Most importantly, it can emerge as a mechanism to prevent ethnic conflicts[76] as in the case of Basques, Catalans, autonomous models in Northern Ireland and the Serbs dominated Sprska in Bosnia and Herzegovina. The operation of territorial autonomy may be limited only to a designated province or a region in the State yet it has a direct effect on every individual and group of people living within that territory.[77] Thus, individuals belonging to sub-

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[73] *Lapidoth, supra,* 6, p.38.

[74] *Suksi* in *Hannikainen* and *Horn* (eds.), *supra,* 37, footnote 11, p.120. Further details, *I.Ahren,* 'Small Nations of the North in Constitutional and International Law', 64 (3) *NJIL* 1995, p.461.

[75] This amendment is popularly known as the 'thirteenth amendment' which came into force on 12 Nov. 1987, see *M.L.Marasinghe,* 'Ethnic Politics and Constitutional Reform: The Indo-Sri Lankan Accord', 37 *ICLQ* 1988, pp.566-568.

[76] See details *Nordquist, supra,* 35, in *Suksi* (ed.), *supra,* 2, p.64.

[77] *Y.Dinstein,* 'The Degree of Self-Rule of Minorities in Unitary and Federal States', in *C.Brolman, R.Lefeber* and *M.Zieck* (eds.), Peoples and Minorities in International Law, Martinus Nijhoff: Dordrecht/ Boston/London, 1993, p.235. *Dinstein, op.cit.*15, in *Dinstein* (ed.), *op.cit,* 10, p.292. See also *A.Eide,* 'Approaches to Minority Protection', in *Phillips* and *Rosas* (eds.), *supra,* 3, pr.41, p.90.

groups will have a greater opportunity within a territorial autonomy "to preserve, protect and promote values which are beyond the legitimate reach of the rest of the society"[78] than where personal autonomy is operated. The political power of autonomous units or regions might be greater in a State which contains a homogenous population or where less divisions in terms of ethnicity or similar characteristics are evidenced between population groups, in contrast to the State which is pluralist or divided along the lines of ethnicity. If autonomy is granted due to pressure of ethnic elements, the powers may not be that significant because the State from the very beginning may have come to the negotiating table with a reluctant heart and mind. In brief, the effectiveness of autonomy depends upon the degree of independence possessed by the autonomous region over the affairs of the people in its territory, in particular in the areas of legislation and its implementation. In the end, the determining factor will be the extent to which the parties to the autonomous arrangement are prepared to co-operate with each other[79] and make it work. It is also of importance to note that in order to exercise sovereign power effectively, an autonomous territory also needs a government free from interference from the State.[80]

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[78] *Hannum, op.cit.* 9, p.4. See also *J.J.Solozabal,* 'Spain: A Federation in the Making', in *J.J.Hesse* and *V.Wrights* (eds.), Federalizing Europe? Oxford UP: Oxford, 1996, p.247.

[79] *Steiner, supra,* 61, p.1542.

[80] *Sohn, supra,* 5, p.190.

3.4 *Variations of Autonomous Models, "From a Classic Federation to Various Forms of Cultural Rule"*

Elazar states that there are at least 100 functioning examples of autonomous models ranging from classic federation to various forms of cultural home rule.[81] However, according to Lyck there are 500 autonomous units worldwide.[82] Most of them different from each other involving a wider range of different arrangements. There is no uniform pattern in autonomous arrangements with respect to the degree of the transfer of power to the region or structure of the autonomous unit. Hannum and Lillich accept that autonomy is necessarily limited though a "wide-ranging transfer of powers" can be seen in some models".[83] Greenland,[84] the Faeroe islands[85] and the Aaland Islands provide examples of extensive autonomous power. By a comparison of autonomy of the Aaland Islands with an *Oblast* or *Okruga* in the Republic of Russia, one can immediately observe a significant difference between these two models. The Aaland Islands operate as one territorial unit, and are close to a territorial autonomy, considering

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[81] *Elezar, op.cit.* 33, introduction, xvii.

[82] See *L.Lyck*, 'Lessons to be Learned on Autonomy and on Human Rights From the Faeroese Situation Since 1992'. 64 (3) *NJIL* 1995, p.481.

[83] *Hannum* and *Lillich*, *op.cit.* 22, in *Dinstein* (ed.), *op.cit.* 10, p.216, footnote 8. See also *Sohn*, *supra*, 5, pp.180 -190

[84] Greenland's autonomy has notably increased since the 1950s and it was conferred an extensive autonomous powers in 1978 *Home Rule Act*. See *Lyck, supra*, 82, p.482.

[85] The Faeroese Islands achieved self-government status by the *Home Rule Act* of 1948, Danish Law no 137, 23 March 1948, reprinted in *UNYBHR* 1950, cited in *A.Olafsson*, 'Relationship Between Political and Economic Self-Determination: The Faeroese Case', 64 (3) *NJIL* 1995 p. 467.

its distinctive geographical identity.[86] It possesses substantial legislative, administrative and executive powers though it constitutionally comes under the sovereignty of Finland. An Aalandic member of the Finish Parliament, relying on his own experience with the operative aspects of Aaland autonomy stated that Aalandic autonomy ever since the 1920s has been developing and growing stronger. Since 1954 it has its own flag, it has separate postage stamps since 1980s, since 1993 it owns its own postal administration, since 1970s it has become a member of the Nordic Council and has the right of participation in the meeting of Nordic Ministers. It has been granted power to deal with culture, religion, education, and some administrative functions with legislative powers. Most importantly, the Aaland's legislative competence is very extensive.[87] On the other hand, the competence of the kind of *oblast* or *okruga* model is relatively modest and minimal.[88] They stand at the bottom of the federal structure of the former Soviet Union and the present Russian Federation being confined to a small local areas mainly dealing with local, cultural and administrative matters. Whilst all major nations (*natsiya*) were given either Union Republic or autonomous republic status (which was defined on a territorial basis having at least 80,000 to 100,000 people), less developed small national (*narodnost*) were given either the

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[86] See sec. 1 and 2, Annex 3, *Act on the Autonomy of Aaland*, 1991, Act no. 1144, 16 Aug. 1991.

[87] See *G.Jansson*, 'Introduction', in *Hannikainen* and *Horn* (eds.), *supra*, 37, p.1; *Palmgren*, in *Hannikainen* and *Horn* (eds.), *supra*, 37. pp.85-97,

[88] *Lapidoth*, *supra*, 6, pp.84-92.

oblast or *okruga* autonomy models.[89] In fact the former were given their own governments with legislature, executive and judiciary. Both *oblast* and *okruga* come under the authority of a union republic. Therefore any acts of these autonomous regions or areas can be amended or repealed by the Union republics. Lapidoth says "that the autonomous areas and the autonomous regions had very limited, purely administrative autonomy- if the expression is at all appropriate".[90]

However, as points out by Palley, there are certain characteristics common to any autonomous model. First of all, both the center and the autonomous territorial units exercise divided sovereignty[91] whilst coordinating and complementing each other. Competence of each level of government is identified and often constitutionally defined and guaranteed. However, the center exercises the most important tasks relevant to the whole State while the competence of regional autonomous units is confined to the region. Both parties' aim is to prevent conflicts and disagreements so as to preserve the sovereign integrity of the State while preserving their diversities in dignity and honour. "In such a system", as stated by Palley, "units and center are more committed to working

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[89] Autonomous models experimented with under the former USSR were not only complex but also demonstrate distinctive characteristics. They are different to that of other autonomous models in many ways. There were Union Republics (SSR), autonomous republics (ASSR), then autonomous regions (*oblast*), and autonomous areas (*okruga*). These arrangements were structured within a federal structure. See *ibid.* p.85.

[90] *Ibid.* p.89.

[91] See for details, *Infra*, 3.6.

together than to disagreeing and fragmenting".[92]

States are, however, more cautious in conferring or maintaining autonomous powers on the province or regionally based sub-groups, as is evident from the Kosovo dispute, fearing that new autonomous regions will become a threat to the empowering State. Therefore, States seek to ensure that autonomous regions or provinces operate in compliance with the constitutional or international arrangements (by way of treaties) agreed upon by both parties. This is normally carried out by constitutional or other international arrangements which may provide for the involvement of administrative and executive branches of both the center and the region to remedy any breach of constitutional structure and to make sure that the system operates smoothly. But, some States are opposed to any involvement of international mediation. For instance, Serbia's (FRY) opposition to NATO involvement in the implementation process in the event of any arrangement being made for autonomy for the Kosovo province can be presented as an example.

3.5 *Autonomy with 'Shared' or 'Divided Sovereignty'*

Minorities' claims for 'shared' or 'divided sovereignty' within the framework of autonomy is one of the most contentious issues in international law. If we were to accept the theory that sovereignty belongs to the nation-State, and it has therefore nothing to do with minorities or other sub-groups, then minorities' claims for

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[92] *C.Palley,* Constitutional Law and Minorities, report no.36, Minority Rights Group: London, 1978, p.13.

autonomy with shared or divided sovereignty would fail. Recognition of their claims would create problems for nation-States. Changing the traditional understanding of the concept of sovereignty[93] would result in the dawn of a new era in international relations.

The view that sovereignty could be restricted, for example, by way of constitutional arrangements is gaining acceptance amongst publicists. Divisibility of sovereignty has been popular since the 18th century. It became clear with the transformation of the USA, Germany and Switzerland from confederal into federal systems that the divisibility of sovereignty between federal governments and the union States was no longer such a contentious issue. Because both federal State and union States are sovereign; both units enjoy sovereignty within their competence. Restrictions can be imposed on sovereignty through internal and external arrangements thus limiting its competence. Oppenheim rightly concluded

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[93] From a theoretical point of view, the classical understanding of the concept of sovereignty is that of 'omnipotence'. According to Bodin (1530-1596), the pioneer of the classical doctrine of sovereignty, the person who exercises sovereign power can exercise absolute power and introduce law at whim and pleasure at any time regulating the behaviour of citizens. See, *J. Bodin* De La Republique, 1577, cited in *R.Y.Jennings*, and *A.Watts*, (eds.), Oppenheim's International Law, vol. I, PEACE, 9th ed, Longmans: Essex, pr.36, p.124, 1992. *T.Hobbes*, Leviathan, [1928 ed.], EP Dutton and Co: London and Toronto. Bodins's theory was further expanded by Hobbes arguing that sovereignty was above religious laws (*Leviathan*, 1651) during the 17th century and later by Calhoun in A Disquisition on Government, 1851 cited in *Oppenheim, ibid.* p.124. Sovereignty was necessary, suggested Hobbes, to avoid conflicts and could be used as a weapon to maintain law and order against horrible calamities created by 'masterless men',. *Hobbs, ibid.* p.95. In their view, sovereignty could not be restricted and it is indivisible. Even

that sovereignty is divisible, most importantly in federal States.[94] However, he pointed out, "the supreme authority which a State exercises over its territory would seem to suggest that on one and the same territory there could exist only one full sovereign State, and that for there to be two or more full sovereign Stets on one and the same territory is not possible".[95] The sovereign State is the one which "possess independence all round, and therefore full sovereignty". Union States in federal States are "not-full sovereign States or full subjects of international laws". They are, however, possess authority over certain matters "as far as their competence reaches".[96] However, in federations, union States ('non-full sovereign States') could enjoy less sovereign powers.

Contemporary international jurists assert that the divisibility of sovereignty is prominent in pluralist societies. Lee points out that "inward or downward development from state to sub-state entities contrast with upward or outward development from states into intergovernmental organisations... ."[97] Franck also admits that the State is subdividing itself into sub-groups (sub-actors) which can, in his view, be regions or populations.[98] In modern polities, there may be many instances where sovereignty is exercised by more than one organ.

Rousseau (*Le Contrat Social*, 1762) advocated and defended the indivisibility of sovereignty, *ibid.* p.124.

[94] *Ibid.* pr.36, p.124 and pr.75, p.249.

[95] *Ibid.* pr.175, p.565.

[96] *Ibid.* pr.75, p.245.

[97] *R.S.Lee*, Commentary on 'Multiple Tiers of Sovereignty: The Future of International Governance', *ASIL* Proceedings, , 1994, (April, 6-9), p.52.

Regional governments or union States, in particular in federal structures, exercise powers which legitimately come within their competence. In such cases it is 'divided sovereignty' which is exercised by both the 'federal State and its member-States' as pointed out by Oppenheim.[99] Does then a degree of autonomy in the form of shared sovereignty conferred upon a region have any relevance to minority and other sub-groups? Can at least a certain element of sovereignty be exercised by a segment of the population of a State, for instance by minority groups living within a designated region within the State? Lee argues that elements of sovereignty can be passed down to a region and to peoples within it.[100] Sovereignty does have corresponding obligations and commitments to the sub-elements existing within sovereign States. Its obligation to groups (ethnic, indigenous and other weaker groups such as women) are emphasised by many contemporary scholars.[101] According to Deng, it brings with it serious obligations, most notably commitment to human rights.[102] However, these progressive analyses of sovereignty have met with dissent. For example, Ratner states that such arguments ignore the essential nature of sovereignty. Sovereignty, in his view, is "the entitlement of a state to act as it wishes at the international level- the

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[98] *T.M.Franck,* Commentary on 'Multiple Tiers of Sovereignty: The Future of International Governance', *ASIL* Proceedings, , 1994, (April, 6-9), p.53.

[99] Oppenheim's International Law, *supra.* 93, pr.169, pp.564-65 and pr.170, p.571.

[100] *Lee, supra,* 97, p.52.

[101] *C.Chinkin,* Commentary on 'The End of Sovereignty?' *ASIL* Proceedings, 1994 (6-9 April), p.73. *T.M. Franck,* Commentary on 'Duties, Distributions and Obligations', *ASIL* Proceedings, April, 6-9, 1994, p.73. *Lee, supra,* 97, p.52.

ability to resist intervention from the international community".[103] Higgins also expressed a similar opinion.[104]

Redistribution of sovereignty is seen by Khan as a reallocation of some functions. It does not, however, in Khan's view, "approach a displacement of the idea of state sovereignty".[105] Fox also argues that the 'reallocation of sovereignty' involving especially human rights strengthens the sovereign State as a political unit. The abiding political ethic within such a system is 'tolerance'.[106] All members of the sub-group or groups living in the autonomous State, it can be argued, possess some elements of sovereign power through their representative governments. In such cases, sovereignty can be seen in autonomous rights or federal rights, because these rights ultimately emanate from sovereignty. Thus, autonomous States created in response to the agitation of sub-groups or minority groups will become 'non-full sovereign States'.

Current understanding of human rights and 'democratic governance' enhances and strengthens the arguments that minorities living in autonomous States can exercise shared-sovereignty with the central or federal government.

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[102] *F.Deng,* Commentary on 'Multiple Tiers of Sovereignty', *ASIL* Proceedings, 1994, ((April, 6-9), p. 56.

[103] *S.Ratner,* Commentary on 'End of Sovereignty', *ASIL* Proceedings, 1994 (April, 6-9), p.75.

[104] *R.Higgins,* Commentary on 'End of Sovereignty', *ASIL* Proceedings, 1994 (April, 6-9), p.73.

[105] *P.W.Khan,* Commentary on 'Multiple Tiers on Sovereignty', *ASIL* Proceedings, 1994 (April, 6-9), p.54.

[106] *G.H.Fox,* Commentary on 'Multiple Tiers of Sovereignty', *ASIL* Proceedings, 1994 (April, 6-9), p.57.

This sharing is aimed at the strengthening and stabilising of nation-States so as to avoid conflicts and anarchy. Thus, minorities as a segment of a 'people' can claim certain rights emanating from sovereignty by adhering to norms recognised by international law. This implies that minorities can enjoy their legitimate rights within autonomy or, short of secession involving a federal solution. It can further be argued that, there may be a slim relationship between minority groups and sovereignty.[107] This can be described by examining the concept of 'responsive sovereign State' which requires the fulfilment of States' obligation to its peoples and sub-groups, i.e., minorities. States' obligation, argued Deng, emanates from sovereignty which is associated necessarily with human rights.[108]

Rosenau interprets sovereignty pointing out that it "can be treated as a psychological concept and it can be used to explore the behaviour of ethnic groups, nationalism, and peoples' sense of community and territoriality".[109] This is, however, more political than current theories of international law are prepared to uphold. Nevertheless, it should also be noted that sovereignty cannot float in a vacuum, nor is it a non-negotiable institution.[110] Sovereignty, as admitted by many

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[107] *J.N.Rosenau,* 'Sovereignty in a Turbulent World', in *G.M.Lyons* and *M.Mustanduno* (eds), Beyond Westphalia? State Sovereignty and International Intervention, The John Hopkins University Press: Baltimore and London, 1995, p.192.

[108] *Deng, supra,* 102, p.56.

[109] *Rosenau,* in *Lyons* and *Mustanduno* (eds.), *supra,* 107, p.192.

[110] See *W.Soyinka,* The Open Sore of a Continent, Oxford UP: Oxford, 1996.

States in their constitutions, exists among people.[111] Modern States possess sovereignty as trustees rather than owners or simply being rulers. Thus it can be argued that minority groups can claim shared or divided sovereignty through both personal and territorial autonomy within a unitary, confederal or federal structure.

Sovereign power or State sovereignty is therefore no longer the unquestionable and noble concept it was. "The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality".[112] It has now come under great pressure and increasingly become controversial.[113] Sovereignty has also been weakened to a considerable extent by continued attack by the federalists.[114] A prominent member of the World Federal Association suggested that it was time we should "talk about sovereignty of people instead of sovereignty.[115] They contend that union States of a federal structure are entitled to certain degree of independence as in the case of the USA, Germany, Canada and Switzerland. In fact, union States of federal structure are often described as sovereign States. Some human rights scholars also view the polity "as a matrix of

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[111] See The Constitution of Sri Lanka, Art 3 and 4. Article 3 states: "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

[112] An Agenda For Peace, *supra,* 1, pr.17, p.959.

[113] *Khan*, *supra.* 105, p.54.

[114] During the 18th century federalists defending the American revolution justified a certain degree of independence for union States within a federation. Alexander Hamilton, James Madison, and John Jay were prominent federalists who presented the theory of concurrent sovereignty of the federal State and its member States. See Oppenheim's, International Law, *op.cit.* 93, pr.69, p.118.

overlapping, interlocking units, powers and relationships".[116] Moreover, sovereignty's most important appurtenance - integrity of the 'territory'[117] of the State - has became a legitimate target of many minority groups who are fighting for either self-government with greater autonomy or independent statehood. Most notably, many minority groups seem to think that the traditional meaning and understanding of sovereignty is no longer valid in contemporary multiethnic societies.[118] Most minority groups refuse to believe in indivisible sovereignty. For example, the leader of the movement of autonomy in the 'Sverdlovsk Ural Republic' in the Ural Mountains, Eduard Ergartovich Rossel stressed that sovereignty was not exclusively the possession of central government. It exists in every component part of the State system.[119]

Minority groups, as pointed out by Fowler and Bunck, are showing enthusiasm for re-possessing or recreating sovereignty because it is associated

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[115] *W.Hoffmann,* Commentary on 'Multiple Tiers of Sovereignty: The Future of International Governance', *ASIL Proceedings* 1994 (6-9 April), pp.64-65.

[116] *Elazar, op.cit.* 33, Introduction, p.xii.

[117] 'Territory' is the most important part of the sovereign State. According to Oppenheim, territory is "totally independent of the racial characteristics of the inhabitants of the State. The territory is the public property of the State, and not of a nation in the sense of a race". *H.Lauterpacht* (ed.), Oppenheim's International Law, A Treatise, vol. 1, PEACE, Longman: Essex, 1962, pr.169, p.408. He further said that "the importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority". *Ibid.* pr.172, see also pr.173-175, pp.415-419.

[118] See *R.B.Goldman* and *A.J.Wilson* (eds.), From Independence to Statehood: Managing Ethnic Conflict in Five African and Asian States, Frances Printer: London, 1984, see in particular chapter 10.

with an assortment of privileges and rights. "They are keenly aware of the benefit of entry into the private clubs of sovereign states".[120] On the other hand, this shows their inconsistent attitudes towards sovereignty, because whilst attacking sovereignty they themselves try to possess sovereignty by achieving statehood. Without sovereignty they know very well that independent States cannot exist, because it is highly unlikely that the international community will ever be prepared to accept non-sovereign entities as members of their exclusive clubs. Anarchic societies are not what the UN and other regional and international bodies like to see.

Sovereignty does have different dimensions when it comes to indigenous peoples. It is said that 'indigenous sovereignty' can take on multiple meanings ranging from 'cultural integrity' to 'internal management'.[121] Indigenous groups justify their struggle arguing that it is to win back or restore their 'lost

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[119] *G.M.Easter*, 'Redefining Centre-Regional Relations in the Russian Federation: Sverdlovsk Oblast', 49 (4) *Europe- Asia Studies* 1997, p.631.

[120] *M.R.Fowler* and *J.M.Bunck*, Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty, The Pennsylvania State University Press: Pennsylvania, 1995, p.17. See further *B.Kingsbury*, 'Whose International Law: Sovereignty and Non-State Groups', *ASIL Proceedings*, 1994, (6-9 April), p.4.

[121] *J.J.Corntassel and T.H.Primeau*, 'Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination', 17 (2) *HRQ* 1995, p.361. See also *V.Deloria*, 'Self-Determination and the Concept of Sovereignty', in *R.Dunbar-Ortiz* and *L.Emerson* (eds.), Economic Developments in American Indian Reserves, cited in, *Corntassel* and *Primeau*, *ibid.* p.361.

sovereignty'.[122] The concept of 'prior sovereignty' or 'original sovereignty' is presented by some indigenous groups as a strategy to achieve greater autonomy in the areas in which they live. Corntassel and Primeaus write, "prior sovereignty refers to the argument that antecedent to the invasion of the North American continent by the European powers, Indian communities exercised sovereignty over themselves and that, at least in the initial stages of contact, this sovereignty was formally recognized by the colonial powers via the treaty-making process". Quoting a landmark judgment, *Worcester* v *The State of Georgia,*[123] it was argued by Hutchins *et al* that when aborigines (indigenous peoples) did enter into treaties with colonial power they gave up only 'external sovereignty' while retaining 'internal sovereignty'.[124] A similar opinion was expressed in the majority judgment in *Casimel* v *Insurance Corporation of British Colombia.*[125] Thus sovereignty has now become a part of indigenous peoples' lexicon in an ongoing quest for greater autonomy".[126]

3.6 *Autonomy Within a Federal Structure*

Federalism is originated from a Latin word 'foedus', meaning a 'covenant'.

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[122] *S.A. Williams,* International Legal Effects of Secession by Quebec, Center for Public Law and Public Policy: New York, Ontario, 1992, cited in, *Fowler* and *Bunck, supra,* 120, p.3.

[123] 31 US 350, 6 Pet 515 [1832]

[124] *Hutchins, Hilling* and *Schulze, supra,* 43, pp.253-54.

[125] 106, *DLR* (4th) 720 (BCCA) (1993), p.728.

[126] *Corntassel* and *Primeau, supra,* 121, p.361.

Partnership among various elements in a common cause is envisaged.[127] A federal State is a union of several sovereign States (*Bundesstaatten*).[128] Federalism in a very broad sense means the distribution of powers between a federal State and regions or union States.[129] It is a kind of "combining self-rule with shared rule"[130] involving individuals, groups and often geographical variations. When models of autonomy operate in a 'quasi-federal'[131] or 'federal' structure, both federal and union States can make policies common to both units. Thus, they exercise their power within their competence without encroaching upon each others' powers and, in such a way as to maintain their respective integrities. Elazar noted that "basic policies are made and implemented through negotiation in some form so that all can share in the system's decision-making and executive powers".[132]

Federalism is a political concept and it has "a long, rich and diverse history and encompasses a wide variety of political forms".[133] It is a mechanism which delegates certain subjects to the central government whilst leaving other

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[127] *Elazar* (ed.), *op.cit.*33, Introduction, p.vv.

[128] Oppenheim's International Law, *supra*, 93, pr.75, pp.248-249.

[129] *Bernhardt*, *op.cit.*51, in *Dinstein* (ed.), *op.cit.* 10, p.23.

[130] *Elazar* (ed.), *op.cit.* 33, Introduction, xii.

[131] The current Spanish constitution is designed within a quasi-federal structure according to Solozabal. See Solozabal, in *Hesse* and *Write* (eds.), *op.cit.* 78, pp.325-360.

[132] *Elazar, op.cit.* 33, Introduction, p.xv.

[133] *M.Forsyth,* 'The Political Theory of Federalism-The Relevance of Classical Approaches', in *Hesse* and *Write* (eds.), *op.cit.* 78, p.31. See also *B.R.Opeskin*, 'Federal States in the International Legal Order', 63 (3) *NLR* 1996, pp.353-386.

subjects to the sub-regions.[134] In federalism, the emphasis is on non-centralisation of power, constitutional diffusion and sharing of power between various institutions. Federal units operate within fixed boundaries thus respecting the territorial integrity and national unity of the State. Special Rapporteur Eide states that federalism might be the result of 'limited unification' of various units which "have joined together but retained a reserved domain within their territorial units".[135] Dinstein argues that federalism does not mean a federation of independent States because there can be only one federal State.[136]

It is worthy of mention that there are different varieties of federal States, from the most restrictive (eg. the former Eritrean model) to the most extensive (eg. the Swiss, German, and US models). In the former category, the central government holds very wide power, whilst in the latter powers come within the competence of the constituent States of the Federation. However, the common feature of a federal system is the division of legislative powers. Such Union States and federal government derive their powers from the constitution, which acts like an arbitrator or source of power. "The central government could not assume responsibilities which were not within its competence without

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[134] *Forsyth, ibid.* p.32. See also Opinion no.1 of the Badinter Committee, 31 (6) *ILM* 1494 [1992], p.1495.

[135] ESCOR, E/CN.4/Sub.2/1993/34, 10 August 1993, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, pr. 255, p. 55 (Possible Ways and Means, 1993).

[136] *Dinstein*, in *Brolman, Lefeber* and *Zieck* (eds.), *supra*, 77, p.221.

endangering the basic compromise of federation and, ultimately, the federation itself".[137]

The federal State operates with a number of component units",[138] (they may be called, cantons, landers or provinces, union States or, as in the case of the USA, 'states'). It is, therefore, in a better position than the unitary State to accommodate ethnic, linguistic and other regional variations, because wide powers to the regions will be attractive to sub-groups.[139] Moreover, federalism favours tolerance, mutual understanding and respect batween the various entities which make up the State.[140] When a federation is created taking into account ethnic, religious and linguistic differences, then it reflects the desire of the constituent parties to accommodate self-rule for minority groups in those areas in which they are mainly concentrated.

Federalism as a constitutional strategy has been applied in many parts of the world to accommodate linguistic and ethnic differences. Its application to minority groups is immense. It is widely accepted that federalism could effectively address issues relating to minority groups and promote the rights of persons belonging to minorities by granting a certain degree of legislative, judicial and financial autonomy. "Well-organized federalism was a means to ensure the perpetuity of the state as it was the expression of an institutionalised

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[137] See A/C.3/SR. 292, 26 Oct. 1950, pr.17, p.134 (during the debate on the proposed federal clause to the ICCPR).

[138] *Dinstein* in *Brolman et al*, (eds.), supra, 77, p.222. See also *Elazar* (ed.), *op.cit.* 33, Introduction, p.xv.

[139] *Dinstein, ibid.* p.221.

[140] ESCOR, E/CN.4/Sub.2/1996/2, 30 Nov. 1995, pr.51, p.13 (Switzerland).

dialogue that required the constant search, in the common interest, for a common denominator between often contradictory interests".[141]

Federalism is not, however, a concept embedded in international law, which according to Schreuer, "has a tendency to turn a blind eye to federal structures and regard their distribution of functions as internal matter".[142] Most States are of the view that the "distribution of power between the central government and local or regional authorities was merely an internal problem which was of no concern to international law".[143]

It can be argued that reluctance to consider federalism as a vital part of international law might be due to the horizontal nature of international law. A parallel system, or asymmetrical federal structure has a tendency to create conflicts between the centre and the federal provinces. In contrast to regional or cantonal governments in a federation, Westphalian model nation-States operate horizontally.[144] This implies that there cannot be other subgroups operating in asymmetrical or more alarmingly in vertical ways that would challenge the authority of the State. Therefore, they are not welcome by the nation-State system in general.

In contrast to the principle of federalism, 'autonomy' is a relatively new concept. Although autonomy may operates within a federal or confederal

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[141] *Ibid.* pr.51, p. 13 (Switzerland).

[142] *C.Schreuer,* 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?", 4 (4) *EJIL* 1993, p.449.

[143] For example see A/C.3/SR.293, 26 Oct. 1950, pr.2, p.141 (Poland) and A/C.3/SR.292, 26 Oct. 1950, prs.78-79, p.139 (Cuba).

[144] *Franck, supra,* 99. p.51.

structure it is not a branch of federal theory nor are they synonymous.[145] Common aspects can be detected in both systems. They are, as correctly pointed out by Bernhardt, "distinct phenomena in modern history with basically different underlying philosophies" with different political background.[146]

3.7 *Autonomy is Non-derogable ?*

It is said by some jurists that once autonomy is granted it cannot unilaterally be abolished. This theory seems to be based on both constitutional and international law without properly examining the State practices. It is true that many modern autonomous States or regions are created through either constitutional or normal legislative mechanisms. In both these instances there may be some entrenchment in constitutions or legislation making it difficult for either an autonomous region or a central government to make any amendments or to abolish unilaterally without consulting the other party. For example, the Spanish constitution guarantees that the Spanish parliament alone cannot make any changes to it or take steps to abolish the autonomous States unilaterally. There are certain procedures to be followed as stipulated by section 168 of the 1978 constitution. The self-governments of Portuguese Azores and Medira also possess such constitutional guarantees in the opinion of Suksi. He says that "a certain entrenchment of the principle of autonomy" can be seen in section 288 of the

[145] *Hannum* and *Lillich*, *op. cit.* 22, pp. 858-889.

[146] *Bernhardt*, *op.cit.*51, in *Dinstein* (ed.), *op.cit.* 10, p.23. See also *Dinstein*, in *Brolman et al*, *supra*, 77, p.234.

Constitution of Portugal. Any changes to the autonomy through legislative means have to be made by mutual consent of both the regions and the centre. Changes can be introduced by the Portuguese Parliament only after consideration of the opinions of the autonomous regions except in a state of siege or emergency as stipulated by section 19 (I) of the *Portuguese constitution.*[147] Similarly, any amendments to the existing autonomous regions should be carried out in Italy only with the co-operation of the autonomous regions though autonomy is not entrenched in the Constitution. Amendments to Aaland autonomy Act must also have the consent of the Legislative Assembly of Aaland. Referring to legal rights created by the *Autonomy Act of Aaland,* 1991, Palmgren states that "the right given to Aaland can never be taken away without the consent of a qualified majority of the Legislative Assembly"[148] though there is no such right entrenched in the constitution or any other statutes. Where autonomous regions are created as a result of international treaty or under the aegis of the UN or other regional bodies it can be argued that the State cannot get rid of such arrangements at its will, because; a) States are obliged by their international commitment, and b) autonomies created by international organizations or by a treaty are considered important institutions having *sui generis* character.[149]

The above arguments are also based on the notion that sovereign States have obligations and duties to their constituent parties. States are obliged not to renege on what they promised when they entered into agreements with their

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[147] *Suksi* in *Hannikainen* and *Horn* (eds.), *supra*, 37, p.110.

[148] *Palmgren*, in *Hannikainen* and *Horn* (eds.), *ibid.* p.86.

[149] *M.Suksi*, 'On the Entrenchment of Autonomy', in *Suksi* (ed.), *supra*, 2, p.157.

constituent parties. For instance, referring to the Faeroe Islands Home Rule, some scholars argue that the powers (legislative, executive and judicial) conferred upon the *Landsstyri* (legislative assembly) of the Faeroe Islands by the Danish Parliament cannot be taken back without the consent of the islanders. Yet there is no consensus on this. Suksi argues that the Faeroe's autonomy can be reclaimed by the Danish parliament since its powers are a kind of delegation of power.[150] Once autonomy arrangements have been introduced by the Constitution or by an ordinary act of parliament, states Suksi, "a state is under an obligation not to worsen or abolish them without the consent of the inhabitants concerned. It is a legal protection under international law".[151]

Though there are constitutional safeguards preventing the State taking unilateral action in amending or abrogating the autonomous arrangement, State practice suggests such constitutional guarantees or international involvement may not restrain States when they are determined to see the end of any autonomous States in their territories. Classic examples of this are the abolition of the autonomous regions of Spain by Franco's military regime in 1939, the destruction of Eritrean autonomous model by the Ethiopian monarch in 1962, the revocation of the Kosovo autonomous provincial government by the Serbian parliament in 1989-1990, the suspension of the regional government of the North and East provinces of Sri Lanka in 1990, and the abolition of the self-government of

[150] *Suksi* in *Hannikainen* and *Horn* (eds.), *supra*, 37, pp.113-114.

[151] *Ibid.* pp.113-14.

Nagorny Karabakh in Nov. 1991 by Azerbaijan.[152] One of the most recent cases is that of the termination of the three year old Crimean autonomy by the Ukrainian Parliament on 17 March 1995.[153] International law or UN or other regional practices do not have any viable means for preventing such arbitrary decisions though they can keep immense pressure on the recalcitrant States. It can therefore be argued that autonomy is a permitted right which can be enjoyed only as far as the State is prepared to go along with such arrangements. In practice, the survival of models of autonomy depend upon the goodwill of the empowering State.

Conclusion

Autonomy with shared-sovereignty, from the minorities' perspective, strengthens their position in any regional arrangement within a unitary, federal or confederal structure. For example, the representative of Espacio-Americano called on the Working Group on Minorities to consider autonomy as a means to ensure the effective participation of minorities.[154] Psychologically the term 'autonomous government' may provides much satisfaction and political leverage against the central government. It reflects the desire of different ethnic groups in a State structure to remain separate from others yet in certain areas to work with the majority community on an equal footing.

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[152] See *T.Hakala*, 'The OSCE Minsk Process: A Balance of the Five Years', 9 *Helsinki Monitor*, 1998, pp.4-.5.

[153] *Suksi* in *Hannikainen* and *Horn* (eds.), *supra*, 37, foot note, p.125.

[154] ESCOR, E/CN.4/Sub.2/1996/2, 30 Nov. 1995, pr. 52, p.13.

4 Claim for Autonomy Through the Right to Self-Determination?

Introduction

Minorities argue not only that they are entitled to autonomy with shared sovereignty but also that this right emanates from the right to self-determination, thus giving the impression that autonomy is a part of international law. It is obvious that "autonomy captures the sense and meaning of the concept of self-determination,"[1] but what is less clear is whether autonomy is an established component of the right to self-determination. Divided opinions prevail on this issue amongst scholars. The validity of such claims and whether there is any evidence in international law to suggest that autonomy is an accepted concept are examined in this chapter by referring to the opinions of jurists and UN and other international documents.

4.1 *Autonomy as a Part of Self-determination?*

There are significant signs that autonomy is gradually becoming more prominent in international law though at present it is still living under the shadow of the right to self-determination. Some scholars are very optimistic. For instance, Sohn states that

[1] Nicaragua's statement cited in *R.L.Barsh*, 'Indigenous Peoples and the Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force', 18 (4) *HRQ* 1996, p.797.

the concept of autonomy is present both in constitutional and in international law. In his view, autonomy has emerged as a viable alternative to self-determination through UN practice.[2] Some scholars, notably, Bernhardt, Hannum, Kimminich and Brownlie interpret autonomy in terms of self-determination. Autonomy in the narrower sense, argues Bernhardt, "has to do with the protection and self-determination of minorities",[3] a notion which has been angrily rejected by many States as will be shown in chapter six. Both minorities and indigenous groups, in the view of Hannum, can exercise a 'meaningful internal self-determination' through autonomy, which allows them to control their own affairs in a way they like, yet is not inconsistent with the 'ultimate sovereignty'.[4]

Claims for autonomy by minority groups are seen by Kimminich as a claim for limited self-determination.[5] Autonomy through self-determination, in his view, is a *modus operandi* which can be used in pluralist societies to accommodate the legitimate rights of minority groups within a federal structure. He further points out autonomy can be useful to block secessionist groups seeking independence by allowing minority groups to operate within a pluralist structure. Both Murswiek and Kimminich emphasise that territorial autonomy is the only viable option to secession

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[2] *L.B.Sohn*, 'The Concept of Autonomy in International Law and the Practice of the United Nations', 15 (2) *ILR* 1980, p.180.

[3] *R.Bernhardt*, 'Federalism and Autonomy', in *Y.Dinstein* (ed.), Models of Autonomy, Transaction Books: New Brunswick and London, 1981, p.26.

[4] *H.Hannum*, Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights, 1996 ed. Philadelphia : University of Pennsylvania Press, pp.473-74.

[5] *O.Kimminich*, 'A Federal Right of Self-Determination ?', in *C.Tomuchat* (ed.), Modern Law of Self-Determination, Martinus Nijhoff: Dordrecht/Boston/London, 1993, p.100.

or independence provided only it is granted in time.[6] Kimminich points out that where the State violates the fundamental human rights of minority groups, then they can invoke the right to self-determination in order to bring about constitutional changes aimed at achieving minority protection through autonomy or a suitable federal structure. If they cannot achieve justice from the recalcitrant State, then, argues Kimminich, oppressed minority groups could secede by invoking the right to self-determination.[7] Brownlie is of the view that autonomy is one of the models inherent in the right to self-determination to which minorities are entitled whatever the traditional meaning of autonomy and the doctrine of the right to self-determination might be. He argues that "the exercise of self-determination involves a wide range of political choices, including independent statehood, federal union, and various forms of autonomy or associated statehood".[8] However, some scholars disagree with the suggestion that autonomy is part of the right to self-determination. Suksi, Steiner and Eide are, however, more cautious and pragmatic than Kimminich, Brownlie and Bernhardt. Suksi says there is a slim chance of autonomy being transformed to "some kind of half-way house short of secession".[9] Although international law does not create any direct right to autonomy, stated Suksi, national

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[6] *Ibid.* p.98. See also similar views, *D.Murswiek*, 'The Issue of a Right of Secession: Reconsidered', in *Tomuschat* (ed.), *ibid.* p.39.

[7] *Kimminich, supra*, 5, p.92.

[8] *I.Brownlie*, Treaties and Indigenous Peoples, Clarendon Press: Oxford, 1992 p.48. See further *I.Brownlie*, 'The Rights of Peoples in Modern International Law', in *J.Crawford* (ed.), The Rights of People, Clarendon Press: Oxford, 1988, pp.1-16.

arrangements leading to the creation of autonomous areas may signify a certain recognition of right to self-determination. Such arrangements, as Suksi says, whether created by constitutional or ordinary legislation, may sometimes be protected under principle of self-determination.[10] Special Rapporteur Eide is more cautious although he sees some interrelationship between autonomy and minorities. Autonomy is seen as "the highest or maximum aspirations" or the "highest possible level of rights" which minority groups can enjoy in domestic law by staying within the States.[11] Eide, however, indicated that some form of territorial sub-divisions may be applied within a sovereign State allowing sub-groups to enjoy greater political powers.[12] He concludes:

> "What is less clear is whether groups have a right to some local self-government, or autonomy within the state, on the basis of the right to self-determination...some form of territorial sub-division may in some cases be a practical way to ensure the existence and identity of an ethnic group, provided it is given a democratic, not ethnocratic content. Whether there exists a general right is much more doubtful."[13]

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[9] *M.Suksi*, 'The Constitutional Setting of the Aaland Islands Compared', in *L.Hannikainen* and *F.Horn* (eds.), Autonomy and Dimilitarisation in International Law: The Aaland Islands in a Changing World, Kluwer Law International: The Hague/London/Boston, 1997, p.102.

[10] *Ibid.* p.113.

[11] ESCOR, E/CN.4/Sub.2/1990/46, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, pr.23, p.6.

[12] *Ibid.* p.6.

[13] ESCOR, E/CN.4/Sub.2/1993/34, 10 Aug. 1993, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, pr.88, p.19.

There are some encouraging developments. Autonomy is interpreted by some political scientists and philosophers in terms of 'democratic governance', a theory which is considered a further development of internal self-determination. It is a system which is operated within a democratic environment and supports "pluralism in togetherness whereby different groups could maintain and develop their own identity and characteristics".[14] States are supposed to take appropriate measures to ensure that minorities will have an opportunity for the actual enjoyment of human rights and fundamental freedoms within democratic political framework.[15]

Lijphart, a political scientist, and its main theoretical analyst, has identified autonomy as one of the important elements in 'consociational democracy'. It does, according to Lijphart, represent a significant stage of the right to self-determination. It is inherently a power-sharing democracy utilizing democratic means to keep a balance of power amongst competing sub-groups.[16] This may involve a 'grand

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[14] ESCOR, E/CN.4/Sub.2/1996/2, 30 Nov. 1995, pr.38, p.10. See also *J.Raikka,* 'On the Ethics of Minority Protection', in *M.Suksi* (ed.), Autonomy: Applications and Implications, Kluwer Law International: The Hague/London/Boston, 1998, pp.33-42; *M.Williams,* 'Justice Towards Groups: Political not Juridical', 23 *Political Theory* 1995, pp.67-91; *W.Kymlicka* Liberalism, Community and Culture, Clarendon Press: Oxford, 1989; *W.Kymlicka* (ed.), The Rights of Minority Culture, Oxford UP: Oxford, 1995; *W.Kymlicka,* Multicultural Citizenship, Clarendon Press: Oxford, 1995; *M.Rickard,* 'Liberalism, Multiculturalism, and Minority Protection, 20 *Social Theory and Practice* 1994, pp.143-17[illegible]

[15] Principle VII, The Helsinki Final Act, 1975, 14 *ILM* 1292, [1975], p.1295.

[16] *A.Lijphart,* 'Self-Determination Versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems', in *W.Kymlicka* (ed.), *op.cit.* 14, pp.275-287. According to Lijphart, the origin of the theory of consociational democracy goes back to the 17th century. The genesis of the concept can be discerned in Johannes Althusius, a federal political theorist (Politica Methodica Digesta, 1603). But, it was Sir Arthur Lewis, according to Lijphart, who was

coalition method' based on an executive power-sharing and a certain degree of self-determination for each group whether they live together or separately.[17] Consociational democracy, in Lijphart's view, also provides an opportunity for ethnic groups (identified as segment of sub-groups) to administer their cultural matters better than in any other system. In other words, autonomy in a consociational democracy is synonymous with 'territorial federalism'.[18] Particularly, Eide noted that consociational democracy can be used as an alternative to a 'majoritarian type of democracy' and "it is more suitable for good government in plural societies divided by ethnic, linguistic, religious or cultural differences, where the groups are clearly identifiable".[19]

4.2 *The Right to Autonomy Under International Law?*

Even though decentralisation of power and autonomy have increasingly become popular in the 1990s, in particular as a solution to ethnic conflicts, according to Hannikainen, autonomy does not have a strong basis in international law. He argues that internal domestic arrangements such as autonomies fall within the sphere of

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considered the 'intellectual originator' of the theory of consociational democracy (*A.A.Lewis*, Politics in West Africa, Allen and Unwin: London, 1965). See further *A.Lijphart*, Democracy in Plural Societies: A Comparative Exploration, Yale University Press: New Haven, Conn, 1977.

[17] *A.Eide*, 'Approaches to Minority Protection', in *A.Phillips* and *A.Rosas* (eds.), The UN Human Rights Declaration, Abo Academic University Institute for Human Rights, and Minority Rights Group International: Turku/Abo/London, 1993, p.89

[18] *Lijphart, supra,* 16, in Kymlicka (ed.), *op.cit.* 14, pp.275-287.

[19] *Eide*, in *Phillips* and *Rosas* (eds.), *supra,* 17, pr.40, p.89.

constitutional law, which are normally beyond the control of general international law though they can influence States' behaviour in domestic matters. "As long as a state has not assumed any specific obligation to consent to autonomous arrangements, it is up to that state whether to provide autonomy or not".[20] Simply because international law recognises certain collective rights, argues Suksi, it does not automatically follow that there exists the right to autonomy under it.[21] Suksi also holds the view that autonomy exists at constitutional level.[22] The Special Rapporteur Eide clarifying the UN practice and the position of international law voiced his doubts about the claim that there already existed a general right of autonomy in international law or its validity is based on the rights to self-determination.[23] However, he admits the possibility that autonomy could evolve as a general right through instruments relating to minority rights or the rights of the UN Declaration on Minorities or a future Universal Declaration on the Rights of Indigenous Peoples.[24]

Nonetheless, the Special Rapporteur does not deny the importance of territorial arrangements in suitable cases provided such sub-divisions should occur

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[20] *L.Hannikainen,* 'Self-determination and Autonomy in International Law', in *Suksi* (ed.), *op.cit.*14, 1998, p.87.

[21] *Suksi*, in *Hannikainen* and *Horn* (eds.), *supra*, 9, 1997, p.183.

[22] *Ibid.* p.152.

[23] Possible Ways and Means, 1993, pr.88, p.19.

[24] *Ibid.* pr.88, p.19.

without harming existing boundaries.[25] Wherever possible, States should find suitable approaches to facilitate the accommodation of different ethnic or linguistic groups.[26]

It is submitted that autonomy may become a part of international law. However, the reluctance to introduce any substantial law in terms of international law guaranteeing autonomy as a legal right to minorities, except indigenous peoples, is evident. The case in point is the UN Declaration on Minorities, 1992. The closest inference can be drawn from the Declaration is article 2 (3) which refers to participatory rights of minorities. It states:

> "Persons belonging to minorities have the right to participate effectively in decision making on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation".

The Participatory right advocated by this article does not amount to the right to autonomy. Moreover, it is based on an individual right. Any persons belonging to a minority have the right to take part in the decision making process at either national or regional level they wish to do so. Although article 4 (2) appears to be providing some favourable recommendations, it can be argued that it relates to no more than personal or cultural autonomy:

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[25] *Ibid.* pr.124 (a), p.27.

[26] *Ibid.* prs.124, 126, 140-145 and 247.

"States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards".

The right to territorial autonomy is not entrenched in either of these articles. Both articles, however, encourage diversity and pluralism within a structure of democratic or consociational governance. Thornberry stated: "There is no specific right to autonomy in the Declaration, but 'effective' participation through local and national organizations may necessitate the creation of autonomies to achieve the Declaration's standard".[27]

4.3 *Indigenous Peoples' Right to Autonomy*

"Self-Determination is the River in Which all other Rights Swim"

Many indigenous peoples stress that arrangements in the form of autonomy is an expression of and realisation of self-determination.[28] It is in wider sense, self-government beyond 'self-regulation of a community of people through their own institutions in order to regulate their own conduct toward each other, and to have control over the natural resources, environment, traditional way of life (hunting,

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[27] *P.Thornberry*, 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations', in *Phillips* and *Rosas* (eds.), *supra*, 17, pp.42-43. See further *N.Lerner*, 'The 1992 UN Declaration on Minorities', 23 *IYHR* 1993, pp.111-128.

[28] See *J.Bohlin*, 'Human Rights and Access to Natural Resources', 64 (3) *NJIL* 1995, pp.495-499.

fishing, and the like). They strongly believe that as inheritors "they have the inherent right to self-determination" in the territories which they occupy or to lands which they claim.[29] For example a tribunal set up in 1993 by indigenous activists at Hawaii in *Ka Ho'oklokolonui Maoli* also upheld that indigenous peoples have the inherent right to sovereignty and self-government which can be realized through self-determination.[30] It is said by Michael Dodson, the Commissioner for Aboriginal and Toress Strait Islanders' Social Justice Commissioner, "self-determination is the river in which all other rights swim".[31] Arrangements in the form of autonomy in respect of indigenous peoples' are often considered in terms of internal self-determination. Nonetheless, the right to secession is not implied by these arguments.[32] Coulter, a member of the Citizen Band Potawatomi Tribe and Executive Director of the Indian

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[29] The statement of the Miskito, Sumo, and Rama nations in the Atlantic Coastal area of Nicaragua (MISURASATA). See *Hannum*, Autonomy and Sovereignty, *supra*, 4, pp.257-262.

[30] See *P.W.Hutchins*, *C.Hilling* and *D.Schulze*, 'The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine', 29 (2) *UBCLR* 1995, p.280. See also *Alfredsson, G.*, 'The Right of Self-determination and Indigenous Peoples', in *Tomuschat* (ed.), 1993, pp.41-54; *E.A.Daes.*, 'Some Considerations on the Right of Indigenous Peoples to Self-determination', 3 *Transnational Law and Contemporary Problems* 1993, pp.1-11; *R.Torres.*, 'The Rights of Indigenous Populations: The Emerging International Norm', 16 *YJIL* 1991, pp.127-175.

[31] *C.Scott*, 'Indigenous Self-determination and Decolonisation of the International Imagination: A Plea', 8 *HRQ* 1996, p.814.

[32] See the submission made by the Gitkson and Wet'suwet'en tribe in *Delgamuukw* v *British Colombia* 104 *DLR* (4th) BCCA [1993] pp.591-592.

Law Resource Centre clarifying the general opinion of the indigenous peoples stated:[33]

> "Practically no indigenous representatives have spoken of a right to secede from an existing country... . It is clear that indigenous leaders mean self-determination to include freedom from political and economic domination by others; self-governments and the management of all their affairs; the right to have their own governments and laws free from external control; free and agreed-upon political and legal relationship with the government of the country and other governments, and the right to control their own economic developments".

Indigenous peoples do not have a legal right to autonomy according to the "current status of international law".[34] There was, however, been significant progress made in this particular area since 1989. The ILO Convention no. 169 (1989)[35] recognised the right of indigenous peoples to control their own institutions, and ways of life to maintain and develop their identities, to practise their languages and observe their religions.

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[33] *R.T.Coulter*, 'The Draft UN Declaration on the Rights of Indigenous Peoples: What is It? What Does it Mean'? 13 *NQHR* 1995, p.131.

[34] See the Report of the Inter-American Commission on Human Rights on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc. OAE/Ser.L/V II, 61, 1984 cited in *Hannum*, Autonomy and Sovereignty, *supra*, 4, pp.79-221. A similar view was expressed by the Sami Rights Committee on the Legal Situation of the Sami Population (appointed by Norway), see Hannum, *ibid.* p.252.

[35] 28 *ILM* 1382 [1989], pp.1384-1392.

Indigenous peoples have found strong advocates of their rights. For example, indigenous peoples' right to autonomy through the right to self-determination was recognised by the UN Experts in 1991 when they concluded, "the Meeting of Experts shares the view that indigenous peoples constitute distinct peoples and societies with the right to self-determination, including the rights of autonomy, self-government, and self-identification".[36]

However it is the Draft Declaration on Indigenous Peoples which has made significant progress by recognising the right of indigenous peoples' right to autonomy in terms of the right to self-determination.[37] The rights contained in this Declaration are more expansive and specific than the ILO Convention mentioned above. Huchins *et al* argue by referring to ILO Convention no. 169 (1989) and the Draft Declaration on Indigenous Peoples that these international documents "recognised the right of aboriginal peoples to self-government not as a new right but as an inherent right that always existed".[38]

The Draft Declaration on Indigenous Peoples recognised indigenous peoples' right to control their lives according to their traditional system. Most importantly, Article 3 recognises their right to self-determination:

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[36] Submission to the Commission on Human Rights, Feb. 1992, p.186, cited in *E.Stamatopoulou*, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic', 16 (1) *HRQ* 1994, p.79.

[37] See articles 2, 21, 31, 32 and 33 of the UN Draft Declaration on Indigenous Peoples, 1994. See also *Zieck.Y.A.*, 'Some Remarks on the Draft Declaration on the Rights of Indigenous Peoples', 8 *LJIL* 1995, pp.103-113.

[38] *Hutchins et al, supra*, 30, p.279.

> "Indigenous 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 developments".

This article should, however, be read in conjunction with article 31 which states:

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

Articles 4, 19, 21, 23, 25, 26, 27, 30, 32 and 33 recognises the rights of indigenous peoples to maintain their traditions and customs, indigenous legal systems, indigenous political and economic institutions, to keep lands, territories, waters, coastal seas, and 'other resources' which have traditionally been owned and occupied by indigenous peoples. These rights are, according to article 42, no more than "minimum standards for the survival, dignity and well-being of the indigenous peoples". In contrast to article 27 of the ICCPR which offers only limited rights for individuals belonging to minority groups, or the UN Declaration on Minorities (articles 2 (3) and 4 (2)) the above articles represent a higher standard of minority rights and_signal a move from traditional international law. The Working Groups' Chair-Person and Rapporteur Erica-Irene A. Daes states that the above rights are

essentially limited, and the indigenous peoples must operate by staying within the nation-State system, unless the system is "so exclusive and non-democratic that it no longer can be said to represent the whole of the population".[39] Only the nature and degree of autonomy can be negotiated with the State concerned by the indigenous peoples "in good faith, on sharing power within the existing State, and to the extent possible, to exercise their right to self-determination by this means".[40] She recognises the possibility of a rearrangement of a power-sharing arrangement between States and indigenous communities "through constitutional reforms". She says, "I believe that the right of self-determination would ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the State in which they live".[41] It is submitted that however progressive and far reaching the rights enshrined in the Draft Declaration on Indigenous Peoples may be, they should not interpreted as anything other than a right within the context of participatory democracy or consociational democracy.

A few recent judgments accept the validity of the claims of indigenous peoples to self-government. In *Delegamuukw* v *British Colombia*, Lambert JA pronounced:

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[39] See *Coulter, supra,* 33, 1995, pp.131-132.

[40] See the explanatory note by the Rapporteur of the Working Group on Indigenous Peoples, ESCOR, E/CN.4/Sub.2/1993/26/Add.1, pr.19, 21 and 23.

[41] *Ibid.*

> "...because the questions are difficult to answer does not mean that the aboriginal right of self-government does not exist... . this world contains many questions that are difficult to answer".[42]

Conclusion

There are signs that autonomy might in future be developed into a principle of international law within the context of the principle of self-determination thereby enhancing its internal aspects.[43] International law does not prohibit arrangements designed to provide mechanisms involving regional autonomy for any ethnic or indigenous groups. They, in turn, are expected to exercise these rights in compliance with the laws of the empowering State. The establishment of adequate autonomous measures is in the hands of the nation-States, but it is not a legal right that can be exercised as of right in international law. It is a half-way house between claims and rights. However, a claim is the first step towards acquiring legal rights.

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[42] 104 *DLR* (4th) 470 BCCA [1993], p 717

[43] See *infra* chapter six.

5 Models of Autonomy and Movements for Autonomy

Introduction

The purpose of this chapter is to analyse the main characteristics of selected models of autonomy whilst examining the current trends within movements fighting for autonomy and their impact on modern nation-States. How and why sub-groups in multiethnic polities agitate for greater autonomy with shared sovereign power is further examined.

Do minority groups genuinely want power-sharing schemes based on autonomous structures located within the boundaries of nation-States? Or are there other ambitions behind their claims? Do they seek to use autonomy as a stepping stone to independent statehood? These are questions to which a definite answer cannot be given. Some ethnic groups genuinely want power sharing arrangements so as to realize their rights. Other groups may not.

Claims for regional autonomy with extensive political powers raise a new dimension to minority rights. Ethnic groups perceive autonomous regimes to be necessary, "not simply to assure their ulterior survival, but principally to avoid oppression and violence".[1] Another remarked, "autonomy is for the minority like

[1] *H.J.Steiner*, 'Ideals and Counter Ideals in the Struggle Over Autonomy Regimes For Minorities', 66 *NDLR.* 1991, p.1540. See further *W.Kymlicka*, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press:Oxford, 1995, p.7; *H.Hannum*, 'The

water for a fish".[2] From the minorities' perspective, without having greater political power in terms of territorial autonomy, they are effectively being deprived of their legitimate rights to determine the political, economic and cultural way of living they would like. On the other hand, modern nation-States are continually struggling to cope with the renewed claims for ethnically defined autonomous regions. The "incremental effect such claims will have upon the international legal order" is immense and unpredictable.[3]

As recent history witnessed, claims for autonomy by minority groups may result in the emergence of 'ethnic provinces' as rival power bases undermining the authority of the nation-States. A case in point is the Kosovo Albanian 'shadow-State'. Mr.Ibrahim Rugova, the leader of the Democratic League of Kosovo (DLK) has been able to create a virtual parallel ethnic Albanian 'shadow State' in the province of Kosovo since 1991 by building various institutions in direct challenge to Serbia's claim to Kosovo. Rugova was elected President of the self-declared Republic of Kosovo in 1992 and in 1998. The Kosovans' intention is to

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Limits of Sovereignty and Minority Rights: Minorities, Indigenous Peoples and the Right to Autonomy', in *E.L.Lutz*, *H.Hannum* and *K.J.Burkes* (eds.), New Directions in Human Rights, University of Pennsylvania Press: Philadelphia, 1989, pp.3-24.

[2] *C.Tabajdi* (undated) Current Questions of International Minority Protection at the End of 1994. Author is the Political Secretary of State, Office of the Prime Minister of the Republic of Hungary when this paper was presented, cited in *P.Thornberry*, 'Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities', in *M.Suksi* (ed.), Autonomy, Applications and Implications, Kluwer Law International: The Hague/London/Boston, 1989, p.97.

[3] *H.Hannum* and *R.B.Lillich* 'The Concept of Autonomy in International Law', 74 *AJIL* 1981, p.858.

achieve an 'intermediate sovereignty' is as a basis for further development towards independence.[4] Similar developments are taking place in the Northern and Eastern provinces of Sri Lanka and in the Kwazulu kingdom in South Africa.

5.1 *Autonomy as a Strategy : First "Equality, Then to Priority and in Extreme Cases to Exclusivity"*

The campaigns of minority groups for greater territorial autonomy in contemporary polities seem to be politically divisive, and detrimental to national unity. Some of these claims seem to be eccentric and militant. Claims often start from "equality, then proceed to priority and in extreme cases to exclusivity".[5] Such claims are often based on a right to a particular geographical area alleged to be defined or inherited by natural boundaries associated with a particular ethnic or racial group. Initially, they appear to be politically neutral, innocent, harmless and reasonable, but their consequences can be very deep and destructive in actual political terms.[6]

There is a certain methodology in this mayhem. Claims for regional autonomy with greater political power often begin in small clusters of disgruntled individuals extends to a mass circle of organized groups and then develop into

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[4]Http://www.int-crisisgroup.org/projects/balkans/reports/kos09,22,Feb.1999. *A.Robinson,* 'Kosovo Violence Starts Alarm Bells Ringing', *The Financial Times,* 4 March 1998, See also *G.Dinmore,* 'Ethnic Albanians Bury Massacre Victims', *The Financial Times,* 4 March 1998. See further *infra* chapter 9, 9.4.

[5] *D.L.Horowitz,* Ethnic Groups in Conflict, University of California Press: Berkeley, 1985, p.197.

[6] *Ibid.* p.196.

clandestine militant political movements. This often gives rise to violence and long-drawn-out wars. This is particularly true of the LTTE,[7] the Chitagongs in Chitagong Track in Bangladesh, and the KLA in Kosovo.[8] The most horrendous contemporary example has been that of the Serbs' abortive attempt to carve a 'pure-Serb autonomous State' out of Bosnia and Herzegovina and Croatia. The strategy adopted by the Serbs was described by the International Criminal Tribunal for the Former Yugoslavia in its findings as follows:

> "In April 1991 several communities joined a Serbian association of municipalities. These structures were formed in areas predominantly inhabited by Bosnian Serbs, generally by vote of the predominantly Bosnian Serb Local Assemblies. At first, this association was a form of economic and cultural corporation without administrative power. However, separate police forces and separate Assemblies rapidly developed. In September 1991, it was announced that several Serb Autonomous Regions in Bosnia-Herzegovina had been proclaimed, including Krajina, Romanjija and Stara Herzegovina, with the aim of separating from the Republican government agencies in Sarajevo and creating a Greater Serbia".[9] ...Crisis Staff were formed in the Serb

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[7] See *S.L.Gunasekara,* Tigers, Moderates and Pandora's Package, Multi Packs (Ceylon) Ltd: Colombo, 1996.

[8] *T.Walker,* 'Serbs Step up Hunt for Rebel Cells in Kosovo', *The Times,* 9 March 1998. See also *D.L.Phillips,* 'Comprehensive Peace in the Balkans: The Kosovo Question', 18 *HRQ* 1996, pp.821-32. See *J.Bugaijski,* Nations in Turmoil: Conflict and Corporation in Eastern Europe, 2nd ed. Westview Press: Boulder / Colo, 1995.

[9] *Prosecutor v Dusko Tadic a/k/a "Dule"*, case no. IT-94-I-T, 7 May 1997, reprinted in 4 *IHHR* 1997, pr.97, p.667.

Autonomous Regions to assume government functions and carry out general municipal management".[10]

As these cases suggest, a claim for autonomy by an ethnic group in a State often results in conflict with the interests of other nationals and undermines the stability of the nation-State.[11]

Generally, before embarking on violent clandestine struggles, minorities claiming autonomy focus initially on issues of morality and justice. A departure from the existing constitutional structures is often urged in favour of a territorial re-arrangement in order to realize their rights in the areas of natural resources, value systems, cultures, religions and linguistic matters.[12] A recent example was that of hastily arranged informal local opposition groups in the former USSR. They "began to present demands for the official recognition of their languages, the teaching of their national culture and history, the protection of their environment, and the self-determination of the economy".[13] Another example is the claim of the Hungarians in the Republic of Slovakia for linguistic and cultural rights, that is, the right to teach in the Hungarian language, the right to use it for road signs, the

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[10] *Ibid.* pr.103, p.668.

[11] *R.Mullerson*, International Law, Rights and Policies: Developments in Eastern Europe and the CIS, Routledge: London/New York, 1994, p.85.

[12] *W.Soyinka*, The Open Sore of a Continent, Oxford University Press: Oxford, 1996. See *H.Hannum*, Autonomy, Sovereignty, Self-determination, University of Pennsylvania Press: Philadelphia, 1990, p.457-58 (Hannum, Autonomy and Sovereignty).

[13] See *S.Kux*, 'From the USSR to the Commonwealth of Independent States: Confederation or Civilized Divorce?', in *J.J.Hesse* and *V.Wright* (eds.), Federalizing Europe? Oxford UP: Oxford, 1996, p.328.

demand for State's assistance for cultural projects etc. As the Slovak government began to implement most of these demands, a new set of demands for greater autonomy for the southern region known as 'the Komarno Proposal' was presented by the Hungarian national group in 1994 by using a secret map to justify their claims. Refusing to yield to these demands, the Slovaks branded them as a first step to secession.[14] As these cases demonstrate, claimants take extreme care to present their demands in the guise of a 'power-sharing' mechanism with the majority population on an equal footing for the benefit of all. Expected changes are claimed within existing territorial boundaries. For example, the Albanians living in Tetvo and surrounding villages (a relatively small area in Western Macedonia) are demanding constitutional changes that will "give them more autonomy", stressing that constitutional re-arrangement with greater autonomy will "boost educational and job opportunities".[15] The Silesian movement for autonomy in Upper Silesia in Poland led by Rudolf Kolodziejczk wants to "concentrate everything except the police, the army, the courts and foreign policy" in the 'historical region of Upper Silesia'. The Silesian campaign for autonomy is slowly taking off the ground attracting many supporters in recent times. In the autumn 1997 election, demands for autonomy were backed by more than 100,000 people, 8% of the total population in the region. Its leaders were reported to have sought 'advice' from the Catalan and Basque separatist leaders. More disturbingly, Rudolf

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[14] *E.Bakker*, 'Growing Isolation: Political and Ethnic Tensions in the Slovak Republic', 9 *Helsinki Monitor* 1998, pp.28-29.

[15] *K.Hope*, 'The Albanian Minority: Barometer of Ethnic Tension', *Financial Times*, 15 Nov. 1996. See also *M.Binyon*'s article on Macedonia, *The Times*, 21 April 1999.

Kolodziejczk is alleged to have recently discussed autonomous strategy with the leader of the 'Republica of Padania', Mr. Umerto Bossi.[16] Sometimes, a change from a federal structure to a 'confederation' or at least to a loose union of States akin to the EU[17] is advocated. For instance, before the secession from the former Socialist Federative Republic of Yugoslavia (SFRY), Croatian and Slovenian politicians with the approval of Macedonia and Bosnia-Herzegovina in 1990 demanded that constitutional changes be made to create a union of States in which different autonomous regions could exercise sovereignty.[18] The Sudan Peoples'

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[16] Anonymous author, 'Poland: Not So Pure', *The Economist*, 29 Nov- 5 Dec. 1997, p.52. The Upper Silesian issue goes back to the 1930s, when the Silesean nationalism was not so developed in the province. They felt strongly about their separate ethnic identity, even during that period. See *A.Cobban*, The Nation State and National Self-Determination, TY Crowell: New York, 1969, p.256.

[17] It is now admitted that 'elements of federalism' can be discerned in the powers of organs of the EU. See *R.Y.Jennings* and *A.Watts* (eds.), Oppenheim's International Law, Peace, vol.1, 9th ed Longman: Essex, 1992, p.249. Laws, regulations and directives issued by the EU are binding over both States and citizens living in the member States. It is apparent that the European Union (formerly EEC) is transforming itself from a confederated State *(staatenbund)* to a loose federation (*bundesstaaten*). It, however, still contains some elements of confederated system too, the characteristics of which was described by Oppenheim as follows: "Confederated States (*Staatenbund*) are a number of full sovereign States linked together for the maintenance of their external and internal independence by a treaty into a union with organs of its own, which are vested with a certain power over the member States, but not over the citizens of these States. Such a union of confederated States is no more itself a State than a real union is; it is merely an International Confederation of States, a society of an international character, since the member Sates remain full sovereign States and separate international persons". *Ibid.* pr.74, pp.246-247.

[18] Croatia, Slovenia and Bosnia-Herzegovina were federal Republics within the former Yugoslav Federation, having a greater autonomous power than 'socialist autonomous

Liberation Movement (SPLM) informed (in November 1997) the Khartoum administration that 'South Sudan should have a choice of becoming an independent state or remaining part of a united Sudan on the basis of a confederation of north and south Sudan under a central authority. It should be a secular state... .'[19] Similar claims have been made by the self-proclaimed 'Transnistrain Moldavan Republic' (a small area between the Dniester river and the Ukraine) in Moldava -"for the creation of a federation with their own constitution, army, currency and foreign policy".[20] Some Afrikaner groups are also demanding that they should be allowed to establish an 'Afrikaner People's State (*valkstaat*) "within the borders of South Africa".[21] The Inkatha Freedom Party in South Africa representing the Zulu people has made known its claims for a provincial State with greater autonomy within a federal structure of the South African Republic.[22] Russian nationals in Narva and Sillamae (predominantly Russian towns) in Estonia have recently voted overwhelmingly in favour of autonomy in response to Estonia's discriminatory citizenship legislation against non-Estonians. The Russian Christian Union has been threatening that it would

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regions' such as Kosovo and Vojvodina. *P.F.Lyttle,* 'Electoral Transitions in Yugoslavia', in *Y.Shain* and *J.J.Linz* (eds.), Between States, Cambridge UP: Cambridge, 1995, p.253. See further *T.Varady,* 'Minorities, Majorities, Law and Ethnicity: Reflections of the Yugoslav Case', 19 *HRQ* 1997, p.49.

[19] *M.Wrong,* 'Sudan's Rebels Demand Plebiscite', *Financial Times*, 6 Nov. 1997.

[20] See *K.Jungwiert* and *M.A.Nowicki,* 'Report on the Legislation of the Republic of Moldava', 5 *HRLJ* 1994, p.390.

[21] *J.Dugard,* 'International Law and the South African Constitution', 8 (1) *E JIL* 1997, p 87.

[22] *Ibid.* p.87.

prefer separatism to integration with Estonia.[23] These claims are rapidly arousing international concern.

5.2 *Reasons Behind the Emergence of Movements for Autonomy*

Claims for greater autonomy may occur, *inter alia,* when a minority group feels that it has been subjected to discrimination at the hands of the State in which it lives or if it feels that it is better off having a greater political power to control its own 'affairs' without interference from outsiders. Various other reasons are also advanced to justify these claims. A reason for the Sileseans' demand for autonomy, according to its proponents, is due to rejection of their Silesian ethnic identity by the Polish political leaders. It is reported that the Polish Appeal Court has rejected the proposition that there is a separate 'Silesean ethnic community' in Upper Silesia. The Silesians also believe that they have been the "butt of industrial exploitation and discrimination" ever since the region was absorbed by Poland due to its "Polanisation Policy".[24] Movements arising in such circumstances cannot easily be suppressed or ignored as was the case of South Tyrol in Italy and the violent political campaign of the separatist Sikhs in Punjab. For example, the Sikhs have been fighting for decades for greater autonomy for Punjab. 'Shiromani Akali Dal', the main political stream of the Sikh nationalism, in its 'Anandpur Sahib Resolution', 1973, declared its determination to achieve union State status for

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[23] Anonymous author, 'Them and Us', *Economists*, 17 Aug. 1996, p.68. See also *R.C.Visek* 'Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia', 38 *HILJ* 1997, p.371.

[24] Anonymous Author, 'Poland : Not So Pure', *supra*, 16, p.52.

Punjab within a federation in which all States are equally represented at the centre".[25] Paragraph 1 (b) says, "In this new Punjab, and other states the central intervention should be restricted to Defence, Foreign affairs, Post and Telegraphs, Currency and Railways. The rest of the departments should be under the direct control of Punjab". Akalis' main demands were centered around bread and butter issues such as control over river water, control of the capital city (Punjab), and agricultural subsidies.[26] This would be federal in the real sense though gradually that demand turned out to be for a separate 'Khalistan' due to mishandling by the Indian government of the Punjab issue.[27] The majority of Sikhs are of the view that they have been deprived of their political, economic and cultural rights due to the centralizing tendencies unleashed by the post-Nehruvian leadership,[28] and particularly by Indira's uncompromisingly tough regime.[29]

Crimean Tartars in the Crimean Peninsula in Ukraine,[30] the Albanians in

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[25] See full text in *H.Hannum* (ed.), Documents on Autonomy and Minority Rights, Martinus Nijhoff: Dordrecht/Boston/London, 1993, pp.310-13.

[26] See *A.Kholi*, 'Can Democracies Accommodate Ethnic Nationalism? Rise and Decline of Self-Determination Movement in India', 56 *JAS* 1997, pp.335-338.

[27] *W.H.Morris-Jones*, 'South Asia', in *R.H.Jackson* and *A.James* (eds.), States in a Changing World, Clarendon Press: Oxford, 1993, p.171. See also *G.Singh*, 'The Punjab Crisis Since 1984: A Reassessment', in 18 *Ethnic and Racial Studies*, 1995, pp.493. See further *B.R.Nayer*, Minority Politics in Punjab, Princeton University Press: Princeton, NJ, 1989.

[28] *P.Brass*, The Politics of India Since Independence, Cambridge University Press: Cambridge, 1990, cited in *Singh, ibid.* p.147.

[29] *Kholi, supra*, 26, pp.335-338.

[30] See generally *Mullerson, supra*, 11, chapter 2.

Macedonia,[31] Nepali speaking Gurkhas of West Bengal, Kachins, Chins, Shans, Mons in Myanmar (formally the Republic of Burma), the Muslims in Eastern part of Sri Lanka are some other known candidates for regional autonomy. The leader of the Tamils of Indian descent[32] in the hill country in Sri Lanka, Saumya Moorthy Thondaman, a parliamentarian, trade union leader and a cabinet minister since 1977 has been for a considerable time campaigning for a regional assembly for 'hill country Tamils of Indian origin'. He openly says that he and his party are opposed to the break up of Sri Lanka. But his close association with the leader of the LTTE undermines his credibility. Bretons and Basques in France are also claiming regional autonomy within a federal structure.[33] The Basques[34] and Catalans fought the 'parasitic and moribund' Spanish regime until they secured extensive autonomous powers,[35] *estado autonomico* or *estado de las autonomias*

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[31] Albanians living in Macedonia and Kosovo are separated only by mountains. Often they operate as one unit or are having close cooperation with each other in their struggle for independence. See *J.Pettifer*, 'Encircling Wolves Awaits Their Chance', *The Times*, 9 March 1998.

[32] The Indian Tamils should not be identified with indigenous Tamils living in Northern and Eastern part of Sri Lanka. They were brought to Ceylon by British planters during 19th and early 20th centuries as indentured labourers. See *infra* chapter 11.

[33] *J.Claydon*, 'The Transnational Protection of Ethnic Minorities: A Tentative Framework for Inquiry', 13 *CYIL* 1975, p.28.

[34] See *S.Ben-Ami*, 'The Catalan and Basque Movements for Autonomy', in *Y.Dinstein* (ed.), Models of Autonomy, Transaction Books: New Brunswick and London, 1981, pp.67-84. See also *C.Schreuer*, 'Autonomy in South Tyrol', *Dinstein* (ed.), *ibid.* p.54.

[35] The most recent amendments to these two autonomous regions were established by the "Autonomy Statutes for the Basque Region and Catalonia by *Royal Decree- Law*, on 13 and 14 September 1979. See *L.B.Sohn*, 'The Concept of Autonomy in International Law and the Practice of the United Nations', 15 *ILR* 1980, footnote 11, p.182,. Basques,

territoriale,[36] respectively for the Basque country and Catalonia. Even during the 19th century, the Spanish authorities had employed various strategies to destroy the Catalan identity, mercantile law, legal system, and the use of the Catalan language. During the military regime of General Franco, the oppression of Catalans was intensified. Yet autonomy movements for Catalans could not be stopped.[37] Their demand for regional autonomy was achieved in 1932, and later in 1978 the present autonomy status was granted. The Faeroe nationalist movements campaigned for centuries until they secured 'home rule', less than full

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Catalans, Galicians and Andalusians have been recognized by 1978 Spanish constitution as 'historical communities'. ESCOR E/CN.4/Sub.2/1993/34, Possible Ways and Means of Facilitating the Peaceful Solution of Problems Solving Minorities, pr.268, p.58 (Possible Ways and Means, 1993).

[36] 1978 Spanish Constitution which provided for autonomous regions for some ethnic groups does not use the term *'estado autonomico'*, which is said to be popularized by politicians. 'Autonomous communities' is the chosen term in the Constitution. See details *Solozabal* in *Hesse* and *Wright*, *supra*, 13. See for example articles 137 and 143 of the Constitution and article 1 of the Statute of Autonomy of the Basque Country, Organic Law 3/1979 of 18 Dec. 1979, see *Hannum* (ed.), Documents on Autonomy, *supra*, 25, p.156. The Spanish constitution has introduced 17 autonomous self-governing communities. Among them are, Catolonia, Galicia, the Basque country, the Valencian community and the Balearic islands. Article 2 promulgates: 'The constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to autonomy by the nationalities and regions of which it is composed and solidarity among them all", Possible Ways and Means, 1993, prs.256-267, p.58.

[37] See *Cobban*, *op.cit.*16, p.251.

independence, by the *Home Rule Act* of 1948.[38] The Kurds' struggle goes back centuries, yet there is no clear sign of political settlement or abeyance of their military campaign. The Jura movement campaigned for nearly 160 years until it succeeded in securing a separate Jura canton in 1979 within a federal structure of Switzerland.[39] The Marshall islands composed of 34 atolls gained autonomous status in 1980 from the USA.[40] South Tyrol (Alto Adige) achieved regional autonomy "partly by terrorism and partly through willingness by the Italian government".[41] These cases strengthen the argument that when the bandwagon of

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[38] Faeroe island has since 1852 limited self-government with which the islanders were not satisfied. The Home Rule Act 1948 introduced home rule for Faeroe islanders in recognition of islanders' claims.

[39] The Jura Canton became the 23rd member of the Swiss Federation, see *D.J.Elazar* (ed.), Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements, Longman Group:Essex, 1991, p.256. See *D.Thurer,* 'Switzerland: The Model in Need of Adaptation'? in *Hesse* and *Wright* (eds.), *supra,* 13, 1996, pp.219-239.

[40] *N.Y.Times,* 15 Jan. 1980, cited in *Hannum* and *Lillich, supra,* 3, p.858.

[41] *C.Palley,* Constitutional Law and Minorities, Report no. 36, Minority Rights Group: London, 1978, p.14. See also *A.E.Alcock,* The History of the South Tyrol Question, Joseph: London, 1970. The Paris Agreement of 5 September 1946 between Austria and Italy introduced limited authority to South Tyrol (Alto Adige). Article 2 said, "The populations of the above- mentioned zones will be granted the exercise of autonomous legislative and executive regional power... ." This is implemented by the first Autonomy Statute of 1948, the text of which is printed in the Constitutional Statute of 26 Feb. 1948, Official Gazette, 13 March 1948. A comprehensive autonomous 'package' was not been agreed until 1972. The new Autonomy Statute came into force in 1972 by the Decree of the President of the Republic of 31 August 1972, no. 677. This is published in the Official Gazette, *Raccolta Ufficiale delle Leggi,* 3136, 20 Nov. 1972, no. 301, p.57. Italy has now 20 autonomous territorial units in its territory. For further details, *Hannum,* Autonomy and

autonomy movements begins to roll it cannot easily be stopped or suppressed either by democratic or military means. As Cobban correctly points out, ordinary rights containing village assemblies, local councils or limited cultural autonomy are not enough to appease such movements.[42]

There are various other factors which contribute to the multiplication of claims for autonomy. States' failure to understand the aspirations of sub-groups, neglect of ethnic, religious and cultural differences, the organized politics of nationalism, undue dominance of majority over minorities and unequal distribution of national income are some of the main factors which exacerbate this process.[43] There are many contemporary examples. Sudan's (i.e., northern Muslims') unequal and discriminatory treatment and alleged exploitation of natural resources such as oil and water in Southern Sudan is alleged to have led to the escalation of a claim for regional autonomy for Southern Sudan.[44] In justification of their struggles for autonomy, the Andalusians and the Galicians have alleged that their regions had been exploited by the Spanish imperialists for centuries as if they were 'African colonies'.[45] The Punjabi Sikhs' struggle for autonomy is based, amongst other things, on the Indian Central government's alleged exploitation of the natural

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Sovereignty, *op.cit.*12, pp.432-440. See further *R.Lapidoth,* Autonomy, Flexible Solutions to Ethnic Conflicts, United States of Peace Press: Washington, DC. 1997, pp.100-112.

[42] *Cobban, op.cit.* 16, p.266.

[43] *M.Howard,* 'Ideology and International Relations', 15 *Review of International Studies* 1989, p.2. See further *Steiner, supra,* 1, p.1541.

[44] These allegations are refuted by the Sudanese government. See A/C.3/50/SR.8/30 Oct. 1995, pr.14, p.5 (Sudan).

[45] *Ben-Ami,* in *Dinstein* (ed.), Models of Autonomy, *supra,* 34, p.80.

resources of Punjab. A similar allegation was leveled against Pakistan by its erstwhile wing, East Pakistan, before the latter successfully achieved separation from the former. This allegation was found to be proved by the investigation conducted by the International Commission of Jurists.[46] The Ogoni peoples living in the oil-rich Ogoniland of the Republic of Nigeria also make similar allegations against the republic of Nigeria.[47] The Movement for the Survival of the Ogoni people (MSOP) and its Campaign for Democracy's allegations are based on, *inter alia*, the exploitation of petroleum and gas by the Nigerian Government in Ogoniland with the complicity of the multinational petroleum companies.[48] It is reported that in 1994 alone $30 billion worth of oil was extracted from Ogoniland.[49] Before the overthrow of the former President Mobutu's regime, Kasai and Shaba, southern provinces of Zaire, renewed their claims for autonomy

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[46] The Secretariat of the International Commission of Jurists, The Events in East Pakistan, H. Studer: Geneva, 1972.

[47] There are, according to some independent reports, about half a million Ogoni people in Ogoniland which is located in River State in the Niger Delta covering 400 square miles. Due to civil unrest and oppression by the Nigerian government, many intellectuals such as lawyers, doctors, teachers, and many other professionals have already left the Ogoni region. *The Times*, 30 March 1996. See further *S.I.Skogly*, 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria', 15 *NQHR* 1997, p.48. See also *M.Birnbaum* QC, 'Nigeria: Fundamental Rights Denied, Report of the Trial of Ken Saro-Wiwa and Others', 1995, published by Article 19 in association with the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales, cited in *Skogly*, *ibid.* p.48.

[48] See generally *Soyinka, supra,* 12.

[49] See *Skogly*, *op.cit.*47, p.49.

against the Republic of Zaire alleging that the government had been exploiting its natural resources- copper and cobalt.[50]

5.3 *Self-government through Autonomy Depends on the Good-Will of the Empowering State?*

Independent statehood via autonomy is not the only way by which minorities can achieve their aspirations.[51] Various other political arrangements and policies which recognize and accommodate minorities' concerns and legitimate interests may serve the same purpose. However, greater autonomy, from minorities' perspective, provides an opportunity for minority groups to establish their own way of administration, political system and to enjoy a certain degree of independence within the modern nation-State system.[52] The transfer or delegation or decentralization of power from the center to the province at regional level offers an opportunity to a particular segment of a population or a region to participate in decision- making and implementation more effectively than a centralised system.

The granting of autonomy is also used by States as a means of hanging on to the *status quo* by preventing a discontented segment of their population from

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[50] *The Economist*, 23 Nov. 1996.

[51] *J.N.Rosenau*, 'Sovereignty in a Turbulent World', in *G.M.Lyons* and *M.Mastanduno* (eds.), Beyond Westphalia? State Sovereignty and International Law, The John Hopkins UP: Baltimore and London, 1995, p.202.

[52] *Ibid.* p.202. See further *N.Chandrahasan*, 'Minorities, Autonomy, and the Intervention of Third States: A droit de regard', 23 *IYHR* 1993, pp.129-145.

leaving them for good. The former USSR under Mikhail Gorbachev and the Russian Federation under Boris Yeltsin provide examples. When the signs of disintegration of the former USSR appeared, Gorbachev tried to keep regional provinces in a loose union promising them unprecedented autonomous powers. This strategy went wrong heralding the collapse of the Soviet Empire. Kux noted that the centrifugal force of ethnicity had played a pivotal role in destruction of the former USSR.[53] Under the 'Lebed-Maskhadow' peace plan of 1996, Chechnya was cajoled into accepting greater autonomous status within a federal structure of the Russian Federation initially for five years; at the same time Chechnya and the Russian Federation committed themselves to reaching an agreement by 31 December 2001, *inter alia*, respecting the right of self-determination of Chechen ethnic groups and establishing 'programs for the restoration of the socio-economic structure of the Chechen Republic'.[54] Before launching a military attack in the summer of 1995, similar tactics were used by Croat politicians to keep Croatian Serbs living in Krajina within the Croatian Republic. Autonomous status for the Krajina province within the Croatian republic was offered in the Constitutional Act on *Human Rights and Freedoms of National and Ethnic Communities or Minorities in the Republic of Croatia*[55] because the Croatian army felt that it

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[53] *Kux*, in *Hesse* and *Wright* (eds.), *supra*, 13, pp.325-358. See further *P.Kubicek*, 'Recognition, Nationalism and Realpolitik in Central Asia, 49 *Europe-Asia Studies* 1997, p.637.

[54] See 'Lebed-Maskhadow Joint Declaration and Principles for Mutual Relations' reprinted in 17 *HRLJ* 1995 pp.240-241. This document is very vague and does not guarantee independent statehood for Chechnya by the year 2001.

[55] Published in Narodne Novine, 34/1992, *Varady*, *op.cit.*18, p.36.

would not be able to defeat the local Serb separatists militarily. The latest offer for greater autonomy in the form of union status within a federal structure for the north-east Tamils by the Sri Lankan government has also been branded by the LTTE as a 'political conspiracy'[56] to defeat Tamil minority groups' claim for a separate State. Models of autonomy have so far successfully been used by Spain in the 1978 constitution principally to keep the Basques and Catalans within a 'half-way-federal' Spain[57] which according to some scholars is "probably one of the most successful innovations in recent times".[58]

Autonomous bodies can play a significant role in shaping and restructuring internal political and administrative mechanisms. However, autonomous regions in some federal States may be allowed to deal only with such limited areas as cultural and linguistic matters as in the case of linguistic

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[56] BBC2, 15 November 1997. See also *Sri Lankan Monitor*, No. 118, Nov. 1997, p.1.

[57] See *J.J.Solozabal*, 'Spain: A Federation in the Making'? in *Hesse* and *Wright* (eds.), *supra*, 13, 1996, pp.240. A 1978 constitutional amendment to the Spanish constitution is a new kind of experiment. When it was being drafted its authors were not allowed to use other federal constitutional models as a reference point. Solozabal, *ibid.* Suksi also claimed that Spain was gradually approaching federal model. See *M.Suksi*, 'The Constitutional Setting of the Aaland Islands Compared', in *L.Hannikainen* and *F.Horn* (eds.), Autonomy and Demilitarisation in International Law: The Aaland Islands in a Changing Europe, Kluwer Law International: The Hague/London/Boston, 1997, p. 99.

[58] *A.Eide*, 'Approaches to Minority Protection', in *A.Phillips* and *A.Rosas* (eds.), The UN Minority Rights Declaration, Turku/Abo- London, 1993, pp. 90-91. Hannum also agreed. See *Hannum* (ed.), Documents on Autonomy, *supra*, 25, pp.144-45. See further *Elazar*, *supra*, 39, p.vii.

communities in Belgium,[59] and also some present local arrangements implemented in Nordic countries in respect of indigenous peoples. In a few cases, autonomous regions are allowed to enjoy greater control over legislative, executive, political, administrative matters, social services, health and environmental matters, regional taxation, transport and education systems, local government etc.[60] For example, Greenland was granted an extensive powers by the *Greenland Home Rule Act*, 1978. It has power to levy taxes, enact rent legislation, deal with housing subsidies and housing administration, environment and protection, to maintain religious institutions, fishing, hunting, agriculture, reindeer-breeding, preservation of wild life, country planning, trade and monopolies legislation, social questions, labour market conditions.[61] The Faeroe islands are another successful autonomous model enjoying great autonomous power. They have been granted powers over 'special

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[59] In Belgium, regionalist autonomous movement launched first by the Dutch speaking Protestant Flemish movement. First their demands were centered on 'linguistic equality' and then on 'cultural autonomy'. Later their demands spread to wider areas as well. Now Belgium is divided in to three linguistic communities, and four regions. See respectively *Cobban*, *op.cit.* 16, pp.253-254 and *Hannum* (ed.), Documents on Autonomy, *supra*, 25, p.180.

[60] *Hannum* and *Lillich*, *supra*, 3, p.887.

[61] *Greenland Home Rule Act*, Act no. 577 of 29 Nov. 1978. It operates within a unitary State. See Article 1 of the Danish constitution. See full text in *Hannum* (ed), Documents on Autonomy, *supra*, 25, pp.213-18. However, Greenland Home Rule does not confer 'unlimited power' to Greenland. Denmark keeps autonomous powers of Greenland under its supervision. It is only a qualified one. For example, defence, treaty making powers and foreign relations are excluded from the Greenlandic authorities. See *L.Lyck*, 'Lessons to be Learned on Autonomy and on Human Rights From the Faeroes Situation Since 1992', *NJIL* 1995, p.482. See further *I.Foighel*, 'A Framework for Local Autonomy: The Greenland Case', in *Dinstein* (ed.), Models of Autonomy, *supra*, 34, pp.36-37.

Faeroes matters' in which the Faeroes Island's Legislative Assembly have legislative, executive and administrative authority to deal with vast areas such as taxation including import duties, income tax through municipalities, power to introduce rules and regulations in respect of education, social and health affairs, matters relating to trade and land including hydroelectric production, control over living marine resources and sub-soil resources. It can determine the form of the national flag as well taking decisions on matters relating to passports. Olafssson observes that the main characteristics are those of political and economic self-determination.[62] The cantonal governments in Switzerland have since 1874 been very successful in the operation of power sharing at Cantonal level which has been structured by virtue of law and customs more in terms of linguistic differences than other characteristics of minority groups.[63] Hong Kong also seems to be enjoying greater legislative, executive and administrative powers seemingly without much interference from the mainland China. Its autonomy is guaranteed by the Joint Declaration of the Government of the United Kingdom of Great Britain and

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[62] See *A.Olafsson*, 'Relationship Between Political and Economic Self-Determination: The Faeroes Case', 64 (3) *NJIL* 1995, p.467. Analyzing the autonomous models in Faeroe Island and Greenland, Lyck wrote that they are pragmatic, future-oriented and based on cooperation. Nevertheless, she also noted the failure of the economy and increase of unemployment, pointing out some negative aspects of, in particular, Faeroe's situation. See *Lyck, ibid.* p.482.

[63] It should be noted that Switzerland is in-between confederation and federation rather than a union of autonomous regions. See *J.ASigler*, Minority Rights: A Comparative Analysis, Greenwood Press: Westport/Connecticut/London, 1983, p.181.

Northern Ireland and the Government of the Peoples' Republic of China.[64] The regional governments in Germany,[65] the provincial governments in Australia and the Republic of India[66] can also be seen as examples of regional governments that have been allowed to exercise greater political, legislative and economic power. They cannot theoretically speaking be identified as models of autonomy though their regions or provincial governments exercise greater autonomous power within

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[64] On the Question of Hong Kong signed on 19 Dec. 1984 and the Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China, Decree no. 26, adopted on 4 April 1990. See the full text in *Hannum* (ed.), Documents on Autonomy, *supra*, 25, pp.220-272.

[65] Regional governments, *Lander* have greater access to EU institutions. The German constitution does not identify *Lander*, the regional governments, as autonomous units. *C. Schreuer*, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?", 4 *EJIL* 1993, p.462. It is also worthy of note that Germany, Australia and the USA do not mention their federal regions as autonomous regions. However, some cultural and religious differences to a greater extent are instrumental in German model. See further Possible Ways and Means 1993, pr.255, p.5.

[66] As stated by Atul Kholi, the Republic of India also experimented in creating provincial governments using linguistic differences as a test particularly since 1956. See *Kholi, supra*, 26, pp.334-35. India has however, neglected ethnic demand to a greater extent structuring their provincial governments alone the line of linguistic differences. The exception also can be seen. The Punjab province has been based most importantly on Sikh ethnic identity. But some of the Republics in India are not satisfied with the existing political arrangements, most notably, Tamil politicians in Tamil Nadu. The leader of the *Dravida Munnetra Kalazagham* complained that "in Tamil Nadu we had no industry at all and all the powers were concentrated in the north. Even if we wanted to cut the grass in front of the governor's house, we had to seek permission from the federal government". See Suzanne Goldenberg, *The Guardian*, 17 April 1996. See further *Kholi, ibid.* pp.334-35. Kholi referring to Tamil Nadu states that after achieving the regional autonomy at union

a federal structure.

The authority and competence of the autonomous regions depend very much on the mutual understanding and constitutional arrangements between the center and the region. Yet the degree of autonomy concerning sensitive areas such as security and the economic and political sphere, apart from religious and cultural areas, often proves to be contentious. Most models of autonomy are not given authority to deal with monetary policy, issues of currency and coinage, international relations, national defence, customs, immigration policy, airports and other national ports, protection of national and external borders and frontiers.[67] Modern nation-States are particularly concerned about "matters of foreign affairs or defence" which should, in the view of many, be dealt with by the central government.[68] In rare cases, autonomous regions are granted authority to deal with the international community in limited areas specifically identified by both the central government and the autonomous regions, i.e., in the areas of cultural and economic cooperation.[69] For instance, each Emirate in UAE is allowed to keep membership in the OPEC. However, Emirates do not have competence to enter

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state level within the Indian Federation, Tamil nationalism lost its steam and settled down to 'realpolitik'. *Kholi, ibid.* pp.334-35.

[67] See Annex to the New Autonomy Statute 1972 (South Tyrol); article 149 of the Constitution of Spain 1978 (Basque country); Ninth Schedule, List I to the Constitution of Sri Lanka 1978 (as amended by 1987). See further *Hannum* and *Lillich,* 'The Concept of Autonomy in International Law', in *Dinstein* (ed.), Models of Autonomy, *supra*, 34, 1981, p.216, footnote. 8.

[68] See His Serene Highness Prince Hans-Adam II of Liechtenstein's statement to the UN General Assembly, A/48/PV. 36, 11 Nov. 1993, pp.1-5.

[69] See *Lapidoth, op.cit.* 41, pp.32-35.

into international treaties as separate States.[70] The Basque country[71] has been given power to control major ports which has became a controversial issue amongst Spaniards. Quebec in Canada,[72] the Flemish and Walloons in Belgium[73] are other examples of autonomous models which have been granted limited power to deal with the international community in cultural affairs.[74] The Archipelago of Azores and Medira are empowered by article 229 (1) (t) of the Constitution to engage in co-operation with other foreign regional entities and to strengthen their interrelationship with them in conformity with the foreign policy.[75]Article 28 of The Charter for the Kingdom of the Netherlands 1954[76] allows its autonomous regions, the Netherlands Antilles, to have international relations in limited areas. The new federal autonomous 'entities' created by the General Agreement for Peace in Bosnia and Herzegovina in its constitution are allowed "to establish special parallel relationship with neighbouring states consist with the sovereignty

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[70] See *Hannum* and *Lillich*, *supra*, 67, in *Dinstein* (ed.), Models of Autonomy, *supra*, 34, p.252

[71] See Official Records of the Human Rights Committee, 1990/91, CCPR/10, CCPR/C/51/ Add. 1 and CCPR/C/64/Add. 1, pr.120, p.80.

[72] See for example Agreement on Acid Precipitation Between Quebec and the State of New York, 26 July 1982, cited in *Schreuer*, *supra*, 65, p.450.

[73] 1988 Constitutional amendments empowered the regions to enter into international agreements with foreign States in limited areas such as cultural exchanges without prior agreement of the central government, see *Hannum*, Autonomy and Sovereignty, *op.cit.*12, p. 411.

[74] It should however be noted that the foreign relations power of sub-state entities is limited to matters assigned to them for internal regulation and is subject to strict federal control. See *Schreuer, supra*, 65, p.450.

[75] *Suksi,* in *Hannikainen and Horn* (ed.), *op.cit.*57, footnote, 1 p.120.

and territorial integrity of Bosnia and Herzegovina".[77] It is worth mentioning that each of the eighteen 'semi-autonomous' regions in the Russian Federation was granted "the right to independently participate in foreign relations and foreign economic affairs, to govern itself based on its own constitution and to choose its own anthem, flag and state symbol" by President Boris Yeltsin in March 1992[78] by the Treaty of Federation and it was further elaborated in the 1993 Constitution of the Russian Federation.

5.4 *Indigenous Peoples and Movements for Autonomy*

Now most indigenous peoples are well organized and have been fighting for greater regional autonomy, sometimes even resorting to violence as in the case of the Mohawk Indians at Oka[79] and Mayas in Guatemala (*the Unidad Revolucionaria Nacional Guatemaltec*). However, indigenous peoples generally prefer to have a power-sharing structure with greater autonomy within existing territorial boundaries. As Special Rapporteur to the Sub-Commission

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[76] See the full text in *Hannum* (ed.), Documents on Autonomy, *supra*, 25, pp.353- 369.

[77] Article 2 of the Constitution of Bosnia and Herzegovina, reprinted in 35 *ILM* 118 [1996], p.120 Full text of the Constitution, see pp.118-125. This constitution and other related documents and Annexes are popularly known as 'Dayton Agreement', which was signed on 14 December 1995 at Paris.

[78] *Washington Post*, 1 April 1992, cited in *D.P.Moynihan*, Pandaemonium: Ethnicity in International Politics, Oxford UP: Oxford, 1994, p.71.

[79] They resorted to armed struggle over ancestral lands in the 1980s. See States report submitted under art. 40 of the ICCPR, Canadian report, Official Report of the Human Rights Committee, 1990/91, CCPR/10, CCPR/C/51/Add. 1 and CCPR/C/64/Add. 1, pr.16-17, p.9.

Martinus Cobo observes the indigenous peoples are "determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems".[80] The final declaration adopted by the Preparatory Meeting of Indigenous Peoples in 1987 stated what they have been fighting for:

> "Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes air space, surface and subsurface rights, inland and coastal waters, sea, ice, renewable and non-renewable resources, and the economies based on those resources'.[81]

The backbone of indigenous peoples' argument is that they are the inheritors or inhabitants of those States. Therefore they do not want to see a fragmentation of their countries. For example, in 1985 Samis in Norway, Finland, Sweden, and indigenous peoples in the Aaland islands, the Faeroe islands, and Greenland convened a 'convention' to discuss the possibility of setting up a '*Samiid Aednan*' to fight for their rights. In their final communiqué they emphasized that they would not seek an independent and sovereign nation State[82] breaking away from the existing States because the areas in disputes were their inherited lands. It is worth noting that they expressed their desire to keep their citizenship in the

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[80] ESCOR, E/CN.4/Sub.2/1986/7/Add. 4, pr.378-80.

[81] ESCOR, E/CN.4/Sub.2/1987/22, Annex V, pr.4.

[82] *Hannum,* Autonomy and Sovereignty, *op. cit.* 12, p.257-62.

countries in which they live. Similar attitudes were demonstrated by the *MISURASATA*, an organization of the Miskito, Sumo and Rama nations in the Atlantic coastal area of Nicaragua in April 1987. Having agreed with a provision in the Treaty of Peace they declared that they would exercise their inherent right within existing boundaries of Nicaragua.[83]

The above position is more or less true in the case of aborigines in Australia, Maoris in New Zealand, Amerindians in America, Samis and other Indian tribes/nations in the Nordic countries and Veddahs in Sri Lanka. Traditional land disputes and the exploitation of natural resources are some of the most important issues arising between States and these indigenous communities. For examples, the Veddahs[84] in Sri Lanka, who are the oldest indigenous community in the island, instead of turning to violence sought legal remedies in the Badulla District Court in 1988 by way of a possessary action to recover their ancestral forest-lands when the Mahaweli Authority[85] started to divert the River Mahaweli for hydraulic-agricultural developments *via* their traditional hunting lands. Their leader, Thisahamy,[86] tried to secure their traditional lands and forests from the

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[83] *Ibid.* pp.211-212.

[84] See *K.N.O.Dharmadasa* and *S.W.R.De.A.Samarasinghe* (eds.), Vanishing Aborigines: Sri Lanka's Veddahs in Transition, Vikas: New Delhi, 1991.

[85]The Mahaweli Authority is a State authority which comes under the Ministry of Irrigation and Land. It is named after the river Mahaweli around which the main hunting grounds and traditional lands of Veddhas are located.

[86] Tisahami is the most respected leader whose authority is unquestionably accepted by most groups belonging to Veddha. He is also well known among European tourists and respected by political leaders of every persuasions (except terrorist separatist groups) of political parties.

outsiders, the settler community. No territorial rearrangement was sought in this case. They sought the right to self-determination over their traditional lands without interference from the 'Mahaweli Authority' and the outside settlers. Generally, land, is the "*raison d'etre* of indigenous peoples' culture".[87]

Conclusion

The speed and the progress made by many movements for autonomy seems to have lost momentum as nation-States have demonstrated firmness in resisting them. Yet when a campaign for autonomy emerges with its cultural, religious, linguistic and ethnic baggage it is not easy to confine it within fixed boundaries however much the international community may want to do so. Some movements may in the course of their struggles disappear after failing to achieve their objectives and to win the strong international support. Others for example, the Basques and Catalans may achieve autonomy with self-rule and may be satisfied.

The form and nature of autonomous models depends on the circumstances in which they emerge. When they occur in a relatively homogeneous environment and without great acrimony autonomous models will have a chance of success. However, when autonomous models are created in situations similar to that of Eritrea and Kosovo there is every possibility that they will eventually fail either moving towards secession or by collapsing completely.

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[87] See *R.L.Barsh*, 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force', 18 *HRQ* 1996, p.801.

6 Claims for Autonomy The Concerns of States

Introduction

"The international community is composed primarily of States. Any changes in the composition of the international community are of immediate concern to existing States... ."[1] States' practice in respect of any structural changes to States will have a greater impact on other international corporate bodies such as the UN, EU, OAU, OAS, and the like. The decisions taken or opinions expressed by the delegates of States at national and international level shape the norms of international relations. Thus State practices may gradually emerge as coherent principles which may in the end get recognition as norms of international law. Therefore, it is appropriate to examine what State practices are in respect of claims for autonomy by minority groups and to examine whether there is a possibility that autonomy may get recognised as a principle of international law.

The traditional perception has been that singling out minorities for special treatment was detrimental to national unity and stability. Such steps are seen as creating invidious distinctions between citizens, and, above all, accommodation for minority rights is seen as a dangerous strategy which encourages minorities to

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[1] *R.Y.Jennings* and *A.Watts* (eds.), Oppenheim's International Law, PEACE, vol. 1, 9th ed. Longman: Essex, 1992, pr.39, p.128.

"maintain their resistance to political integration and to remain discontented and rebellious minorities".[2] Accusing fingers are often pointed to the Helenin movement in pre-war Czechoslovakia (which campaigned for minority rights for the Germans living in neighbouring European States) and the alleged anti-government activities by Nazi sympathizers in the German colony in the south of Chile before the Second World-War.[3]

However, there has been a positive developments in minority rights in recent times. States appear to be prepared to take positive measures to address the concerns of minority groups, in particular on issues relating to language, culture, and religion. Yet, they are, it seems, reluctant to grant political power to minority groups by allowing them to control the regions in which they live. Such initiatives are considered as the creation of rival power bases. The common position seemed to be, "if you give them an inch (or centimeter), they will want a yard (or meter)".[4] The right to autonomy is considered as something having the potential to destroy territorial integrity and the sovereignty of nation-States. These concerns of the nation-State are examined in this chapter by analysing State practices (selected samples) in international arena.

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[2] *L.M.Goodrich,* The United Nations, Stevens and Sons Ltd: London, 1960, p.244.

[3] A/C.3/SR.1103, 14 Nov. 1961, pr.44, p.215.

[4] *P.Thornberry,* 'Minority Rights', in Academy of European Law (ed.), Collective Course of the Academy of European Law, vol. vi. 1997, p.326.

6.1 *"We Must Avoid Creating a State Within a State"*

Claims of minorities for autonomy raise strong objections. There are many reasons for States to be worried about the claims of minorities for autonomy. The consequences of claims for autonomy associated with ethnicity are unpredictable. Greater autonomy for regions in terms of ethnic identity is therefore not universally welcome. Fierce opposition to claims for autonomy by minorities was even heard at the League of Nations. Addressing a League of Nations committee, the Brazilian representative Mr. Mello Franco registered his opposition to the claims of minorities. Supporting the statement made by Blociszewski and Paul Fauchille, he stated:

> "We must avoid creating a state within a state. We must prevent the minority from transforming itself into a privileged caste and taking definite form as a foreign group instead of becoming fused in the society in which it lives. If we carry the *exaggerated conception of the autonomy of minorities* to the last extreme, these minorities will become disruptive elements in the state and a source of national disorganization".[5]

Nearly seven decades later, referring to the liberal campaign for regional autonomy for the Yanomami Reserve in Brazil, another prominent politician in Brazil, the Governor of the province, tried to justify such historical fears suggesting that:

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[5] Emphasis added. See *B.Heyking,* 'The International Protection of Minorities: The Achilles' Heel of the League of Nations", in 13 Problems of Peace and War, Grotius Society 1928, p.44.

"...there are ideological problems. There is nothing to stop those who today defend the preservation of Indians like creatures in a Zoo from one day trying to declare an independent Yanomami State in this land of great mineral riches. As Brazilians, we cannot accept this calmly"[6]

Senegal also has a similar opinion about claims for autonomy in 'Casamance', which the Senegal government identifies as a "secession that must be stopped".[7] The Macedonians are furious about the Albanian minorities' claims for greater autonomy in the Western part of Macedonia. The Macedonian Albanians' struggle for autonomy has not only been confined to political campaigns. Violent clashes between the Macedonian majority community, the Slavs, and the Albanian minority group have already occurred several times. The Western part of Macedonia has already become "Macedonia's barometer of inter-ethnic tension". Albanians are threatening that unless their demands for greater autonomy are met to their satisfaction they will 'follow the example of Albanians in Kosovo and opt out of Macedonian society altogether'.[8]

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[6] *G.Cruz*, 'Brazil's Miners: Military Eye Amazon Tribal Lands', *Washington Post*, 17 April 1987, cited in *H.Hannum* (ed.), Documents on Autonomy and Minority Rights, Martinus Nijhoff: Dordrecht, 1993, p.182.

[7] HRC Report, SR 722, cited in *D.McGoldrick*, The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights, Clarendon Press: Oxford, 1991, footnote. 115, p.265.

[8] *K.Hope*, 'The Albanian Minority: Barometer of Ethnic Tension', *Financial Times*, 15 Nov. 1996.

Moreover, the political explosiveness of the principle and its dynamism may lead to violence, destruction, loss of human lives and public property.[9] It is not therefore surprising that autonomy is considered one of the most "dreaded expression".[10] Autonomy for minority groups is viewed by some as an absurdity,[11] and campaigners for autonomy are seen as 'traitors'. Others see 'ethnic autonomy' as a tragedy which could only contribute to the disintegration of the sovereignty of nation-States and the escalation of violence, or - as an Unofficial Commission appointed to inquire into the grievances of the Sinhalese in Sri Lanka found in its interim report - "impractical internal agreement" which would in turn result in the conflict scenario engulfing everyone.[12] Many Italian speaking peoples who became a minority in South Tyrol autonomous region feel the same. They are so frustrated that many are now supporting *Movimento Sociale Italiano* (MSI), an Italian Fascist

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[9] *R.Mullerson*, International Law, Rights and Politics: Developments in Eastern Europe and the CIS, Routledge and LSE: London/New York, 1994, p.60.

[10] *C.Tabajdi*, (undated) Current Questions of International Minority Protection at the End of 1994, cited in *P.Thornberry*, 'Images of Autonomy and Individual and Collective Rights in International Instruments of the Rights of Minorities', in *M.Suksi* (ed.), Autonomy, Applications and Implications, Kluwer Law International: Netherlands, 1998, p.97.

[11] Prior to the 1952 *Federal Act* which created the Eritrean autonomous unit, some Ethiopians expressed their anger alleging that it might harm the sovereignty of Ethiopia. See *H.Erlich*, 'The Eritrean Autonomy 1952-1962: Its Failure and Its Contribution to Further Escalation', in *Y.Dinstein* (ed.), Models of Autonomy, Transaction Books: New Brunswick USA/ London, 1981, pp.183-212.

[12] Refugee Council (London), *Sri Lankan Monitor*, 1 Sept. 1997, p.2. See further *R. Lapidoth*, Autonomy, Flexible Solution to Ethnic Conflicts, United States Institute of Peace Press: Washington DC, 1997, p.111.

party, and some are leaving the province for good.[13] Most States are therefore suspicious about claims for autonomy by minority groups, because it might be a first step towards secession,[14] or "an entrance on a dangerous path leading towards the State's dismemberment through external self-determination"[15] (as was the case in Eritrea and perhaps eventually in Chechnya). This was emphatically stated by the political wing of the ETA, *Herris Batasuna,* when it decided to accept autonomy for the Basque country in 1979. Issuing a statement to its supporters, *Harris Batasuna* assured them "autonomy...should be embraced and shrewdly used as a first step towards full self-determination and eventual secession from Spain".[16] A similar strategy is being considered at present by the moderate separatist Kosovan leaders who sought to negotiate autonomy with the Serbs and the six nation Contact Group at Rambouillet in 1999. They appear to be willing to accept autonomy initially for three years, then want a referendum to consult the Albanian Kosovans about the status of future Kosovo.[17] Such ambitions would undermine the sovereignty of the State, the scenario which most States want to avoid.[18] Apparently influenced by these experiences States are generally of the view that the purpose of claims for autonomy by minority groups is to "take control of natural

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[13] *Lapidoth, ibid.*

[14] *Mullerson, supra,* 9, p.59.

[15] See details, *H.J.Steiner,* 'Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities', 66 *NDLR* 1991 p.1558.

[16] See *S.Ben-Ami,* 'The Catalan and Basque Movements for Autonomy', in *Dinstein* (ed.), Models of Autonomy, *supra,* 11, p.83.

[17] Http://www. my.netscape.com/news/TopStories, 22 Feb.1999.

[18] See *McGoldrick, supra,* 7, pr.5.26, p.257.

resources for the exclusive use of their community to the detriment of others".[19] The claims for regional autonomy made by separatist groups are seen therefore as a danger to the existence of the nation-State.[20] Numerous examples abound. When Southern Sudan was granted regional autonomy in 1972 by the *Southern Provinces Regional Self-Government Act,* 1972, it was alleged that new autonomous status had been used by the Southern Sudanese separatist movements as a pretext for accelerating their guerrilla activities against the central government - thus putting the whole idea of regional autonomy in jeopardy.[21] In the Kosovo dispute, it is alleged by the Serbian authorities that the autonomous status of Kosovo had been used by Kosovo Albanians "to cleanse the region of non-Albanians. This was to be their first step towards secession".[22] The Serbian President Solobodan Milosovic

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[19] A/C.3/48/SR.22, 30 Nov.1993, pr.38, p.9 (Kenya).

[20] See further *J.Claydon,* 'The Transnational Protection of Ethnic Minorities: A Tentative Framework for Inquiry', 13 *CYBIL* 1975, p.39; *J.Symonides,* 'Collective Rights of Minorities in Europe', in *R.Lefeber, M.Fitzmourice,* and *E.Vierdag* (eds.), The Changing Political Structure of Europe, Nijhoff: Dordrecht, 1991, p.110.

[21] The Khartoum government also contributed to the failure of the autonomy experiment. Southern Sudan was granted autonomous status by the 'Southern Provinces Regional Self-Government Act 1972. This is reprinted in *Das Selbstbestimmungsrecht der Volker,* Koln-wien: Bohlau, 1973, pp. 678-84, cited in *L.B.Sohn,* 'The Concept of Autonomy in International Law and the Practice of the United Nations', 15 (2) *ILR* 1980, p.182, footnote, 9. See also *H.Hannum,* Autonomy, Sovereignty and Self-Determination, University of Pennsylvania Press: Philadelphia, 1990, pp.308-327 (Autonomy and Sovereignty).

[22] *M.Paunovic,* 'Nationalities and Minorities in the Yugoslav Federation and in Serbia', in *J.Packer* and *K.Myntti* (eds.), The Protection of Ethnic and Linguistic Minorities in Europe, Institute for Human Rights: Abo Akedemi University Press: Turku/Abo, 1993, pp.145-165.

continually maintains this position alleging that the main aim of Kosovan Albanians "is the disintegration of Serbia and merging that part of the country with Albania".[23] It is also said that the behaviour of the Albanian ethnic group since the 1980s has contributed to a deterioration of the relationship between the Serbs and the Albanians. 'Kosovo is for Albanians', and 'Kosovo - Republika' have been some of the popular slogans used during this period by the Kosovan Albanians. Non-Albanians were alleged to have been intimidated, terrorized and subjected to systematic pressure for decades, which subsequently resulted in the decrease of non-Albanians in 1945 from 30% to 10% in 1990s. This situation, as Paunovic described, created a State within a State, or the possibility of having two Albanian States in Europe, which from the stand point of non-Albanians, was indeed a dangerous scenario.[24] The Serbian authorities are adamant. "If we loose Kosovo, we'll loose Serbia, the Federal Republic of Yugoslavia and our freedom, which should be sacred to us".[25]

States are aware of many other instances where greater autonomous regions in the form of union States or republics in federal structures have been used by minority groups to set the scene for the next stage, independence. It is evident

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[23] *D.L.Philips*, 'Comprehensive Peace in the Balkans: The Kosovo Question', 18 (4) *HRQ* 1996, p.825. It is estimated that there are now more than two million Albanians living in Kosovo, 90% of the total local population, p.822.

[24] *Paunovic, supra,* 22, pp.145-165. See further *Z.T.Irwin*, 'Yugoslavia and Ethnonationalists', in *F.L.Shiels* (ed.), Ethnic Separatism and World Politics, University Press of America: Lanham/ London, 1984, pp.72-105.

[25] Http://my.netscape.com/news/TopStories, 2 Feb. 1999.

that Croatia and Slovenia[26] succeeded in becoming independent States because their previous greater autonomous status amongst the provincial republics helped them in strengthening their power bases against the Serb dominated Yugoslavian military regime, JNA.[27] Yet, the more convincing example was provided by the model of Eritrean autonomy. Prior to their experience in autonomy, it was said that many Eritreans were not even organized as a strong ethno-political group. As Erlich put it "an Eritrean nationalist movement was non-existent".[28] Nonetheless, since the failure of autonomy in Eritrea, the Eritreans have not only organized as a distinct nation, but they have also been able to establish an independent State.

Mullerson's analysis of the break-up of the former Soviet Union also supports such a fear. Referring to the autonomous provinces of the former Soviet Union, he argues that the break-up of the Soviet Empire accelerated because some autonomous Republics which enjoyed union/ republic status (SSR) were able to secede easily due to their extensive autonomous political power helping them build up a strong power base. When it was apparent that the Soviet Union was on the verge of disintegration, it was not difficult for the provincial union republics to

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[26] Croatia and Slovenia were 'republics' in the former Socialist Federal Republic of Yugoslavia. It should be mentioned that they were not identified as autonomous regions though these two republics enjoyed greater autonomous power within a federal structure. See *Hannum, supra,* 6, pp.762-763.

[27] *P.F.Lyttle,* 'Electoral Transitions in Yugoslavia', in *Y.Shain* and *J.J.Linz* (eds.), Between States, Cambridge University Press: Cambridge, 1995, p.253. In fact by Basic Principle 1 of 1974 (as amended by 1987) the Constitution of former Yugoslavia recognized the right of every nation to self-determination including the right to secession.

[28] *Erlich, in Dinstein* (ed.), Models of Autonomy, *supra,* 11, p.173.

declare independence without facing any significant military action from the Kremlin. For example, Ukraine, Georgia and Belorussia did not encounter any significant objection from the Kremlin power base. Yet Karelia and Abkhazia[29] did not achieve independence because they had not previously enjoyed greater political power through autonomy unlike Ukraine or Georgia. Therefore, they did not have an opportunity to strengthen their political and military power bases.

Similarly, when the Republic of Sri Lanka established the Northern Eastern Provincial Assembly with unprecedented powers of autonomy including executive and legislative powers in pursuance of the *Indo-Sri Lanka Accord*, 29 July 1987 the Eelam Peoples' Revolutionary Liberation Front (EPRLF),[30] the elected Tamil militant political party of the Northern and Eastern provinces declared an independent Tamil Eelam in 1990, a few months after its election victory, confirming many doubters' view that minorities are dangerous and may, sometimes, not be trustworthy. This may have a morsel of truth given the destructive tendencies of militant minority groups against States and public property.[31] LTTE's bombing of the Central Bank of Sri Lanka, major oil refineries in Colombo, the World Trade

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[29] From 1940 to 1956 Karelia was a constituent autonomous republic of the former Soviet Union. It enjoyed the status of 'Union Republic' but later, in 1956, its political power was reduced by demoting to a constitutional unit, autonomous republic. Abkhasia suffered a similar fate. This has weakened their position in the course of time. See *Z.Tskhovrebov* 'An Unfolding Case of a Genocide: Chechnya, World Order and the Right to Be Left Alone', 64 (3) *NJIL* 1995, p.513. See further *Mullerson, supra*, 9, p.79.

[30] See *infra* chapter 11, 11:10.

[31] See United Nations Actions in the Field of Human Rights, The Center for Human Rights, UN Publications: New York and Geneva, 1994, pr.1629.

Center in Colombo respectively in 1995, 1996 and 1997, the IRA's bombing of Canary Wharf main buildings in 1996, the Serb minority military junta's virulent and destructive campaign against Muslims in Bosnia-Herzegovina in 1993-95 are telling examples.

6.2 *Claims for Autonomy: Endless Process?*

Moreover, claims for autonomy may be an endless process. Autonomy movements, both democratic and militant, in Assam (in the northeastern part of India/ *Bharat*[32]) provide a classic case in point. First it was granted 'union State' status in recognition of its distinct geographical, historical and demographic identity. Assam is an ethnic mosaic containing a myriad of ethnic and tribal groups, each with its own distinct identity going back centuries. In the 1960s, Nagas, Mizories and many other ethnic groups intensified their campaign, initially for greater autonomy within the State of Assam. Later, however, these demands developed into a separate 'union state-status' within the federation of the Republic of India. The Nagas gained union State status for 'Nagaland', carved out of Assam in 1963. Meghalaya was granted autonomous region status (sub-state) within Assam, and later in 1971 it graduated to the status of union State. The new Meghalaya was also carved out of Assam.

The process does not stop here. Candidates for greater autonomy have mushroomed. Assamese speaking people living in the Brahmaputra valley also

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[32] India is also known as Bharat in the Indian Constitution 1949 (as amended by 1988) which according to article 1 is a 'union of states'. See *Hannum* (ed.), Documents on Autonomy, *supra*, 6, p.276.

began to campaign for greater autonomous power, in particular, in economic matters. Outsiders, in particular the Bengali Hindus and Muslim migrants became a target as they were seen to obstruct the development of the native Assamese. These political demands terrified the indigenous tribal group, Bodo/ Bodo Kochari,[33] who began to worry about these new developments, particularly about the possibility of their being marginalised due to the increased political and economic power of the Assamese. The Bodos then began their campaign for *Udayachat* (Bodoland) with greater autonomy, ironically this time with the tacit encouragement of the federal government in New Delhi. Both the political and military campaigns for '*Udayachat*' increased. Their struggle was met with brutality at the hand of the authorities in Assam, the Assamese speaking Hindus who were, however, unable to suppress Bodo nationalism or their campaign for greater autonomy over their traditional lands and natural resources. Later, the parties came to a compromise. In 1993, the Bodos were given a 'Bodoland Autonomous Council', this time within the State of Assam. The Assamese government's reluctance to implement this new model of autonomy has given rise to a violent campaign with the emergence of 'Bodoland Liberation Tigers', a separatist movement composed of radical and militant young Bodos. The struggle has been going on ever since.[34] This tendency is

[33] They are a collection of sub-tribes. It is estimated that they account for 4.5 million of the population in Assam. See *J.Dasgupta,* 'Community, Authenticity, and Autonomy: Insurgence and International Development in India's Northeast', 56 (2) *JAS* 1997, pp.345-370.

[34] *Ibid.* pp.345-370. See further *R.N.Prasad* (ed.), *Autonomy Movements in Mizoram*, Vicas: New Delhi, 1994; *B.Pakem* (ed.), Regionalism in India, Har-Anand: New Delhi,

very much alive in Sri Lanka. Initially in the 1950s it was the Tamil politicians who demanded greater autonomy for the Northern and Eastern provinces in the island. Later, in the 1990s Muslim minority groups also began to present their claims for autonomy. Now, a leader of one of the factions Mr. Ashrop, who is also a Cabinet Minister in the present Peoples' Alliance (PA), demands that any constitutional amendment should provide for an autonomous region for the Muslims living in the Eastern part of the island. Not surprisingly, the Indian Tamils have also presented their claims for a Tamil Autonomous region in the hill country in which they are principally concentrated. These are only few examples. A more or less similar process is developing in many parts of the world.

6.3 *Attitudes of the States: "Technically Difficult or Politically Sensitive or Both"*

A system of power-sharing within an existing State structure on a basis of race, ethnicity, religious or cultural differences is not a right guaranteed by general international law. However, it is worthy of note that international law is not generally concerned with the domestic constitutional arrangements which involve decentralization of power from the center to the periphery, perhaps involving minority groups.[35] The uncertainty of international law on the principle of autonomy is quite well known even though now it has been suggested that autonomy may be

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1993; *P.Chatterjee*, The Nation and its Fragments, Princeton University Press: Princeton, 1993, cited in *Dasgupta, ibid.*

[35] See *P.W.Hutchins, C.Hilling* and *D.Schulze*, 'The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine', 29 (2) *UBCLR* 1995, p.267.

used "only in exceptional cases" by way of federal arrangements involving devolution or decentralization of power.[36]

There is now increasing evidence to suggest that autonomous arrangements or federal solutions are encouraged in the form of decentralization of power to regions as a solution to ethnic conflicts as in the case of Bosnia and Herzegovina, Sri Lanka, and Kosovo. Bosnia and Herzegovina was restructured along the lines of ethnicity and religious affiliation by the Dayton Peace Accord.[37] An enormous amount of pressure, the stick and carrot strategy had been applied on the Muslims, Croats and Serbs to accept autonomy as a solution to their problems within a federal structure. Eritrean autonomy within Ethiopia in 1952, the Memel Territory under the sovereignty of Lithuania in 1924, the Aaland Islands in 1921 are other famous examples of federal solutions to ethnic problems which the UN and its predecessors, the League of Nations, experimented with. The Paris Aid Group, the EU, the Nordic countries and the UN have also been applying pressure on the Republic of Sri Lanka to find a solution to Tamils' demands within a federation

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[36] Commission of Human Rights, 42nd session, Agenda Item 18, E/CN.4/sub.2/1990/46, 20 July 1990, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, pr.23, p.6.

[37] The General Framework Agreement for Peace in Bosnia and Herzegovina signed on 14 Dec. 1995. Signatories to the agreement are the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia for itself and on behalf of the Republic of Srpska (Bosnian Serbs). See Yearbook, published by the UN and the International Criminal Tribunal for the former Yugoslavia, 1996, p.321. Annex 4 to the Constitution of Bosnia and Herzegovina in its article 2 states that Bosnia and Herzegovina shall consists of two 'entities', the Federation of Bosnia and Herzegovina and the Republic of Srpska, see p.118. Full text in 35 *ILM* 75 [1996], pp.118-125.

according them greater autonomy. Current pressure on both Kosovan Albanians and the Serbs in the Federal Republic of Yugoslavia by the UN, the EU and the NATO to come to an agreement on autonomous rule for Kosovo is a telling indication that the international community is gradually coming to terms with minorities' claims for autonomy.

Minorities' claims to personal or cultural autonomy do not attract much objection from the nation-States, in contrast to claims for territorial autonomy. Personal autonomy of minority groups, for example, the right to establish schools, practise their religion and cultures, and to exercise limited economic rights are not generally disputed by nation-States.

However, the reaction to greater political power in terms of territorial autonomy is quite different. The response of the international community was exhibited at the debate on the proposal on autonomy put-forward by Liechtenstein[38] in the UN General Assembly. It proposed that *communities having a distinctive social and territorial identity*[39] should be able to enjoy autonomy to realize the right of self-determination over their affairs. It is their inherent and inalienable right, it argued further, to decide their political system in the way they like. The proposal went further, suggesting that in suitable cases those communities 'having distinctive social and territorial identity' should be allowed to evolve as independent States.[40] Liechtenstein's argument has been further developed as follows:[41]

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[38] See Liechtenstein's proposal UN Doc. A/Res/48/147 and Add.1 1991.

[39] Emphasis added.

[40] A/C.3/48/SR.22, 30 Nov. 1993, pr.5, p.3.

[41] A/C.3/51/SR.27, 13 Aug. 1997, pr.5, pp.2-3.

"...The concept of self-determination, namely, the attainment of independence by peoples under colonial domination, has virtually been completed. Since then, the concept of self-determination has evolved, with minorities seeking greater autonomy within the nation State in which they resided. Many conflicts occurred because there were no channels in the parent State through which minorities could assert their distinctive identities. Often, they saw secession as the only solution, even though the parent State was likely to resist the option - by force of arms, if necessary... . the realization by minorities of some degree of self-determination was crucial to the maintenance of international peace and security".

This proposal attracted much criticism. Most States furiously opposed it. Some were confused about the scope of the proposal and its implications for the nation-State system. Others were opposed to any kind of proposal which would promote greater autonomy for a section of the population merely on the grounds of ethnicity or racial differences. It was emphasized that such unwelcome initiatives would have the far reaching consequences for the nation-State system.

Reactions however were mixed. It is interesting to note that some States admitted reluctantly the wisdom of accommodating some form of limited autonomy for minorities, as circumstances required. Hungary's delegate stated that in his country "minorities were legally autonomous and appropriate measures, including financial provision were taken to protect their identity".[42] However, whilst it is true that the Hungarian State has introduced legislation to grant 'self-government' status

[42] *Ibid.* pr.54, p.12.

for minority groups within its territory,[43] it does not believe that autonomy will develop into a universal right due to differences of opinions of States.[44] Nepal was certain that "at international level" this principle "remained vague".[45] The delegate for Estonia, agreeing with the above critics, stated that the notion of autonomy was lacking clarity.[46]

Malta's position was that autonomy should be operated within the structure of existing nation-States without harming their territorial integrity and sovereignty. In its view, autonomy is "technically difficult or politically sensitive, or both" due to the "complex nature of the issues" and an "immediate solution" could not therefore be found. However, it admitted that autonomy has in many instances, "provided a practical device for resolving complex situations which would otherwise have denigrated into conflict" and the "fragmentation of States".[47] Slovakia's position was also a positive one.[48]

The delegate for Slovenia pointed out that autonomy could be used to prevent the "escalation of tensions into open conflicts".[49] He claimed that Solovenia has taken some legislative initiatives to grant 'self-government' status to Italian and Hungarian minority groups living in its territory "to carry out certain tasks of state

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[43] *T.Varady*, 'Minorities, Majorities, Law and Ethnicity: Reflections of the Yugoslav Case', 19 *HRQ* 1997, p.36.

[44] A/C.2/48/SR.22, 30 Nov. 1993, pr.37, p.9.

[45] *Ibid.* pr.4, p.2.

[46] *Ibid.* pr.11, p.4.

[47] *Ibid.* pr.1, p.2.

[48] A/C.3/48/SR.21, 30 Nov. 1993, pr.45, p.10.

[49] A/C.3/48/SR.21, 26 Nov. 1993, pr.23, p.6.

authority" by the Act on Self-Governing National Entities (which was enacted by the Slovenian Parliament on 5 October 1994).[50] It is worthy of note that Slovenia was concerned about the activities of "political elites and clans" in clandestine movements which are ready "to seize and maintain power"[51] in the guise of minorities' rights. Croatia's Constitutional Act on Human Rights and Freedoms of National and Ethnic Communities or Minorities in the Republic of Croatia, 1992, provided for 'cultural autonomy' by introducing autonomous regions with special self-governing status in the areas of Glina and Knin, where minorities represent more than 50% of the local population according to 1991 census.[52]

The Russian delegate did neither support nor opposed the proposal on autonomy at the General Assembly debate. Nonetheless, the Russian delegate expressed his country's willingness to introduce "constitutional changes" to guarantee equality and non-discrimination for "all the country's inhabitants".[53] In accordance with the Russian Federation's Constitution adopted on 12 December 1993 it has introduced 21 republics, 6 territories (*kari*), 49 regions (*oblast*), and 2 federal cities, 1 autonomous region and 10 autonomous areas.[54] However, it is not clear as to whether it is ready to grant minority communities autonomous status amounting to internal self-government. In practice, new autonomous regions are discouraged. When Sverdlovsk, an *oblast*, in the Ural Mountains attempted to gain

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[50] This was published in Uradni List, Slovenian Official Gazette 65/1994, see *Varady, supra*, 43, p.36.

[51] A/C.3/49/SR.8, 25 Oct. 1994, pr.9, p.4.

[52] *Varady, supra*, 43, p.36.

[53] A/C.3/49/SR.6, 31 Oct. 1994, pr.54, p.10.

[54] *T.Gazzini*, 'Considerations on the Conflict in Chechnya', 17 (3/6) *HRLJ* 1996, p.93.

economic autonomy for the region and sought promotion to the status of Republic within the Russian Federation, the Moscow politicians with the full backing of President Yeltsin are alleged to have taken every step to crush the movement for autonomy. The leader of the regionalist movement, Mr.Eduard Ergartovich Rossel assured the political authorities in Moscow that their campaign was to "strengthen the integrity of the Russian Federation and the all Russian single state as a basis for the realization of the principle of federalism for all the subjects of the federation".[55] Above all, he was against any campaign for greater political power which was based on ethnicity which he genuinely believed should not be allowed to happen. He stressed that the "basis of the federation should be territorial, not ethnic... ."[56] A similar criticism was leveled against the Moscow authorities by the Ruslan Avshev, President of Ingushetia, and Tartastan's President, Mintimer Shaimier. Even the Treaty on Social Accord of April 1994 implicitly admitted the fact that the federation has not actually encouraged the policy of decentralization of power in order not to allow local autonomy to flourish.[57]

In the view of Pakistan, autonomy can be used to overcome political and economic disparities in multiracial and multiethnic societies such as Western Europe, but not in newly independent countries in Asia and Africa.[58] Uruguay's

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[55] See details *G.M.Easter*, 'Redefining Center- Regional Relations in the Russian Federation: Sverdlovsk Oblast', 49 (4) *Europe-Asia Studies* 1997, p.631. See also *Gazzini, ibid.* p.93.

[56] *Ibid.* p.

[57] See *T.M.Resler*, 'Dilemmas of Democratization: Safeguarding Minorities in Russia, Ukraine and Lithuania', 49 *Europe-Asia Studies* 1997, p.96.

[58] A/C.3/48/SR.22, 30 Nov. 1993, pr.40, p.9.

position was that autonomy was a useful device to assure certain political, cultural, ethnic and religious rights. Its representative, supporting the 'noble attempt' of Liechtenstein, tried to allay the fear of African and Asian States by assuring them that the application of autonomy would not "open up a Pandora's box". He explained that he:[59]

> "could not understand why some countries had serious reservations about supporting the Liechtenstein's draft proposal. It only allows minorities to negotiate degrees of autonomy allowing them to reaffirm certain political, cultural, ethnic and religious rights which could not be ignored or denied without triggering armed conflict and violence".

Following a similar line, autonomy, in the view of Armenia, was a "highly useful concept" which can be used to "prevent ethnic conflicts".[60]

Confusion increased further when some States tried to interpret the notion of autonomy in terms of the right to self-determination. For example, the delegate for Liechtenstein tried to convince others that autonomy could be used as an "optional mechanism for self-determination"[61] in the realization of human rights. Austria's position was also similar. It pointed out that autonomy could be used as one aspect of self-determination.[62] Hungary agreed.[63] According to the Ukraine,

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[59] *Ibid.* pr.47, p.11.

[60] A/C.3/48/SR.21, 26 Nov 1993, pr.12, p.4.

[61] A/C.3/48/SR.22, 30 Nov. 1993, pr.48, p.12.

[62] *Ibid.* pr.51, p.12.

[63] *Ibid.* pr.53, p.12.

autonomy implies a decentralization of power which ensures the "realization of self-determination through a more flexible and gradual process".[64] Ukraine informed the Assembly members that it has already taken some constitutional measures to establish autonomous regions by the *Ukrainian Act on National Minorities* living in the region of Beregovo District of Sub-Carpathia.[65] However, its position remains ambiguous. "Ethnicity could be a divisive factor in the process of nation building" - therefore Ukraine was not prepared to consent to more than cultural autonomy. The concept, according to Resler, is no more than a recognition of individual rights without discrimination as to race and ethnicity.[66] The Latvian Republic introduced in 1991 *the Act on Unrestricted Development and Right to Cultural Autonomy of Latvia's Nationalities and Ethnic Groups*, which recognized the cultural autonomy and self-administration of the culture of all nationalities and ethnic groups.[67] The Estonian delegate agreed with Ukraine, Liechtenstein and Austria, though his support was qualified. He further clarified that autonomy implied "cultural-self governments" on a 'non-territorial' basis which are "equal to local governments".[68] Nonetheless, in his view, autonomy could be used as a 'flexible model' to defuse tensions and to grant rights to those 'dispersed communities', such as the Romany

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[64] *Ibid.* pr.30, p.8.

[65] Enacted on 25 June 1992, printed in Ukrainian Official Gazette, 36/1992. See details, *Varady, supra*, 43, p.30,

[66] *Resler, supra*, 57, p.98.

[67] This is enacted on 19 March 1991, printed in Latvian Official Gazette, *Augustas Padomes Un Valdibas Zinotajs*, 21/1991, amendments printed in the New Latvian Official Gazette 25/1994. See *Resler, ibid.* See further *Lapidoth, op.cit.*12, pp.95-96.

[68] A/C.3/48/SR.22, 3 Nov. 1993, pr.9, and p. 3, prs.11, p.4.

and Jewish peoples.[69] It should be noted here that the Estonian government has granted cultural autonomy to the Germans, Russians, Swedish and Jewish minorities within its territory by the 1993 *Estonian Act on Cultural Autonomy for National Minorities* who account for at least 3,000 individuals belonging to any minority group.[70] Uruguay, Hungary, Armenia and Nigeria are among others who entertained similar opinions.

However, some States have serious doubts about the wisdom of interpreting the concept of autonomy in terms of the right to self-determination. Many Asian States in the Indian sub-continent and the African States have vehemently rejected such a proposition. For example, both India and Pakistan were opposed to any attempt to introduce autonomy in the guise of self-determination. Autonomy, in the view of India, should not be identified within the scope of "principle of right to self-determination".[71] They are two different principles applied in different circumstances. The Indian representative further argued that "autonomy related to constitutional theory and the domestic structure of sovereign States" whilst the right to self-determination is a theory developed by the UN concerning the situation of non-independent countries. He warned that any "attempt to blur, if not eliminate, the distinction between domestic law and constitutional law" would not be tolerated. The Indian representative observed that Liechtenstein's proposal

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[69] *Ibid.* prs.12-13, p.4.

[70] This new Act was published in the Estonian Official Gazette, *Riigi Teataja*, 71/1993, which came into effect by Presidential Decree on 11 Nov. 1993, see Articles, 2 (1). For details *Varady, supra*, 43, p.37.

[71] A/C.3/48/SR.22, 30 Nov. 1993, pr.29, p.7.

"clearly exceeded the scope of the Charter" by failing to distinguish between two different concepts, self-determination and autonomy.[72] Such an endeavour was fraught with danger and would be viewed by many as flagrant interference in the internal affairs of States".[73] Granting autonomy to a particular region is, in the view of the Indian delegate, purely within the powers of respective States. Such a crucial decision cannot be taken by the United Nations in the face of States' opposition. Pakistan's position was also based on similar grounds. Its representative further stated that even though self-determination could be applied by European States granting greater autonomous powers in their respective territories, countries that had achieved independence from colonial empires were not obliged to apply such a potentially "destructive policy".[74] Similarly, Nepal was in principle opposed to the application of autonomy in "established political entities" in the guise of the doctrine of self-determination. Its delegate categorically stated that such an interpretation or an application of autonomy "could only encourage the fragmentation" of States,[75] because it could be used to justify the interference by clandestine separatist movements in the internal affairs of States. Possibly he had 'Indian involvement' in his country's affairs in mind when he opposed the proposal, because India's interest in the domestic affairs of Nepal has given rise to misunderstanding between these two nations on many occasions. Nepal contains a sizable section of citizens of Indian descent in its territory.

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[72] *Ibid.* pr.28, p.7.

[73] *Ibid.* pr.29, p.7.

[74] *Ibid.* pr.40, p.9.

[75] *Ibid.* pr.3, p.2.

Malaysia was opposed to autonomy as a solution to ethnic conflicts in independent States because the concept and scope of the autonomy proposed by Liechtenstein would be "expanded beyond acceptable limits".[76] Malaysia was ready to accept the qualified version of 'internal self-determination', but it should not be more than certain limited rights, "freedom of choice in free and just national elections".[77] If States were compelled to implement models of autonomy guaranteeing extensive territorial powers in the context of self-determination to satisfy certain ethnic groups within nation-States, such steps would "dangerously undermine the concept of nation-States on which the current international order was founded".[78] The Malaysian delegate warned the international community of the possibility of political unrest arising out of such territorial re-arrangements. In his view such steps would encourage minority communities to "demand rights that were inherently incompatible with national unity".[79] The Indonesian delegate was not convinced about the practicability of the proposal because it was in conflict with the territorial integrity of States and might hinder the process of nation-building. Indonesia has reason to worry about the consequences of such territorial arrangements since it has 300 different ethnic communities. Should these ethnic groups be allowed autonomous regions with greater political power in recognition of every ethnic and tribal groups' distinctive identity this would create, argued the Indonesian delegate, "serious and far-reaching political and legal implications and

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[76] A/C.3/48/SR.22, 30 Nov. 1993, pr,15, p.4.

[77] *Ibid.* pr.16, pp. 4-5.

[78] *Ibid.* pr.16, pp. 4-5.

[79] *Ibid.* pr.16-17, p.5.

potential for abuse" of the concept of autonomy.[80] Its objections to Liechtenstein's proposal were threefold, i) it was contrary to territorial integrity, ii) it was against national unity, and iii) it was detrimental to the sovereignty of States.[81] He was in no doubt that autonomy could lead to the fragmentation of newly independent countries[82] and "could pose a serious threat to national efforts to promote unity through diversity".[83] Indonesia as a democratic State, in the view of Indonesian delegate, was ready to promote freedom of expression or democracy but saw no logic in applying a principle which would create 300 ethnically based mini-States. The Indonesian delegate therefore suggested that instead of encouraging ethnic communities to go their separate ways they should be integrated into the framework of a democratic society. No doubt he was influenced by the Timorean scenario which has long created problems for Indonesia on the international plane. Slovakia's position was similar in some respects to that of India's stance on this. Autonomy is, according to the Slovakian delegate, clearly a constitutional concept which has nothing to do with 'internal self-determination'.[84]

Iraq's position was more straight-forward. Iraq's delegate warned that he would oppose any "erroneous attempts to reinterpret the principle of the right to self-determination", that gave wider meaning to autonomy because such attempts would "contravene the spirit of the United Nations Charter".[85] However, it admitted

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[80] *Ibid.* pr.24, p.6.

[81] *Ibid.* pr.23, p.6.

[82] *Ibid.* pr.25, p.7.

[83] *Ibid.* pr.25, p.7.

[84] A/C.3/48/SR.22, 30 Nov. 1993, pr.45, p.10.

[85] A/C.3/48/SR.21, 26 Nov. 1993, pr.25, p.7.

the possibility of the realization of the right to self-determination involving the granting of political and cultural rights to minorities within the existing boundaries 'through open dialogue'. Iraq's delegate explained his country's experiment with "the autonomy region of Iraq Kurdistan, where legislation and executive power was vested in elected members of the Kurdish community under a pioneering law".[86] Mr. Castro, the delegate of the Philippines, having admitted the applicability of the principle in internal government activities, argued that autonomy should be applied by the nation-States, "within the framework of their national constitution and fundamental laws through democratic and political means",[87] thus indicating the constitutional nature of the notion of autonomy.

African nation-States are, with a notable exception, Nigeria, worried about the possible consequences of the application of autonomy in their countries. For instance, the Ghanian delegate opposed Liechtenstein's proposal because, i) it would encourage "multiple political loyalty", ii) it would be "destructive to the health of States", and iii) such initiatives "would roll back the progress made toward nations out of diverse communities". It was further pointed out that should autonomy be applied to the African continent in particular there would be "endless

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[86] *Ibid.* pr. 26, p.7. Autonomy for Kurds was recognized by Iraq's Constitution of 1970 by its article 8 (c). By Act no. 33 of 11 March 1974 (as amended by 1983) Iraq provided for a Kurdish autonomous region. Article 262 provides: "The region of Kurdistan shall enjoy autonomy and shall be regarded as a separate administrative unit endowed with distinct personality within the framework of the legal, political and economic unity of the Republic of Iraq..." See *Hannum* (ed.), Documents on Autonomy, *supra*, 6, pp.317-324.

[87] A/C.3/48/SR.21, 26 Nov. 1993, pr.14, p.5.

balkanization".[88] A similar opinion was expressed by the Kenyan representative. He was sceptical about the effective realization of the right to self-determination envisaged through autonomous regions within independent States.[89] Kenya was concerned about the possibility of endless new States on the African continent should autonomy be acceded. It was also not sure whether autonomy would guarantee the "absence of conflicts".[90] The Nigerian delegate remarked that, "realization of the right to self-determination through autonomy was a concept familiar to the experience of his own country... ."[91] Nigeria, though its practice has been dubious, was uncompromisingly in favour of the proposal. Its delegate said:

> "His delegation believed that *self-determination through autonomy* was a credible alternative to the current tendency towards the fragmentation of States, and could be used constructively to encourage the internal and non-violent resolution of conflicts by reforming government structures with the emphasis on achieving greater responsiveness through decentralization".[92] (emphasis added).

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[88] A/C.3/48/SR. 22, 30 Nov. 1993, pr.7. p.3.

[89] *Ibid.* pr.36-38, pp.8-9.

[90] *Ibid.* pr.38, p.9.

[91] *Ibid.* pr.20, p.6. Special Rapporteur, Eide was also supportive of Nigeria's decentralization process as a solution to ethnic conflicts, see Possible Ways and Means, 1993. pr.256, p.55.

[92] A/C.3/48/SR.21, 26 Nov. 1993, pr.21, p.6.

6.4 *Developments in Europe: "Like Throwing a Bone to the Yapping Dogs" ?*

Politicians in Europe are very cautious about the wisdom of the transfer or devolution of power to appease minorities' claims for greater autonomy. For example, making a statement on the proposed devolution to Scotland, Lord Tebbit, the former Cabinet minister and the Chairman of the Conservative Party, stated that devolution to Scotland would cause resentment in England and it would be followed by independence.[93] Referring to claims for regional assemblies to Wales and Scotland, former Prime Minister John Major alleged that the Welsh and Scottish assemblies proposed by the Labour leader Tony Blair "would destroy 1,000 year of British history". He further alleged that "Labour would throw a bone to the yapping dogs in Welsh and Scottish separatism".[94]

Neither the ECHR nor the Framework Convention for the Protection of National Minorities[95] states anything special about the rights of autonomy for minorities. The closest reference to minority groups' participatory rights in cultural, social, economic life and public affairs affecting the regions where they live or in the matters affecting them comes in article 15. But on close examination, it does not

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[93] *BBC News Bulletin*, 16 Feb. 1997. See also *N.Tebbit*, 'My Challenge to Major: Let the Scots Decide', *The Sunday Telegraph*, 16 Feb. 1997.

[94] See 'Major Derides Labour Devolution Package', *The Times*, 14 Feb. 1997.

[95] Framework Convention adopted on 10 Nov. 1994 and opened for signature on 1. Feb. 1995. See the full text in 16 (1-3) HRLJ 1995, pp. 98-101. See analysis on this, *H.Klebes*, 'The Council of Europe's Framework Convention for the Protection of National Minorities', *ibid.* pp. 92-98. See also *G.Gilbert*, 'The Council of Europe and Minority Rights', 18 (1) *HRQ* 1996, pp.161-189.

unambiguously guarantee such a right.[96] A significant change of attitudes towards minorities' claims for autonomy was recognized in July 1991 at a seminar organized by the CSCE (now OSCE) Meeting of Experts on National Minorities. It recommended in its Report (part iv)[97] that to improve the situation of minorities, "where democratic institutions are being consolidated and national minorities issues are of special concerns," the following measures could be helpful;

> a) the local bodies and autonomous administration, as well as autonomy on a territorial basis, including the existence of consultative, legislative and executive bodies should be chosen through free and periodic elections; and
>
> b) an establishment of self-administration by a national minority in situations where autonomy on a territorial basis does not apply; and
>
> c) the introduction of decentralized or local forms of government.

Decentralization of power at regional basis was advocated by the experts. The report of the CSCE Council from the CSCE Seminar of Experts on Democratic Institutions suggested that in the context of constitutional reform, vertical decentralization and the division of the functions of government on a federal, regional and local basis to accommodate "historical, regional or ethnic distinctions"

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[96] Art 15 states that "the parties shall create the condition necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them". See the full text in 34 *ILM* 351 [1995], p.356. *Gilbert,ibid.* pp.161-89.

[97] Report of the CSCE Meeting of Experts on National Minorities, 30 *ILM* 1692 [1991], pp.1692-1702.

be adopted.[98] Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights recognized by its article 11: [99]

> "In the region where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or *autonomous authorities* or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State".

Nonetheless, neither of these recommendation has been adopted by the OSCE. The Documents of the Copenhagen Meeting on the Human Dimension of the Conference on Security and Corporation (29 June 1990) contained the following proposal in Principle iv, paragraph 35:

> "The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.
>
> The participating States note that the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one the possible means to achieve these

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[98] See 31 *ILM* 374 [1992], p.380.

[99] Emphasis added. Reprinted in 16 (1-3) *HRLJ* 1993, p.112. One commentator remarked that this recommendation "goes much further than any other political or legal document" concerning minority rights in Europe. See. *M.Alexanderson,* 'The Need for a Generalized Application of Minorities Regime in Europe', 8 (4) *Helsinki Monitor* 1997, p.55.

aims, *appropriate local or autonomous administrations* corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned".[100]

The Copenhagen document advocates only a local democracy which guarantees participation of national minorities in the area of policy making. Autonomy has, however, not been recognized in terms of territorial rearrangements taking into account minorities' concerns. However, this undoubtedly demonstrates the willingness on the part of the OSCE States to facilitate the aspiration of minorities for autonomous rights, albeit that no action has so far been taken on this.

An earlier initiative, the European Charter of Local Self-Government had promoted the idea of autonomy in the form of enhanced power for local authorities provinces or regions where minority elements were concentrated.[101] Article 3.1 of the Charter states:

"Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population"

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[100] Emphasis added. 29 *ILM* 1305 [1990]. See further *J.Helgesen,* 'Protecting Minorities in the Conference on Security and Co-operation in Europe, (CSCE) Process', *in A.Rosas* and *A.Helgesen* (eds.), The Strength of Diversity-Human Rights and Pluralist Democracy, Martinus Nijhoff: The Netherlands, 1992, pp.178-179.

[101] Council of Europe, Conference on the European Charter of Local Self-Government, Studies and Texts, no. 27, 1993, p.7. This was reaffirmed in the Final Declaration of the Conference on the European Charter on Local Self-Government at Barcelona on 23-35 of January 1992, see the conference report, *ibid.* pp.193-195,

This was further elaborated by article 3.2 which enshrined the notion of elected local assemblies. Article 4.8 and 5 respectively provide for meaningful powers for local government at territorial level. At the Barcelona summit 1992, autonomy through decentralization for local areas where minority groups live was further advocated by some delegates, notably by the Catalan and Basques delegates who explained their experiences in their respective autonomous regions. Many other members of the Council of Europe also agreed. Describing the position of the Council of Europe, in his opening statement Dr D. Thomas M. Buchsbaum stated:

> "The experience of several European countries shows that the problems of minorities can be solved through *greater autonomy at local or regional level.* Of course, this kind of solution is only suited to situations in which communities live as a compact group in a particular area (region, province etc.) of a country. Nevertheless, the other situations (scattered minority or community of travelers) may also benefit from the development of local democracy and the search for solutions at the level closest to the communities in question".

He further stated:

> "In Resolution 232 (1992) on autonomy, minorities, nationalism and European Union, the CLRAE recommends the launching of a powerful political and cultural education campaign to increase public awareness, possibly under the title, 'living together in the new multicultural Europe".[102]

[102] Emphasis added. *Ibid.* p.144.

Neither OSCE documents nor politicians generally, as Hannikainen argued, favour political autonomy for national minorities.[103] European States have a reputation for their vacillation in their stance on autonomy. Yet, when non-Western European countries are involved in ethnic conflicts, Western European States preach the virtues of autonomous arrangements to ease tensions and to accommodate minorities' concerns as has been seen in Kosovan ethnic conflicts. A statement by the Chairman-in-Office of the OSCE reflects this policy. He declared on behalf of the OSCE that Nagorny Karabakh should be granted the "highest degree of self-rule"[104] within Azerbaijan to solve ethnic violence.

6.5 *"Indigenous Peoples are Assumed to Remain Within Existing Sovereign States"*?

Most States which contain indigenous peoples are prepared to accommodate only cultural autonomy and limited territorial realignments. Referring to indigenous peoples' claims to self-determination, the Australian representative emphasized that in any autonomous arrangements indigenous peoples have to operate with existing States' boundaries. He said, "to suggest that indigenous self-determination was a threat to the territorial integrity of States was to ignore the fact that most

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[103] *L.Hannikainen*, 'The Status of Minorities, Indigenous Peoples and Immigrant and Refugee Groups in Four Nordic States', 65 (1) *NJIL* 1996, p.13.

[104] See the statement of the Chairman-in-Office, in OSCE Decisions 1996 Lisbon Document, Annex I, 1996, p.23.

indigenous people did not desire independence".[105]

There are some indications in recent years that indigenous groups in many parts of the world are gradually winning their arguments, to a certain extent, for autonomous status for their traditional lands. It is still too early to make any conclusion about the specific nature of such right to autonomy. Some Latin American countries seem to be responding positively to the claims of indigenous peoples. Responding to the Human Rights Committee, Columbia admitted the legitimate claims of indigenous groups "to own their territory in which to settle, their right to adopt their own organizational structures and elect their own authorities, and the right to study their own living conditions and decide on their development models". Also, it guaranteed their "right to use of renewable natural resources in their territories".[106] However, Colombia does not refer to these territories as 'autonomous regions' or territories. Chile, Bolivia, Mexico, Peru, Venezuela have also taken similar steps to that of Colombia. It is worthy of note that, in particular Chile expressed its concerns about the possible threat to State's territorial integrity by the claims of an indigenous group.[107] Nicaragua was ready to introduce autonomous regions within its borders. It claimed that it has already set up a reserve for indigenous communities on the Atlantic coast with "far reaching

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[105] See further details, *R.L.Barsh,* 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force', 18 (4) *HRQ* 1996, p.798.

[106] CCPR/C/64/Add. 3, pr. 213, 215, 217, cited in Possible Ways and Means, 1993, pr.238, p.50.

[107] *Barsh, supra,* 105, p.797.

status of autonomy".[108] Guatemala was prepared to experiment with a limited cultural autonomy, particularly by way of decentralization of the education of Mayan people allowing them to pursue their culture and to provide an opportunity for development.[109] Here, 'decentralization' is not intended as territorial autonomy. Indeed, the Guatemalan representative emphasized that his country was hoping to "exercise sovereignty without any possible dispute" over its whole territory. The recent agreement between Guatemala and the *Unidad Revelucinario Nacional Guatemalteca* promised to confer limited powers on indigenous groups in the form of personal autonomy. Part V (a) in the agreement stipulates that the government "undertake to promote a reform of the constitution". Part V (b) says: "Recognizing the role of the communities, within the framework of municipal autonomy, in exercising the right of indigenous peoples to determine their own development priorities, particularly in the field of education, health, culture and the infrastructure... ." Part V (c) states: "Taking account of the advisability of having a regional administration based on far-reaching decentralization and deconcentration...the Government undertakes to recognize the administration of the educational, health and cultural services of the indigenous peoples on the base of linguistic criteria... ."[110] The Mexican constitution includes some provision for (in recognition of the existence of) indigenous rights, and the government has taken some steps to set up reserves (which are not autonomous). It is however not ready

[108] Possible Ways and Means, 1993, pr.270, p.58.

[109] A/C.3/49/SR. 32, 5 Jan. 1995, pr.22, p.6.

[110] *Ibid.* pr.23, p.6, see details 36 *ILM*, 258 [1997], p.289.

to yield to claims of territorial autonomy by indigenous groups.[111] According to Brazil, "the focus on land was inappropriate for an instrument dealing with human rights".[112]

Nordic countries have been following different policies on autonomy. Denmark has granted autonomy status by way of introducing self-government for the Faeroe Islands and Greenland. Denmark has recognized that these autonomous territories could secede and achieve independence if that was what they wanted by exercising their right to self-determination.[113] Similarly the Aaland Islands was given home rule status by Finland. The Samis in Norway have been able to get a separate Sami '*Semetinget*' (parliament) with elected representatives.[114]Eide says that the nature of its authority "is more personal than territorial, but both elements exist".[115] In addition, six municipalities in Northern Norway were formed into administrative areas with extensive power allowing Samis to deal with language and cultural matters. However, continued denial of ownership of traditional territories by the Norwegian government raises some concerns for indigenous peoples in Norway. The representative of Norway at the debate on indigenous rights insisted that his government would support indigenous groups to achieve their "aspirations for greater control over their own destiny" provided that they enjoyed these rights

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[111] A/C.3/49/SR.31, 28 Dec. 1994, pr.10, p.3.

[112] *Barsh, supra*, 105, p.801.

[113] See *Hannikainen, supra*, 103, pp.1-71.

[114] This was established on 12 June 1987 and commenced its work in October 1989. Possible Ways and Means, 1993, pr.243, p.52. See details *I.Ahren*, 'Small Nations of the North in Constitutional and International Law', in 64 (3) *NJIL* 1995, pp.457-63.

[115] Possible Ways and Means, 1993, pr.243, p.52.

within existing boundaries.[116] Finland established a parliament for Samis in 1973.[117] Nonetheless, it has been granted only limited power. According to Hannum, it is no more than an advisory body.[118] Sweden also followed a similar path establishing a parliament in 1993. Yet the government is alleged to have continually refused to accommodate "real power and force" for indigenous peoples.[119] It is said that even special hunting and fishing rights for Samis were removed by the very Act which established the Sami parliament. Some elected members are however optimistic. A member of this body, Mr.Ahren, wrote that parliament is a "milestone to the Sami endeavour to achieve self-determination".[120] Norway and Finland are prepared to experiment with personal autonomy to a limited extent, but "maintained that the modalities should be determined jointly by indigenous peoples and the State".[121] However, these more restrictive types of autonomous units are generally empowered to deal only with cultural, traditional, economic, linguistic matters, and the like. In practice, Brazil, Japan, and the USA,[122] have not demonstrated their willingness to share power with indigenous peoples on a collective basis. Canada's position was that the "Federal government remained firmly committed to bringing about aboriginal self-government...within the existing constitutional framework in order to realize their aspiration for more autonomy and control over matters

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116 *Barsh, supra,* 105, p.799.

117 CCPR/C/58/Add. 5, prs.135-142.

118 *Hannum,* Autonomy and Sovereignty, *op.cit.* 21, p.255-256.

119 *Hannikainen, supra,* 103, p.34.

120 *Ahren, op.cit.* 114, p.460.

121 *Barsh, supra,* 105, p.800.

affecting their lives"[123] at communal level. It has nevertheless, conferred self-government on various tribes. Amongst these, the autonomous region of Nunavut in northeast Canada is worthy of mention. But progress on autonomy, from the perspective of tribal groups, is unsatisfactory.[124]

6.6 *Future Directions?*

The traditional position on autonomy, in the light of current developments, is gradually and slowly changing. A few States now seem to be prepared to accept as inevitable that autonomy might in the near future be recognized as a principle of international law. For example, in the view of Austria, autonomy is now an "important concept".[125] Ukraine recognises autonomy as a principle in international law.[126]

Responding to the criticism, and continuing its campaign for autonomy through self-determination Liechtenstein has argued that the principle was fully in compliance with well established principles such as territorial integrity and non-interference in the domestic affairs of States.[127] During the debate on the right to

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[122] The USA set up at least 280 different 'reservations' for indigenous communities. See *Lapidoth, op.cit.* 12, p.18.

[123] See Canada's statement to the HRC, in HRC, Official Records of the Human Rights Committee, *1990/1991*, vol. 1, CCPR/10, CCPR/C/51/Add.1 and CCPR/C/64/Add. 1, pr. 32, p. 11.

[124] *Lapidoth, op.cit.* 12, pp.18-19.

[125] A/C.3/48/SR.22, 30 Nov. 1993, pr.52, p.12.

[126] *Ibid.* pr.31, p.8.

[127] *Ibid.* pr.48, p.11.

self-determination at the forty-ninth session of the UN General Assembly, Liechtenstein further tried to justify its proposal by emphasizing that "the proposed initiative was designed to offer ways and means for the reasonable expressions of plausible aspiration of that nature through free options ranging from *limited and basic self-administration to virtual internal self-government*".[128] Mrs. Fritsche, its representative, speaking on Agenda item 109, 'Rights of Peoples to Self-determination'[129] stressed that autonomy through self-determination is one of the best channels through which minorities can assert their distinctive identities and, therefore, it is in compliance with existing principles of international law. Such measures, in her view, would help maintain peace and security in multi-ethnic societies.[130] Ecuador's position was cautious, but constructive. Its delegate said:[131]

> "The principle of self-determination could not run counter to the equally inalienable principle of respect for the territorial integrity of States. Violation of that principle would threaten further the already fragile international peace... . Initiative could be used to improve and implement the concept of governance; it could help to develop methods that would assist member States in their efforts to bring about the full advancement of the various components of their societies...*legitimate aspiration of different communities can be achieved through increasing decision making powers to local authorities*" (emphasis added).

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[128] Emphasis added. See A/C.3/ 49/SR.8, 25 Oct. 1994, pr.12-13, p.5.

[129] UN Doc. A/51/392, 414 and A/51/532-S/1996/864.

[130] A/C.3/51/SR 27, 13 August 1997, pr.5, pp.2-3.

[131] A/C.3/48/SR.21, 26 Nov. 26 1993. pr.16, p.5.

He further said that his country has already been following a system involving a distribution of power to the local populations, and emphasized that elements of decentralization of power are involved in this principle. The Estonian delegate welcoming the proposal on autonomy stated that the doctrine of self-determination should take further progressive steps beyond the colonial context and should be allowed to develop in the form of autonomy. He admitted that autonomy is now developing in the context of the right to self-determination.[132] In his opinion such progressive steps would "concomitantly prevent conflicts". Uruguay,[133] Hungary[134] and Armenia[135] did not hesitate to admit the validity of the principle. The latter was of the opinion that, with a view to realizing the right to self-determination, States should elaborate different ways and means, in particular through autonomy, which, "help to reconcile the right to self-determination with the principle of territorial integrity".[136] Slovenia remarked that the principle of self-determination should be interpreted by "encompassing new situations".[137] The OSCE in 1996 admitted that the "highest degree of self-rule" could be implemented by means of self-determination. This is no doubt a significant development in European thinking which has the potential for speeding up the further development of the right to self-

[132] *Ibid.* pr.21, p. 6.

[133] *Ibid*, pr.46, p.10-11.

[134] *Ibid.* pr.55, p.12-3.

[135] A/C.3/48/SR.21, 26 Nov. 1993, pr.11-12, pp.3-4.

[136] *Ibid.* pr.12, p.4.

[137] *Ibid.* pr.23, p.6.

determination through autonomy.[138] Some States are not so convinced. Slovakia pointed out that the right of self-determination can be applied in a changing geopolitical world through autonomy, though it is still a constitutional concept, and certainly not a rule of international law.[139] Kenya was not so sure that even in the future autonomy would become a fully fledged principle of international law.[140] Nepal's position was not so different to that of Kenya.[141]

It is submitted that autonomy with shared-sovereignty is not a right recognized by many States. Even though some States and international organisations are prepared to experiment. However, it is not possible to say how long it will take for States to recognise autonomy as a valid principle in both domestic and international arenas.

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[138] See The statement of the OSCE Chairman-in - Office in OSCE Decisions 1996, Lisbon Document, Annex I, 1996, p.23.

[139] A/C.3/48/SR.21, 26 Nov. 1993, pr.45 p.10.

[140] A/C.3/48/SR.22, 30 Nov. 1993, pr.7, p.3.

[141] A/C3/48/SR.22, 30 Nov. 1993, pr.37, p.9.

7 Secessionist Movements

Introduction

Claims by minority groups for secession have often resulted in virulent clashes between minority groups on the one hand and the State (which is normally controlled by the majority community) on the other creating a threat to the stability of modern pluralist societies and to international peace. This chapter examines the background of secessionist movements in contemporary multiethnic polities to lay a foundation for an analysis of the legitimacy of secessionist claims in chapter 8, and a critical examination of the attitudes of the international community to such claims (see chapter 10).

7.1 *Ethnic Revivalism as a Prelude to Secessionism*

Ethnic revivalism is seen by some as a form of struggle to establish ethnically defined new post-modern-tribal-states[1]. From the perspective of minorities', the

[1] The concept of 'postmodern tribal-state' is popularised by Thomas M. Franck and supported by many, including Higgins and Cassese. See *T.M.Franck*, 'Postmodern Tribalism and the Right to Secession', in *C.Brolmann et al* (eds.), Peoples and Minorities in International Law, Martinus Nijhoff: Dordrecht/Boston/London, 1993, pp.3-28. See also *R.Higgins*, 'Postmodern Tribalism and the Right to Secession, Comments', in *Brolmann, ibid.* pp.29-36. *A.Cassese*, Self-Determination of Peoples, Cambridge University Press: Cambridge, 1995, p.338. However, some scholars question the suitability of such a term, notably Patrick Thornberry and the Special Rapporteur, Asbjorn

decolonisation of Asia, Latin America, Africa and elsewhere let them down. It was often peoples belonging to majority communities who were able to succeed their former colonial masters. Many minority groups feel that not only in newly created States, but also in long established Westphalian model nation-States, they have been discriminated against and unjustifiably excluded from the power structure. So, struggles for new nation-States are being enthusiastically taken up in many parts of the world. [2]

A negative international environment and the failure of the UN, some argue, have to a certain extent being instrumental in awakening ethnic consciousness. Ahmed argues that small ethnic groups have lost their faith in the

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Eide. Thornberry noted that when 'tribal' in the descriptive sense is used it might carry some negative connotation. His preferred term is 'ethnic fundamentalism', see *P.Thornberry,* 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism', in *C.Tomuschat* (ed.), Modern Law of Self-Determination, Martinus Nijhoff, Dordrecht/ Boston/London, 1993, p.105. Special Rapporteur Asbjorn Eide also uses 'ethnic fundamentalism' to identify this new ethnic revivalism and the resulting trend towards secession, see Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, 2nd Progress Report, UN Doc. E/CN.4/Sub.2/ 1992/37, prs.16-22. The same author, 'In Search of Constructive Alternatives to Secession', in *Tomuschat* (ed.), *ibid.* 1993, pp.139-176. One can argue that 'ethnic fundamentalism' also implies negative connotations since 'fundamentalism' suggests fringe group extremism in some societies. However this author sees no reason why 'postmodern tribal-states' should not be used. Many of those ethnic militant groups' campaigning for secession base their ideologies on tribalism as is evident from much secessionist violence.

[2] *R.Mullerson,* 'Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection', 56 *MLR* 1993, p.799.

UN and begun to organise themselves in a search for security and protection through new nation-States.[3] Most prominent examples are the Sikhs in Punjab, the Palestinians in the occupied territories in the Gaza strip and the Kurds in Iraq, Turkey and Iran. They have selected the gun-barrel strategy to achieve their goal of new tribal-States.

Some are critical of such movements. Horowitz points out that post-modern ethnic revivalism has become a cancer in peoples' lives.[4] Whilst few States have been able to avoid some measure of secessionist conflict, it is equally true that such conflicts have literally engulfed many post-war States in Latin America, Asia, Africa and Europe.[5]

A move towards secession may be triggered when a significant proportion of a population begins to question the legitimacy of the existing boundaries of a State,[6] and a State tries to keep discontented minority groups within its territory without their consent[7] or subjects them to extreme forms of discrimination. In the latter situation, a respect for diversity in such States is alarmingly missing. Power is often concentrated in the hands of small cliques of

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[3] *A.S.Ahmed*, 'Ethnic Cleansing: A Metaphor for Our Time', 18 (I) *Ethnic and Racial Studies* 1995, p. 6.

[4] *D.L.Horowitz*, Ethnic Groups in Conflict, University of California Press: Berkeley, 1985, Preface, p.xi.

[5] *T.M.Franck*, 'Clan and Super Clan: Loyalty, Identity and Community in Law and Practice', 90 *AJIL* 1996, pp.359-383.

[6] *C.S.Leff*, 'Democratization and Disintegration in Multinational States: The Breakup of the Communist Federations', 51 (2) *World Politics* 1999, p.206

[7] See *W.Soyinka*, The Open Sore of a Continent, Oxford UP: Oxford, 1996.

elites whilst in most cases excluding minorities. Despotic leaders exercise power in the name of the interests of the people without relying on the consensus of the people.[8] Many post-colonial African and Asian States provide examples. The late Sani Abacha of Nigeria, the former President Mobutu Sese Seko in Zaire, the former self-styled Emperor Jean-Bedel Bokasa in Central Africa, Idi Amin in Uganda,[9] the late Presidents, JR. Jayawardane and R. Premadasa in Sri Lanka, the former Presidents General Zia, Ayub Khan, and Yahya Khan in Pakistan, the Polpot regime in Kampuchea, the former President Suharto in Indonesia and the present military regime in Myanmar are classic cases. Such an environment creates breeding grounds for the claims of minorities for post-modern tribal-states.

7.2 *The Post-modern Tribal-state Scenario*

There is a certain pattern in minorities' claims for greater political power. These claims usually start with autonomy, then may proceed to separatism, whilst a final step would be secession, the post-modern tribal-state or irredentism. These three steps may operate vertically as well as horizontally as the graph below illustrates. When a compromise can be achieved through mutual understanding between a minority group (or groups) and the State concerned, autonomy may develop (as is illustrated in the graph vertically) within unitary, a federal or confederal structure

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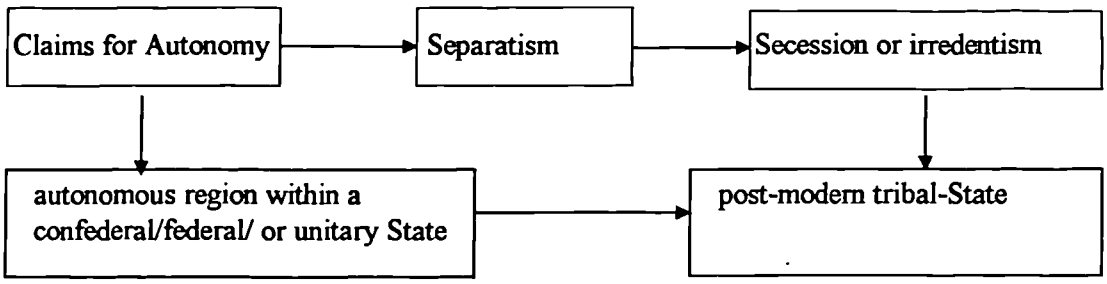
[8] See *C.Schreuer*, 'The Waning of the Sovereign State: Towards a New Paradigm For International Law', 4 (4) *EJIL* 1993, p.448.

[9] Both Bokasa and Idi Amin were alleged to have eaten their political enemies for lunch. See *J.Sympson*, "Was Cannibal Bokasa's Story All Cooked Up", *The Sunday Telegraph*, 10 Nov. 1996.

consisting of union-States. When claims for autonomy fail the resentments of minority groups may develop first into separatism, then into rebellion against the sovereign State which if successful might result in a post-modern tribal-state. On the other hand, autonomy might increase minorities' ambitions to achieve post-modern tribal-States by operating first vertically, then moving horizontally. Even assuming that a minority group achieved autonomy with shared sovereignty within a federation, tendencies towards for a post-modern tribal-state might still operate. Indeed, autonomous power may help a minority group to strengthen its power base. Here, the development is from the federation to a post-modern tribal-State.

Chart- A Hypothetical Pattern of the Movements from Autonomy to Secession



In 1944 Cobban noted that nationalism had passed from the era of State building to State breaking. He observed how 'dormant nationalities' were coming to the surface and had become a threat to the nation-State structure.[10] His prophetic statement anticipates the upheavals of contemporary polities engulfed by

[10] *A.Cobban,* National Self-Determination, Oxford UP: London/New York and Toronto, 1944,Preface, p. XI

secessionist violence. Nationalism has gone through many stages, from nationalism to ethno-nationalism, and then to post-modern tribalism involving "the break-up or serious weakening of states".[11] In many parts of the world secessionist struggles are increasingly becoming the order of the day.

Some research reveals that there are active movements fighting either for secession or greater autonomy in more than sixty nation-States, almost one third of the international community.[12] This phenomenon has reached a point at which even the smallest minority groups armed with the so-called secessionist right to self-determination are fighting for new nation-States. Buchheit refers to an instance where a declaration of secession was served on the Australian government by twenty nine individuals living in the province of the Hutt River in Western Australia.[13] The politics of secessionist struggles have become attractive to a wide range of people- young, old, intellectuals etc. Honour and pride mixed with aggression and militancy play a significant role in the psychology of such movements. Yet single factor cannot be attributed to the secessionists' motives. The behaviour of human beings is indeed very complex and is usually beyond our comprehension. Human beings do not normally regulate their behavioural patterns

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[11] *I.Bremmer* and *A.Bailes*, 'Sub-Regionalism in the Newly Independent States', 74 (I) *International Affairs* 1998, p. 131.

[12] *M.H.Halprin*, *D.J.Scheffer* and *P.L.Small*, Self-Determination in the New World Order, Carnegie Endowment for International Peace: Washington DC, 'Forward', 1992, p.XI. See generally *L.C.Buchheit*, Secession, The Legitimacy of Self-Determination, Yale University Press: New Haven and London, 1978.

[13] *Ibid.* p.IX.

in a rational way nor do they behave in a civilised way. The behaviour of human beings is unpredictable. As Arthur Koestler argues when human beings lose self-control the inevitable result is over-excitement and a tendency to assert themselves to the detriment of others.[14] Reason and wisdom are overcome by fear, uncertainty, insecurity, loneliness, prejudice etc. Human beings naturally tend to group together precisely for these reasons. When this happens, group processes create divisions amongst different groups which cannot easily be erased. This is particularly true of ethnic groups. Ronen argues very convincingly that ethnic groups (encompassing religious and linguistic groups) often try to rally around their specific groups to avoid the dominance of other groups. Here the foundation of such groups is based on "a sense of collective destiny on the basis of a collective past and common biological descent".[15] This is seen as a constant struggle, the purpose of which is to control their own lives by themselves without the interference of 'outsiders'. Ethnic identity thus gradually become "a rallying point for confrontations" with other similar groups.[16] Stephanie Lawson rightly argues that "the single-minded assertion of ethnic differences can overwhelm all other aspects of identity, resulting in the total domination of social and cultural

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[14] *A.Koestler,* The Ghost in the Machine, Pan Books Ltd: London, 1967, p.117.

[15] *S.Lawson,* 'Self-Determination as Ethnocracy: Perspectives from the South Pacific', in *M.Sellers* (ed.), The New World Order, Sovereignty, Human Rights and the Self-Determination of Peoples, BERG: Oxford/Washington DC, 1996, p.156.

[16] *D.Ronen,* The Quest for Self-Determination, Yale University Press: New Haven and London, 1974, pp.42-43. See further *H.R.Isaacs,* 'Basic Group Identity: The Idols of the Tribe', in *N.Glazer* and *D.P.Moynihan* (eds.), Ethnicity, Theory and Experience, Harvard University Press: Cambridge/ Massachusetts/London, 1976, p.30.

aspects of identity, resulting in the total domination of social and cultural life".[17] This may, as argued by Ronen, gradually increase pressure toward secession, and the establishment of their own community,[18] or, as bluntly points out by Franck, constitute new "uninational and unicultural - that is, post-modern tribal-states".[19] Existing State structures are perceived as insufficient to cater for ethnic demands or seen as an obstacle to development as a separate nation. Such an environment puts pressure on both minorities and States, and in extreme cases escalates into secessionist violence.[20] This has become a concern for more than a third of nation-States at present because secessionist movements do not hesitate to challenge the legitimacy of the present structure of multiethnic polities.[21] It is said that nation-States are now being continually hounded by ethnonationalists.[22]

Secessionist movements have achieved significant momentum, specially, since the end of Cold War and the collapse of the former USSR[23] and its satellite Socialist States in Eastern Europe.[24] Since 1990 twenty nine new nation-States

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[17] *Lawson, supra*, 15, p.156.

[18] *Ronen, supra*, 16, p. XII.

[19] *Franck, supra*, 1, p.21.

[20] *Ronen, supra*, 16, p.XII and p.49.

[21] *F.L.Shiels*, 'Introduction', in *F.L.Shiels* (ed.), Ethnic Separatism and World Politics, University Press of America, Lanham/New York/London, 1984, p.1.

[22] *Ibid.* p.1.

[23] *D.S.Treisman*, 'Russia's Ethnic Revival, The Separatist Activism of Regional Leaders in a Post Communist Order, 49 (2) *World Politics* 1997, pp.212-249.

[24] *K.S.Shehadi*, Ethnic Self-Determination and the Break-up of States, Adelphi Papers 283, Brassey's (UK): London, 1993, p.6. See further *D.E.M.Mihas*, 'Romania Between

have emerged and subsequently been granted membership of the UN. The former Soviet Union was dissolved unexpectedly, and 15 new nation-States emerged. Eastern Europe has followed the same path and some minority groups have been successful in achieving new nation-States.[25] For example, on the 22 of May 1992, the United Nations General Assembly admitted three new members - Slovenia, Bosnia and Herzegovina, and Croatia. On 17 September 1991 constituent parts of the former USSR, Estonia, Latvia and Lithuania were admitted to the UN as new members. Azerbaijan, Armenia, Kazakastan, Kyrgystan, Moldova, Tajikistan, Turkistan, and Uzbekistan were admitted by the UN on 2 March 1992. Georgia was admitted on 31 July 1992. Belarus (earlier, Byelorussia) and Ukraine were original UN members and therefore no issues arose as to their membership being recognised by the UN. Elsewhere, notably Eritrea brokeaway from Ethiopia with the connivance of the international community in 1993[26] to the delight and satisfaction of minority communities in other parts of the world. Some other secessionist struggles also succeeded. For example, ethnic Slovaks in the former Czechoslovakia was successful in achieving their Slovak nation-State without embarking upon a war against the Czechs.[27] But Croatia had achieved its

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Balkan Nationalism and Democratic Transition', 17 (3) *Politics*, 1997, pp.175-181. See also *Leff, supra*. 6, pp.205-235.

[25] See *Y.Z.Blum*, 'UN, Membership of the "New" Yugoslavia: Continuity or Break ?", 86 (4) *AJIL* 1992, pp.830-832.

[26] *Halprin et all, supra*, 12, p.14. See also *Shehadi, supra*, 24, p.8.

[27] See *E.Stein*, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions', 88 *AJIL* 1994, pp.427-450.

independence by seceding,[28] in the context of a dissolution, from the former Yugoslav Republic after a long-drawn-out-war which claimed the lives of many thousands of men and women. This is now becoming the new paradigm in the international order. Nakhichevan, Nagorny- Karabakh, Tartastan, Chechnya, Kosovo, Bougainville,[29] and Jaffna, previously unheard names in international politics, have emerged out of obscurity as new candidates for post-modern tribal-States. As Mullerson notes, secessionist movements believe that, "this is the correct moment to achieve their goals. Now or never".[30] For many minority groups, "separatism seemed the only vehicle for self-expression".[31] This new danger, as noted by the former UN Secretary-General Boutros Ghali, creates more unstable and fragmented micro-States. He cautioned, "rather than 100 or 200 countries, you may have at the end of the century 400 countries, and we will not be able to achieve any kind of economic development, not to mention more disputes on boundaries".[32] According to the former US Secretary of State Warren Christopher, if we fail to respond quickly, "we'll have 5,000 countries rather than

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[28] See the Opinion of Badinter Committee on this, *infra* chapter 8.

[29] *S.Lawson*, 'Ethno-Nationalist Dimensions of Internal Conflict: The Case of Bougainwille Secessionism', in *K.P.Clements* (ed.), Peace and Security in the Asia-Pacific Region: Post-Cold War Problems and Prospects, United Nations University Press and Dummove Press: Tokyo, 1993, pp.58-77.

[30] *R.Mullerson*, International Law, Rights and Politics: Developments in Eastern Europe and the CIS, LSE and Routledg: London, 1994.

[31] *J.A.Sigler*, Minority Rights: A Comparative Analysis, Greenwood Press: Westport/ Connecticut /London, 1983, p.189.

[32] *The Times*, 21 September 1992, cited in *Shehadi*, *supra*, 20, p.8.

the hundred plus we now have".[33] Though this may not happen in the near future, secessionist developments have shattered the conventional belief that the UN system would eventually be able to bring peace in the post-war era by respecting and guaranteeing individual's rights on a universal basis.

No doubt, these events encourage minority groups to believe that they are politically as well as legally entitled to secede from existing States by invoking the doctrine of the right to self-determination. Yet the difficulties which they have to overcome are enormous.

7.3 *Separatism, Irredentism and Secession*[34]

Various definitions are provided by political and social scientists to identify the phenomenon of *secession*, and to analyse how secession is different from kindred concepts such as *separatism* and *irredentism*. It is common to see these terms used interchangeably. 'Separatism', whilst inherently embedded in ethnic claims for minority rights,[35] nevertheless indicates two different options.[36] One is that of the

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[33] Cited in *Shehadi, supra.* 24, p.3.

[34] 'Separatist', 'separatism' and 'secessionist' all have negative connotations. It is said that it was General de Gaulle who popularized these terms during the Algerian war. Details *J. Tubiana,* 'The Linguistic Approach to Self-Determination', in *I.M.Lewis* (ed.), Nationalism and Self-Determination in the Horn of Africa, Ithaca Press: London, 1983, p.23.

[35] Sigler argues that minority rights, 'for the sake of clarity and logic', should not be identified with 'separatism'. See *Sigler, supra,* 31, p. 191.

[36] See, *Z.T Irwin,* 'Yugoslavia and Ethnonationalists', in *Shiels* (ed.), *supra,* 21, 1984, p.105.

demands of an ethnic group for a new nation-State. Secessionist Tamil guerrillas in Sri Lanka, and Basques ETA in Spain fall into this category. The second option allows separatists to pursue their claims for a lesser alternative, that is for autonomous status for whatever region the minorities make their claims. Kurdish separatists in Iraq and the Catalans in Spain and the moderate Sikh nationalist movements in Punjab come into the second category. When the second option is followed, separatism does not necessarily lead to the establishment of a new nation-State.[37] However, the nature of the claims made is dependent on the level of mutual understanding between the separatists and the government.

Heraclides gives the following definition of secession: "secession is a special kind of territorial separatism involving States. It is an abrupt unilateral move to independence on the part of a region that is a metropolitan territory of a sovereign independent state...In secession there is a formal act of declaration of independence on the part of the region in question. Secession thus defined can be called secession stricto sensu or secession simpliciter".[38] Secession is a movement which campaigns for independence for a region of an existing nation-State, and which, if successful, results in the redrawing of the boundaries of the State.[39] Generally, secessionists neither claim the whole territory of the State nor do they

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[37] *Horowitz, supra*, 4, p.231.

[38] *A.Heraclides,* The Self-Determination of Minorities in International Politics, Franck Class and Com. Ltd: London, 1991, p.1.

[39] See details *A.Buchanan,* Secession: The Morality of Political Divorce, From Fort Sumter to Lithuania and Quebec, Westview Press: Boulder/Sanfrancisco/Oxford, 1991, p. 11.

want to change the political or constitutional structure of the State at issue.[40] Most importantly, as Buchanan correctly points out, the State's authority to govern a province or a region which is predominantly inhabited by the group represented by secessionists is severely challenged.[41] The State at issue is identified and described as an occupying force in a given territory. Secession based on territorial claims presents more complexities and difficulties than any other form of domestic unrest. Although they often call themselves liberation armies, secessionist groups are different from national liberation movements. In the latter case the sole purpose is to capture the whole territory by changing the State structure by violent and undemocratic means.

Secession may occur within a province or provinces in the State itself. Demands can be based on a group or regional basis. This is normally associated with minority groups - therefore secession is considered by some as "a special species of ethnic conflicts".[42] The movement operates at a regional basis and may consist of many ethnic and religious groups, e.g. the Eritrean secessionist movement (Arab Beja, Arab Afar, Black African and Christians), Biafran secession (Ibo,[43] Ibibio, Efik, Ijaw and many other small tribes) and present secessionists in

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[40] *Ibid.* p.11.

[41] *Ibid.* p.10.

[42] *Horowitz, supra*, 4, p.231.

[43] During the Biafran war (and still), the Biafran secession was and is identified as ethnic secession launched by the Ibos. See *C.S.Phillips,* 'Nigeria and Biafra', in *F.L.Shiels* (eds.), *supra*, 21, 1984, pp.176-177. However, Col. Ojuku who led the separatist campaign rejecting such assertions emphasised that Biafran struggle was between the 'North and South' and between 'Nigeria and the former eastern region'. *Ibid.* p.178.

southern Sudan[44] (mainly Christian religious groups with the assistance of other ethnic and tribal groups).[45] However, the most important element of a secessionist claim is, as pointed out by Brilmar, the continued claim to a particular piece of land which would be used, if the secession succeeded, for the future State.[46]

Secessionists advocate the dismemberment of a State, and "intend to abandon their current State, and in so doing, to take with them the land on which they live".[47] Secession often emerges and is organised from below[48] unlike a *coup d'etat* with which the politicians and the officials at higher echelons are often associated. Sometimes, elite members of secessionist groups provide leadership, in particular, on the ideological front with an international campaigns to win friends, sympathisers and activists. If the struggle succeeds, the region at issue may achieve independent Statehood, which is normally by a unilateral declaration on the part of the secessionists. Sometimes this may happen with the tacit agreement of the international community. Bangladesh is the most quoted example. It may also

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[44] They are mainly Negroid. Most tribal groups remain pagan. Southerners are divided into three main linguistic groups, i.e. Niloties, Nilo-Hamities, and the Sudanic. Each linguistic group is composed of various sub-tribal groups. For example, the Sudanic includes the Azande, Kreish, Bongo, Moru and Madi tribes. See *B.Whitaker*, 'The Southern Sudan and Eritrea', in *B.Whitaker* (ed.), The Fourth World, Victims of Group Oppression, Sidgwick and Jackson: London, 1972, pp. 77-79.

[45] See details *Ronen, supra*, 16, p.45.

[46] *L.Brilmayer*, 'Secession and Self-Determination: A Territorial Interpretation', 16 *YJIL* 1991, pp.187-188.

[47] *Ibid.* p.187.

[48] *Horowitz, supra*, 4, p.273. A classic example is that of the LTTE. Their leaderships come from the lower castes of the Tamils. See details in *infra* chapter 11.

happen with or without the consent of the majority community or the State at issue. Slovakia seceded with the consent of the Czechs. Eritrea broke away from the Ethiopian State with the blessing of both the UN and the OAS.

There is a significant difference between irredentism and secession. Irredentism presents a different scenario to that of secession. The term 'irredentism' is said to have originated from an Italian word, *irredenta,* meaning is 'redemption' of the territory conquered by a foreign country.[49] But in modern political jargon it stands for territorial claims by a State to a part of the territory of another State. This may also involve alliances of ethnic groups across the borders (involving kindred ethnic groups in two or more States) whose principal aim is to merge with another State. This is usually on historical or ethnic grounds or both.[50] Somalia's claims to the Ogaden region in Ethiopia and the Djibouts region in the Northeast province of Kenya, Morocco's claims first to all of Mauritania and later to the Western Sahara, Argentina's claims to Malvinas (Falklands), Spanish claims to Gibraltar, the Irish Republic's former claim to Northern Ireland are cases in point. Irredentist movements wish to see a merger of part of a territory to which they claim with another State in which other members of their group live. In the 1950s and 1960s some Tamil separatist movements had advocated the merger of the Dravidian nations across the Polk Strait uniting South Indian Tamils and Ceylon Tamils in the north-eastern province of Sri Lanka to create a *Dravidastan/*

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[49] See details *J.Mayall,* Nationalism and International Society, Cambridge UP: Cambridge, 1990.

[50] *Ibid.* p.272. This thesis however does not focus on this aspect of irredentism.

Dravidam. Similar movements are evident in other contemporary multiethnic polities.[51] It is asserted that the Albanians living in Macedonia and Serbia have ulterior motives behind their campaigns for greater political power, that is they hoped to join the Albanian State to create a 'Greater Albania'.[52] Similar attempts have recently been made by the Serbs in Macedonia and Bosnia and Herzegovina to create a 'Greater Serbia' with a view to providing a common home for Serb nationalities in central and eastern Europe. The attendant consequence of the building of greater Serbia was demonstrated in his interview by Vladimir Srebov of the Serbia Democratic Party as follows: "The plan was for a division of Bosnia into two spheres of influence, leading to a Greater Serbia and a Greater Croatia. The Muslims were to be subjected to a final solution - more than half were to be killed, a smaller segment converted to Orthodoxy while a smaller segment still, those with riches, could buy their lives and leave. The goal was to cleanse Bosnia-Herzegovina completely of the Muslim people".[53] Transylvanians' desire for merger with Hungary by breaking away from Romania, the Azerbaijanis in Georgia with Azerbaijan are well known other instances. Due to its international dimension, irredentism thus presents more problems than secession. However, irredentist movements are not in abundance in comparison with secessionist movements at present.

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[51] See details *Horowitz, supra*, 4, p.281.

[52] *Z.T.Irwin*, 'Yugoslavia and Ethnonationalists', in *Shiels* (ed.), *supra*, 21, 1984, pp.105-131.

[53] See details *E.Vulliamy*, 'Bosnia: The Crime of Appeasement', 74 (1) *International Affairs* 1998, p.77.

7.4 *Secession: "Pregnant With Such Unutterable Calamities"*

Secession is the most dangerous phenomenon in the era of post-modern tribalism. There is one significant aspect to this phenomenon- it is, as pointed out by Albert Taylor Bledsoe one and a half centuries ago, "pregnant with such unutterable calamities".[54] Cobban described secession as "generally a work of destruction and breaking down of established connexions".[55]

Secession can result in civil unrest and chaos. "It can shatter old alliances, stimulate the forging of new ones, tip the balance of power, create refugee populations, and disrupt international communities".[56] As Thornberry points out, at worst, secessionist movements may lead to 'genocidal policies of so-called ethnic cleansing'.[57] Eide views secession as "one of the most serious contemporary threats both to a peaceful evolution of the international order and to the advancement of human rights". Therefore, he suggested that secessionist movements based on 'ethno-nationalism' should be constrained and counteracted.[58] Presenting a very forceful argument, Mullerson emphasised that endless tribalization may increase if secessionism is recognised or encouraged.[59] He also points out that the potential threat of secessionism to international society

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[54] *A.T.Bledsoe,* Is Jeff Davis a Traitor? Innis and Comp: New York, 1866, p.1, cited in *Buchanan, supra,* 33, Preface, p.viii.

[55] *Cobban, supra,* 8. p.75.

[56] *Buchanan, supra,* 39, p.2.

[57] *Thornberry,* in *Tomuschat* (ed.), *op.cit.* 1, p.104.

[58] *Eide,* in *Tomuschat* (ed.), *ibid.* pp.140 and 144.

[59] *Mullerson, supra,* 30, p.71.

is too much to warrant any acceptance in international law or political science. Emergence of a multiplicity of small States based on ethno-nationalist ideology may not help the international order.[60] He also sees secessionist leaders as selfish and power crazy, ready to exploit any opportunity to satisfy their ambitions at the expense of non-combatant peace loving civilians.[61] Above all, secession undermines, as pointed by Cassese, the State structure.[62]

Secession is conspicuous for its unpredictability both in its movements and its impact on the State. Ethnically based secessionism results in deep divisions and tensions amongst different ethnic groups. Such an environment generates mistrust, fear and insecurity which are not ideal ground for the development of liberal democracies nor do they help human rights to flourish. Accompanying elements are aggressiveness, hatred, and intolerance towards other ethnic groups. Consequently, other smaller ethnic groups are prompted either to find protection from the largest ethnic group in the polity or to seek separate ethnic enclaves by having their own tribal States.[63] For example, the Muslims living in the Northeast provinces of Sri Lanka had never sought ethnically based separate territory before the commencement of the secessionist struggle of the LTTE. But now not only do they seek protection against Tamil secessionist groups such as the LTTE but also demand a separate province of their own in the eastern part of the island.

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[60] *Ibid.* p. 90.

[61] *Ibid.* p.90.

[62] *Cassese, op.cit.* 1, p.339.

[63] *Mullerson, supra*, 30, pp. 84-85.

As such, secession is a variable phenomenon associated with extremism. Secessionist movement operate in both forward and reverse directions. They "slide back and forth between autonomy and independence".[64] The case in point is the secessionist movement that prevailed in the province of Madras before it was elevated to union-State status. The secessionist Dravidian movements in Tamil Nadu reversed course preferring greater political power within a federal structure. A similar root was taken by the Northern Nigerian secessionists, mostly Hausa - Fulani people, who abandoned their secessionist goal in 1966, despite many prominent leaders feeling that secession was the only way which guaranteed 'honour and dignity'.[65] But such constitutional arrangements are still seen by secessionist forces in term of separatism. Some secessionists may move away from autonomy to secession as in the case of Mizo secessionists (Mizo National Front in Mizoram in Northeast India) and the Moro National Liberation Front in the Philippines.[66] Southern Sudan secessionists have changed their positions from autonomy to secession and *vice versa* many times. Each and every secessionist movement does not end in the achievement of independence. The abortive Biafran secessionist struggle is one such case. There is no rule that prevents secessionists from coming to a compromise solution well short of independence. Autonomous

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[64] *D.S.Treisman, supra*, 23, p.224. See further *A.Kohli,* 'Can Democracies Accommodate Ethnic Nationalism? Rise and Decline of Self-Determination Movements in India', 56 (2) *JAS* 1997, p.326.

[65] *Horowitz, supra*, 4, pp. 241 and 243.

[66] See details *ibid.* p.230.

status in terms of territory might be such a compromise as happened in Tamil Nadu, the Basque country and Catalonia.

The paradoxical nature of this phenomenon is such that, sometimes, secessionist tendencies in suppressed groups may never develop into a secession. The Lozi homeland in Zambia is one of the examples provided by Horowitz. Even though the powers of their monarch were limited and many other legislative measures were taken to curtail administrative powers within the region, the Lozis preferred to stay with unitary Zambia.[67] Secession is rarely mentioned even when matters deteriorate. Other notable examples are the Catalans. Both the Basques and the Catalans had been equally subjected to oppression for many decades, yet, the Catalans' secessionist tendencies are insignificant by comparison with the Basques.[68]

The target population in a secessionist campaign is of course different. Firstly, the secessionists have to keep the group or the region intact and their ardent supporters together. If that cannot be achieved, then at least the passive support of the target group is expected. Most importantly, the assistance of the international community is needed. Both these objectives may be targeted simultaneously. However, it is only the most advanced secessionist groups such as

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[67] *Ibid.* pp.241-243.

[68] *Ibid.* pp.231 and 252. Robert P.Clark describes the Basque separatists as the most violent, intransigent, always assertive and, above all, the 'most difficult to reconcile'. See details *R.P.Clark,* 'Spain and the Basques', *Shiels* (ed.), *supra*, 21, 1984, p.71.

the PKK (the Kurdish Workers Party)[69] LTTE and the ETA which find little difficulty in reaching the international organisations through which the justification of their respectively secessionist and irredentist claims can be effectively defended.

As Heraclides notes, secessionists use propaganda as a strong weapon to gain legitimacy for their movements.[70] Misrepresentation and distortion of facts and figures are effective tools in their armoury. Beatings as well as pleadings are used to maintain group control and to achieve group loyalty as in the case of the Tamil Tigers in Sri Lanka, ETA in Spain, and the IRA movement in the Northern Ireland. An alleged exploitation of the community or the region concerned, and the neglect of the group or the region are attributed to the State and to the dominant groups in the State concerned. Propaganda is not so difficult at the initial stage of the conflict due to difficulties of getting accurate information. It may be due to the reluctance of both States and secessionist groups to allow the international media access to the theatres of conflicts.

Moreover, secessionists employ various strategies to justify and strengthen their case. From persuasion by peaceful means to coercion and violence,[71] the latter being a kind of 'propaganda by deed'. Human sufferings and the sacrifice of a perceived 'enemy group' is seen as justified in the struggle for a worthy cause. The blowing up of buildings, especially those belonging to the State,

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[69] See *D.McDowall*, 'The Kurdish Question: A Historical Review', in *P.G.Kreyenbroek* and *S.Sperl* (eds.), The Kurds, A Contemporary Overview, Routledge: London and New York, 1992, p.20.

[70] See *Heraclides*, *supra*, 38, pp.42-43.

[71] *Buchheit*, *op.cit.* 12, p.19.

the theft of property, the random killings of members of the enemy group, kidnapping and inflicting fear and uncertainty are some prominent tactics used by secessionists with a view to bringing their 'just cause' to the attention of the international community and domestic politicians. If the State at issue is not prepared to give up a part of its territory in recognition of a secessionist claim, violence is the ultimate choice adopted by many contemporary secessionist groups in the belief that ultimately the State will be forced to accept secession.[72] Violence in the name of group interests is justified on the assumption that a people has the right to choose its own cause, particularly its political destiny.[73] Fighting, in the views of secessionists, is not only 'intrinsically important', but also instrumentally valuable' for protection against the enemy group or State and for the survival of the group,[74] and in pursuit of their life as a free people.[75]

It is argued that as a separate nation or a region, secession can be justified on moral grounds. The philosophy behind this argument is that individuals or groups have the inherent right to decide whether to stay with the existing polity

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[72] *Ibid.* p.19. For example, ETA secessionist group in Basque country in Spain has so far, from 1968 to date, alleged to have killed 763. See details, *D.White*, 'Basque Politicians Under the Gun', *The Financial Times*, 27 Jan. 1998.

[73] *P.Gilbert*, Terrorism, Security and Nationality: An Introductory Study in Applied Political Philosophy, Routledge: London and New York, 1994, see particularly chapter 6. See further details *A.Margalit* and *J.Raz*, 'National Self-Determination', in *W.Kymlicka* (ed.), The Rights of Minority Cultures, Oxford UP: Oxford, 1995, p.89.

[74] *Margalit* and *Raz*, *ibid.* p. 89. The whole article appeared in 87 (9) *Journal of Philosophy* 1990, pp.439-61.

[75] *Ronen, supra*, 16, p.47.

or leave it and set up their own States. Arguments based on morality are based on liberal principles. Secessionists believe that the right to secession flows from natural rights which guarantee inherent right to self-government. They often refer to the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen to claim a stake in the moral high ground.[76] The right to determine their own political system is presented as a strong reason. If the secession does not harm the other communities or groups or individuals then States have a moral obligation not to obstruct it. According to liberal political philosophy, secessionists should be allowed to achieve their aspirations to the maximum without interference by States. Because, both groups and individuals have an inherent right to decide or select the kind of society, community or the State in which they would like to live. The right to participate in the political process is one of the most essential rights to which any individual is entitled. The State simply cannot violate these basic rights - it is morally bound to safeguard rights within a liberal environment which is conducive to the enhancement of individual rights. Individuals acquire rights not as citizens of the State, but as human beings. Therefore, individual's decision alone matters in determining whether he or she should join a society or a polity or breakaway at any time he or she choose to do so. On these grounds, it is argued, that secession is a morally justifiable right which cannot be suppressed by any one.[77]

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[76] *Brilmayer, supra*, 46, p.179.

[77] See details *Buchanan, supra*, 39, chapter 2; *V.V.Dyke*, 'The Individual, The State, and Ethnic Communities in Political Theory', in *Kymlicka* (ed.), *op.cit.* 73, 1995, pp.44-45;

7.5 *The Ubiquitous Nature of Secessionist Movements: "Locked in a Life-or-Death Struggle"*

As one State representative stated, most secessionist movements enter "the path of the gun" and are eventually "locked in a life-or-death struggle"[78] against States to achieve their ultimate paradise, the new nation-States. Some of these secessionist movements, as stated by the Armenian delegate, "have escalated into long-standing conflicts or civil wars".[79] Secessionist military action launched by the secessionist Serbs to create the Republika Srpska[80] in the Republic of Bosnia - Herzegovina resulted in the most bloody war, the "first general war since 1945",[81] we have witnessed in recent history. Ethnic Albanians living in the Kosovo region have been fighting the Serbian forces for independence "to preserve their language, educational system, traditional culture",[82] or perhaps to join the Albanian Republic.[83] The justification claimed for these struggles is the building of nation-States along the lines of ethnic, religious, linguistic and cultural boundaries.[84] We

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D. Murswiek, 'The Issues of a Right of a Secession- Reconsidered', *Tomuschat* (ed.), *op.cit.* 1, 1993, pp.21-40.

[78] A/C.3/49/SR.8/, 25 Oct. 1992, pr.12, p.5.

[79] A/C.3/48/SR. 21, 26 Nov. 1993, pr.11, p.4.

[80] See *infra* chapter 9, 9.5.

[81] *B.Denitch,* Ethnic Nationalism : The Tragic Death of Yugoslavia, University of Minnesota Press: Minneapolis/London, 1994. Further see *D.P.Moynihan,* Pandemonium: Ethnicity in International Politics, Oxford UP: Oxford, 1994, p.72.

[82] A/C.3/47/SR.8, 19 Oct. 1992, pr. 48, p. 13 (Albania).

[83] See *infra* chapter 9, 9.4.

[84] See generally *J.H.Kohn,* Nationalism, Its Meaning and History, Van Nostrand Princeton (NJ) 1965, 2nd ed..

have not yet seen the end of Yugoslavian ethnic wars. "The only question remaining is how many nations or nearly nations will emerge from the carcass".[85] These dangerous tendencies are gradually spreading over the boundaries of many contemporary nation-States[86] as will be shown below.

On the African continent secessionist movements are active as never before. "From Angola to Somalia, from Burundi to Rwanda to Liberia" conflicts are widespread.[87] Due to these conflicts, in the words of Namibia's Foreign Minister, "Africa is bleeding...the African people are burning in misery and mayhem".[88] Human tragedy and mass killings of innocent people "have gone beyond the bounds of reason".[89] It is common knowledge that in the Democratic Republic of Congo, Uganda, Burundi, Algeria, Ethiopia, Somalia, Papua New Guinea, Sri Lanka and Sudan many thousands of non-combatant civilians suffer as a result of violence launched by secessionists. The international community has also witnessed with horror how 'freelance gunmen' operating on a tribal basis launched a suicidal war against each other bringing Somalia into total anarchy.[90]

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[85] *R.A.Jackson* and *A.James* (ed.), States in a Changing World: A Contemporary Analysis, Clarendon Press: Oxford, 1993, p.100.

[86] *Shehadi* , *supra*, 24, p.3.

[87] A/51/PV.20, 3 Oct. 1996, p 9 (Senegal).

[88] A/51/PV. 14, 30 Sept. 1996, p.6.

[89] Reference to Somali situation by Mr. Al-Eryany, the Yemen Deputy Prime Minister's address to the UN, DHA News, UN Department of Humanitarian Affairs, Special Edition, Jan/Feb 1994, p. 12.

[90] The United Nations and the Situation in Somalia, UN Department of Public Information: New York, DPI/1321/Rev. 4, May 1995, p.1.

The sole purpose appears to be to carve Somalia into several micro-States (tribal-States) purely and simply on the basis of tribal and clan allegiances. Secessionists in the northern part of Somalia have already set up an independent 'Somaliland' which appears to be gaining international approval indirectly. Secessionist wars in Sudan's southern and eastern regions have entered into a new era under the umbrella organisation of 'the National Democratic Alliance' - which consists mainly of non-Muslim groups in the southern[91] and eastern parts of the country. Even the neighbouring countries, Ethiopia, Eritrea and Uganda are alleged to have been involved in assisting the rebels against Sudan.[92] New claimants are emerging year after year. Amongst these the South African White settler communities, Afrikaners, have already declared their determination to fight for a 'white homeland' (*volkstaat*), breaking away from the Republic of South Africa.[93] Support for a *volkstaat,* which is led by the 'Freedom Front', has been gaining ground according to recent reports. Professor Hendrik Robbertz, the Chairman of the *Volkstaat* Council was reported as saying, "self-determination for Afrikaners will determine whether South Africa will survive as a stable community of secure peoples". He further said, "we don't accept the idea of a pot where you throw in everything and then you have a new nation".[94]

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[91] Historical background to the conflict between the South and North in the Sudan, see *Whitaker* (ed.), *op.cit.*44, pp. 80-94.

[92] *Financial Times*, 9 Feb. 1997.

[93] *R.W.Johnson,* Afrikaners' 'Rights of Hopes in Bluff and Bluster', *The Times*, 27 Dec. 1993.

[94] *S.Kiley,* 'Afrikaners Win Backing for Separate Homeland', *The Times*, 7 Aug. 1998.

In Europe secessionist movements are on the increase, in particular in Eastern and Central Europe. New nation-States emerging out of the former USSR are grappling with this problem, and there seems to be no end of secessionist claims by new minority groups. The Chechen separatist armed struggle against Russia is a classic case in point. When Boris Yeltsin offered the separatists greater autonomous status including the right to have powers to establish relations with the international community and other economic and cultural organisations, to govern according to their constitutional structure, the right to determine their flag and national anthem, Chechen and Tartastan ethnonationalist politicians rejected his offer because they were not satisfied with anything short of Statehood.[95] The Ossetians and the Abkhazians, who represent respectively 3 per cent and 1.9 per cent of the population of the Republic of Georgia, have declared respectively Ossetia and Abkhazia as independent States. The Abkhazians have attempted several times to break-away from Georgia. In 1990, the Abkhaz Supreme Soviet declared Abkhazia a sovereign Republic.[96] In the hope that the Abkhzians would remain in the Georgian Republic, they were offered "disproportionate representation" by the Georgian government in the legislative council of Abkhzia. This constitutional arrangement has been neglected by the Abkhazian separatist politicians making it clear that it does not match their separatists' ambitions. Separatist Crimean Tartars in the Crimean peninsula of Ukraine are not satisfied

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[95] *Washington Post*, 1 April 1992, cited in *Moynihan, op.cit.* 81, p.71.

[96] See The United Nations and the Situations on Georgia, UN Department of Information: New York, DPI/1693, April 1995, p.1. See details in *infra* chapter 9.9.7.

with administrative and territorial autonomy for Crimea.[97] The Armenian minorities' campaign for secession in the Nagorny Karabakh[98] region in Azerbaijan resulted in a large scale ethnic war between Azerbaijan and Armenia. The Turkish Cypriot separatists are, at present, not even satisfied with the "bicommunal and bi-zonal federation" proposed by the Greek Cypriot President Mr.Glafcos Clerides based on the principle that the future political structure of Cyprus should be composed of two politically equal communities.[99]

Similarly, despite having an autonomous province, ETA secessionists in the Basque country have continually been fighting for a separate State even though they have recently (October 1998) declared a cease-fire and expressed their willingness to enter into democratic path. The Guardian columnist Tunku Vardarajan writes that ETA wants nothing short of a total sovereignty. Its members posed the question, "how can we accept political consensus within the Spanish State if we do not accept that State in the first place"?.[100] The liberal political analyst may find it hard to grasp why ETA fighters do not want to accept one of the most advanced self-governments in Europe. Perhaps, it is not so surprising - their motto is, *Euzkadi ta a skatassuna'* - land and freedom.

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[97] A/C.3/51/SR.28, 19, Sept. 1997, pr.14, p.5 (Ukraine). See details *J.Packer,* 'Autonomy Within the OSCE: The Case of Crimea', in *M.Suksi* (eds.), Autonomy: Applications and Implications, Kluwer Law International: The Hague/London/Boston, 1998, pp.312-314.

[98] See *infra* chapter 9, 9.8.

[99] A/51/PV. 10, 26 Sept. 1996, p.3. See further A/C.3/47/SR.9, 27 Oct. 1992, pr.89, p.19. See *infra* chapter 9, 9.8.

[100] *The Guardian*, 23 July 1996.

Separatist tendencies are prevalent even in the most advanced democratic systems such as the UK, USA, and Canada. In Great Britain although the Scots have not yet resorted to violence, 52 per cent of 18-23 year olds are in favour of an independent Scotland according to an opinion poll conducted in December 1996 by *Scotland on Sunday*.[101] Northern Ireland's republican struggle against the British government is well known and it is continuing its attempt of achieving a united Ireland. Secessionist movements are active in Wales in the guise of 'Welsh language groups' although they have not yet resorted to serious violence.

In Canada, Francophile Quebecois have been claiming the right to secede for a long time even though Quebec is enjoying greater autonomous power within a federal structure considered by many liberal constitutionalists to be "one of the most decentralized in the world".[102] Yet, the majority of Quebecois are in favour of secession and further constitutional arrangements may not suffice to quell secessionist desires for an independent Quebec. "We want a country, we will wait a bit, but not for long", said Jacques Parizau, a separatist leader.[103] In the USA, Puerto Rican and Alaskan secessionist movements are also campaigning for independent statehood. The latter is alleged to have connections with international terrorist organisations.[104]

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[101] *The Times*, 30 Dec. 1996.

[102] *Buchanan, supra*, 39, p.128. See further *J.Porter*, 'Ethnic Pluralism in Canadian Perspective', in.*Glazer* and *Moyniham* (eds.), *op.cit.*16, pp. 267- 304.

[103] Http://www.usatoday.com/news/index/inque 005 htm, 16 March 1999. See *re Secession of Quebec* (1998) 2 SCR 217.

[104] *Moynihan, op.cit.*81, p.76.

Asia is beset by a great number of separatist movements. Given the diverse nature of the various ethnic and tribal populations, specially in northern and eastern parts of the continent, it is not surprising that these demographic diversities should make the region unstable and politically volatile. Secessionist armed struggles by ethnic and tribal groups in Sri Lanka, India, Bangladesh, Pakistan and Myanmar (previously known as Burma) have a long history - and there seems to be no end to such conflicts. Most tribal and ethnic groups in the region are of the view that they have been deprived of their nation-States, first by the British Raj, and then by the newly created States. These resentments have resulted in widespread violence between ethnic or tribal groups and States. Not surprisingly, secessionist armed struggles have resulted in border clashes between States causing the deterioration of inter-States relations. For example, India has had many clashes with Pakistan since it became a new nation-State. India has supported separatist movements in Pakistan and Pakistan has supported secessionist movements operating in India, each merely to hurt or take revenge on its enemy.[105] It is widely reported that many separatist movements in the northern and eastern regions of India have been supported financially, ideologically and militarily by the Republic of Chinese and Pakistan. India's clandestine assistance, both politically and militarily, for the Sri Lankan Tamil secessionist groups has resulted in the deterioration of diplomatic relations between India and Sri Lanka during, in particular 1986-1993. The invasion of Sri Lankan air-space by the Indian Air Force on the instruction of the former Indian Premier, Indira Ghandi, damaged

[105] A/C.3/50/SR.50, 12 Jan. 1996, pr.43, p.8 (Indians' allegation against Pakistan).

the relationship between these two countries creating an atmosphere of war on the island. When, in pursuance of the Indo-Lanka Peace Accord, 1987,[106] the Sri Lankan government made an offer of autonomous powers to the merged northern-eastern provinces of the island, the hard-core Tamil secessionist group, the LTTE, rejected it outright making it clear that such a move would not fulfil the aspiration of the Tamil nation for a separate Tamil Eelam. The Chitagongs in Chitagong Hill Tracks were at first prepared to accept greater autonomous status within Bangladesh, yet due to the "spiral of government repression and armed resistance" Chitagong secessionist groups are now fighting for an independent Chitagong and they are gaining ground, in particular since 1975. Separatists in Kashmir and Jammu,[107] the Nagas and the Mizos in the Republic of India are also fighting for respectively, Nagaland and Mizoram. The Nagas commenced their separatist struggle even before India attained independence. This was given impetus by the declaration of independence by Naga national leaders on the eve of the declaration of Indian independence by the British Raj. Both British and later post-independent Nehruvian governments refused to grant independent status to Nagaland. A short-lived independent sovereign 'Federal Government of Nagaland' has never been militarily or politically able to sustain its proclaimed statehood. Nonetheless, with the encouragement of Pakistan and sometimes with the military assistance of the Chinese Republic, the Nagas' irrdentist movement, currently the Nationalist Socialist Council of Nagaland, with the secret alliance of Manipur's United

[106] See the full text of the Accord, 26 *ILM* 1175 [1987], pp.1175-1183.

[107] A/C.3/47/SR.9, 27 Oct. 1992, pr.52, p.12 (Pakistan).

National Liberation Front and Poresh Baruash's United Liberation Front of Assam are continuing their struggle to create a Christian Socialist State in greater Nagaland. Analysing this unusually protracted military struggle, Mahmud Ali writes: "Nagas have fought Indian forces for more than three decades and, despite immense odds, continue to do so".[108] The Manipur secessionist struggle launched by the Meitei tribal group is another example of the determined and uncompromising nature of modern secessionist movements. Recognising the legitimacy of some of the claims made by the Meitei secessionist movement the Indian government established the Manipur Hill Council according to it greater autonomous powers within the Indian federal structure. Yet, both the Peoples Liberation Army (PLA) and Peoples Revolutionary Government of KunglaPak (PREPAK), the main separatist groups of Meitei, are not satisfied with a limited autonomous status. The secessionists' argument is that, "we are beasts of burden under Mayang colonial rule; let us throw out Mayang rule and build a new society. We want independence, we want liberalism".[109] Extremely concerned with the Marxist-Leninist leaning of both factions, the PLA and PREPAK, the Indian government does not seem to want to come to a compromise with them. The Meiteis' aim is to establish not only a socialist State but also to revolutionise the existing socio-demographic structure in order to remove migrant communities and Indian influence.

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[108] *S.M.Ali*, The Fearful State: Power, People and Internal Wars in South Asia, Zed Books: London and New Jersey, 1993, p.37.

[109] *Ibid.* p.47.

In Darjeeling in West Bengal the Gurkhas's struggle for an independent State commenced as far back as 1907. They first tried peacefully to secure a separate constituency to voice their grievances in the national assembly. Later, the campaign turned to the liberation of Gurkhalan, a struggle launched both politically and militarily. The militant groups' struggle has "transformed Darjeeling from a peaceful tourist haven into a potential tinder-box".[110] Pranta Prashad and the GNLF were prominent amongst secessionist groups in the 1980s. Even though the central government of India was able to persuade some moderate leaders of the Gurkha National Liberation Front to accept autonomous status for 600,000 Gurkhas by establishing the 'Darjeeling Gurkha Hill Council' in 1988, the military wing of the GNLF and other small secessionist groups are not satisfied with such a constitutional arrangement. So the hit-and-run guerrilla campaign against the State authorities and their administration has continued though success seems unlikely at least in the near future.[111] Baluchis and Pathans in Pakistan have also been unsuccessfully fighting for their own nation-States. Myanmar, Thailand, Indonesia and Philippine have also experienced similar violent secessionist movements by minority groups. Myanmar's unitary structure is threatened mainly by Karens since Myanmar gained independence from the British Empire in 1948.[112] Separatist ethnic groups increased their activities against Myanmar after the military coup in

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[110] *Ibid.* pp.53-54.

[111] *Ibid.* pp.53-56.

[112] Myanmar's Foreign Affairs Minister Mr. Ohn Gyaw stated that there were 16 secessionist groups in his country fighting for independent States. See A/50/PV, 13, 27 Sept. 1996, p.16.

1962. Constitutional changes also triggered the secessionists' struggles since Myanmar was declared a unitary State by the 1974 constitution.[113]

In conclusion, although only a few secessionist groups have been successful in achieving post-modern-tribal-states there is no sign of a decrease in secessionist struggles. Whilst some have lost momentum others are increasingly active. Ultimately success or failure depends on the extent to which these groups are prepared to carry on their struggles and on the determination of States to resist them.

[113] *R.Milne*, 'South East Asia', in Jackson and James (eds.), *supra*, 85, 1993, p.183.

8 The Right to Secession Law and Practice

Introduction

Politicisation of the doctrine of self-determination by ethno-nationalists and even by "many European leaders"[1] has given rise to false hopes amongst minority groups. It is often said that the right to secession is in accordance with the right to self-determination. This has already become a controversial issue in contemporary polities, and this is in many respects similar to the situation prevalent in post-World War I Europe and elsewhere. Encouraged by the manifesto of the Bolshevik revolutionaries in the USSR which declared that nations have the right to decide their own destinies,[2] and later by Wilson's advocacy of national

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[1] *R.Higgins*, Problems and Process, International Law and How We Use It, Clarendon Press: Oxford, 1994, pp. 121- 124 and 128.

[2] *A.Cassese*, Self-Determination of Peoples: A Legal Reappraisal, Cambridge University Press: Cambridge, 1995, p.17; see further *B.Simma* (ed.), The Charter of the United Nations: A Commentary, Oxford University Press: Oxford, 1994, pr.9, p.58. See *J.Stalin*, Marxism and the National and Colonial Question, A Collection of Articles and Speeches, London, 1913, re-published in 1941, pp.20-21, cited in *Cassese*, *ibid*, p.14. Stalin wrote in 1913: "The right to self-determination means that a *nation* can arrange its life in accordance to its own will. It has the right to arrange its life on the basis of *autonomy*. It has the right to complete *secession*. Nations are sovereign..."[2] Emphasis added. See also *V.I.Lenin*, Selected Works, London, 1969 (ed). p.159. Hans Kohn does not admit the genuineness of Lenin or Stalin's commitment to the right of self-determination. He points out that the principle was used by both as a propaganda weapon against the western powers. "To communism", argued Kohn, "persons and nationalities alike were not ends in themselves but instruments to be used in various and

self-determination through democratic governance as the expression of the people, small nations "began a wild rush" for independent Statehood "which was to sweep onward until the end of the war and beyond" eventually becoming an "uncontrollable torrent".[3] Reminiscent of these events, the right to self-determination is now increasingly used as a means to their ends by militant minority groups in all corners of the world.[4] The view of States seems to be that the "slogan of self-determination was increasingly being used by political elites and clans in order to seize and maintain power... ."[5] This is variously referred to as 'ethnic self-determination',[6] 'secessionist self-determination',[7] or 'ethnic separatism'.[8]

Traditionally, the position has been that international law is reluctant to validate secessionist claims.[9] This position was reflected in the opinion delivered by the

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opportunist ways". *H.Kohn*, 'The United Nations and National Self-Determination', 20 *Review of Politics* 1958, p.528. See, *Cassese*, *ibid*, pp.20-23.

[3] *A.Cobban*, National Self-Determination, Oxford University Press: London/New York and Toronto, 1944, p.12.

[4] *Cassese*, *supra*. 2, p.5. See also *L.C.Buchheit*, Secession, The Legitimacy of Self Determination, Yale University Press: New Haven and London, 1978, p. 214. See also *S.Lawson*, 'Self-determination as Ethnocracy: Perspectives from the South Pacific', in *M.Sellers* (ed.), The New World Order, BERG: Oxford, Washington, DC, 1996, p.168.

[5] A/C.3/49/SR.8, 25 Oct. 1994, pr. 9, p.4 (Russia).

[6] *KS.Shehadi*, Ethnic Self-Determination and the Break-up of States, Adelphi Paper- 283, Brassey's [UK] Ltd: London, 1993.

[7] *Cassese*, *supra*, 2, pp. 339-343.

[8] *F.L.Sheils* (ed.), Ethnic Separatism and World Politics, University Press of America: Lanham/ New York/London, 1984.

[9] *C.Tomuschat*, 'Self-Determination in a Post-Colonial World', in *C.Tomuschat* (ed.) Modern Law of Self-Determination, Martinus Nijhoff: Dordrecht/ Boston /London, 1993, p.7.

International Commission of Jurists appointed to inquire into the Aaland Islands.[10] The right of national groups to separate themselves from the State of which they form part was not recognised, because such claims would, in the view of Commission of Jurists, challenge the legitimacy of political and territorial integrity of existing States, and would help secessionist elements to destroy order and stability within a State and to "inaugurate anarchy in international life".[11] Later, the same conclusion was reached by the Commission of Rapporteurs who were appointed to look into the Aaland Islands problem.[12] Tomuschat says "one hundred years ago, even to raise such a question would have been considered preposterous or nonsensical".[13] Self-determination has been instrumental in dismantling colonial empires in both Asia and Africa in the post-world-war period. Could it be, asked Shaw, used as a "lever to dismember States" ?[14]

The Supreme Court of Canada is also of the view that there is no right under international law or constitutional law to unilateral secession. However, it recognises the possibility that secession may in certain cases emerge as a justifiable option where: a) 'a people' is governed as part of colonial empire; b) 'a people' is subjected to alien subjugation, domination or exploitation; and c) 'a people' is denied any meaningful exercise of its right to self-determination within the State of which it forms a part. In other circumstances, it was held, "peoples are expected to achieve self-determination within the framework of this existing state. A state whose government represent the whole of the people operates on a basis of equality and without discrimination, and respects the principle of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recoginized by other states" (re *Secession of Quebeck* (1998) 2 SCR 217.[15] New States can still emerge peacefully by consent of the contending parties. This

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[10] *LNOJ*, Special Supl. 1, 1920, p.5. See further *V.P.Nanda,* 'Self-Determination Under International Law: Validity of Claims to Secede', 13 *CWJIL*, 1981, p.257. *A.Rigo-Sureda,* The Evolution of the Right of Self-Determination: A Study of United Nations Practice, A.W. Sijthoff: Leiden, 1973, p.32.

[11] *LNOJ* Spec. Supl. 3 [1920], pp.3-19.

[12] *Ibid.* p.5. Further see *Sureda, op.cit.*10, p.32.

[13] *Tomuschat, supra*, 9, p.8.

[14] *M.N.Shaw*, 'Peoples, Territorialism and Boundaries', 3 *EJIL* 1997, p.482.

[15] See also ESCOR, E/CN.4/Sub.2/1993/34, pr.86, p.18. See also The Committee on the Elimination of Racial Discrimination, General Recommendation, XXI, UN Doc. A/51/18, pr.11, 5 (18) *IHHR* 1998, p.20.

is now theorised as "consensus secession" by some scholars.[16] "Changes arising from peaceful negotiations, free of acts of aggression or external intervention", as stated by Eide, "are obviously in conformity with international law".[17] Examples abound. Panama's secession from Colombia, Venezuela's secession from Gran Colombia in 1830,[18] Senegal from the Mali Federation in 1960, Syria from the United Arab Republic in 1961,[19] Singapore from the Malaysian Federation in 1965, Eritrea from Ethiopia in 1993,[20] the Baltic States[21] (Lithuania, Estonia and Latvia) in 1991 from the USSR, and the emergence of Norway and Sweden as two separate independent States in 1905 are some of them.[22] In fact, declarations of independence by the Baltic States were warmly welcomed by the EC on 27 August 1991 which expressed its approval by immediately establishing diplomatic

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Discrimination, General Recommendation, XXI, UN Doc. A/51/18, pr.11, 5 (18) *IHHR* 1998, p.20.

[16] *G.Marchildon* and *E.Maxwell*, 'Quebec's Right of Secession Under Canadian and International Law', 35 *VJIL* 1992 p.590.

[17] E/CN.4/Sub.2/1993/34, pr. 86, p.18.

[18] Schiels (ed.), chapter one, *supra*, 8.

[19] *R.Young*, 'The State of Syria: Old or New', 56 *AJIL* 1962, p.482.

[20] In a referendum held in Eritrea from 23 to 25 of April 1993, registered voters "almost unanimously voted in favour of independence". 26 (4) *Bull. EC* 1993, point. 1.4.13, p. 81.

[21] The Balkan States' independence is viewed as the restoration of sovereignty which they lost to the USSR in 1940. See the Declaration of European Community Foreign Ministers, Brussels, 28 Aug. 1991, 24 (7/8) *Bull. EC.* 1991, p.115. See also *R.Rich*, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *EJIL* 1993, p. 38. *T.Gazzini*, 'Consideration on the Conflict in Chechenya', 17 (3-6) *HRLJ* 1996, p.96.

[22] See *Nanda, op.cit.* 10, p.272; *Buchchiet, op.cit.* 4, pp.98-99; *Marchildon* and *Maxwell, supra*, 16, p.622; *J.Klabbers* and *L.Lefeber*, 'Africa: Lost Between Self-Determination and Uti Possidetis', in *C.Brolmann et al* (eds.), Peoples and Minorities in International Law, Kluwer Law: Dordrecht/Boston/London, 1993, p. 45.

relations with them.[23] Both the Slovak and Czech Republics emerged as separate independent States on 1 Jan. 1993 by mutual consent, the existing administrative borders becoming each country's external boundaries.[24] Thus when a minority or sub-national group is granted the right to secede by constitutional arrangement, if secession occurs in a democratic way, it may acquire legitimacy.[25]

Although international law does not prohibit secession it is equally correct that secession is not recognised as a valid right under international law. The Special Rapportuer Gross Espiell commented: [26]

> "The express acceptance of the principles of the national unity and the territorial integrity of the State implies non-recognition of the right to secession. The right of peoples to self-determination, as it emerges from the United Nations, exists for peoples under colonial and alien domination, that is to say, who are not living under the legal form of a State. The right to secession from an existing State Member of the United Nations does not exist as such in the instruments or in the practice followed by the Organisation, since to seek to invoke it in order to disrupt the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter".

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[23] The Declaration of European Community Foreign Ministers, Brussels, 28 Aug. 1991, 24 (7/8) *Bull EC* 1991, p.115.

[24] See *Shaw*, *supra*, 14, pp. 478-507.

[25] *Ibid.* p.45.

[26] *H.Gross Espiell,* The Right to Self-Determination, Implementation of United Nations Resolutions, E/CN.4/Sub.2/405/Rev.1, pr.90. See also *A.Cristescue,* The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments, E/CN.4/ Sub.2/ 404, Rev. 1, 1981, pr.136, and pr.279.

8.1 *There is No Right to Secession Explicitly or Implicitly in the UN Charter*

It is less controversial to say that the UN Charter did not legitimize secessionist rights. The principle enunciated in article 73 recognises that the *peoples* and *inhabitants* of the territory of the Non-Self-Governing Territories and Trust territories have the right to 'self-government'. States are required to "take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement". But in general terms both article 1 (2) and 55 recognise that one of the purposes of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Travaux preparatoires reveal that any secessionist right was excluded when the draft of the UN Charter was finalised. The common understanding amongst member States on this was demonstrated by the delegate of Colombia:

> "...If it (self-determination) means self-government, the right of a country to provide its own government, yes, we would certainly like it to be included; but if it were to be interpreted, on the other hand, as connoting a withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy and we should not desire that it should be included in the text of the Charter".[27]

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[27] Unpublished microfilmed minutes of the debate of the First Committee of the First Commission of the San Francisco Conference, quoted as note. 2, Meeting of 14 and 15 May 1945, cited in *Cassese*, 'Political Self-Determination- Old Concepts and New Developments', in *A.Cassese* (ed.), UN Law / Fundamental Rights: Two Topics in International Law, Sijthoff and Noordhoff : Alphen and den Rijn, 1979, footnote, 3, p.162 and p.138. See also *Cassese supra*, 2, pp.38-49.

States were never in doubt that groups of peoples living in the independent State would be the repository of secessionist rights. The UK representative's analysis of the *peoples* in the Charter (articles 1 (2) and 55) supports this proposition. He asserted that, "The United Kingdom delegation did not believe that the principle of self-determination had been intended to form a basis upon which provinces or other parts of independent States could claim a right to secession... ."[28] Charles De Visscher's statement that, "applied without discernment, self-determination would lead to anarchy",[29] was quoted in support of his argument. The notion of self-determination was thus reformulated in a conservative State oriented approach. It was not imagined by the founding States of the UN that by approving the peoples' right to self-determination there would be any threat to the territorial integrity of the nation-State which at that time was considered sacrosanct.[30] What the UN Charter provided for was self-government. Taking into account the concerns of most States, the drafting committee agreed that articles 1 (2), 55 and 73 would not confer secessionist rights on a section of the population of an independent State.[31] This is also the view taken by the eminent commentator on nationalism and national self-determination, Hans Kohn. Government based upon the consent of the governed and the respect for the equality of its peoples is what is enshrined in the Charter. Most importantly, any racial or ethnic connotation is absent in these articles.[32] Higgins rightly points out that

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[28] A/C.3/SR.890, 3 Dec. 1965, prs.18-19, p.303.

[29] *C.De.Vischer,* Theory and Reality in Public International Law, Princeton: Princeton UP, 1957, p.128, cited, *ibid.* pr.20, p.303.

[30] *Cassese, supra,* 2. p.138.

[31] *Ibid.* p.40.

[32] *Kohn, op.cit.* 2, p.536.

"the Charter aims at bringing all human beings, irrespective of their origin or status, within the purview and range of human rights promotion... ."[33]

8.2 *A Right to Secession is not in the Colonial Declaration*

However, the meaning of *peoples* in the *Colonial Declaration*[34] has been subject to doubtful misinterpretation by some minority rights campaigners who assert that minorities are peoples who can decide their political future in whatever way they like. Paragraph 2 of the Colonial Declaration has often been cited to justify their argument. It states:

> "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".

As has been seen in chapter 2, *all peoples* in the above provision means the totality of the population of a given territory. During the debate on the Colonial Declaration this position never became a serious issue amongst State representatives, paragraph 2 being linked to paragraph 6 of the Declaration which states:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

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[33] *R.Higgins*, 'Human Rights and Rights of Peoples', 6 (3) *EJIL* 1995, p.467.

[34] The Colonial Declaration was considered by most States as the "most authoritative pronouncement on the principle since the adoption of the UN Charter". See GAOR, Agenda Item, 87, Annexes (xxii), 22nd session, 1967, pr.184.

This was, according to the delegate of the Netherlands, the continuation of the principle enshrined in article 2 (4) of the UN Charter.[35] States expressed their concerns about the possible misuse of paragraph 2. For example, Guatemala wanted to be assured that "self-determination of peoples may in no case impair the right of territorial integrity of any states".[36] In fact, Guatemala presented a separate resolution emphasising that rights enshrined in paragraph 2 should in no case violate the Charter principle, "the other very important principle of a country's territorial integrity".[37] Sweden also wanted clarifications that paragraph 2 of the Declaration would not entitle "a segment of a population or region of a state" to secession. Otherwise, argued the delegate, secessionists' in regions like Congo (Leopodville) would be justified in continuing to pursue their secessionist agenda.[38] The Federation of Malaya,[39] and Iran, both signatories to the forty-three-power resolution, assured countries like Guatemala and Sweden that the forty-three-powers were in agreement with the rationale behind these two paragraphs - i.e. that the territorial integrity of a State would not be harmed by 'paragraph two rights'.[40] The 'forty-three-power resolution' (almost all of the signatories were from Latin America, Asia, the Middle East and Africa) was very carefully drafted to assure others that paragraph 2 did not interfere with or harm the territorial integrity of independent States. The common understanding appeared to be that any attempt by a segment of a population or a region of the State to exercise the right to self-determination by breaking away from the State would be nullified

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[35] A/PV. 947, 14 Dec. 1960, pr. 62, p.1276.

[36] *Ibid.* pr. 63, p.1276.

[37] A / L. 325, *ibid.* pr. 63, p.1276.

[38] A/PV. 946, 14 Dec. 1961, pr.14, p.1266.

[39] *Ibid.* pr.39, p.1268.

[40] *Ibid.* pr.54, p.1269 (Iran).

by the operation of paragraph 6. The rationale behind these two paragraphs is clear - peoples' right to self-determination cannot be operated in conflict with another fundamental principle developed within the UN, the territorial integrity and sovereignty of a State. This is, as pointed out by Higgins, very carefully thought out to balance the approach taken by the States' representatives who took part in the process of finalising the Colonial Declaration.[41] Analysing paragraph 6 in particular and the Colonial Declaration in general, Buchheit commented, "both the context of the Colonial Declaration and the plain terms of paragraph 6 outweigh any speculation regarding a possible separatist interpretation of the right to self-determination."[42] As viewed by some scholars paragraph 6 was meant to operate as a sort of "grandfather Clause" standing against any secessionist attempts.[43]

8.3 *A Right to Secession is Not in the Friendly Relations Declaration*

Campaigners for secessionist rights also heavily rely on the Friendly Relations Declaration.[44] Paragraph 2 says:

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[41] A / L 323/1952 and Add. 1-6. See also *Higgins*, *supra*, 1, p.122.

[42] *Buchheit, op.cit.*4, p.87.

[43] *R.S.Clark,* 'The Decolonisation of East Timor and the United Nations Norms on Self-Determination and Aggression', in International Law and the Question of East Timor, published by the Catholic Institute for International Relations and International Platform of Jurists for East Timor, 1995, p.89

[44] For details see *R.Rosenstock,* 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', 65 *AJIL* 1971, pp.713-735.

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development"."

However, paragraph 2 should be read in conjunction with paragraph 7, which states:

"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 or independent states conducting themselves in compliance with the principle of (self-determination) and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[45]

As argued by Morocco in the *Western Sahara* case,[46] when these two paragraphs are read together two principles can be discerned:

I) self-determination as indicated in paragraph 2 of the Resolution; and

2) the principle of national unity and the territorial integrity of nation-States as guaranteed in paragraph 7.

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[45] See further GA Res. 1654/16), The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and People, 1066th plenary mtg, 27 Nov. 1961. In the preambular paragraph, emphasis was placed on "partial or total disruption of national unity and territorial integrity".

[46] *Western Sahara* (Advisory Opinion) Order of 3 Jan. 1975 *ICJ Report*, pr.49, p.29.

The effect of paragraph 2 is deliberately restricted by paragraph 7[47] which operates more or less as a subordinate clause to paragraph 2. More emphasis is thus placed on the territorial integrity of States. This principle is a continuation of the earlier position taken in the UN Charter and the Colonial Declaration. Mauritania argued in the *Western Sahara* case that the principle of self-determination cannot be disassociated from that of respect for national unity and territorial integrity. It also emphasised that in certain cases a priority should be given to territorial integrity.[48] In fact, some States attempted during the debate on the Friendly Relations Declaration to give priority to political unity over any other concerns. For example, the representative of Madagascar requested at the 871st meeting of the 6th committee that Madagascar's proposal emphasising five principles should be discussed. Amongst them, sovereignty of States, territorial integrity and the condemnation of subversive activities of an internal or external nature are prominent.[49] Morocco also voiced its concerns about seditious movements within the boundaries of independent States.[50] Czechoslovakia's opinion was that peoples' right to self-determination "connoted the right of a State freely to decide its destiny, including its form of statehood, and to choose the system and institutions which it deemed most appropriate".[51] Another representative stated that though peoples' right to self-determination meant their

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[47] See *Higgins, supra*,1, pp.117-121; *P.Thornberry,* 'Self-Determination, Minorities and Human Rights: A Review of International Instruments', 38 *ICLQ*, 1989, pp. 867-889.

[48] *Western Sahara, supra*, 46, pr.50, p.29.

[49] A/C.6/SR. 871, 8 Nov. 1965, pr. 12, p.188. See Madagascar's resolution, A/5757, Add. 1.

[50] A/C.6/SR. 883, 26 Nov. 1965, pr.31, p.257.

[51] A/C.6/SR. 886, 1 Dec. 1965, pr.54, p.279.

inalienable right freely to determine to chose the way of life they wanted, the principle should not be invoked by minorities within a State to cause its dismemberment.[52]

The Report of the Special Committee on Friendly Relations pointed to the fact that the overwhelming opinion of States was against any suggestion that minorities as peoples could exercise the peoples' right to self-determination or secede on that basis. The Committee reported:[53]

> "Certain representatives were of the opinion that the principle was a universal one and applied to all peoples and places. Other representatives, however, drew attention to the difficulties that would be involved with respect to the right of self-determination, should the expression be used without definition. It would, they pointed out, encourage secessionist movements within the territories of an independent State. As observed by one representative, every ethnic, cultural or geographical group within a sovereign state would consider it had the immediate and unqualified right to the establishment of its own states. This representative was of the view, therefore, that the right of self-determination should be regarded as referring to the right of a majority within a generally accepted political unit".

Paragraph 7 should not be interpreted as authorising or encouraging any form of secession or separatist movements.[54] Both paragraphs 2 and 7 should be read and construed in accordance with the broader principles of the UN Charter supporting territorial integrity

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[52] Ecuador's statement, A/C.6/SR. 891, 6 Dec. 1965, pr.54, p.316. See also GAOR, Agenda Item 87, Annexes (xxii) 1967 (on Friendly Relations), pr. 68, p. 81.

[53] *Ibid.* pr. 63, p.80.

[54] The Committee on the Elimination of Racial Discrimination, General Recommendation, XXI, UN Doc. A/51/18, 1996, pr.11, 5 (1) *IHHR* 1998, pp.19-20.

and the sovereignty of States. These two terms, territorial integrity and sovereignty, are interrelated and voluminous UN documents repeatedly assert the significance of them as fundamental principles.[55]

For this reason, the Friendly Relations Declaration does not allow peoples to secede or break away by violating the territorial integrity of the State. If we were to interpret the Friendly Relations Declaration more generously so as to cover minorities' rights to self-determination, thereby conceding their right to secede, it could be like opening a Pandora's box. Indeed, there is a hidden danger that minorities might be used by ethno-politicians to pursue their aggressive agendas or subversive activities. Thus Eide argues that exaggerated and misconceived interpretations of the right to self-determination might encourage secessionist groups.[56] Moreover, as stated by the Committee on the Elimination of Racial Discrimination in its General Recommendation "a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security".[57]

The Friendly Relations Declaration should also be seen as a continuation beyond the colonial principles enunciated in the Colonial Declaration. The interrelationship

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[55] See the following UN Documents, UN Charter Art 2 (4); Article 111 (3), the Charter of the Organisation of African Unity, 1963; See also the following Case laws, *Frontier Dispute Case* (*Burkina Faso* v *Republic of Mali*) 1986 *ICJ Reports*, 554, p.565. Military and Paramilitary Activities in and against Nicaragua, *Nicaragua case* [1986] *ICJ Rep.* 14. See more details below. See also the judgment of the Russian Constitutional Court, 31 July 1995 on the unilataral declaration of secession by Chechnya, reprinted in the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1, cited in *P.Gaeta*, 'The Armed Conflict in Chechnya before the Russian Constitutional Court, 7 (4) *EJIL* 1996, p.565.

[56] ESCOR. E/CN.4/Sub.2/1993/34, pr.79, p.17.

[57] *Op.cit.*15, pr.11.

between these two documents cannot be ignored in interpreting and understanding the true legal structure of the phrase peoples' right to self determination.[58] Higgins states that "both GA. Res. 1514 (XV) and 2625 (XXV) - each of which emphasises self-determination - caution against anything being interpreted to violate territorial integrity... . This is a standard formula, and is almost invariably to be found in instruments that affirmed the right of self-determination, as if to set the limits to that right or at least to provide a counterweight".[59] These cautious and logical views were reflected in Cristescu's final report on the right to self-determination. He stated that *peoples* should not be interpreted so as to encourage secessionist or irredentist movements.[60]

The upshot is that the right enshrined in paragraph 2 is to be applied within existing boundaries. This conclusion is supported by some of the earlier UN General Assembly resolutions. For example, the resolution on Eritrea emphasised that the right to self-government (which was identified with the right to self-determination in the case of Non-Self-Governing Territories and nations living in colonies), should be enjoyed "while at the same time respecting the Constitution, institutions, traditions and international status and identity of others... ."[61] GA Res. 545 (vi) 5 Feb. 1952 stated that it should be exercised in conformity with the purposes and principles of the United Nations. This operates reciprocally. States for their part, should show the fullest respect for the

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[58] *Higgins, supra*, 1, p.121.

[59] *Ibid.* p.121.

[60] Cristescu's report, *op.cit.*26, pr.268, p.39.

[61] GA Res. 390 (v) 14 Dec. 1950, Preambular paragraph C.

inhabitants of their territories, and are obliged to safeguard their institutions, traditions, religions and languages. Minorities, on the other hand, are expected to behave as loyal citizens.

8.4 *Can the Legitimacy of Secession be Discerned in Paragraph 7 of the Friendly Relations Declaration* ?

The second part of paragraph 7 of the Friendly Relations imposes some conditions upon States:

i) States should conduct their activities in compliance with the principle of self-determination;

ii) States should possess a democratic government which represents the whole people; and

iii) States should not discriminate against their subjects or persecute minority groups on the grounds of race, creed, colour etc.

Thus it emphasises the necessity of having a democratic government representing the whole peoples in the territory without distinction as to race, creed or colour. States must afford minorities the rights recognised in international law.[62] If no such guarantees exist in

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[62] The Committee on the Elimination of Racial Discrimination, General Recommendation XXI, 1996, UN Doc. A/51/18, PR.11, 5 (1) *IHRR* 1998, p.20. See also ss.25, 26 and 27 of the Vienna Declaration and Programme of Action 1993, 32 *ILM* 1661, 1993, pp.1663-1687. This aspect of States' obligations and requirements of representative government was emphasised by western powers, notably by the UK. See GAOR, Agenda Item. 87, Annexes (xxii) 22nd session, 1967, pr. 176, p.29. See further, the decision of the Special Arbitration Commission on Yugoslavia (Badinter Commission), Opinion no. 1, 31 *ILM* 1494, 1992, pr.3, p.1497 and Opinion no.2, 31 *ILM* 1497, 1991, pr.2, p.1498.

a given State, then the secessionist claim may be accepted as justifiable. Cassese concludes that when it is absolutely apparent that internal self-determination is absent from the system and racial or religious groups are being subject to extreme and unremitting persecution, such an environment might make secession legitimate.[63] In fact, as Cassese correctly points out, elements of secessionist rights can be discerned in paragraph 7 of the Friendly Relations Declaration under certain very strict circumstances.[64]

Shaw also agrees that where human rights are grossly violated and internal self-determination is alarmingly absent, secession may, as a last resort, be recognised by the international community.[65] Nonetheless, Shaw states that such a scenario is in practice unlikely. He emphasises that territorial integrity is given prominence over the right to internal self-determination in non-colonial settings. Shaw's arguments are in fact very persuasive. He does not think that paragraph 7 was under any circumstances intended to be used as a license to attack the territorial integrity of a given State. He argues:[66]

> "The implication here is that, by reversing the proposition, States that do not so conduct themselves are not protected by the principle of territorial integrity. This, however, is hardly acceptable. Such a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed

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[63] *Cassese, supra*, 2, p.120. See also *J.Klabbers* and *R.Lefeber*, 'Africa: Lost Between Self-Determination and Uti Possidetis', in *Brolman et al* (eds.), Peoples and Minorities, pp.45, 46 and 53.

[64] *Cassese, ibid.* p.123.

[65] *Shaw, supra*, 14, p 483.

[66] *Ibid.* p.483.

before the qualifying clause in the provision in question...the inevitable and unavoidable starting point remains that of the primacy of the principle of territorial integrity".

Hannum's argument is in agreement with the thesis that Friendly Relations Declaration placed the importance of territorial integrity and political unity above that of other concerns, i.e. peoples' right to self-determination.[67] Capotorti's arguments are to a greater or lesser extent in agreement with Cassese rather than Shaw. While emphasising that minorities as such do not have a legal right to self-determination according to customary international law, Capotorti admitted, however, that when a particular minority group is subjected to discrimination based on race, creed or colour they may have some reasonable claim to secession.[68] Nanda argues that, "under specific circumstances, the principle of self-determination is to be accorded priority over the opposing principle of territorial integrity".[69] He admits that paragraph 7 of the Friendly Relations Declaration might open the door to secession under specific circumstances though there is no procedure to guarantee a smooth transition to Statehood. Nonetheless, as he correctly points out, recognition of secessionist claims would not be that easy. Nanda notes:

"Even assuming the legitimacy and permissibility under international law of the right to secede, many difficult definitional hurdles remain before this right could be applied and implemented. To establish the minimum standards of legitimacy, it is necessary to identify: (i)

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[67] *H.Hannum*, 'Rethinking Self-Determination', 34 *VJIL* 1993, p.17.

[68] *F.Capotorti*, 'Are Minorities Entitled to Collective International Rights', in *Y.Dinstein* and *M.Tabory* (eds.) The Protection of Minorities and Human Rights, Kluwer Law: Dordrecht/ Boston/ London, 1992, p.510.

[69] See opposite view *Nanda, op.cit* 10, p.270.

> the group that is claiming the right of self-determination; (ii) the nature and scope of their claim; (iii) the underlying reasons for the claim; and (iv) the degree of the deprivation of basic human rights".[70]

Even in such a case, secession is considered to be the last resort. He notes that there must be compelling evidence to prove that any action short of secession would not remedy the situation.[71] However, he points out that it would be dangerous and unworkable to accord legitimacy to secession based on ideological grounds.[72]

According to the Secretariat of the International Commission of Jurists, 1972 (Commission of Jurists), peoples' rights to have a democratic governance are recognized by the right to self-determination. Analysing the events in East Pakistan in 1971, which ultimately led to the creation of Bangladesh, the Commission of Jurists was of the view that:

> "That the principle is subject to the requirement that the government does comply with the principle of equal rights and self determination and does represent the whole principle without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full rights of self-determination will revive".[73]

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[70] *Ibid.* p.275.

[71] *Ibid.* p.276.

[72] *Ibid.* p.277.

[73] *The Secretariat of the International Commission of Jurists,* The Events in East Pakistan, H. Studer: Geneva, 1972, p. 69.

The Commission found justification in the East Pakistan insurrection against West Pakistan's military aggression. The Government of Pakistan was alleged to have discriminated against the East Pakistan peoples for a long time in almost all fields on the basis of ethnicity. Continuous economic exploitation and subjugation of East Pakistan by West Pakistan since the 1950s was identified by the Commission of Jurists in the context of neo-colonialism.[74] Nanda also argues that the prevailing situation in East Pakistan in 1971 and before warranted the resort to self-determination by East Pakistan.[75]

8.5 *There is No Right to Secession Explicitly or Implicitly Provided For in Article 27 of the ICCPR*

It is often argued that when article 27 is read in conjunction with article 1 (2) minorities' claims as political or social groups for self-determination are valid. Article 27[76] does confer some limited traditional civil and political rights upon persons belonging to ethnic, religious and linguistic minority groups. These rights have some resemblance to classical political and civil rights.

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[74] *Ibid*, p. 79, See also *V.S.Mani*, 'The 1971 War on the Indian-Sub Continent and International Law', 12 *AJIL* 1971, p.84. See further *S.K.Agrawala*, 'New Norm-Creating Potentialities of Bangladesh Tragedy in the Area of Human Rights' in *R.P.Dhokalia* (ed.), Essays on Human Rights in India, B.H.Univ: Varanasi, 1978, pp.140-146.

[75] *Nanda, op.cit.* 10, p.336.

[76] It is the only binding provision, according to Nowak, in international and human rights treaty laws for the protection of minorities. See *M.Nowak*, UN Covenant on Civil and Political Rights: CCPR Commentary, NP. Engel: Strasbourg, 1993, pp. 482-83.

The wording of this article unequivocally suggests that it is only individuals belonging to minority groups who can claim benefit under it.[77] Although article 27 has collective elements, as noted by the Human Rights Committee[78] it does not guarantee any political rights stipulated in article 1 on a collective basis. Individuals or groups of individuals can complain about violation of rights contained in articles 6-27.

During the debate on article 25 of the proposed covenant on human rights (it became the present article 27 of the ICCPR), many States stressed that 'article 25 rights' should be a minimum right accommodating only rights for individuals belonging to minorities, not minorities as such.[79] Some States were of the view it should guarantee no more than the cultural, religious and linguistic practices of persons belonging to minorities.[80] Article 25 rights when exercised, argued Turkey, "must not conflict with public safety, public morality or national law".[81] Mali's representative stressed that "while enjoying the rights stated in article 25, minorities should not be given the rights which

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[77] See *D.Sanders*, 'Collective Rights', 13 *HRQ* 1991, p.376. See also following decisions of the Human Rights Committee, *Chief Ominayak and the Lubican Lake Band* v *Canada*, communication no. 167/1984 in 11 *HRLJ* 1990, p. 305; *Ivon Kitok* v *Sweden*, Communication no 197/1985; *Sandra Lovelace* v *Canada*, communication no. 24/1977, 2 *HRLJ* 1981, p.158: *Mikmaq Tribal Society*, communication no. 205/1986, in 5 *HRLJ* 1984, p.194.

[78] General Comment no. 23/50 on article 27 / minority rights, under art.40, pr.4 of the ICCPR, pr. 3.2, 4 and 5.3. The full text, 15 (4/6) *HRLJ* 1994, pp. 234-236. The Committee held that "there is no objection to a group of individuals, who claimed to be similarly affected, collectively to submit a communication about alleged breaches of their rights". See *Lubican Lake Band*, *ibid.* p. 311.

[79] A/C.3/SR.1103, 14 Nov. 1961, pr.39, p.222 (Australia).

[80] A/C.3/SR. 1004, 14 Nov. 1961, pr.16, p.220 (Pakistan).

[81] *Ibid.* pr.20, p.220 (Turkey).

would permit them to gain national ascendancy".[82] Any "special political privileges", according to the delegate of Saudi Arabia, were not meant by article 25. He further stressed that minorities must remain loyal citizens.[83] Minorities, in the view of the Libyan delegate, could not within the ambit of article 25 enjoy rights in violation of the rights of majorities.[84] Nicaragua[85] and Australia[86] also entertained a similar view.

There is an unbridgeble difference between articles 1 and 27. Whilst peoples' right to self-determination is enshrined in article 1 (2), the rights of individuals belonging to minorities are included in article 27.[87] Minorities as such have no right to self-determination based either on Article I or 27 of the ICCPR. The Badinter Commission has given a wider interpretation to article 1. It concluded.[88]

> "Article 1 of both of the two 1966 International Covenants on Human Rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right *every individual* may choose to belong to whatever ethnic, religious or language community he or she wishes".

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[82] *Ibid*. pr.21, p.220.

[83] *Ibid*. pr.32, p.221.

[84] *Ibid*. pr.38, p.222.

[85] *Ibid*. prs.36-37, p.222.

[86] *Ibid*. pr.39, p.222 and prs.36-37 (Nicaragua).

[87] *Higgins*, *supra*, 1, p.127. See *T.M Franck*, 'The Emerging Right to Democratic Governance', 88 *AJIL* 1992, p.58.

[88] Emphasis added. The Badinter Committee, opinion, no.2, 31 *ILM* 149.,1992, pr 3. p.1498.

Capotorti stated, "In the structure of the Covenants there is, undoubtedly, a clear distinction between the right conferred on all peoples in Article 1 and the rights of persons belonging to minorities in Article 27".[89] He noted that it is impossible to read article 1 as conferring any right of secession or special autonomy on minority groups living in States which are well structured in democratic governance.[90] One of the architects of the UDHR and the drafting of the Covenant on human rights, a former Director of the United Nations Division of Human Rights, came to the conclusion that article 1 did not recognise secession except for colonies.[91] The Human Rights Committee's position is also that there is a distinction between article 1 (2) and 27 of the ICCPR.[92] The Human Rights Committee in its general comments stated that "the enjoyment of the right to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party". However, the HRC recognised that some of the rights relating to individuals belonging to minority groups have been "closely associated with territory and use of its resources".[93] The HRC commented:

> "In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination

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[89] *F.Capotorti*, 'The Protection of Minorities under Multilateral Agreements on Human Rights', 12 *IYBIL* 1976, p.9.

[90] *Ibid.* p.21. See *Franck*, *op.cit.* 87, p.58.

[91] *J.P.Humprey*, Human Rights and the United Nations: A Great Adventure, Transnational Publishers, inc: New York, 1984, p.129.

[92] Human Rights Committee, General Comment, no. 23/50 art. 27, UN Doc. CCPR/C/21/Rev. 1/ Add. 5 (1994). See full text, 15 (3/4) *HRLJ* 1994, pp.234-236.

[93] *Ibid.* pr.3.2.

> proclaimed in article 1 of the Covenant...The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in part III of the Covenant and is cognizable under the Optional Protocol".[94]

In the view of the Human Rights Committee, article 1 does confer a right of self-determination only upon peoples as such. The Band members' attempt in the case of *Lubican Lake Band* to seek remedies under art. 1 of the ICCPR on the basis that their right to self-determination was violated by misappropriation and destruction of their environmental and economic base, and by proposed developments by the Canadian government threatening their way of life and culture was not successful. The Human Rights Committee preferred to investigate the dispute under article 27.[95] The Committee held in its views that individuals could not claim under the Optional Protocol alleging that they were victims of a violation of the right to self-determination under article 1. Confirming this position further in its final views of 26 March 1990 the Committee held that a group of people had no procedural rights provided under the Optional Protocol to pursue a case of alleged violation of self-determination against a State.[96] An attempt by a

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[94] See pr. 1 and pr. 8. See also GAOR, 39th session, supl. no. 40, A/39/40, Annex VI, General Comment no. 12/21, article 1, 95th session, supl. 40, A/45/40, vol. II, Annex IV, Sect. A.

[95] No. 167/1984, 11 *HRLJ* 1990, p.311.

[96] *M.Nowak*, 'The Activities of the UN Human Rights Committee: Developments From 1 August 1989 Through 31 July 1992', 14 *HRLJ* 1993, p.16.

group of residents of the South Tyrol under article 1 in *A.B et al* v *Italy*[97] was rejected by the Human Rights Committee. The Committee held in its views that an individual could not claim under the Optional Protocol alleging that he was victim of a violation of the right to self-determination under article 1. In *San Andres* v *Colombia* the communication of a group of English-speaking Protestants in the island of San Andres claimed that their right to self-determination had been violated by the Colombian government by "systematic Colombianization of their island employing immigration policies, tourist industry, militarisation, employment discrimination, education policy etc".[98] Rejecting their communication the Human Rights Committee held that the individual communication procedure enshrined in the Optional Protocol does not apply to art. 1 of the ICCPR. In the case of *Whispering Pines Indian Band*,[99] the Committee reaffirmed the position taken by earlier cases.

On the other hand, persons belonging to minorities cannot for all practical purposes seek secession under article 1 or 27 because without a collective basis secession is only a mirage. Of course, individuals in minority communities can enjoy certain rights under Article 27 in their personal capacity, but not minorities as such.

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[97] Communication no. 413/1990, Decision of 2 Nov. 1990, 12 *HRLJ* 1991 p. 25.

[98] Communication no. 318/1988. Decision of 25 July 1990, See *Nowak, supra*, 96, p.14.

[99] Communication no. 358/1989, Decision of 5 Nov. 1991. See *Nowak, ibid*. p.16.

8.6 *The UN Declaration on Minorities Does Not Explicitly or Implicitly Provide For a Right to Secession*

The Declaration on the Right of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992 recognises that the rights conferred by the Declaration would not allow the sanctity of territorial and political unity of States to be violated.[100] The travaux_preparatoires reveal that many States reiterated their concerns about the possible effect on the territorial and political integrity of States unless safety measures were embodied in the Declaration. For example, Bulgaria and the USSR presenting an amendment[101] to the proposed article 5 urged: "In ensuring and promoting the rights of minorities, strict respect for the sovereignty, territorial integrity, political independence and non-interference in the internal affairs of those countries in which minorities live should be observed". The Representative of the Four Directions Council also placed emphasis on territorial integrity while arguing that minorities' rights be guaranteed. He proposed: "Nothing in the present Declaration shall be interpreted as permitting any activity which is contrary to the purposes and principles of the United Nations".[102] The representative of the Ukraine stressed that :

> "persons belonging to minorities shall respect the human rights and fundamental rights of others and refrain from activities which prejudice the promotion of mutual understanding,

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[100] See preambular pr. in 14 *HRLJ* 1993, p.54.

[101] E/CN.4/Sub.2/L.734, see ESCOR, E/CN.4/1989/36, Annex III, included in ESCOR, E/CN. 4/1989/38/ 7 March 1989, p.14.

[102] ESCOR, E/CN.4/1989/WG. 5/WP. 2, cited in ESCOR, E/CN.4/1989/38/7 March 1989, pr. 38, p.9.

tolerance, good neighbourliness and friendship among nations and racial or ethnic groups in conformity with the principle enshrined in the United Nations Charter and with international instruments in the field of human rights".[103]

Though participatory rights of persons belonging to minorities at national and regional level in the areas of cultural, social, economic and public life have been recognised by art. 2 (3) "within a democratic framework based on the rule of law",[104] they should exercise these rights in a manner not incompatible with national legislation. Commitments expected from States by arts. 4-7 are not obligatory. In fact they are very vague and imprecise. Terms contained in arts. 2-3 such as, 'encourage conditions', 'the State should consider appropriate measures', 'the State shall protect', 'the State shall fulfil in good faith', 'obligations and commitments that they have to assume', do not impose any binding obligations on States. Commitments and obligations rely on the goodwill of States. Should a State fail to take appropriate measures or fail to implement any of these obligations, can minorities opt for secessionist or irredentist paths? There is not even a glimpse of such a possibility to be discerned in the UN Declaration on Minorities, 1992.

Emphasis is placed by article 8 (2) on persons belonging to minorities so that the right set forth in the Declaration shall not prejudice enjoyment by all persons of universally recognized human rights and fundamental freedoms.[105] Article 8 (4) states:

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[103] ESCOR, E/CN.4/1989/WG. 5/WP. 3, included in ESCOR, E/CN.4/1989/38, p. 9, pr. 4.

[104] See the Preamble of the UN Declaration on Minorities, 1992.

[105] See *G.Alfredsson* and *A.de.Zayas*, 'Minority Rights: Protection by the United Nations', 14 *HRLJ* 1993, pp.1-9; *B.I.Omenga*, 'The Draft Declaration of the United Nations: On the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities', The International Commission of Jurists, *The Review* 1991, pp.33-41.

"Nothing in this Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States".

Therefore, any exercise of the rights recommended by the Declaration by a section of a population of a given territory will not be valid if such activities have a harmful effect on other communities.

The Chairman-Rapporteur Ms Zagroka Ilic of the Working Group on Minorities also reminded other members of the Working Group that their role mandated by the Commission resolution 1995/24, was, while finding ways and means to implement the rights contained in the Declaration, to make sure that the territorial integrity and political independence of States were protected.[106] The position taken by the above UN treaties and resolutions was reaffirmed by the Vienna Declaration and Programme of Action, 1993. In its section 2 having affirmed that all peoples have a right to self-determination, it was emphasised that this right "should not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States having democratic and representative government."

[106] The Report of the Working Group on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, ESCOR, E/CN.4/Sub.2/1996/2 30 Nov. 1995, pr.27, p.8.

8.7 *"Frontiers Can Only be Changed by Peaceful Means and by Common Agreements"*

The stability of frontiers and the acceptance of existing internationally recognised boundaries now come under *uti possidetis juris,*[107] and are considered a general principle of international law.[108] Any violation of the boundaries of a State amounts to aggression against a State within the meaning of the GA Resolution 3314 (xxix) on the Definition of Aggression.[109] Changes to boundaries can take place without involving aggression or the use of force, by peaceful means, and by common agreement. The static nature of this principle suggests that inter-State activities and the domestic functions of the nation-State are to operate within existing boundaries. *Uti possidetis juris* is concerned with territorial *status quo* or territorial sovereignty of States. Thus, *uti possidetis juris* provides legitimacy both for existing States and newly independent States,[110] and "acts as a counter-weight to other legitimizing principles such as ethnic, religious or historic affinities".[111] It was developed, as Judge Abi-Saab in his separate opinion in *Burkina Faso* v *Republic of Mali*

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[107] *M.N.Shaw*, Title to Territory in Africa: International Legal Issues, Clarendon Press: Oxford, 1986; See further *M.N.Shaw*, 'The Heritage of States: The Principle of Uti Possidetis Juris Today', 67 *BYIL* 1996, pp.76-154. See *Cassese, supra*, 2, pp.190-193; *Klabbers* and *Lefeber, op.cit.* 63, pp.54-70.

[108] *Burkina Faso* v *Republic of Mali, op.cit.*55, p.565. Further see Opinion no. 3, principle 3, Badniter Committee , 31 *ILM* 1488, 1992 pp.1499-1500; See also *A.Pellet,* 'The Opinions of the Badinter Committee: A Second Breath for the Self-Determination of Peoples', 3 *EJIL* 1992, pp.178-181.

[109] *Shaw, op.cit.* 107, p.77.

[110] *Ibid.* p.97.

[111] *Ibid.* p.98.

held, as a means of "preventive conflicts".[112] Although the origin of *uti possidetis juris* lies in Roman law, it was first applied in Latin America in the 19th century,[113] then in Africa it developed as an established principle. Similarly Asia and Europe have adopted the principle of the sanctity of existing boundaries in their inter-State relations.

Indeed from the 1960s it was African States which further developed this principle. Considering that border problems constituted "a grave and permanent factor of dissension", the Assembly of Heads of State and Government at Cairo in 1964 (Cairo Resolution) pledged (article 2) themselves to respect existing frontiers on their achievement of national independence. This is the reaffirmation of article III of the Charter of the OAU, 1963.[114] The Cairo Declaration, as Brownlie noted, limits the operation of the right to self-determination in the post-colonial African States in order to guarantee the stability of territorial integrity and the political independence of newly independent African nation-States.[115] In 1967 a resolution adopted by the Assembly of Heads of State and

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[112] *Supra*, 55, p.661.

[113] The starting point of this principle in Latin America is considered to be the adoption of the Treaty of Confederation signed by the Congress of Lima in 1847. See *I.Brownlie*, Principles of Public International Law, Clarendon Press: Oxford, 1990 4th ed. p.134. See also the 5th edition, 1998, pp.132-133.

[114] See *I.Brownlie*, Basic Documents on African Affairs, Clarendon Press: Oxford, 1971, pp.1-17.

[115] OAU Resolution on Border Disputes, 1964 (OAU Doc. AHG/Res. 16 (1)), *ibid.* pp. 360-361. It is worth noting that Somalia and Morocco did not ratify this resolution. See also *I.Brownlie*, African Boundaries: A Legal and Diplomatic Encyclopedia, Hurst and Comp: London, 1979, pp. 9-11. See further *S.Touval*, 'The Organization of African Unity and African Borders', 21 *International Organization* 1967, pp. 102-127. See also articles 2 (1) and 3 (3) of the Charter of the Organisation of African Unity 1963 which placed emphasis on the territorial integrity of African States inherited from the colonial empires.

Government of the OAU at its 4th ordinary session at Kinshasa deplored secessionist attempts against existing African States.[116] An OAU resolution on the 'Situation in Nigeria', 1967, reaffirmed this position.[117] The sanctity of boundaries was once again affirmed in the Cairo Declaration on Somalia, 1997.[118]

In *Burkina Faso* v *Mali*[119] the request of both parties was that the frontier dispute be resolved, "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization, and to effect the definitive delimitation and demarcation of their common frontiers".[120] It was held that the obvious purpose of the application of *uti possidetis* was "to prevent the independence and stability of new States being endangered by fratricidal struggles..."[121] The Chamber concluded that *uti possidetis juris* would be of value to the African peoples in preserving what has been achieved by them and "to avoid a disruption which would deprive the continent of the gains achieved by so much sacrifice."[122] Judge Ad Hoc Abi-Saab stated that without stable frontiers, the exercise of self-determination is in reality a mirage.[123]

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[116] OAU Declaration on Kenya-Somali Relations, 1967. See *Brownlie, supra*, n.115, pp. 362-363. Further see *O.S.Kamanu*, 'Secession and the Right of Self-Determination: An OAU Dilemma', 12 *The Journal of Modern African Studies*, 1974, p.370.

[117] Brownlie, *supra*, n.113, pp. 364.

[118] SC Res. 1000, 29 Dec. 1997, Annex, the full text in 37 *ILM* 780, 1998, pp.781-787.

[119] *Burkina Faso v Republic of Mali, op.cit.* 55, p.554. See also *G.J.Naldi*, 'The Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali): Uti Possidatis in an African Perspective', 36 *ICLQ* 1987, pp.893-903; *K.Oellers-Frahm*, 'Frontier Dispute Case (Burkina Faso v Mali)', in 12 Encyclopedia of Public International Law, 1990, pp.122-126.

[120] *Burkina Faso, ibid.* p.557.

[121] *Ibid.* p.565.

[122] *Ibid.* pp.566-67.

[123] *Guinea-Guinea-Bissau Maritime Delimitation Case*, 77 *ILR* 1988, pp. 636-692.

This principle has also been applied in Asia. Although the ICJ did not mention the principle of *uti possidetis* as such in *Preah Vhear,*[124] the judgment delivered was in fact based on *status quo* boundaries between Thailand and Cambodia thus admitting the principle in Asian countries.

The opposition to secessionist attempts to change existing internationally recognised boundaries and territorial sovereignty of States by aggression or use of force has been more prominent in the 1990s than at any other time in post-war Europe. The European position has been hardened by the unexpected surge of ethnic particularism mixed with militant and anarchic tendencies since the Cold War ended (especially in Central and Eastern Europe), and by their effect on the "overall stability, the unification and democratisation of European States".[125] Most States were taken by surprise by the speed with which these new developments sprung up in the form of "a manifestation of aggressive nationalism".[126] The disintegration of the former USSR and the Socialist Federal Republic of Yugoslavia still rings alarm bells across the frontiers of the European continent. In addition to the human cost arising out of ethnic conflicts, Western Europe itself has to shoulder the consequences of these economic and social upheavals.[127] For example, referring to the Balkan ethnic conflicts, the US delegate warned about their

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[124] *Case Concerning the Temple of Preah Vihear, Cambodia v Thailand* (Merits) *ICJ* Report, 1962 p.34. See also *Rann of Kutch case*, award, 7 *ILM* 633, 1968

[125] Human Rights: A Continuing Challenge for the Council of Europe, Council of Europe: Strasbourg, 1995, p.45.

[126] CSCE Budapest Document of 6 Dec. 1994, see the full text, 15 (11/12) *HRLJ* 1994, p.449-458.

[127] *M. Weller*, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 *AJIL* 1992, p.580.

"dangerous impact on Yugoslavia's neighbours, who face refugee flows, energy shortfalls and the threat of a spillover of fighting".[128] Western Europe was deeply concerned about the fighting and indiacriminate bloolshed that took place in the heart of Europe.[129] Addressing the UN General Assembly on 24 Sept. 1991, the President of the Council of European Communities referred to the scenario of "uncontrolled and violent fragmentation" occurring in the heart of Europe due to extreme nationalism and ethno-centrism, which, in his view, bring "shame, bloodshed and suffering to our continent".[130] Military activities involving different ethnic groups caused especial concern amongst the members of the OSCE, the EU[131] and the Heads of State or Government of the seven major industrial nations.[132]

With this understanding, it was widely accepted by the European institutions (mainly, the Council of Europe, OSCE, EU) that there should be immediate action to secure the effective protection and promotion of ethnic, cultural, linguistic and religious

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[128] SC Res. 23067, 25 Sept. 1991.

[129] The joint statement by the Community and its Member States on 6 Nov. 1991, 24 (11) *Bull. EC* 1991, p.91.

[130] Statement by Mr.Hans van den Broek, the President of the Council of the European Communities to the UN GA on 24 Sept. 1991, 24 (9) *Bull.EC* 1991, p.87. See also the statement made by Presidential Meeting between Mr. Delors, Mr. Lubbers and Mr. Bush (EC-US), 24 (11) *Bull. EC* 1991, p. 93.

[131] See the Joint statement of the Community and its Member States on Yugoslavia of 2 Aug. 1991, 24 (7/8) *Bull EC.* 1991, p.112 ("The Twelves' strong interest in a peaceful solution to Yugoslavia's problem, not only for the sake of Yugoslavia itself and its constituent peoples, but for Europe as a whole").

[132] See the London Declaration by the Community and its Member States on Yugoslavia adopted on 17 July 1991. 24 (7/8) *Bull. EC* 1991, pp.140-144.

identity[133] of persons belonging to national minorities within pluralist societies under the rule of law,[134] whilst respecting the territorial integrity and national sovereignty of States,[135] with a view to; a) achieving a lasting end to ethnic confrontations, and b) to preserving democracy, stability and peace within the continent.[136] A goodwill gesture was demonstrated by a decision to establish the post of High Commissioner on National Minorities by the CSCE in July 1992. However, European institutions were equally adamant that the solution should not be found by giving way to ethnic militarism thereby legitimizing secessionist and irredentist claims. This uncompromising position resulted in the proclamation of a chain of declarations and statements by intergovernmental organisations and Heads of States rejecting the legitimacy of secessionist and irredentist movements, in particular during the period 1989-1995, although there had been some initiatives from the 1970s to protect and promote the cultural dimension of minority rights. It seems that the broader liberal approach taken in the Friendly Relations Declaration

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[133] See for example Principle 4, pr.32, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, in Human Rights in International Law, Basic Texts, Council of Europe: Strasbourg, 1992, p.444. See further The Charter of Paris for a New Europe, 21 Nov. 1990. *Ibid.* p. 450. See also the Recommendation No. R (92) on the Implementation of Rights of Persons Belonging to National Minorities, in European Convention on Human Rights: Collected Texts, Council of Europe: Strasbourg, 1994, pp.340-341.

[134] CFSP Presidency statement on Cannes European Council on 26 and 27 June 1995, Presidency Conclusions (SN 211/95), p.7.

[135] See the Preamble in the Framework Convention for the Protection of National Minorities, 1995, 16 (1/3) *HRLJ* 1995, p. 98. Parliamentary Assembly of the Council of Europe, Strasbourg in Recommendations 1134/1990; 1177/1992 and 1201 /1993.

[136] See preamble in the Proposal for an Additional Protocol to the ECHR concerning Persons Belonging to National Minorities, 14 *HRLJ* 1993, p.145.

(pr.7) was followed in most of the resolutions, declarations and treaties adopted in Europe during this period. In particular, the phrase "States conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" was enshrined together with the human dimension. It was further emphasised that the active involvement of persons, groups, organisations and institutions would be essential to ensure continuing progress towards the achievement of a peaceful and stable Europe.[137] However, it was reiterated that minority rights should be exercised within existing boundaries in compliance with domestic and international law. The culmination of this process was reached with the pronouncements of a series of Opinions by the Badinter Commission as will be shown in detail below.

8.8 *From the Helsinki Final Act to the Badinter Committee*

The point of departure in the human dimension of the CSCE commenced with the Helsinki Final Act, 1975.[138] The main objective, as enshrined in the preamble, was to "promote better relations among signatory States and to ensure conditions in which their people can live in true and lasting peace free from any threat to or attempt against their security". Even though certain human rights and fundamental freedoms and most importantly "equal rights and self-determination of peoples" (Principle VIII) were enshrined in the Final Act as some of its objectives, the emphasis was placed on the requirements that parties should

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[137] The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Preamble, p.426.

[138] See the full text in Human Rights in International Law, Basic Rights, Council of Europe: Strasbourg, 1992, pp.363-402.

refrain from the threat or use of force (Principle II); the inviolability of boundaries (Principle III) and the territorial integrity of State (Principle IV). Principle I states that "they consider that their frontiers can be changed, in accordance with international law by peaceful means and by agreement". However, principle III operates as a subordinate clause to principle I. The former emphasised that the participating States should regard one another's boundaries as inviolable. Will this enable "peoples" (mentioned in Principle VIII) to pursue their political, economic, social and cultural development as they wish ? It is worthy of mention that the rights recognised in Principle VIII are to be exercised in harmony with the ideals enshrined in Principle III. Campaigns for peoples' right to self-determination should be within the confines of the existing boundaries of European States. Any elements of secessionist rights are absent in the Helsiniki Final Act.

The Ten Principles adopted by the Helsinki Final Act have been the foundation for subsequent European declarations and treaties. Having affirmed its commitment to the Principle VIII enunciated in the Final Act, the CSCE Concluding Document of the Vienna Meeting on the follow up to the Conference 1989 confirmed its "commitment strictly and effectively to observe the principle of the territorial integrity of States".[139] Principle V stressed that "no actions or situations in contravention of this principle will be recognized as legal by the participating States of the Conference on the Human Dimension of the CSCE". The Document of the Copenhagen Meeting, 1990 in its Principle IV (37) states:

> "None of these commitments may be interpreted as implying any right to engage in activity or perform any action in contravention of the purposes and principles of the Charter of the United

[139] Principle V, 10 *HRLJ* 1989, p.273.

Nations, other obligations under international law or the provisions of the Final Act, including the principle of territorial integrity of States".

This prohibition clause was to appear in almost all European declarations, resolutions or treaties which dealt with either the security of Europe or the human dimension of the issues emanating from minorities problems. *In the Charter of Paris for a New Europe,* 1990,[140] under the sub-title 'Security', it was stated that the Heads of State or Government of the States of the CSCE were "determined to co-operate in defending democratic institutions against activities which violate the independence, sovereign equality or territorial integrity of the participating States". These include illegal activities involving outside pressure, coercion and subversion. The *EC's Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,* 16 Dec. 1991, also confirmed the commitment to the "inviolability of all frontiers" stating unequivocally that frontiers could only be changed "by peaceful means and by common agreement".[141] This position has continually been applied in other declarations. The European Communities, for example, insisted that "any change of internal and international borders by force is not acceptable...".[142] It was reiterated at a Ministerial Meeting of 8 Nov. 1991 that the use of force and the policy of *fait accompli* to achieve changes of borders were illusory and

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[140] 11 (4/3) *HRLJ* 1990, 381-384. See *S.J.Roth*, 'The CSCE Charter of Paris for a New Europe: A new Chapter in the Helsinki Process', 11 (3/4) *HRLJ* 1990, pp.373-379.

[141] 4 *EJIL* 1993, p. 72.

[142] See the joint statement of the Member States of the EC published in the Hague and Brussels on 2 Aug. 1991 on Yugoslavia, 24 (7/8) *Bull.EC* 1991, p. 112.

would never be recognized by the Community and its Member States of the EC.[143] The *European Charter for Regional or Minority Languages* 1992,[144] which is in many ways constructive in its approach to the protection and promotion of "the cultural dimension of regional or minority languages",[145] nevertheless in its article 5 proscribes any secessionist activities within the national borders of nation-States. It states, "Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States".

This position was continued in article 1(2) of the *Proposal for a European Convention for the Protection of Minorities,* 1991.[146] Any action contrary to the fundamental principles of international law and in particular of the sovereignty, territorial integrity and political independence of States is prohibited. Art. 15 (I) requires that any member of a minority "shall loyally fulfil the obligations deriving from his status as a national of his State". Art. 15 (2) states that when the rights set forth in this Convention are exercised by minorities, they "shall respect the national legislation, the right of others, in particular those of the members of the majority and of other minorities". This position is also maintained in the CSCE Document of the *Moscow Meeting of the Conference on the*

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[143] 24 (11) *Bull.EC* 1991, p.91. A similar statement made at the UN General Assembly debate on 24 Sept. 1991, see details 24 (9) *Bull.EC* 1991, p.87.

[144] See the full text in 14 (3/4) *HRLJ*, no. 3-4, 1993, p.148-152.

[145] See further the European Charter for Regional or Minority Language, Explanatory Report, Council of Europe Press: Strasbourg, p.5.

[146] 12 (6/7) *HRLJ* 1991, p 270.

Human Dimension of the CSCE, 3 Oct. 1992.[147] This hard-line, yet cautious and pragmatic position was re-affirmed by Article 21 of *the Council of Europe Framework Convention for the Protection of National Minorities*, 1994. This article reaffirmed both Principle IV of the Document of the Copenhagen Meeting and art. 5 of the European Charter for Regional or Minority Language. It says, "Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States".[148] It is worthy of note that especial measures were introduced in many of these documents to suspend any rights and freedoms guaranteed for minorities in case of such rights being violated to the detriment of the State and the rights of others. Article 14 of the *Recommendation* 1201 (1993) of the Council of Europe's Parliamentary Assembly on an additional protocol on the rights of national minorities to the European Convention on Human Rights provides that the rights and freedoms in this protocol can be restricted in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others".[149] The General Framework Agreement for Peace in Bosnia and Herzegovina 1995 in its article 1 stated that no one should be allowed to use "threat or use of force against the territorial integrity or political independence of independent countries.[150] The Cannes

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[147] 12 (11/12) *HRLJ* 1991, pp.471-478.

[148] 16 (1/3) *HRLJ* 1995, pp.98-101. This was opened for signature on 1 Feb. 1995.

[149] See full text in 14 (3/4) *HRLJ* 1993, pp.145-146.

[150] See the text in 18 *HRLJ* 1997, pp.309-310.

European Council in 1995[151] and the European Council meeting in Luxembourg on 12-13 Dec. 1997 reaffirmed this long-standing commitment to the integrity and inviolability of external borders and the sovereignty of States.[152] This position acquired legitimacy by the Badinter Committee's decision that existing boundaries cannot be legally changed except where the States concerned agree. As Opinion no. 3 (4) of the Badinter Committee states, the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect.[153]

8.9 *Badinter Committee: "Secessionists Will Not Be Rewarded"*

Can the break up of Yugoslavia be recognised as a secession ? Some scholars argue that Slovenia, Bosnia and Herzegovina and Croatia seceded.[154] It is noteworthy that the Conference on Yugoslavia's *Arbitration Commission* (Badinter Commission) came to its decisions by assuming that the Republic of Yugoslavia was then irreversibly in the "process of dissolution."[155] The former boundaries of the republics of the federation, it was held, would acquire the character of borders protected by international law.[156] The Badinter

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[151] See Cannes European Council on 26 and 27 June 1995 Presidency Conclusions (SN 211/95), p.5, subtitle, 'Stability, Security and Good-neighbourliness', points 1-5.

[152] Conclusion of the Presidency, 12 *Bull. EC* 1997, point 1.4.4, p. 9.

[153] Opinion no.3 of the Badinter Committee, 31 *ILM* 1488, 1992, pr.2, p.1500. See also Opinion no.2 of the Badinter Committee, 31 *ILM* 1488, 1992, pr.1, pp.1497-1498.

[154] *Y.Z.Blum*, 'UN Membership of the New Yugoslavia: Continuing or Break'? 86 *AJIL* 1992, pp. 830-833. See further *H.Hannum*, 'Self-determination, Yugoslavia, and Europe: Old Wine in New Bottle?', 3 (57) *Transanational Law Contemporary Problems* 1993, pp.58-69.

[155] Opinion no.1, 31 *ILM* 1488, 1992, pr.3, p.1497 and Opinion no.8, 31 *ILM* 1521, 1992, pr.1, p.1522.

[156] Opinion no.3, 31 *ILM* 1488, 1992, , pr. 2, p.1500.

Commission rejected the position taken by Serbia that "those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY...".[157] Any suggestion that these States emerged by exercising the right to self-determination was also rejected. The emergence of Slovenia, Croatia and Bosnia -Herzegovina as new States was identified by the Badinter Committee in terms of doctrine of the succession of States.[158] Opinion 2 (2) states:[159]

> "However, 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".

Respect for territorial integrity and the acceptance of existing boundaries of independent States have now become the standard formula in inter-States' relations. Articles 4 and 15 (12) of the Hungary-Romania Treaty on Understanding, Co-operation and Good Neighbourliness of 1996[160] and the Agreement Establishing the Commonwealth of Independent States (between Belarus, the Russian Federation and the Ukraine),[161] and the

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[157] See Opinion no. 1, 31 *ILM* 1488, 1992, 1494. See also Opinion no.8, 31 *ILM* 1494, 1992, p.1522.

[158] *Ibid.* p.1494.

[159] Opinion no. 2, 31 *ILM* 1488, 1992, pr.1, p.1498.

[160] 36 *ILM* 340, 1997, ("Parties shall respect the inviolability of their common borders and the territorial integrity of other party").

[161] 31 *ILM* 138, 1992 ("High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth").

subsequent Alma Ata Declaration on 21 Dec. 1991,[162] and the Border Agreement between Lithuania and the Russian Federation on 24 Oct. 1997[163] reiterated the inviolability of existing boundaries and the territorial integrity of their respective States. Shaw states, "Although these instruments refer essentially to the principle of territorial integrity protecting international boundaries, it is clear that the intention was to assert and reinforce a *uti possidetis* doctrine".[164]

Conclusions

Neither UN practices, treaties, resolutions, the judgments of the ICJ nor the conclusions of other arbitration committee recognise the right to secession. It is not a legal right which can be exercised by minorities as of right. Current opinions on the peoples' right to self-determination do not support the theory that minorities can secede by invocation of the right to self-determination.[165] Most importantly there is no interrelationship between the

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[162] 31 *ILM* 138, 1992, p.148 ("Recognising and respecting each other's territorial integrity and the inviolability of existing borders"). Signatories to this agreement were, Azerbaijan, Armenia, Kazakhastan, Kyrgystan, Moldava, Tajikistan, Turkmenistan and Uzbekistan.

[163] CFSP Presidency statement, Brussels, 29 Oct. 1997, Nr. 11689/97 (Presse 311), CFSP: 99/97.

[164] *Shaw, supra*, 14, p.499.

[165] *D.McGoldrick*, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, Clarenden Press: Oxford, 1991, p.15; *R.Mullerson*, International Law, Rights and Politics: Developments in Eastern Europe and the CSCE, LSE and Routledge: London, 1994, p.70. *R.Higgins*, 'Post Modern Tribalism and the Right to Secession in *C.Brolmann et al* (eds.), *supra*, 29. p.33; *L.Eastwood Jr*, 'Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia', 3 *DJ CI L* 1993, p.299; *P.Monahan*, The Law and politics of Quebec secession', 33 *OHLJ*, 1995. See further HRC,

right to self-determination and secession. Self-determination is a collection of human rights which has to be exercised in conformity with the territorial integrity of the State. As an alternative to breaking existing States, self-determination is intended to promote peace, and prosperity and to guarantee the universal human rights of individuals as well as groups. It is not a destructive force or a tool which can legitimately be used to dismantle the nation-State. However, international law does not refuse to accept political realities in each case.[166] The emergence of new States or the dissolution and disappearance of existing states are not a new phenomenon. If a State emerges as a consequence of secession having fulfilled the criteria within the meaning of the Montevideo Convention and the guidelines issued by the EC then international law will eventually recognise such a State. However, this should not be taken as endorsing any right to secession on the basis of self-determinition.

1995. See further HRC, The general comment 1994, Article 27/ minority rights, 15 (4/6) *HRLJ* 1994, pp.234-236, pr. 3:1. Further details *Simma, op.cit.* 2, pr.35, p. 65.

[166] See the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 Dec. 1991, 24 (12) *Bull.EC* 1991, p. 119.

9 Secessionist Attempts Case Studies

Introduction

Secession is strongly opposed by the UN and other regional bodies who fear that any recognition of it will set "dangerous precedents that would undermine the legitimacy of multi-national states".[1] The claim that secession can be exercised by virtue of the right to self-determination is also rejected. The former UN Secretary-General U Thant's statement that if self-determination is understood to mean that a section of a population of a particular member State has the right to secede then there will be no end to dismemberment of States has been the position adopted by post-world war nation-States.[2] In Africa, Asia and Europe secessionists' struggles for the creation of new nation-States have, with few exceptions, failed. The most difficult task for secessionists is to justify the break-up of a State as "a radical solution to the political problems" arising from ethnic and other diversities.[3] World opinion seems to have taken the view that the demands for secession are a kind of "virus of tribalism".[4] This chapter examines selected samples of secessionist attempts and analyses how the UN and other international and regional institutions respond to such actions.

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[1] *O.S.Kamanu*, 'Secession and the Right to Self-determination: an OAU Dillemma', 12 (3) *The Journal of Modern African Studies*, 1974, p.36.

[2] 7 (2) *UN Monthly Chronicle*, Feb. 1970, p.39.

[3] *Ibid.* p.361.

[4] *The Economist*, 29 June 1991.

9.1 *Katanga 1960-1963: "The UN's First Face-to-Face Confrontation with the Spectre of Secession" ?*

Katanga is a province in the Republic of Congo, the former Belgian colony which achieved independence in 1960. Katanga's proclamation of independence of 11 July 1961 and its request for recognition were refused by the UN Security Council,[5] by "both word and deed". Moise Tshombe's declaration[6] that "Katanga will appeal to the entire free world, and ask all nations to recognise our right, like that of every other nation, to self-determination" was not successful. The Secretary-General decided to intervene in the Congo crisis at the request (telegram dated 12 July 1960) of the President and the Prime Minister of the Republic of Congo.[7] The Security Council did everything to prevent secessionists' armed struggle even by employing soldiers against the secessionist fighters.[8] The Katangan insurrection was seen by the UN Secretary General Dag Hammarrskjold as a "question between the provincial government and the Central Government".[9] He refused to entertain the idea that the conflict was between Katanga and the Congo. The Security Council and the GA had continually maintained that the issue was an "internal political problem", or a problem of the Congolese authorities[10] which was "threatening international peace".[11] The

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[5] SC Res. 5002, 24 Nov. 1961.

[6] *J.Dugard,* Recognition and the United Nations, Grotius Publications Ltd: Cambridge, 1987, p.87. See further *R.Higgins,* The Development of International Law Through the Political Organs of the United Nations, Oxford UP: London/New York/ Toronto, 1963, pp. 228-234.

[7] SC Res. 4382, 13 July 1960.

[8] SC Res. 143, 14 July 1960; SC Res. 145, 22 July 1960; SC Res. 146, 9 Aug. 1960; SC Res. 161, 21 Feb. 1961.

[9] SC Res. 4417, 6 Aug. 1960.

[10] SC Res. 4417, 6 Aug. 1960.

Security Council had repeatedly emphasised the importance of and necessity of preserving "the territorial integrity and the political independence of the Republic of Congo".[12] The secessionist leaders were urged not to do anything "which might undermine the unity, territorial integrity and the political independence of the Republic of Congo".[13] Demanding that the parties to the dispute should recourse to "constitutional solutions",[14] the Security Council without dissension (two members abstaining, France and the United Kingdom of Great Britain and Northern Ireland) urged and authorised the Secretary-General to take "vigorous action, including the use of the requisite measures of force, if necessary" to halt the violence and if necessary to deter any unruly mobs.[15]

This was the first time that the UN had to confront with the issue of recognition in the context of the right to secession. The Katangan secession was seen by the UN (both in the Security Council and the General Assembly) as a rebellion against the legitimate State.[16] Consequently, Katanga abandoned its secessionist struggle in January 1963. The UN's

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[11] GA Res. 1474 (ES-IV), 20 Sept. 1960, pr.3. See also SC Res. 4405, 22 July 1960; SC Res. 474, 21 Feb. 1961.

[12] SC Res. 4741, 21 Feb. 1961; SC Res. 5002, 24 Nov. 1961.

[13] GA Res. 1474 (ES-IV) 20 Sept. 1960, pr.5 (a). See also SC Res. 4741, 21 Feb. 1961.

[14] GA Res. 1600 (xv) 15 April 1961 (entitled "The Situation in the Republic of Congo"). See SC Res. 5002, 24 Nov. 1961, pr.4.

[15] SC Res. 5002, 24 Nov. 1961, pr.4. SC Res. 4741, 21 Feb. 1961, and the Secretary-General's report to the SC, SC Res. 4398, 18 July 1960 and Add. 1.6.

[16] SC Res. 4405, 22 July 1960; SC Res. 5002, 24 Nov. 1961, and GA. Res. 1474, Rev. 1 (ES-IV).

organised opposition was seen by some academics as "face-to-face confrontation with the spectre of secession".[17]

9.2 *Biafra 1967 - 1970*

Biafra, the eastern region of Nigeria, proclaimed its independence, seceding from the Republic of Nigeria, on 30 May 1967.[18] Immediately, the federal government of Nigeria sent in the army to crush the uprising rejecting the claim that Biafra as a separate territorial unit could secede by virtue of the right to self-determination. Biafra was recognised by only four African States, Gabon, Ivory Coast, Tanzania, and Zambia.[19] A delegation of the OAU headed by the Emperor Haile Selassie condemned all secessionist activities in Africa in a statement on 22 Nov 1967 stressing that the conflicts should only be solved by preserving the unity and territorial integrity of Nigeria.[20] At the Summit Meeting of the OAU in Algeria on 14 September 1968, the Assembly of Heads of States urged the secessionist Biafrans to

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[17] *L.C.Buchheit*, Secession, The Legitimacy of Self-Determination, Yale University Press: New Haven and London, p.141. See also *V.P.Nanda*, 'Self-Determination in International Law, The Tragic Tale of Two Cities, Islamabad (West Pakistan) and Dacca (East Pakistan)', 66 *AJIL* 1972, p.327.

[18] 6 *ILM* 665 [1967], pp.679-680. See also *S.K.Panter-Brick et al*, Nigerian Politics and Military Rule: Prelude to the Civil War, London, 1970; *C.R.Nixon*, 'Self-determination: The Nigeria / Biafra Case' 24 *World Politics* 1972, pp.412-436; *A.Heraclides*, The Self-determination of Minorities in International Politics, Frank Cass: London, 1991, pp.97-106; *J.de.St.Jorre*, The Nigerian Civil War, Hodder and Stoughton: London, 1972.

[19] However, a statement issued by Tanzania on 13 April 1968 said that the recognition of Biafra would be "a setback to our goal of unity". See *Kanmanu*, *supra*, 1, p.362.

[20] *F.C.Okoye*, International Law and the New African States, Sweet and Maxwell: London, 1972, p. 172.

co-operate with the federal authorities of Nigeria in order to restore the peace, unity and territorial integrity of the Republic of Nigeria.[21] Preferring a different approach to that of Katanga the UN avoided any direct involvement in the dispute, allowing and encouraging the OAU to find a peaceful solution. The Biafran uprising was considered by the UN as a "purely an internal problem".[22] Moreover, clarifying the UN's position, the Secretary-General U Thant stated:[23]

> "As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocal. As an international organisation, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State".

After two and a half year later on 12 Jan 1970 the secessionist leaders surrendered to the Nigerian Federal government.[24]

9.3 *Bangladesh, 1971: Self-Determination through Gun-Barrels?*

East Pakistan had been a constituent part of the Republic of Pakistan since 1947. Pakistan itself emerged by seceding from India in 1947. In March 1971 the birth of the Republic of Bangladesh was proclaimed by Sheikh Mujibur Rahman. This was immediately branded as

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[21] *I.Brownlie*, Basic Documents on African Affairs, Clarendon Press: Oxford, 1971, p.364.

[22] Statement issued by the Secretary-General, UN press release, SG/SM/1062, 29 Jan. 1969.

[23] 7 (2) *UN Monthly Chronicle*, 1970, Feb. p.36.

[24] See *D.J.Ijalye*, 'Was Biafra at Any Time a State in International Law', 65 *AJIL* 1971, p.551.

"treasonous acts" by the President of Pakistan Yahya Khan.[25] On 10th of April, 1971 the Provincial Government of Bangladesh reaffirmed Mujib Rahman's declaration of independence as being "in due fulfilment of the legitimate right of self-determination of the Peoples of Bangladesh".[26]

The UN did not come forward to recognise Bangladesh. However, it was "deeply concerned at the magnitude of the human suffering", at the "crisis in East Pakistan", and at "the disturbing influence of the general situation on the process of economic and social development in the area".[27] The UN urged the parties to the disputes (India, West Pakistan and East Pakistan) to settle this tragedy by respecting the principles of the Charter of the United Nations,[28] whilst recognising the territorial integrity of the Republic of Pakistan. The Secretary-General's report to the Security Council on 20 July 1971 acknowledged that the issue "falls within the competence of the judicial system of a member State- in this case, Pakistan".[29] Secretary-General U Thant expressed his concerns about the potential threat to peace and security, and about "unprecedented problems confronting the international community".[30]

In fact, during the General Assembly debate on the conflicts in Bangladesh the President of the Security Council stated that recognition of Bangladesh could not arise since

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[25] *The Economist*, 13 April 1971, cited in *Nanda, op.cit.* 17, p.322. See also *M.K.Nawaz*, 'Editorial Comment: Bangladesh and International Law', 11 *IJIL* 1971, pp.251-266.

[26] See *Buchheit, supra*, 17, p.207.

[27] GA Res. 2790 (xxvi) 6 Dec. 1971. pr. 1.

[28] GA Res. 2790 (xxvi) B, 6 Dec. 1971, pr. C.

[29] SC Res. 10410, 3 Dec. 1971, pr.3.

[30] GA Res. 2790 (xxv) 6 Dec. 1971, B, preambular paragraph.

the necessary criteria were lacking.[31] Twenty two non-governmental organisations which had consultative status with the UN Economic and Social Council made a request from the Security Council to intervene immediately or take other suitable steps to stop human rights violations.[32] However, even the International Commission of Jurists' request went unheeded.[33] The Security Council's decision not to become involved in the civil war was due to its fear that such actions would not only "inflame the situation" but could also become a precedent.[34] None of the members, as pointed out by Shiels, "was prepared to place the United Nation's seal of approval on a secessionist movement".[35] It was only the sheer scale of the war which compelled both the Security Council and the General Assembly to take the matter seriously.[36]

By February 1972 Bangladesh was recognised by 47 States. In 1972 the application to the UN was refused due to China's veto. Subsequently, in 1974 the UN General Assembly decided without dissent to admit the People's Republic of Bangladesh to membership of the United Nations.[37]

Was the emergence of Bangladesh as a new nation-State a case for secession or was it a classic case in which the Bangladesh exercised their right to self-determination within the meaning of the Colonial Declaration ? Some scholars' analyses support the view that the

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[31] SCOR, 1613th Mtg. 13 Dec. 1971, prs. 92-93, p. 9.

[32] UN Doc. E/CN.4/Sub.2/NGA/46, 23 July 1971.

[33] Press Release of the International Commission of Jurists, 16 August 1971.

[34] *Nanda, op.cit.*17, p.335.

[35] *F.L.Shiels* (ed.), Ethnic Separatism and World Politics, University Press of America: Lanham/New York and London, 1984, p.250.

[36] GA Res. 2793 (xxvi) 7 Dec. 1971; and SC Res. 307 (1971) 21 Dec. 1971.

[37] GA Res. 3203 (xxix) 17 Sept. 1974, and 2937 (xxvii) 29 Nov. 1972.

Bangladeshi people simply exercised a legal right, that is the right to secession.[38] Buchheit argued that it was an example of secession.[39] Nonetheless, it is, in the view of Heraclides, highly unlikely to be followed as a precedent.[40] However, a better analysis presented by Nanda who argued that the Bangladesh case was an example of the exercise of the right to self-determination by the 'Bangladeshi peoples'.

Nanda correctly argues that the oppressive situation prevalent in Bangladesh before the insurrection justified the application of the right to self-determination by the 'Bangladeshi peoples'. The oppressive regime prevalent in East Pakistan was similar to that of a colony which was exploited and whose peoples' human rights were grossly violated by the West Pakistan regime. Thus, the genocide committed against the civilian population of East Pakistan and the grave violation of human rights justified the insurrection of the 'East Pakistani peoples' against the military regime controlled by West Pakistan. Even though the emergence of Bangladesh appeared to be a case of secession, it should be analysed in terms of the right to self-determination. The peoples of East Pakistan can be termed 'peoples' with the meaning of both the Colonial Declaration and the ICCPR and their armed insurrection consequently gained legitimacy as a liberation struggle. Thornberry correctly argues that the international community adjusted to the situation through recognition of the new State" rather than admitting the right to secession of the Bangladeshi peoples.[41]

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[38] *Y.Dinstein*, 'Collective Human Rights of Peoples and Minorities', 25 *ICLQ* 1976, p.108.

[39] *Buchheit, supra*, 17, p.198.

[40] *A.Heraclides*, 'Secession, Self-determination and Nonintervention: In Quest of a Normative Symbiosis', 45 *Journal of International Affairs* 1992, p.406.

[41] *P.Thornberry*, 'Self-Determination, Minorities, Human Rights : A Review of International Instruments', 38 *ICLQ* 1989, p.875.

9.4 *The Republic of Kosovo ?*

Since 1913 Kosovo has been a province of Serbia. The Kosovo[42] region was created in 1974 as a socialist autonomous region under the Constitution of the Socialist Federal Republic of Yugoslavia, in addition to Yugoslavia's six provincial republics. The Kosovo region was given extensive power.[43] Its demand for Republic status was rejected. Kosovo Albanians were considered *narodnosti* (nationalities). Only *narodi* (nations) were granted Republics.[44] Even though the Kosovo region was not a Republic, as pointed out by Caplan, Kosovo enjoyed "all the prerogatives of a Republic, including its own constitution, government, and national bank, and an equal voice within the collective federal presidency".[45] However, autonomous status was abrogated during the period 1989-1991 by various constitutional and legislative means, that is, by the suspension of the Kosovo Parliament, Executive Council of Kosovo and the Presidium[46] on the pretext that the Albanians in Kosovo had manipulated the existing system to their advantage. However, these allegations are refuted by many. The International Criminal Tribunal for the former Yugoslavia found that these allegations were

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[42] See *N.Malcolm*, Kosovo: A Short History, London: McMillan, 1998.

[43] *T.Varady*, 'Minorities, Majorities, Law and Ethnicity: Reflections of the Yugoslav Case', 19 (1) *HRQ* 1997, p.23.

[44] *R.Caplan*, 'International Diplomacy and the Crisis in Kosovo', 74 (4) *International Affairs* 1998, p.748. See also *W.Hondius*, The Yugoslav Community of Nations, Mouton: The Hague, 1968.

[45] *Caplan, ibid.* p.748.

[46] See *Prosecutor* v *Dusko Tadic a/k/a 'Dule'* case no. IT/94/1/T, 7 May 1997, the judgment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, reprinted in 4 (3) *IHRR* 1997, pr.65, p.660.

used as a smoke screen by the Serbian leaders to annex the Vojvodina and Kosovo autonomous regions to the Serbian Republic. The Tribunal found that:[47]

> "Some Serbs had long dreamed of a Great Serbia, a nation which would include within its borders all ethnic Serbs. The effective extension of Belgrade's direct rule over the two provinces was a step in this direction and one that was implemented despite the fact that in Kosovo ethnic Albanians had come to far outnumber Serbs. Kosovo is the part of the homeland of the Serbs of past centuries, the battle of Kosovo was fought there, and the province has particular significance for present day Serbs who regarded its autonomy as a province is specifically hurtful, depriving Serbia of coherent statehood and of control over what is considered to by ancestral Serbian territory".

Not surprisingly, Kosovan Albanians' response has been to resort to armed struggle to achieve independence or join Albania. The slogan of the Albanian liberation fighters is "Kosovo will fight to the death"[48] until the Serbs leave the region.[49] A key commander of the KLA, Remi, dismissed any proposal of dismantling the rebel forces as part of any negotiated settlement that stopped sort of giving full independence to the Kosovo region. Commander Remi is quoted as saying, "We obey our orders, but the General Staff is fighting for the freedom of Kosovo, so we don't expect orders to disarm or disband. We'll put our

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[47] *Ibid.* pr.69, p.661. See also *B.Denitch*, Ethnic Nationalism, The Tragic Death of Yugoslavia, University of Minnesota Press: Minneapolis/London, chapter 4. See also *Helsinki Watch*, Human Rights Abuse in Kosovo, 1990-1992, Human Rights Watch: New York, 1992.

[48] *T.Walker*, 'Kosovo Will Fight to the Death', *The Times*, 23 March 1998.

[49] *A.Loyd*, 'Serbs Must Go or We Fight on, Says Rebel Chief', *The Times*, 17 Feb. 1999. See also *A.Bloed*, 'The Kosovo Crisis', 16 (4) *NQHR* 1998, pp.528-530.

weapons in warehouses only when we have liberated Kosovo". Remi expressing his doubt about any solution of the Contact Group's meeting at Rambouillet saying:

> "I am hoping that we will be accepted by the international community just as our representatives have been accepted at Rambouillet. Freedom means not only the withdrawal of police and military forces from Yugoslavia, but the constitution of a new state with a new system as Albanians wish. And as far as unification with Albania? It's an on-going process, but a slow one".[50]

At the beginning (from Feb. 1998) of the present crisis in Kosovo the response of the European Communities in respect of the autonomous provinces of Yugoslavia was that "the constituent republics and autonomous provinces must have the right freely to determine their own political future in a peaceful and democratic manner and on the basis of recognized international and internal borders".[51] The subsequent policies adopted by the European institutions, mainly the EU and its allies NATO up until 24 of March 1999 represent a significant change in the thinking on secessionist rights, perhaps after realizing the dangerous consequences for multi ethnic polities in the European continent.

Kosovan Albanians proclaimed Kosovo as an independent State in December 1991.[52] However, its request for independence has continually been refused by both the Badinter Committee and the EC, and its Member States. In the referendum held from 26-30

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[50] *Loyd, ibid.* p.12.

[51] Parliament Resolution on the situation in Yugoslavia, 15 March 1991, 24 (3) *Bull.EC* 1991, p. 70.

[52] *Caplan, supra*, 44, p.748.

September 1991, it was reported that 99.87% voted for independence out of 87% of the Kosovan population who took part in the voting.[53] The elected leaders of the Kosovan independence movement promised that they would abide by the criteria required by the guidelines set by the EC. Nonetheless, refusing to accept the Kosovans' constant request for the recognition of their State, the Republic of Kosovo, the European Communities issued a statement that "frontiers can only be changed by peaceful means and the EC and its Member States reminded the inhabitants of Kosovo that their legitimate quest for autonomy should be dealt with within the framework of the EC Peace Conference".[54] The Cardiff European Council Declaration of 1998 is more explicit:

> "A solution to the problem of Kosovo's status can only be found through a vigorous political process. The European Council calls urgently on both sides to return to the negotiating table, with international involvement to agree confidence- building measures and to define a new status for Kosovo. *The European Union remains firmly opposed to independence.* It continues to

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[53] *R.Rich*, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *EJIL* 1993, p.61.

[54] 25 (6) *Bull.EC* 1992, p.108. Only Albania recognized Kosovo as an independent State, see *R.Mullerson*, International Law, Rights and Politics, Developments in Eastern Europe and the CIS, LSE and Routledge, 1994, p.133. However, it is worthy of mention that the former Dutch Foreign Minister and Secretary-General of the Western European Union (WEU) from 1989-1994 is in favour of independent Kosovo. He argued, "Of course, the proliferation of small, perhaps unviable States is not an attractive prospect... . But why make a difference in principle between, say, Slovenia and Kosovo when fundamental rights are being crushed". 'Recognize Kosovo', *International Herald Tribune*, 19 June 1998, cited in *Caplan, supra*, 44, p.761.

support a special status, including a large degree of autonomy for Kosovo, within the Federal Republic of Yugoslavia".[55]

The most recent proposal presented by the Six Nation Contact Group also emphasises that any solution should; a) be found within the existing boundaries of the FRY, and b) include mechanisms for serving a high degree of self-governance for Kosovo, e.g. with its own Parliament, President and Judiciary.[56] The European diplomats in the Contact Group at Rambouillet again insisted that Kosovan secessionist forces should drop their claim to independence if they wanted peace talk to succeed. Ultimatum was delivered to KLA by the Contact Group that "if the KLA does not renounce independence, then there will be no Nato troops in Kosovo".[57]

But this position has now dramatically changed with the bombing campaign against FRY commenced on 24th of March 1999 by the NATO forces. Even before the commencement of war against FRY, some politicians in the EU began to campaign for independence for the Kosovo region. The former Dutch Foreign Minister and Secretary-General of the Western European Union (WEU) from 1989-1994 is in favour of full independence for Kosovo. He argued that "Of course, the proliferation of small, perhaps

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[55] See the Cardiff European Council Declaration on Kosovo, CFSP Presidency statement, Cardiff, 15 June. 1998, Nr. 09553/98 (Presse 209), CFSP: 062/98, p.1. See also CFSP Presidency statement, Brussels, 20. July 1998, Nr. 10397/98 (Presse 256) CFSP 77/98 and The Declaration by the European Union on a Comprehensive Approach to Kosovo, CFSP Presidency statement, Brussels, 27 Oct. 1997.

[56] See part I to III of the Draft Kosovo Interim Agreement, 27 Jan. 1999, http://www. balkanaction.org /pubs/ dkia.html.

[57] *T. Walker*, 'US Stance on Kosovo Talks and 'Secret Flight' Infuriate Diplomats', *The Times*, 18 Feb. 1999.

unviable States is not an attractive prospect... But why make a difference in principle between, say, Slovenia and Kosovo when fundamental rights are being crushed ?".[58] As bombing on FRY has intensified some European politicians have begun to advocate that Kosovo should be granted international 'protectorate status'. whilst others support a partition. The leader of the United Kingdom Liberal Democratic Party Paddy Ashdown argues: [59]

> "There are three things that can clear about the future of Kosovo. It cannot remain under Serb control. By their action the Serbs have forfeited the right to govern the province on the basis of only five percent (sic) of the population. But neither in the short term at least, can Kosovo become independent; that would destabilise Macedonia, undermine Albania and severely damage the fragile peace in Bosnia. And Kosovo certainly cannot remain at war which leaves only one realistic option - an international protectorate, if not *de jure* then *de facto*!".

This may be a new beginning where solutions to minorities' problems are found by super powers bypassing the authority of the UN. The consequences of such a practice may create

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[58] Cited in *Caplan, supra*, 44, p.761.

[59] *P.Ashdown*, 'We Must Aim for a Kosovan Protectorate', *The Observer*, 28 March 1999. This position is now being promoted by other European leaders as well. For example, the President of France Jacques Chirac stressed that the EU should take over the administration of post-war Kosovo as a protectorate under a legal mandate from the UN. See *M.Walker*, *I.Black* and *I.Traynor*, 'Britain and US Shun New Peace Plan', *The Gardian*, 15 April 1999. The term of 'international protectorate' is not a clear concept in international law. As far as a territory remains as an 'international protectorate' it does not possess international personality. See *R.Y.Jennings*, and *A.Watts*, QC, Oppenheim's International Law, 9th ed. Vol. 1, PEACE, pr.81, pp.268-271.

more unstable regions in multiethnic polities thereby encouraging secessionist and separatist groups.

The UN General Assembly (GA) wants the FRY to establish genuine democratic institutions in Kosovo, including the parliament and the judiciary thereby respecting the "will of the inhabitants as the best means of preventing the escalation of the conflict".[60] The UN Security Council (SC) has emphasised repeatedly that the warring parties in Kosovo should seek "meaningful dialogue" with a view to resolving existing problems by political means on the basis of equality for all citizens and ethnic communities in Kosovo.[61] The SC reassured the commitment of all its Member States to the sovereignty and territorial integrity of the FRY.[62] The KLA's military campaign has not been seen as a liberation struggle. Instead, the military activities of the KLA have been identified with "terrorism in pursuit of political goals". All external support for the KLA's armed struggle in Kosovo, including the supply of arms and training for terrorist activities in Kosovo, has been condemned. Rejecting the request by the Kosovan Albanians for independence, the SC reiterated that it was prepared only to consider "enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration".[63] This position was reaffirmed by the SC on 24 Oct. 1998.[64] In the view of both the SC and the GA ethnic violence and military activities in Kosovo are a "human catastrophe", which constitutes a continuing threat to peace and

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[60] GA Res. 52/139, 12 Dec. 1997, pr.2 (d).

[61] SC Res. 1199, 23 Sept. 1998. See also GA Res. 52/139, 12 Dec. 1997, pr. 3.

[62] SC Res. 1199, 24 Sept. 1998.

[63] SC Res. 1199, 23 Sept. 1998.

[64] SC Res. 1203, 24 Oct. 1998.

security in the region.[65] The SC stressed the need for both parties, FRY and the Kosovo Albanian leadership "to enter immediately into a meaningful dialogue without preconditions and with international involvement, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo".[66]

Still many States are of the view that any solution should be found without disrupting the existing boundaries of the FRY. For example, during the GA debate China stated that "Kosovo is part of the Federal Republic of Yugoslavia, which is a sovereign country whose sovereignty and territorial integrity should be respected".[67]

9.5 *An Independent Republika Srpska Krajina and Republika Srpska of Bosnian Serbs*

The Krajina Serbs in Croatia declared an independent Republika Srpska Krajina on 19 Dec. 1991. Later they rejected the autonomous status offered by Croatia in the belief that they would be able to set-up a mini-Serb dominated State.[68] The so-called Republika was composed of West Slavinia, East Slavinia, and Krajina.[69] The request made by the Assembly of Serbian People in Bosnia and Herzegovina for an independent Republika Srpska on 7

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[65] *Ibid.* See also GA Res. C.3/52/L.61, the Draft Resolution on the Human Rights Situation in Kosovo.

[66] SC Res. 1203, 24 Oct. 1994.

[67] A/52/PV.70, 12 Dec. 1997, p.33.

[68] Yearbook, published by the UN and International Tribunal for the former Yugoslavia, p.141. See also *Varady, supra*, 43, p.49.

[69] See *M.Bowker*, 'The Wars in Yugoslavia: Russia and the International Community', 50 (7) *Europe-Asia Studies* 1998, p.1247.

April 1992 was also rejected by the EC.[70] Also, in condemning the proposal of the Serbian parliaments in Knin and Pale to merge with the self-proclaimed Serb Republika Srspka of Krajina, the EU stressed that any such illegal acts would be contrary to the framework established by UN Security Council Resolutions 981 of 31 March 1995 and 990 of 27 April 1995. Emphasising its commitment to the territorial integrity of Croatia and Bosnia-Herzegovina, the EU stated that any activities of the Serbs violating the boundaries of those two States "would be null and void".[71] The Badinter Committee was also of the view that enhanced minority protective measures and greater autonomous powers to the regions of the former Yugoslavia would prevent further escalation of ethnic conflicts. It further held that "The Serbian population in Bosnia-Herzegovina and Crotia must therefore be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law...."[72]

Having deplored the Bosnian Serbs' military attempt with the help of Serbian irregulars to establish an independent Republika Srpska, the EC warned that those trying to change boundaries would never achieve recognition. It stressed that "territorial conquests, not recognized by the international community will never produce the kind of legitimate protection sought by all in the new Yugoslavia...the Community and its Member States will never accept a policy of *fait accompli*. They are determined not to recognize changes of

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[70] *Rich, supra*, 53, pp. 61-62. See further *Mullerson, op.cit.* 54, pp.132-135. At present, the Republika Srpska is a constituent part of the federation of Bosnia and Herzegovina.

[71] CFSP Presidency statement, Brussels, 2 June 1995 on Krajina and Bosnia-Herzegovina, Merging of the self-proclaimed Serbian Republics, Nr. 7570/95 (Presse 164) CFSP: 54/95.

[72] See paragraph 2 of the Opinion no.2 of the Badinter Committee, 31 (6) *ILM* 1992, p.1498. See further *S.Hille*, 'Mutual Recognition of Crotia and Serbia (+Montenegro)', 6 *EJIL* 1995, p.604.

borders by force and will encourage others not to do so either".[73] Condemning the Bosnian Serbs' secessionist attempt to dismember Bosnia-Herzegovina, the EC issued a statement on 11 April 1992 affirming that "they strongly uphold the principle of the territorial integrity of the Republic of Bosnia-Herzegovina as the unquestionable foundation of any constitutional order. They wish to make clear that violations of this principle will not be tolerated and will certainly affect the future relations of those responsible with the Community".[74] The EC and its Member States in its Paris Declaration on 13 Jan. 1993 again emphasised their previous position and demanded unequivocally that the Bosnian Serbs accept the proposed constitutional framework for Bosnia-Herzegovina "without any conditions whatsoever within the next six days". The EC has stressed that the Serbs in Bosnia-Herzegovina should fulfil their commitment to the Vance-Owen Peace Plan and insisted that all groups shall respect the sovereignty of the Republic of Bosnia-Herzegovina and the inviolability of its territorial integrity".[75]

The UN's response has been similar to that of the European Union. The Serbs' attack on Bosnia- Herzegovina were seen as "aggressive acts", "ethnic cleansing", and "terrorist activities" to acquire territory by forceful means. Strongly condemning separatist acts of violence against the sovereignty, territorial integrity and political independence of Bosnia-Herzegovina, the GA warned the separatists that their violence should be halted immediately.[76] In fact, the GA regarded the Bosnian government and its peoples' defensive acts as a "just struggle" to safeguard their sovereignty, political independence and territorial

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[73] The statement by the EC and its Member States, 24 (7/8) *Bull.EC* 1991, pp.115-116.

[74] 25 (4) *Bull.EC* 1992, p.83.

[75] 26 (6) *Bull.EC* 1993, p.122.

[76] GA Res. 47/121, 91st plen. mtg. 18 Dec. 1992, pr.2.

integrity.[77] In a resolution on Yugoslavia, the GA declared all the acts of the "self-proclaimed Serbian authorities" and their followers' to be invalid.[78] The efforts of the Serbs and Croats to partition Bosnia - Herzegovina along ethnic lines have continually been condemned by the Security Council.[79]

As Rich points out, "The issue of whether any of these entities meet the traditional criteria of statehood is not being addressed because they have not passed the EC threshold test. Any acceptance of such entities would be seen as a green light for minorities throughout Europe to assert their independence".[80] However, some critics point out that European institutions including the Badinter Committee have failed to apply a coherent policy in the recognition of new States on the territory of the former Yugoslavia.[81]

9.6 *Nagorny Karabakh*

The Nagorny Karabakh region is an integral part of the Republic of Azerbaijan.[82] The Karabakh Armenians consider their armed struggle against Azerbaijan as a liberation struggle against colonialism. In fact, they have already set-up their own institutions to deal with every aspect of their lives. On the other hand, they are branded as irredentists whose only purpose is to annex the Karabakh region to Armenia.[83] The proposed plan for maximum autonomy

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[77] *Ibid.* pr. 1.

[78] GA Res. 47/147, plen. mtg. 18 Dec. 1992, pr.19.

[79] See for example, SCOR, 3647th mtg. S/PV.3647, 4 Apr. 1996, p.4.

[80] *Rich, supra*, 51, p.62.

[81] See *Mullerson, op.cit*, 54, 47, pp.125-135.

[82] *M.Mooradian*, 'The OSCE: Neutral and Impartial in the Karabakh' 9 (2) *Helsinki Monitor'*, 1998, pp.5-17.

[83] *Ibid.* p.6.

of Karabakh within Azerbaijan has already been rejected by secessionist leader and a self-proclaimed President Arkady Gukasian.[84] The declaration of independence by the Armenian ethnic groups in Nagorny Karabakh in September 1992 was equally rejected by the EC. The Russian Federation and the EC on 10 March 1992 expressed their profound concerns "about the continuing conflicts over Nagorny Karabakh, which threatens to grow into a protracted and bloody war". They stated that such a development would be tragic for the Armenian and Azeri peoples and would threaten regional peace.[85] In fact, issuing a statement on 22 May 1992, the EC condemned any attempts upon the territorial integrity of existing States.[86] The EC on 1 Sept. 1993 condemned the military incursion of Armenians into Nagornoy Karabakh reaffirming the territorial integrity and sovereignty of the States in the region.[87] Any political solution, in the view of the EU, "should lead to a settlement respecting the dignity and interests of the parties to the conflicts in Nagorny Karabakh".[88]

9.7 *Abkhazian Secession*

The separatist struggle of the Abkhaz to secede from Georgia has resulted in one of the worst humanitarian disasters in the Balkans. It is estimated that more than 300,000 people in Abkhazia were displaced due to ethnic cleansing and the policy of genocide adopted by the Abkazian secessionist fighters.[89] The separatists' demands from the outset have been that the

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[84] See *A.Bloed*, 'Conflict in and Around Nagorno-Karabakh', 16 (2) *NHQR* 1998, p.238.

[85] 25 (3) *Bull.EC* 1992, p.100, point. 1.4.4.

[86] *Rich, supra*, 53, p.62.

[87] 26 (9) *Bull.EC* 1993, p.77, point. 1.4.5.

[88] Luxembourg's statement on behalf of the EU during the debate on the Co-operation between the UN and the OSCE. See A/52/PV.55, 25 Nov. 1997, p.4.

[89] S/PV.3535, 12 May 1995, Agenda Item, The Situation in Georgia, p.3.

political status of Abkhazia should be defined by the recognition of their right to determine their political future without interference from Georgia. The proposal for greater autonomy within a federative framework has been continually neglected by the Abkhazin secessionist forces. Instead, they have stressed that any solutions of the dispute between Georgia and themselves should be as between "two subjects of international law". The Georgian leaders described this situation as "secessionist goals through sophistries and the rape of international law".[90] Rejecting any claims for independence by Abkhazians the UN emphasised that the sovereignty and territorial integrity of Georgia was inviolable.[91] The Security Council when referring to Abkhazian separatist claims further emphasised that the borders of a State could not be changed by violence and by force.[92] Both parties were urged to "resolve their differences" "through dialogue and mutual accommodation".[93] The Abkhazian secessionists' policy of changing demographic structure by ethnic cleansing was condemned and declared unacceptable.[94] Any political status for Abkhazia should be within the State of Georgia and should fully respect the sovereignty and territorial integrity of Georgia.[95] The increasing subversive activities of the secessionists including kidnapping, murder and other criminal activities have caused grave concern to the UN because they have the potential for impeding any political settlement to the dispute. The Security Council

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[90] *Ibid.* p. 3.

[91] SC Res. 1124, 31 July 1997. See further SC Res. 1096, 30 Jan. 1997; SC Res. 876, 19 Oct. 1993; SC Res. 896, 13 Jan. 1994; SC Res. 906, 25 March 1994; SC Res. 937, 21 July 1994; SC Res. 971, 12 Jan. 1995; SC Res. 993, 12 March 1995; SC Res. 1036, 12 Jan. 1996; SC Res. 1065, 12 July 1996.

[92] SC Res. 688, 5 April 1991.

[93] SC Res. 1124, 31 July 1997.

[94] SC Res. 1187, 30 July 1998. See further SC Res. 1150, 30 Jan. 1998.

especially expressed its concerns about the continued failure of the parties to resolve their differences, in particular about the uncompromising position taken by the Abkhazian side. The constantly deteriorating safety and security situations of the local population, refugees, and displaced persons have become the priority of the UN.[96] A similar position was adopted by the EU.[97]

9.8 *Secessionist Struggles in Chechnya, Tartastan, Tajikistan and Cyprus*

Previously, Chechnya was an autonomous region under the federal structure of the former USSR. It was then called Chechen-Ingushetia.[98] Chechenya's declaration of independence on 1 Nov. 1991 was not accepted either by the EU[99] or the UN. The Russian Federation immediately declared that Chechenya as a part of the Russian Federation. Rejecting any compromise on their stance on independence the separatist leader General Djokhae Dudgev stressed that "Chechenya is a sovereign State and will enter into negotiations with Russia as equal partners.[100] The reaction of the Russian Federation was to send in the army on 11 Dec.1991 to defeat secessionist insurrection. Conflict between secessionists and the Russian army lasted until August 1996. This war is considered as "the most severe in terms of human

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[95] SC Res. 1150, 30 Jan. 1998. See also SC Res. 1124, 31 July 1997.

[96] SC Res. 1096, 30 Jan. 1997.

[97] CFSP Presidency statement, Brussels 2 June 1998, Nr. 9033/98 (Presse 177) CFSP 49/98.

[98] *Z.Tskhovrebov*, 'An Unfolding Case of a Genocide: Chechnya, World Order and the Right to be Left Alone', 64 (3) *NJIL* 1995, pp.304-307.

[99] The statement issued by the EU Presidency, CFSP/2/95, 17 Jan. 1995. See also the CFSP Presidency statement, Brussels, 23 Jan. 1995, Nr. 4385/95 (Presse 24) CFSP:7/95 on Chechnya.

[100] *Tskhovrebov*, *supra*, 98, p.508.

implications and material" in the Caucasus since 1981.[101] The Chechen's secession was found illegal and in violation of the Constitution of the Russian Federation, 1993, by the Constitutional Court. The Court held that the Constitution of the Russian Federation, like the previous constitutions of the USSR, did not permit a unilateral declaration of secession by a component part of the Federation. Justifying its position the Constitutional Court said, "The constitutional goal of preserving the integrity of the Russian State accords with the universally recognised principles concerning the right of nations to self-determination".[102]

The reaction of the international community by and large has been that the crisis in Chechnya is an internal 'Russian affair'.[103] The Western powers, especially, did not want to create a diplomatic crisis with "emerging democratic Russia".[104] Some American politicians, notably the former US Secretary of State Warran Christopher compared the situation of Chechnya with the American civil war.[105]

The OSCE emphasised that the crisis in Chechnya could only be resolved not by separatism but by peaceful negotiation respecting the territorial integrity of the Russian

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[101] *S.E.Cornell*, 'International Reactions to Massive Human Rights Violations: The Case of Chechnya', 51 (1) *Europe-Asia Studies* 1996, p.85. See further *M.L.Bovay*, 'The Russian Armed Intervention in Chechnya and its Human Rights Implications', International Commission of Jurists, 54 *The Review* 1995, p.34, and *C.Gall* and *T.de.Waal, Chechnya: A Small Victorious War*, Basingstoke: Ban Books, 1997.

[102] This judgment was delivered on 31 July 1995. It was published by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1, cited in *P.Gaeta*, 'The Armed Conflict in Chechnya before the Russian Constitutional Court', 7 (4) *EJIL* 1996, p.564.

[103] *Cornell, supra*, 101, p.91.

[104] *Ibid.* p.91.

[105] *Ibid.* p.91.

Federation and its constitution.[106] While deploring the grave violation of human rights by both parties to the conflict, the UN Commission on Human Rights urged the parties on 27 Feb. 1995 to show respect for the territorial integrity and constitution of the Russian Federation.[107]

The Tartastans' declaration of independence against the Russian Federation on 21 March 1992, and the Crimean independence declaration of 5 May 1995 were also not recognised. Equally, the Islamic Revival Movement's attempt to secede from Tajikistan was rejected by the UN, which reaffirmed its commitment to the sovereignty and territorial integrity of the Republic of Tajikistan and to the inviolability of its borders. The parties were urged to undertake vigorous efforts to find a political solution that preserved the sovereignty and territorial integrity of Tajikistan in accordance with the General Agreement on the Establishment of Peace and National Accord in Tajikistan.[108]

The UN's disapproval of the secession of the Turkish Cypriots has been prominent in recent years. The solution, it argued, should be based on "a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and

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[106] OSCE Permanent Council, Journal no. 6, 2 Feb. 1995, cited in *T.Gazzini*, 'Consideration on the Conflict in Chechenya', 17 (3/6) *HRLJ* 1996, p.101.

[107] ESCOR E/CN.4/1995/SR. 44, 3 March 1995, p.18.

[108] SC Res. 1167, 14 May 1998. See further SC Res. 1113, 12 June 1997; S/PV.3544, 16 June. 1995, p.3. See further CFSP presidency statement, Brussels, 8 June 1998, Nr. 9244/98 (Presse 191) CFSP- 53/98.

territorial integrity safeguarded, and confusing two politically equal communities in a bicameral and bi-zonal federation.[109]

Conclusion

As these cases demonstrate the UN Or regional organisations dealing with human rights, security and peace have never encouraged or given the seal of approval to secessionist movements. The approach adopted by above institutions has varied from outright hostility (as in the case of Biafra) to a lukewarm and negative response (as in the case of Bangladesh). The international community has been following a very cautious and, perhaps, pragmatic approach in response to secession. Parties to secessionist conflicts are encouraged to find peaceful and democratic solutions within existing nation-State structures. Alternative models in the form of greater autonomy for regions or ethnic groups which campaigns for secession have been the preferred solution encouraged by the UN and others as in the case of Kosovo and Nagorny Karabakh. It seems, security concerns, in addition to other spill-over effects such as refugee problems and scarcity of resources have become some of the most prominent factors in discouraging secession.

It should also been mentioned that if a secessionist group succeeds in achieving a separate State the UN does not stand on their way if it is clear to it that the seceding territory can defend itself, command the loyalty of its citizens, and respect the human rights other ethnic groups living in the new State. In re Secession of Quebec (1998) 2 SCR 217, the Supreme Court of Canada held, "The ultimate success of secession would be dependent on recognition by the international community".

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[109] SC Res. 1179, 29 June 1998, pr.2. See further SC Res. 1146, 23 Dec. 1997; SC Res. 1178, 29 June 1998; SC Res. 186, 4 March 1964; SC Res. 367/, 12 March 1975; SC Res. 939, 29 July 1994; and SC Res. 1117. 27 June 1997.

10 The Right to Secession Through the Right to Self-Determination ? Attitudes of States

Introduction

States practice suggests that most States are hostile to any claim for secession by minority groups. Any suggestion that minorities can exercise the right to create States by virtue of the right to self-determination or the right to secession is vehemently opposed by most nation-States. Secession, as will be shown below, is an extremist political concept tinged with tribalism. Nevertheless, in this hostile environment, some radical ideas are emerging which give a new interpretation to the right to self-determination and are supportive of minorities' claims for greater political power beyond autonomy, in particular cases where ethnic conflicts are so deep that no other alternative is possible or where grave human rights violations taking place oppressing minority groups.[1] The purpose of this chapter is to examine these trends.

The right to self-determination has gradually emerged as the "foundation of international order"[2] winning strong support among States. The principle is no longer

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[1] See *G.J.Simpson*, 'The Defusion of Sovereignty: Self-determination in the post-Colonial Age', in *M.Sellers* (ed.), The New World Order, Sovereignty, Human Rights and the Self-determination of Peoples, BERG: Oxford, Washington, DC, 1996, pp.54-60.

[2] A/C.3/50/SR.7, 30 Oct. 1995, pr.65, p.15 (Pakistan).

considered "a mere moral or political postulate, rather a settled principle of modern international law".[3] It is an unquestionable and inalienable right which "all civilized nations should accept and respect",[4] because "self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights".[5]

As early as 1951, some States stressed that the right to self-determination stood above all other rights".[6] It is considered by many as "the precondition for the realization of all human rights",[7] "the corner-stone of the whole edifice of human rights",[8] or the fundamental principle of international relations and a peremptory rule of international law, a

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[3] A/C.3/49/SR.8, 25 Oct. 1994, pr.23, p.6 (Azerbaijan), A/C.3/49/SR.8, 25 Oct. 1994, pr.4, p.3 (Czech Republic).

[4] A/C.3/SR.449, 19 Nov. 1952, pr.32, p.190 (Guatemala). See also the Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF. 157/PC/83, printed in 18 (9/12) *HRLJ* 1997, pp.478-479.

[5] GA Res. 52/113, 12 Dec. 1997, pr.1, ('Universal Realization of the Right of Peoples to Self-Determination); A/C.3/51/SR.26, 18 Sept. 1997, pr.18, p.5 (Albania); A/C.3/52/SR.29, 1 Dec. 1997, pr.36, p.5 (Palestine); A/C.3/50 SR.4, 16 Oct. 1995, pr.13, p.4 (Syrian Arab Republic).

[6] A/C.3/SR. 366, 12 Dec. 1951, pr.26, p.115 (Liberia).

[7] A/C.3/50/SR. 4, 16 Oct. 1995, pr.18, p.5 (Cuba). See also GA Res. 637 A (VII) 12, Dec. 1952; GA Res. 637 (viii) 16 Dec. 1952, preambular paragraph (both resolutions are on the right to self-determination); A/C.3/SR.450, 28 Nov. 1952, pr.46, p.246 (Saudi Arabia); and A/C.3/L.296, 24 Nov. 1952 which stated: "Whereas the right of peoples and nations to self-determination is a prerequisite to the enjoyment of all fundamental human rights", GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p.4.

[8] A/C.3/SR.397, 21 Jan. 1952, pr.4, p.299 (Syria); A/C.3/SR. 460, 1 Dec. 1952, pr.19, p.259 (The Philippine); A/C.3/52/SR.29, I Dec. 1997, pr.28, p.4 (Pakistan).

violation of which constitute a crime.[9] In fact, some States were over optimistic even during the embryonic stage of the United Nations. Indonesia, for example, said:

> "That right was, indeed, basic: nations which, like Indonesia, had just freed themselves from colonialism knew what blood had been shed and what wars had been caused as a result of attacks on that right. His delegation was convinced that by guaranteeing the right of peoples to self-determination, the United Nations could not but help to avert a new world war, or at least to prevent disputes between nations".[10]

Jurisprudence emerging from the ICJ is also very encouraging. It is now admitted that the right to self-determination constitutes a fundamental principle of contemporary international law.[11]

However, States are equally adamant that the right to self-determination should not be interpreted in the sense of entailing secessionist elements which allow groups of people to secede from the State in which they live. Misunderstanding and confusion on the right to self-determination have resulted, in the view of many States, in numerous regional conflicts since the end of the Cold War.[12] Members are urged to place specific limitations on

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[9] A/C.3/50/SR.3, 11 Oct. 1995, pr. 23, p.6 (Algeria); A/C.3/SR.6, 14 Oct. 1994, pr.48, p.9 (Honduras); and A/C.3/49/SR.3, 17 Oct. 1994, pr.24, p.9 (Germany).

[10] A/C.3/SR. 366, 12 Dec. 1951, pr.18, p.115.

[11] See Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolutions 276/ 1970, Advisory Opinion, *ICJ Rep*. 1971, pp.31-32. See Western Sahara Advisory Opinion, *ICJ Rep*. [1975] prs.55-59, pp.31-33. See also Judge Weeramantry's dissenting opinion, Case Concerning East Timor (*Portugal* v *Australia*), 90 *ICJ Rep*. 1995, pr.29, p.102:

[12] A/C.3/48/SR.21, 26 Nov. 1993, pr.14, p.4 (The Philippine).

it to avoid claims for an "unlimited right of secession".[13] States have generally been opposed to any kind of measures which would weaken their structure, because States are "the fundamental units of the international community and the United Nations could not support proposals tending to weaken that basic concept".[14] Nor do they approve a right to secession for a certain segment of the population in a State.[15] Most States are likely to resist, as Liechtenstein observes, any secessionist activities "by force of arms, if necessary".[16] Changes within the 'national boundaries' of States are expected to be in accordance with democratic means.[17] Minorities living in multi-ethnic polities are expected to enjoy rights accorded to them (minorities' rights) whilst respecting human rights and the fundamental freedoms of others, and whilst refraining from any activities which might harm the territorial integrity or political unity of sovereign and independent States[18] in conformity with the principles enshrined in the United Nations Charter and other human rights.[19] No concession beyond autonomy nor any element of secession is tolerated, as stated by the first Premier of India, Jawaharlal Nehru half a century ago. Clarifying unequivocally the position of the post-independence Indian Republic, Nehru emphasised this hard line policy on the eve of Indian

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[13] A/C.3/SR. 460, 1 Dec. 1952, pr.24, p.260 (New Zealand); A/C.6/SR. 893, 8 Dec. 1965, pr.28, p.331(Mali).

[14] See for example A/C.3/SR. 459, 29 Nov. 1952, pr.26, p.253 (Argentina).

[15] A/C.6/SR.893, 8 Dec. 1965, pr.28, p. 331 (Mali).

[16] See A/C.3/51/SR. 27, 13 Aug. 1997, pr.5, p.2 (Liechtenstein).

[17] A/C.3/52/SR.29, 1 Dec. 1997, pr.22, p.3 (India). A similar view was expressed by Ukraine, A/C.3/51/SR.28, 9 Sept. 1997, pr.12, p.4.

[18] A/C.3/51/SR.26, 18 Sept. 1997, pr.62, p.13 (Brazil).

[19] See E/CN.4/1989/WG.5/WP.3, Drafting Proposal Concerning Article 5 of the Declaration on Minorities, Annex III. ESCOR, E/CN.4 1989/38, 7 March 1989, p.16 (Ukrainian Soviet Socialist Republic).

independence in response to the declaration of independence made by Dr Zapu Angami Phizo, the leader of the Nagas:

> "We can give you complete autonomy but never independence. You can never hope to be independent. No state, big or small, in India will be allowed to remain independent. We will use all our influence and power to suppress such tendencies".[20]

Some States even take the extreme position that the creation of a State by exercising the right to self-determination can be exercised by the people of a territorial unit only once in a life-time, and that this right remains valid until freely exercised.[21] During the debate on the right to self-determination it was argued:

> "Nations were created by the exercise of self-determination. But once they had been so created, the right had been exercised and the resulting entity possessed an inviolable and indivisible personality with its own constitution and institutions. It was a principle of international law that States must be taken as they were; self-determination, once exercised, had to be respected".[22]

States' practices in post-world-war II suggest that the Nehruvian approach has been followed by many in response to secessionist claims. The utmost concern has been felt about

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[20] *N.Maxwell,* India, the Nagas and the North-East, 1980, cited in *S.M.Ali,* The Federal State: Power, People and International War in South Asia, Zed Books: London and New Jersey, 1993, p.31.

[21] A/C.3/51/SR.28, 19 Sept. 1967, pr.39, p.9 (Pakistan).

[22] E. 2256, Annex V, Res. A and B. A/C.3/SR. 457, 28 Nov. 1952, pr.28, p.239 (Peru).

the danger of minorities pursuing the right to self-determination through secessionist campaigns.

However, only a few States ever supported the right to secession. During the debate on the proposed article on the right of self-determination, Saudi Arabia advanced the theory that by exercising the right to self-determination minorities could secede when their interests so required. It argued:

> "Secession need not be a tragedy; Ireland had at long last, severed the ties binding it into the United Kingdom, but the two countries continued to live side by side in perfect amity. When their interests so required, minorities should be allowed to secede; a number of Member States of the United Nations have come into being through the exercise by minorities of their right to self-determination....when their interests were fully safeguarded minorities had no reason and no desire to set up separate States".[23]

Although it is not exactly clear, the current Saudi Arabian position seems to support the above position. It stated that the international community should admit that the right of self-determination could be exercised by "peoples who are still subject to injustice, repression and racism".[24] The USSR repeatedly (1917, 1924, 1936 and 1978) stated that the right to secession was compatible with the right to self-determination. Article 72 of the 1978 Soviet Constitution reads: "Each Union Republic shall retain the right freely to secede from the

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[23] A/C.3/SR. 446, 17 Nov. 1952, pr.37, p.168.

[24] A/C.3/47/SR. 9, 27 Oct. 1992, pr.71, p.15.

USSR".[25] But these constitutional guarantees were in fact fake promises only. In practice the Soviet leaders did everything to prevent provinces breaking away. Secessionist tendencies were condemned by the Communist leadership as "fundamentally opposed to the interests of the mass of the peoples both of the centre and of the border regions".[26] The 1990 USSR Law on Procedure for deciding the Secession of a Union Republic and the 1993 Russian Constitution in its Article 66 (5) made a secessionist attempt virtually impossible by constitutional manoeuvring, that is, Republics should get the consent of the USSR Supreme Soviet before seceding.[27] In 1992, the Constitutional Court of the Russian Federation in the *Tartastan*[28] case stated that self-determination has to be exercised in accordance with the principle of the territorial integrity of States. Referring to the 1978 Constitution, the Court held that both Tartastan's declaration of independence and its proposed referendum were unconstitutional.[29] The Court found that Tartastan could change its internal political structure by virtue of the right to self-determination by staying within a State thereby respecting its territorial integrity and the human rights of others. At the same time, it emphasised that the right to self-determination did not provide any legal base for

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[25] *M.Dixon* and *D.McCorquodale*, Cases and Materials in International Law, Blackstone: London, 1991, p.256.

[26] *T.Gazzini*, 'Consideration of the Conflict in Chechnya', 17 (3/4) *HRLJ* 1996, p. 94. See further *R.Mullerson*, International Law, Rights and Politics: Developments in Eastern Europe and the CIS, LSE and Routledge, London and New York, 1994, pp.58-91. See also *P.Gaeta*, 'The Armed Conflict in Chechnya before the Russian Constitutional Court', 7 (4) *EJIL* 1996, p.564.

[27] *Dixon* and *McCorquodale, supra,* 25, p.256-258.

[28] Vedomosty RF, Issue, no.13, Han no.71 (1992) 1 VKS (1993), cited in *G.M.Danilenko*, 'The New Russian Constitution and International Law', 88 *AJIL* 1994, p.463.

[29] *Gazzini, supra,* 26, p.94.

secession.[30] Another State which recognised secession as a constitutional right was the former Yugoslavia. The former Yugoslav Federation's 1974 Constitution in its article 1 recognised the right of every nation to self-determination, including the right to secession. Yet most importantly, there was not any mechanism in the Constitution to implement such a right in the event of a nation wanting to secede.[31] Nonetheless, in practice secession was never considered a justifiable option. The South African constitution, 1996 provides some encouragement to secessionists. Section 235 states:

> "The right of the South African people as a whole to self-determination, as manifested in the constitution, does not preclude, within the framework of this right, recognition of the notion of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation".

There is a possibility that the phrase, "or in any other way", argued Dugard, might be used by secessionists to justify their separatist claims.[32]

Currently, the right to self-determination is going through a revolutionary stage different to that from the 1950s to 1980s. Some States have begun to consider that, a) there is a link between "the situation of minorities and self-determination",[33] b) there may be cases in which minorities could exercise certain rights in the context of internal self-determination,

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[30] *G.M.Danilenko*, 'The New Russian Constitution and International Law', 88 *AJIL* 1994, p.463.

[31] *S.Hille*, 'Mutual Recognition of Croatia and Serbia (+Montenegro)', 6 *EJIL* 1995, p.598.

[32] *J.Dugard*, 'International Law and the South African Constitution', 8 (1) *EJIL* 1997, pp.89-90.

[33] A/C.3/47/SR.7, 5 Oct. 1992, pr.57, pp.12-13 (Brazil).

provided that they are prepared to uphold the national sovereignty and territorial integrity of States in which they live, [34] and c) the scope of the right to self-determination should be expanded in both its internal and external aspects to encompass "the right of distinct peoples within a State, particularly indigenous peoples and national minorities to make decisions on their own affairs".[35] However, any such rights should be confined to internal self-determination.[36]

Liechtenstein argued that a new approach was needed to finding a solution to minorities' grievances.[37] By finding new meanings to the right to self-determination beyond its traditional context, and by enabling a segment of a population living within nation-States to exercise the right to self-determination, most of these conflicts could be solved.[38] In suitable cases, argued the Liechtenstein delegate, secession should be considered as a pragmatic solution. He stated:

> "The inherent right of communities having territorial and social unity to self-determination must be recognized. That involved the free choice by each community of its political, social, economic and cultural diversity in accordance with the interests of its members... ."[39]

A few States supported the initiative of Liechtenstein arguing that any programme which aimed at promoting the "debate on the right to self-determination" would be helpful,[40] and a

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[34] A/C.3/48/SR. 21, 26 Nov. 1993, pr.13, p.4 (The Philippine).

[35] A/C.3/49/SR.6, 31 Oct. 1994, pr.24, p.6 (Australia).

[36] *Ibid.* pr.25, p.6.

[37] See its original proposal A/48/147, 1992, Add.1.

[38] A/51/PV.11, 26 Sept. 1996, p.11 (Liechtenstein).

[39] A/C.3/47/SR.5, 13 Oct. 1992, pr.35, p.8 (Liechtenstein).

step forward.[41] The meaning of self-determination, argued Uganda, should move beyond the colonial situation.[42] However, the strongest support for Liechtenstein's proposal has so far come from Albania which supported the view that the right to secession is included in the right to self-determination. It stated:

> "The relationship between the right to self-determination, territorial integrity of States and the rights of minorities must be addressed... Denial of the rights of peoples to self-determination on the pretext of preserving the territorial integrity of States, and the treatment of those peoples as minorities had led to tragic conflicts. No nation in a multinational State could be treated as a minority... ."[43]

Turning to secession, it stated:

> "Secession was one way in which the right of peoples to self-determination was exercised... The recent experience of the former Soviet Union and the former Yugoslavia showed that peoples should be allowed to exercise their right of self-determination even if it jeopardized territorial integrity... Independent States were reluctant to accommodate separatist claims for fear that they would threaten internal order and the stability of the international system. However, developments in international law and General Assembly resolutions recognizing the right of

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[40] A/C.3/51/SR.28, 19 Sept. 1997, pr.55, p.12 (Andorra).

[41] A/C.3/48/SR.22, 30 Nov. 1993, pr.9, p.3 (Estonia).

[42] A/C.3/47/SR.9, 27 Oct. 1992, pr.18, p.6 (Uganda).

[43] A/C.3/47/SR. 8, 14 Oct. 1992, pr.36, p.10.

self-determination would seem to allow the principle of self-determination to be invoked, under certain circumstances, as the basis for legitimate secession".[44]

However, these views represent only a minority. Any such accommodations are not welcomed by the majority of States. Moreover, many States have been cautious not to promote secession as a right in international law. Such moves "would undermine the modern concept of the nation-State".[45]

10.1 *Right to Self-Determination Does Not Entail a Right to Secession*

Peoples or *all peoples* have the right to determine the form of States "by the democratic means of a majority decision".[46] However, the common understanding of States appears to be that minorities' problems should not be raised in connection with the right to self-determination or implementation of that right. They are completely different issues. Partial views and misconception of the right to self-determination "could encourage separatism based on ethnic consideration".[47] Many emphasised that secession should not be considered as a component part of the right to self-determination,[48] because fragmentation of States conflicts with the right to self-determination. By referring to the final outcome of the San Francisco Conference and the Atlantic Charter, the Netherlands's delegate categorically

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[44] *Ibid.* pr.47, pp.12-13.

[45] A/C.3/48/SR.22, 30 Oct. 1994, pr.22, p.5 (Malaya).

[46] A/C.6/SR. 892, 7 Dec. 1965, pr.320 (Cyprus).

[47] A/C.3/50/SR.5, 27 Oct. 1995, pr.7, p.4 (Brazil). See also A/C.3/50/SR.8, 12 Oct. 1995, pr.8, p.4 (Cyprus) and A/C.3/48/SR.9, 16 Nov. 1993, pr.12, p.4 (Russian Federation).

[48] A/C.3/SR. 447, prs. 26 and 27, 18 Nov. 1952, p.175 (US delegate Mrs Roosevelt).

rejected the notion that secession was implicitly or explicitly approved by the States which took part in the proceedings. "The fear of claims for secession based on self-determination for minority and other groups remains an overriding concern for many States".[49]

Many considered that secession or separatism could not be equated with self-determination.[50] If the right to self-determination be given new meanings beyond the current understanding, argued the delegate of the Russian Federation, "the noble objectives of protection of the right of the peoples could be reduced to the level of primitive separatism" eventually constituting a threat for both international stability and security. It was further argued:[51]

> "At the current time extremists were increasingly using the slogan of self-determination, which in practice led to its confusion with aggressive separatism. The right of self-determination was a right of the peoples, and no clan or group could be allowed to usurp it".

Those destructive groups and movements that have emerged in the name of the right to self-determination should, urged some States, be contained by Governments[52] because in the interest of peace, security and economic well-being under no circumstances should fragmentation of multi-ethnic States be tolerated. It was further suggested that self-

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[49] *D.McGoldrick*, The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights, Clarendon Press: Oxford, 1991, p.257.

[50] A/C.3/51/SR.28, 19 Sept. 1997, pr.13, p.4 (Ukraine); A/C.3/47/SR.8, 19 Oct. 1992, pr.36, p.10 (Australia); A/C.3/48/SR.9, 16 Nov. 1993, pr.12, p.4 ("self-determination does not automatically mean separatism", Russian Federation).

[51] A/C.3/51/SR.26, 18 Sept. 1997, respectively, pr.66, p.14, pr.69, p.15 (Russian Federation).

[52] A/C.3/49/SR. 8, 25 Oct. 1994, pr. 46, p.11 (India).

determination could not be interpreted as a pretext for any cultural, religious or ethnic minority to demand its own State.[53] The Ethiopian delegation explained:

> "There was a tendency to confuse peoples with national minorities in interpreting the principle of self-determination. That interpretation was illogical since the benefits arising out of the right to self-determination could not be conferred on minorities which already had that right on an equal footing with other component groups of sovereign States. Moreover, the right of self-determination, which was an essential condition for the preservation of peace, could not be applied in such a destructive way as to become a possible source of disruption and conflict".[54]

There is another dimension to the differences between secession and self-determination. Self-determination is closely bound up with international peace and security. Yet, secession often creates problems for the harmony of international relations and obstructs the peace, law and order of multiethnic polities. It can be argued that juxtaposition of these diametrically opposed principles does not help minorities' claim to secession.

The view that a region or a regionally based group of States has no right to secession by virtue of the right to self-determination has gained popularity amongst many States.[55] A slightly modified view is also evident. If ethnic groups formed neither a compact

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[53] A/C.3/47/SR.9, 27 Oct. 1992, pr.96, p.20 (Equador); and. A/C.3/50/SR.4, 16 Oct. 1995, pr.29, p.7 (Republic of China).

[54] A/C.3/SR. 453, 24 Nov. 1952, pr.14, p.214.

[55] A/C.3/SR. 451, 21 Nov. 1952, pr.31-32, p.204 (Venezuela).

community nor a majority in a specific territory, they could not, according to Ukraine, claim the right to secession.[56] Ukraine stated:

> "Certain States considered that the right to self-determination of peoples was applicable to the claims of national and even regional minorities but in the opinion of her delegation that is unjustified... Her delegation considered that the right to self-determination could not entail territorial separation for an ethnic group if that group was not in a majority in the territory concerned and if the other group living there objected to the separation".[57]

10.2 *Secession is Illegal, and It is Not a Positive Rule in International Law*

Current States' attitudes seem to be that the method of creating nations should not involve force or secession.[58] If secession involves violence and non-democratic methods, States are reluctant to grant any legal recognition, except in the case of national- liberation movements which are fighting for independence. In fact, liberation struggles against alien and colonial domination are encouraged.[59] However, international law, according to some States, has

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[56] A/C.3/51/SR.28, 19 Sept. 1996, pr.13, p.4 (Ukraine), and E/CN.4/1996/SR.7, pr.31.

[57] A/C.3/51/SR. 28, 19 Sept. 1996, pr.14, p.5.

[58] A/C.3/SR. 457, 28 Nov. 1952, pr.27, p.239 (Peru).

[59] A/C.6/51/SR.30, 12 Aug. 1997, pr.71, p.13 (Pakistan). A violation of the right of peoples who are struggling to achieve independence is considered "an international crime and contrary to the purposes of the United Nations". GAOR, Agenda item 87, Annexes (xxii) 22 session, 1967, pr. 186, p. 31. The use of force by liberation forces could, in Tunisia's view, "be permitted and even encouraged in the exercise of the right to self-determination. See A/C.6/SR.887, I Dec. 1965, pr.26, p.284. See Ceylonese representative's statement, A/PV. 947, 14 Dec. 1960, pr.73, p.1277. A similar statement made by Ecuador approving the "legitimacy of national-liberation movements struggling for their independence", A/C.3/47/SR. 9, 14. Oct. 1992, pr.96, p.20. See further Articles 20 (2) and 20 (3) of the African Charter on

not recognized the position that a segment of a population can unilaterally declare secession from the State.[60] This proposition found many supporters, because the contrary position would obstruct any attempt to maintain the unity of the State.[61] There are many examples. The unilateral declaration of independence by the Republic of Northern Cyprus has continually been condemned as illegal. The secessions of Katanga from the Congo, Southern Rhodesia from the UK, Biafra from Nigeria, the Comorian Island of Mayotte from the Lomoro Archipelago were condemned.[62]

Generally, secession is considered by States as treason, and a violation of established norms of international law.[63] As stated by Roberts, ethnic divisions or ethnic

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Human and Peoples' Right, 1981. Article 20 (3) says: "Colonial or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any recognized means by the international community". Article 20 (3) states: "All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or culture". See also GA Res. 47/82, 16 Dec. 1992, pr.2, which reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination in all its forms and by all available means. See also GA Res. 3314 of 14, Dec. 1974. Further see *K.Small,* 'The Legal Status of National Liberation Movements with Particular Reference to South Africa', 15 *Zambia Law Journal* 1983, pp. 37-59.

[60] A/C.3/52/SR. 29, 1 Dec. 1997, pr. 22, p.4 (India).

[61] For example see A/C.3/SR. 450, 20 Nov. 1952, pr. 3, p. 195 (New Zealand).

[62] *J.Klabbers* and *R.Lefeber,* 'Africa: Lost Between Self-Determination and Uti Possidetis', in *C. Brolmann, R.Lefeber and M.Zieck* (eds.), Peoples and Minorities in International Law, Kluwer Law: Dordrecht/Boston/London, 1993, p. 46.

[63] *J.Crawford,* The Creation of States in International Law, 1979, pp.120-128, Clarendon Press: Oxford.

claims for separate States were considered "divisive, barbarous and vile".[64] For example, movements fighting for secession, in the view of Turkey, are terrorist groups. In fact, Turkey has been adamant that it will not tolerate terrorist acts against its territory.[65] Minorities living within the borders of Turkey, "should fully participate in any local administrative arrangements".[66] India considered secessionists in Kashmir and Jammu as terrorist movements which should be severely dealt with.[67]

10.3 *Secession is Valid only if it is Achieved through Peaceful and Democratic Means*

The majority of States are of the view that the creation of a State or the achievement of independence is legally valid only if it is achieved by "democratic means".[68] By peaceful and democratic means peoples could determine their political future "whether it led to independence or to the establishment of rights within the community".[69] This should be accomplished through the wishes of the people expressed through democratic means such

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[64] *M.Roberts*, 'Ethnic Conflicts in Sri Lanka and Sinhalese Perspective: Barriers to Accommodation', 12 (3) *MAS* 1978, p.354.

[65] At present the leader of the separatist Kurdish leader of the Kurdishtan Workers Party is being tried for treason. See also *Yasa* v *Turkey*, 9 June 1998 (Eur. Ct. HR), 16 (4) *NQHR* 1998, pp.509-510; *Tekin* v *Turkey*, 9 June 1998 (Eur. Ct. HR), *ibid.* pp.510-511.

[66] A/51/PV.15, 30 Sept. 1996, p.6 (Turkey).

[67] A/C.3/47, SR. 10, 19 Oct. 1992, pr.7, p.3.

[68] See for example GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p. 7, A/C.3/L. 305, 28 Nov. 1952 (Lebanon).

[69] A/C.3/SR. 459, 29 Nov. 1952, pr.21, p.253 (Denmark).

as plebiscites or referenda held under the auspices of the UN,[70] and or "other regionalized democratic means".[71] "Recognized democratic means", as explained by the Indian delegate, "should not be divorced from the conventions of the United Nations".[72] On the other hand, if secession can be achieved with the consent of the parties concerned, it is then in compliance with international law and acceptable to the international community.[73]

10.4 *The Right to Create an Independent State Applies Only to Peoples under Colonialism or Other Form of Foreign Domination ?*

When a country achieves its independence does a segment of people living in the independent States possess any residual power to secede ? In a non-colonial setting, minorities' claim to secession in terms of the right to self-determination has been disputed by a majority of States. There are a significant number of States who maintain the position that it is only peoples under colonialism or other forms of alien domination who can claim independence by forming their own form of government by virtue of the right to self-determination. The practices of the Latin American and Afro-Asian countries on this score appear to be largely unanimous.

The Indian delegate said as early as the 1950s that the right to create an independent State as guaranteed in common article I of both Covenants could apply only to

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[70] GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p.3, A/C.3/L.294, 18 Nov. 1952 (US).

[71] GAOR, 7th session, Annexes, Agenda Item 30, 1952-1953, p.4 (India), A/C.3 L.297/Rev.1, 25 Nov. 1952 (on the proposed provision on self-determination). A similar view of Ethiopia, GAOR 7th session, Annexes, Agenda Item 30, 1952-1953, p.6, A/C.3/L.301, 28 Nov. 1952.

[72] A/C.3/SR.459, 29 Nov. 1952, pr.58, pp.255-256.

[73] A/C.3/47/SR. 4, 19 Oct. 1992, pr.43, p.11 (Czechoslovakia).

peoples who were under the authority of other nations, i.e., to peoples living in the Non-Self-Governing Territories and the Trust Territories,[74] a position later approved by other Asian countries.[75] Replying to the US delegate Mrs. Roosevelt's criticism, the Indian delegate told the Third Committee that the application of the right to self-determination beyond the colonial setting was "fraught with dangerous consequences".[76] This apparently extreme and negative position has since then been continually followed by India[77] and many other States.

Most States are adamant that that the right to create States cannot be validated in terms of the right to self-determination.[78] Any attempt to universalise the right, in the view of Lebanon, would not be satisfactory, "because it would imply intervention in matters which were essentially within the domestic jurisdiction of any State".[79] The approach taken by the Northern African States,[80] was similar to that of Asian countries, i.e., that the right to self-determination meant the right of peoples to free themselves from colonialist oppression

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[74] A/C.3/SR. 447, 18 Nov. 1952, pr.43, p.177; and see further A/C.3/SR. 399, 23 Jan. 1952, pr.2, p.311, and GAOR, 7th session, Agenda Item 30, Annexes, 1952-1953, p. 15, UN Doc. A/L.3/L.297, pr. 2. See also A/C.3/50/SR.18, 2 Nov. 1995, pr.44, p.9.

[75] A/C.3/48/SR.22, 3 Nov. 1993, pr.24, p.6 (Indonesia); A/C.3/50/SR.56, 14 Feb. 1996, pr.15, p.4 (Pakistan); A/C.3/50/SR.4, 16 Oct. 1995, pr.29, p.7 (China).

[76] A/C.3/SR. 447, 18 Nov. 1952, pr. 43. p. 177. A/C.3/48/SR.22, 30 Nov. 1993, prs.18-20, p.5 (Sri Lanka).

[77] See for example A/C.3/49/SR.8, 25 Oct. 1994, pr.45, p.11; A/C.3/52/SR.29, 1 Dec. 1997, pr.22, p.3.

[78] A/C.3/48/SR.22, 30 Nov. 1993, pr.54, p.12 (Hungary); A/C.3/SR.447, 18 Nov. 1952, pr.43, p.177 (India).

[79] A/C.3/SR. 459, 29 Nov. 1952, pr.43, p.254.

[80] A/C.3/50/SR. 3, 9 Oct. 1995, pr.23, p.6 (Algeria): A/C.3/50/SR.8, 30 Oct. 1995, pr.10, p.4 (Libya, "all peoples under foreign domination").

or foreign occupation.[81] It could therefore not be invoked as an argument in favour of the disintegration or dismemberment of sovereign States.[82]

The position of the Latin American countries on this issue demonstrates a remarkable understanding with their Asian and African counterparts. Minorities, in the view of many Latin American countries, should not be allowed to exercise the right to secession by abusing the right to self-determination.[83] For example, Brazil argued: "It should be clearly stated that self-determination was a fundamental human rights of those who suffered under colonialism and other forms of foreign domination... ."[84]

10.5 *An Acknowledgement of Secession Will Entail a Danger of Anarchy ?*

The argument that the misuse of the right to self-determination could lead to anarchy and chaos had been advanced by the Western powers and their allies in the formative stage of the UN. Cassin, the delegate of France, told the Third Committee during the debate on the right to self-determination that such an undefined article on the right to self-determination "would allow certain powerful nations to try to disintegrate other nations by instigating artificial separatist movements within peoples united by mutual consent".[85] They were concerned that the exercise of the right of self-determination without any limitations or safeguards might be a cause of friction and it would disturb friendly relations between

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[81] A/C.3/51/SR.26, 18 Sept. 1997, pr.26, p.7 (Sudan).

[82] A/C.3/SR. 8, 30 Oct. 1995, pr.13, p.5 (Sudan).

[83] A/C.3/SR.449, 19 Nov. 1952, pr.21, p.189 (Argentina), pr.39, p.191 (Guatemala) and, A/C.3/49/SR.6, 31 Oct. 1994, pr.48, p.9 (Honduras).

[84] A/C.3/50/SR. 5, 27 Oct. 1995, pr.7, p.4, and A/C.3/51/SR.26, 18 Sept. 1997, pr.61, p.13.

[85] A/C.3/SR. 399, 23 Jan. 1952, pr.30, p.314. For similar view, A/C.3/SR. 445, 14 Nov. 1952, pr.40, p.163 (Australia).

nations. Such a policy might lead to anarchy. The Netherlands cautioned that those countries which try to undermine the State by expanding the principle of self-determination were at the same time undermining the whole world order. States were the principal subjects of existing international law; therefore it was everyone's responsibility to protect them from secessionist movements:

> "The question then was when such a right of secession should be acknowledged. Should it be acknowledged even if the seceding part could neither support itself economically nor defend itself? Would acknowledgement of the right not entail the danger of anarchy? Was there no fear that hostile interests would try to incite to and promote secession".[86]

Commenting on a proposed Resolution on the right to self-determination, the New Zealand delegate stated: [87]

> "If the Committee affirmed the right to self-determination without defining the circumstances in which the members of a group might exercise it, the right would be exploited and used as a propaganda weapon to foment unrest and to divide loyalties. The granting of the right would not produce any beneficial results, but would help those who wished to undermine the stability of a democratic State".

At present, most States in Africa, Asia and some in Latin America have been concerned about the possible consequences for the nation-State of "mindless advocacy of the doctrine

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[86] A/C.3/SR. 447, 18 Nov. 1952, pr.8, p.172 (the Netherlands).

[87] A. E.2256, Annex V, A/C.3/SR. 450, 20 Nov. 1952, pr.5, p.196.

of the right to self-determination".[88] However justifiable the demands of a separatist group may be, States are unlikely to encourage secessionist groups for fear of opening a Pandora's box. Some States are concerned about the possible balkanization effect such secessionist claims might bring into the African continent given ethnic and tribal diversities in the continent.[89] It is often the case, for example, that every African nation has its own Katanga. Once the logic of secession is admitted, there is no end other than anarchy. Such movements, if encouraged, said the former Emperor Haile Sellassie, would harm the "larger and greater objective of African unity".[90] Ghana's representative argued that "...sacrificing the principle of self-determination, or on the other hand, encouraging the dismemberment of States, could not be seen as a meaningful response to the resurgence of nationalism... ."[91] The danger of supporting secessionist movements in independent countries, in the view of Ceylon, is enormous. It would create "a deadly precedent if we regard it as such".[92] Cyprus concluded that if the application of that principle is interpreted as a right which minorities could use to establish sovereign entities then it could "create chaos and cause untold human suffering".[93]

New attempts to enhance the scope of the right to self-determination have been identified as a conspiracy to destabilise the political structure, in particular, of developing countries by Western powers. This consideration made the importance of defending "that

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[88] A/C.3/49/SR.8, 25 Oct. 1994, pr.47, p.11(India).

[89] A/PV. 976, pr. 135, 4 Apr. 1961, p.187 (Upper Volta).

[90] See *D.A.Ijalaye*, 'Was Biafra at Any Time a State in International Law' ? 65 *AJIL* 1971, pp. 551-556.

[91] A/C.3/48/SR.22, 30 Nov. 1993, pr.5, p.3.

[92] A/PV. 2003, 7 Dec. 1971, pr.34, p.3. A/PV.2002, 7 Dec. 1971, pr.82, p.7 (Indonesia).

[93] A/C.3/47/SR.9, 14 Oct. 1992, pr.88, p.18.

principle more necessary than ever before".[94] Some States seem to suspect "powerful States" of exerting external pressures or coercive measures "to effect policy changes" in the developing countries.[95] It was, in Iraq's view, western imperialism which made "erroneous attempts to reinterpret the principle of the right to self-determination as the right of all ethnic, linguistic and religious groups to rebel or secede from the States".[96] In condemning the "repeated attempts" or inappropriate approaches of powerful countries "to modify the concept of the right to self-determination,[97] it was argued that such attempts, a) are in violation of the principles of the Charter, and the "basic principles of international law[98] b) will promote secession and give rise to the eventual breakdown of a sovereign State",[99] c) destroy the political structure of countries they do not like,[100]d) can turn the right of peoples to self-determination into a weapon to be used against the political unity of States,[101] and e) can be used by 'interested parties' to encourage secession by undermining multiethnic polities.[102] Azerbaijan's delegate summarised the concerns of many States:

> "Self-determination was sometimes used with pernicious effect to justify territorial expansion under the pretext of protecting ethnic groups in other States. A glaring example was the use of

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[94] A/C.3/47/SR.9, 27 Oct. 1992, pr. 69, p.15 (Cuba).

[95] A/C.3/49/SR.6, 31 Oct. 1994, pr. 22, p.5 (Malaysia).

[96] A/C.3/48/SR.21, 26 Nov. 1993, pr. 25, p.7.

[97] A/C.3/52/SR. 29, I Dec. 1997, pr.47-48, p. 6 (Cuba).

[98] A/C.3/50/SR. 4, 16 Oct. 1995, pr. 16, p.5 (Cuba).

[99] A/C.3/47/SR.9, 27 Oct. 1992, pr. 88, p.18 (Cyprus).

[100] *Ibid*, pr. 87, p.18.

[101] *Ibid.* pr.88, p.18.

[102] A/C.3/50/SR.7, 30 Oct. 1995, pr.74, p.17 (India).

that principle to cover military aggression against an independent State aimed at annexing its territory".[103]

India, most appropriately, suggested that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to the fragmentation of States, and the peace, security and economic well-being of peoples.[104] States are determined that they will not allow "subversive elements to undermine established political entities" by abusing the right to self-determination.[105]

10.6 *Frontiers Inherited From the Colonial Era Should be Maintained: "Even Slightest Recognition Would be Unwise... ."*

It is evident from current practices that the right of self-determination has invariably been linked with national sovereignty and the territorial integrity of sovereign States.[106] Changes to boundaries, from States' perspectives, will result in a disastrous reassertion of ancient tribal, linguistic or religious divisions. The argument goes that "even the slightest recognition of secession by states would be unwise as showing blood in the lion cage".[107] In particular, the common consensus of African States appears to be that, a) the colonial

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[103] A/C.3/49/SR.8, 25 Oct. 1994, pr. 6, p.3.

[104] AC.3/51/SR.28, 19 Sept. 1997, pr.8, p.3 (India).

[105] A/C.3/48/SR. 22, 3 Nov. 1993, pr. 4, p.2 (Nepal).

[106] For example see GA Res. 47/82/, 89th Ple.mtg. 16 Dec. 1992. GA Res. 49/151, 7 Feb. 1995, pr.2 (on the Right to Self-Determination).

[107] *L.C.Buchheit*, Secession, The Legitimacy of Self-Determination, Yale University Tress: New Haven and London, 1978, p.103.

borders of African States should be "left unaltered" to avoid the risk of disintegration of the States concerned,[108] and b) no one should be allowed to undermine the territorial integrity of sovereign and independent States[109] in the pursuit of their own narrow interests.[110] This uncompromising stance is reflected in the statement made by the Sudan:

> "... the Sudan agreed with the position of the African countries which had decided, as early as the 1960s and within the framework of the Organisation of African Unity, that the frontiers inherited from the colonialist era should be maintained since to do so otherwise should have meant destroying African unity and would therefore have constituted a threat to international peace and security".[111]

The Ghanain representative to the UN, during the debate on the Bangladeshi secessionist struggle, argued:

> "...we have to respect the sovereignty and the territorial integrity of every State member of this organization. This is one of the most fundamental principles which has been accepted by the organization of African Unity. The Organization of African Unity knows that once intervention in the domestic affairs of a member State is permitted, once one permits oneself the higher wisdom of telling another member State what it should do with regard to arranging its own

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[108] A/C.3/51/SR.26, 18 Sept. 1997, pr.26, p.7 (Sudan).

[109] A/C.3/48/SR.22, 30 Nov. 1993, pr.38, p.9 (Kenya); A/C.3/50/SR.7, 30 Oct. 1995, pr.6, p.3, (Nigeria), A/C.3/50/SR.56, 14 Feb. 1995, pr.59, p.13 (Egypt).

[110] A/C.3/48/SR.21, 26 Nov. 1993, pr.25, p.7 (Iraq).

[111] A/C.3/50/SR.8, 30 Oct. 1995, pr.13, p.5. See also A/C.3/51/SR. 26, 18 Sept. 1997, pr.26, p. 7.

political affairs, one opens a Pandora's box. And no continent can suffer more than the Africa when the principle of non-intervention is flouted."[112]

The delegate of Chad stated during the debate on East Pakistan's secessionist war:

"Knowing what the consequences of blind and unreasonable application of the principle of self-determination may be, my Government, which has said 'No' to Katanga and 'No' to Biafra, cannot say 'Yes' to what is now being asked of Pakistan, namely the disintegration of the territorial and national unity of that country".[113]

That the right to self-determination should not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent States has become the standard formula amongst the nation-States of the post-war nation-States.[114] This position was reaffirmed in the

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[112] A/PV. 2002, 7 Dec. 1971, pr. 68, p.6. See also the statement made by the former President of Ghana Mr.Nkrumah in the event of the Congo crisis, A/PV.869, 23 Sept. 1960, pr 26, p 63

[113] A/PV. 2003, 7 Dec. 1971, pr. 295, p.27.

[114] A/C.3/49/SR.6, 31 Oct. 1994, pr.66, p.12 (Turkey), A/C.3/51/SR.28, 19 Sept 1997, pr 13, p.4 (Ukraine), A/C.3/51/SR.26, 18 Sept. 1997, pr.26, p.7 (the Sudan), A/C.3/51/SR 26, 18 Sept. 1997, pr.70, p.15 (Russian Federation), A/C.3/50/SR.4, 16 Oct. 1995, pr 29, p 7 (China), A/C.3/51/SR.28, 19 Sept. 1997, pr.78, p.16 (Myanmar), A/C.3/48/SR.9, 16 Nov. 1993, pr 29, p.7 (Trinidad and Tobago on behalf of the CARICOM); A/C.3/52/L.58 submitted by the Republic of Korea, the Sudan, Tajikistan, Macedonia and Turkey entitled 'the Draft Resolution on Human Rights and Terrorism' (this proposal was adopted by 97 votes to 0 with 57 abstentions), see A/C.3/52/SR.48, 9 Dec. 1997, pr.32, p.5. A/C.3/48/SR 22, 30 Nov 1993, pr.24, p.6 (Indonesia), and A/C.3/47/SR.4, 19 Oct. 1992, pr.25, p.7 (Australia)

'Declaration on Human Rights and Terrorism'.[115] Any fragmentation of States would be harmful.[116]

It is necessary therefore to use the right to self-determination "in order to prevent new conflicts, in strict accordance with constitutional procedures and the internal legislation of the State concerned".[117] The European Union's position is also that any political conflicts between the rights of self-determination and the territorial integrity of sovereign States should be avoided.[118]

However, it should be mentioned that a few States whilst accepting the above position have slightly amended it by stipulating that the protection it offers should be granted only to democratically elected governments and Parliaments accountable to the whole population.[119]

10.7 *Future Directions ?*

Only a few States still believe that the concept of self-determination is no longer helpful in resolving the minority problems of multi-ethnic societies.[120] However, more and more States now believe that a new approach is needed to find flexible solutions to problems arising from the exercise of the right to self-determination. Various proposals have been presented; a) that a broader based national dialogue aimed at meeting the aspirations of the

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[115] A/C.3/52/L.58, see A/C.3/52/SR.49, 9 Dec. 1997, pr.32, p.5.

[116] A/51/PV.18, p.21 and A/C.3/47/SR.9, 27 Oct. 1992, pr.96, p.20 (Ecuador).

[117] A/C.3/50/SR.7, 11 Oct. 1995, pr.43, p.11 (Ukraine).

[118] A/C.3/50/SR.4, 16 Oct. 1995, pr.5, p.3 (Spain on behalf of the EU).

[119] A/C.3/51/SR.26, 18 Sept. 1997, pr.13, p.4 (Turkey), A/C.3/51/SR.26, 18 Sept. 1997, pr.62, p.13 (Brazil) and A/C.3/50/SR.5/ 27 Oct. 1995, pr.7, p.4.

[120] A/C.3/49/SR.8, 25 Oct. 1994, pr.46, p.11 (India).

numerous national ethnic groups in order to create a pluralist and multiparty democracy might be a solution,[121] b) that measures should be taken to improve solidarity amongst peoples and individuals,[122] c) that tolerance and peaceful coexistence should be the foundation of stable multiethnic polities,[123] and d) that diversity should be viewed as "a source of creativity and productivity".[124]

It is still possible, as correctly pointed out by the Russian Federation, that without impairing the principle of territorial integrity, the right of ethnic and national minorities to self-determination can be guaranteed. Autonomy may be the best formula.[125] Any solution, argued the Russian Federation, should be consistent with the principle of the territorial integrity and sovereignty of States.[126] The granting of independence to minority groups is not usually "the ideal solution and could not be applied in all cases".[127]

The argument that the right to self-determination cannot be meaningfully enjoyed when minorities are neglected and that self-determination is a human rights concept that is gaining ground.[128] In this context, what are these human rights which have been emphasised by many States? According to Turkey they are a Government representing "the entire population" whilst simultaneously respecting the rights of each and every group.[129] The

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[121] A/C.3/51/SR.28, 19 Sept. 1997, pr.79, p.16 (Myanmar).

[122] A/C.3/50/SR.5, 27 Oct. 1995, pr.10, pp.4-5 (Mauritania).

[123] A/C.3/51/SR.28, 19 Sept. 1997, pr.2, p.2 (Slovenia).

[124] A/C.3/50/SR.5, 27 Oct. 1995, pr.13, p.5 (Australia).

[125] A/C.3/48/SR.9, 16 Nov. 1993, pr.13, p.4 (the Russian Federation).

[126] A/C.3/48/SR.9, 16 Nov. 1993, pr.12, p.4, and A/C.3/50/SR.4, 16 Oct. 1995, pr.17, p.5 (Cuba).

[127] A/C.3/51/SR.28, 19 Sept. 1997, pr.15, p.5 (Ukraine).

[128] A/C.3/49/SR.6, 31 Oct. 1994, pr.24, pp.5-6 (Australia).

[129] A/C.3/51/SR.26, 18 Sept. 1997, pr.13, p.4, and A/C.3/49/SR.6, 31 Oct. 1994, pr. 66, p.12.

importance of the conditions favourable to the free and overall political, economic, social and cultural developments of nations" was emphasised by some.[130] Representation of minorities in the power structure was emphasised by others.[131] The representative of Germany stated that States should operate within a "democratic and representative political structures, including special sensitivity to the rights of minorities".[132] In the view of Germany, a long list of such rights is necessary to maintain a representative democracy which respects the rights of peoples. Amongst them, the right to freedom of expression, freedom of peaceful assembly and association, opportunities for every one to take part in the conduct of public affairs, the right of access to public service and to vote in periodic elections based on universal and equal suffrage.[133] On behalf of the EU, Spain added a few more rights to the above list, that is the rule of law and the existence of democratic institutions. Democratic and responsive political structures could be of paramount importance in averting any potential conflicts between the right of self-determination and the territorial integrity of sovereign States.[134] 'Distinct peoples and indigenous peoples' should have the right, as pointed out by the Australian delegate to the UN, to make decisions on their own affairs. He particularly mentioned the obligation of national Governments to accommodate the demands of peoples for internal self-determination.[135] In the absence of the above rights, in particular of participatory and representative democracy, is there a case

[130] A.C.3/49/SR.8, 25 Oct. 1994, pr.4, p.3 (Czech Republic).

[131] A/C.3/49/SR.8, 25 Oct. 1994, pr. 10, p.4 (Russian Federation).

[132] A/C.3/SR, 3, 17 Oct. 1994. pr.42, p.9.

[133] A/C.3/49/SR.3, 17 Oct. 1994, pr.42, p.9.

[134] A/C.3/50/SR.4, 16 Oct. 1995, pr.5 p.3.

[135] A/C.3/49/SR.6, 31 Oct. 1994, pr.24, pp.6-6.

for secession ? Even in the absence of these rights there is not, in the view of most States, a case for secession.

In conclusion, current State practice suggest that almost all States refuse to recognise any claims of minorities' right to secession based on the doctrine of self-determination. Territorial integrity and the sanctity of the boundaries of independent sovereign States are given priority over claims of the right to secession.

11 Ethnic Conflicts in Sri Lanka

Introduction

Ethnic conflicts in Sri Lanka have already cost 50,000 lives or more, and 126,281 people have become internally displaced refugees since 1983 whilst many thousands have sought asylum in the West.[1] The conflicts is continuing. The war between the Liberation Tigers of Tamil Eelam (LTTE) and the Government forces almost looks like a medieval conflict claiming hundreds of lives in a single battle. For example, it was reported that there were "more than 1,000 dead", from both the Eelamists and the government forces, in a three day battle from 29 September to 1 October 1998, in Killinochi and Mankulam, two provincial cities in the north. According to an Army spokesman, the loss of Killinochi is the biggest blow since 1,200 soldiers were killed when the Tamil Tigers (most of them teenagers recruited by force or by indoctrination)[2] overran the army base at Mulaitive.[3] The scale of killings by both sides is very high.

The Tamil Eelamists are determined to achieve a separate State, the *Tamil Eelam*[4] by merging the Northern and Eastern Provinces of the island. Analysing the Eelam strategy, Sumeda says that once the initial stage of the State of Eelam is achieved its

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[1] *Daily News*, 28 January 1999.

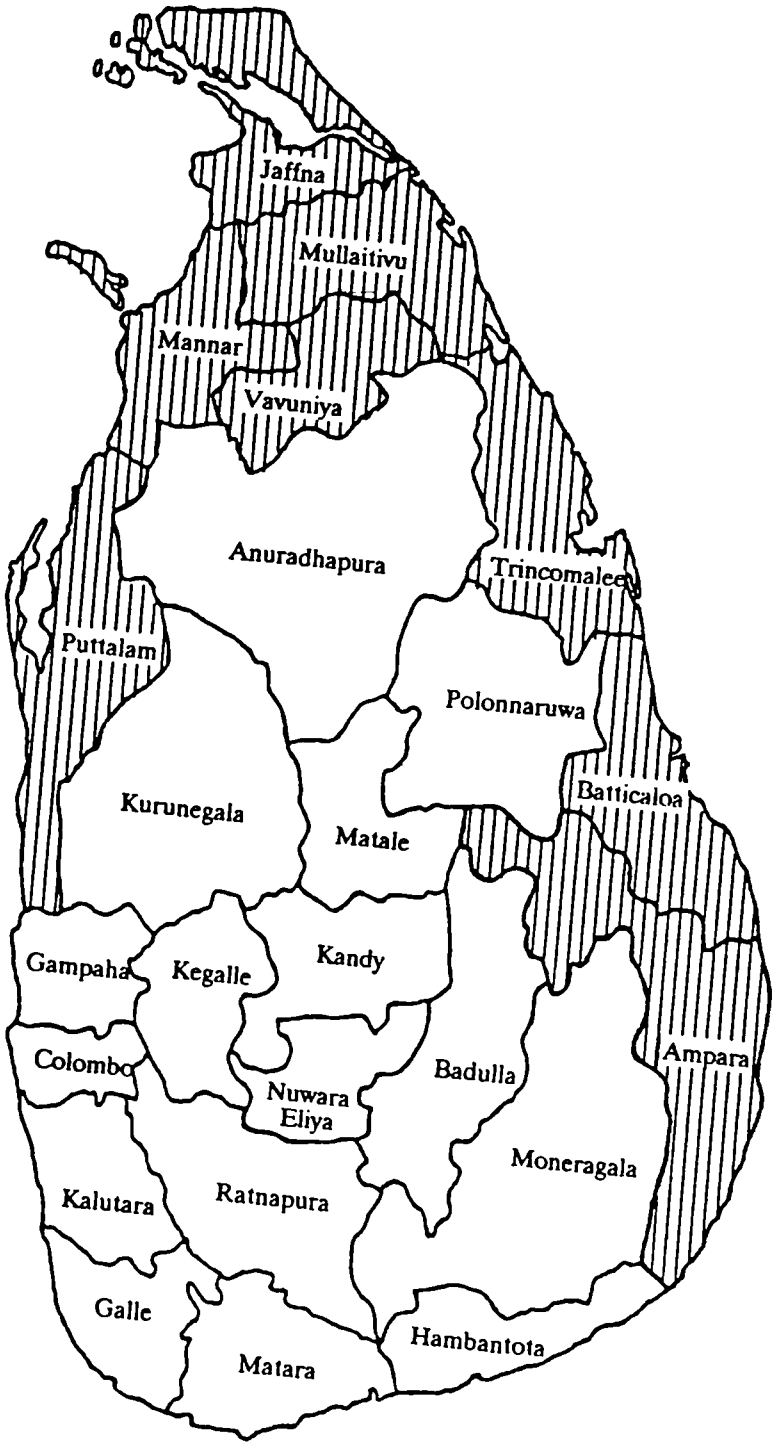
[2] See *P.Sherwell*, 'The Jaffna Falls but Tamil Leaders Vows to Fight On', *The Daily Telegraph*, 6 Dec. 1995.

[3] *V.Yapa*, 'Army Admits Heavy Defeat by Tigers', *The Times*, 2 Oct. 1998.

[4] See the map of an proposed *Tamil Eelam*, map.1.

Sri Lanka – Map no. 1

Proposed Territory of Tamil Eelam



territory would be expanded "in the first instance to the Hill Country and subsequently to other parts of Sri Lanka".[5]

There is no sign that the military campaign of Tamil Eelam, which is nearly three decades old, will disappear in the near future giving way to democratic politics; nor, it seems will government forces cease their operations against the Tamil secessionists. Indeed the leadership of the LTTE has vowed to "settle the differences in the battle field rather than at a round table".[6] This position has not been changed as is clearly indicated by Prabhakaran on 27 November 1998 at his *Maha Veera* day speech (annual heroes' day to commemorate the fallen soldiers during the war).[7] This has resulted in the cessation of the fragile peace that existed from 1994 between the LTTE and the Peoples' Alliance (PA), the political party in power.

Events leading to the present situation emerged as a result of the politics of communalism practised, first by Ceylon Tamil politicians since 1917 and subsequently by the Sinhalese politicians from 1953 onwards. As will be shown below this development occurred through five stages:

1) 1917 - 1920 (primitive stage of communal politics);

2) 1921 -1930 (advocacy of greater representation in the Legislative Council on communal grounds);

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[5] *S.Sumeda,* 'The Defeat to Separatism: The Yan Oya Theory', *The Sunday Times,* 26 Jan. 1997.

[6] *A.S.Prakasan,* 'Back to the Battlefield', *India Today,* 31 May 1995.

[7] *N.Ram,* 'We are Willing to Talk: I don't like to Settle this by War', 15 (26) *Frontline* 19 Dec. 1998- 1 Jan. 1999, p.1. p.12.

3) 1931 -1948 (emergence of the second generation of communal politicians);

4) 1948 -1972 (communalism through separatism); and

5) from 1973 to date (secession through terrorism).

There is ample literature on the events of fourth and fifth stages but the first, second and third stages are still not yet subjected to detailed examination. It is impossible within the confines of this thesis to present detailed research covering all these stages. The Sri Lankan ethnic conflicts are presented only as a special case study. It seems appropriate therefore to examine the first three stages in depth to analyse how communal politics in the last few decades of pre-independence Ceylon helped generate the present ethnic conflicts. However, the course of events through the fourth and fifth stages are also briefly discussed so as to demonstrate how communal politics during the first four decades of the 20th century led to secessionist violence by Tamil militant groups.

Misunderstanding of how communalism developed from a non-violent bi-partisan approach to a destructive violent force often leads to superficial or wrong conclusions.[8] Moreover, it is becoming increasingly difficult for independent observers to assess the situation due to various attempts to distort facts and figures.[9]

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[8] *C.Palley*, Constitutional Law and Minorities, Report no.36, Minority Rights Group: London, 1978, p.10, where she concludes that "the Tamil was denied a place in a new Sinhalese medical faculty". This is incorrect. In fact a new medical faculty was opened in Jaffna a decade ago for Tamil students, in addition to their access to other medical faculties in Colombo, Galle and Peradeniya.

[9] See for example, *S.Ponnambalam*, Sri Lanka: The National Question and the Tamil Liberation Struggle, Tamil Information Centre with Zed Books: London, 1983.

11.1 *The Genesis of Communalism, 1909-1917*

The policy adopted by the colonial government during the period 1833-1930 had been to emphasise racial differences amongst the principal racial groups on the island to its own advantage. As soon as the whole island was brought under one centralised system with Executive and Legislative Councils (LC)[10] subjected to the Governor as proposed by the Colebrooke Commission in 1832 the communal representation commenced.[11] A few Ceylonese, one from the wealthiest members of the higher caste Tamils, one low-country Sinhalese, and one Burgher, were appointed by the Governor to the LC to assist the Government in an unofficial capacity. The communal representation in the island thus began "with unfortunate results to Ceylon politics"[12] and continued until 1930. New constitutional reforms introduced in 1912, 1921 and 1923 for the island retained this communal representation amidst much opposition from many quarters.

S.J.Thambiah, Sri Lanka: Ethnic Frarticide and the Dismantling of Democracy, The University of Chicago: Chicago and London, 1986.

[10] The LC was created by an Order in Council by the Crown in 1833. See *Sir Ivor Jennings*, 'Nationalism and Political Development in Ceylon: The Background of Self-Government', 3 *CHJ* 1953-1954, p.73. The Legislative Council was composed of 15 members, of which 9 were official members and 6 were selected by the Governor on communal basis.

[11] See *S.D.Bailey*, Ceylon, Hutchinson: Stratford Place, 1952, pp.92-97. See further, *L.A.Mills*, Ceylon Under British Rule 1795-1932, Oxford UP: London, 1933, pp.65-67; *S.A.Pakeman*, Ceylon, Earnest Benn Ltd: London, 1964, see particularly chapter 5, pp.59-68.

[12] *S.Navasivayam*, The Legislatures of Ceylon, 1928-1948, Faber and Faber Ltd: London, 1950, pp.9-10. In 1889 two more members were appointed to the LC, one from the Kandyan Sinhalese and one from the Moores as unofficial members, pp.9-10.

However, there was a remarkable unity amongst the various communities in the island in the 1870s as observed by an Englishman William Digby. He wrote that "The diverse races in the island, instead of seeking to acquire dominance over the other, are being drawn together to think and act as one people".[13] The Sinhalese, the Ceylon Tamils, the Dutch and other small minority groups organised as 'Ceylonese' in their political campaign to achieve constitutional reforms under 'the Ceylon League'.[14]

By the early days of the twentieth century there had emerged a new English educated middle class amongst both the Sinhalese and the Tamils[15] amongst which enthusiasm for constitutional reforms gradually increased. They were not content with the existing communal representation which, from their perspective, would do no good for the welfare or the unity of the inhabitants. Moreover, the allocations of seats to each community in the LC (unofficial members) was discriminatory and arbitrary,[16] and helped promote mistrust amongst different ethnic groups.

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[13] See *W.Digby*, in *Calcutta Review*, 1870, cited in D.B.Jayatilaka's Presidential address to the Congress, 21-22 Dec. 1923, The Hand-Book of the Ceylon National Congress, 1919-1928, H.W.Cave and Com: Colombo, 1928, p.583 (the Hand-Book).

[14] See *E.W.Perera*, 'Ceylon Under British Rule, 1796-1906, in The 20th Century Impressions of Ceylon, an extract published in the Hand-Book, p.3.

[15] Most of these leaders studied at the Cambridge, Oxford or at the University of London and became distinguished scholars in many fields, including law and medicine. Most of them were later knighted or took silk.

[16] Table 1, Composition of unofficial members in the LC, 1909.

Ethnic Group	Total number	Allocated Seats
Europeans	6,500	3
Burghers	24,780	1
Moores	250,000	1
Tamils	1,127,000	1
Sinhalese (for both Kandyan and Low-Country Sinhalese)	2,551,000	2

source, the Hand-Book, p.24.

It was apparent to many educated Sinhalese and the Tamils that the continuation of the racially oriented representation to the LC was divisive and unjust. Before the introduction of legislative reforms to the LC in 1912, the demand for the eradication of communal representation was intensified. Constitutional reformer Sir James Pieris (a Sinhalese Christian) argued that existing system was based on inequality and injustice and was "utterly indefensible".[17] Opposition to the racial representation to the LC was almost universal. Most Ceylon Tamils also complained that the racial representation to the LC was "likely to perpetuate class feelings, and was not calculated to introduce the best talents into the Council".[18] However, Governor Sir H.E.McCallum was adamant that the "appointment to seats upon the Legislative Council should continue to be made, as at present, by means of nomination", since "the races inhabiting this island are numerous and divisive".[19] This position was subsequently approved by the Secretary of State for the Colonies, the Earl of Crewe.[20] Thus, out of 10 unofficial members 6 were to be

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[17] Memorial submitted by Sir James Pieris to the Under Secretary of State on 12 Dec. 1908, the Hand-Book, p.9. See the memorial submitted by J.J.C.Pereira and 760 signatories on behalf of the Low Country Products Association of Ceylon to the Colonial Secretary on 3 March 1909, in the *Hand-Book*, p.17. See memorials sent to the Colonial Secretary by the Ceylon National Association, and Chilaw Association in the Hand-Book, respectively, pp.22-27; pp.33-38 and pp.39-4.

[18] A memorial to the Colonial Secretary sent by A.Sabapathy, M.A.Arulanandan and J.M.Hensman on behalf of the Jaffna Association on 10 April 1909, the Hand-Book, pp.27-32.

[19] McCallum's dispatches to the Secretary of State for Colonies Earl of Crew, KG, on 26 May 1909, in the Hand-Book, p.61.

[20] See Colonial Secretary's dispatches to Governor McCallum, 24 Dec. 1909, in the Hand-Book, p.66.

nominated on racial grounds (2 Tamils, 2 low-country Sinhalese, 1 Kandyans, 1 Moores). As Sir Ivor Jennings[21] and Mendis state, this inevitably helped perpetuate the divisions in society, and helped various communities in the island "to consider themselves as separate entities rather than as citizens of Ceylon."[22]

However there was a progressive element in the 1912 constitutional reform, that is for the first time an elective element was introduced by creating an educated Ceylonese electorate from which only one member could be selected to represent the Sinhalese, Tamil and Moore communities.

After 1912 the campaign for both greater reform and against communal representation was continued. A Tamil national, Nevins Salvadurai, at the Congress of Literacy Association in 1914 reminded the gathering that all nationals of Ceylon should work as "one solid whole", or as "one united people -the Ceylonese" which would enable them to work together as "one corporate body".[23] A Sinhalese leader Aramand de Zouza urged the members to "dissipate cliquism" and to create trust between the communities and to become "a single united unit and one community" so that they could fight for reforms.[24] In view of another respected leader of the Sinhalese upper class E.W.Perera,

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[21] *Jennings, supra*, 10, p.73. *W.H.Wriggins,* Ceylon: Dillemmas of a New Nations, Princeton UP: Princeton, 1960, p.82.

[22] *G.C.Mendis*, Ceylon Under the British, 2nd ed. The Colombo Appothecaries Co Ltd: Colombo, 1948, p.122. Farmer also agrees with Mendis on this. See *B.H.Farmer*, Ceylon: A Divided Nation, Oxford UP: London and New York, 1963, p.54.

[23] *M.Roberts*, 'Problems of Collective Identity in a Multi-ethnic Society: Sectional Nationalism vs Ceylonese Nationalism 1900-1940', in *M.Roberts* (ed.) Collective Identities, Nationalism and Protests in Sri Lanka, Marga Institute: Colombo, 1979, p.345.

[24] *Ibid.* p.345.

"the Sinhalese, Tamils, Burghers and Mohamedans are all one race in their love for this island. In this respect they form one community".[25]

The formation of the Ceylon National Congress (Congress) in 1919 was a culmination of this united campaign under the charismatic leadership of Sir Ponnambalam Arunachalam (a Hindu and Ceylon Tamil). The main objective of the Congress was to fight for self-government with greater autonomy, "by constitutional methods by a reform of the existing system of government and administration".[26] The Congress was regarded as the first big attempt after the 1870s at uniting the Tamils, the Sinhalese and the Moores around a common national agenda.[27] More importantly, it was intended to be used as "a vehicle of expression of truly Ceylonese aspirations since its founding in 1919".[28] Remarkably leaders were particularly concerned about the sensitivities of the issues relating to race and religion.[29] As Kearney says, "relations between Sinhalese and Tamils were not only free of tension but were cordial and warm. It was a sign of 'modernity' to

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[25] *Ibid*, p.345.

[26] Article 1 of the Constitution of the Ceylon National Congress, Appendix, H, cited in *R.N.Kearney*, Communalism and Language in the Politics of Ceylon, Duke University Press: North Carolina, 1967, p.27. See further *Farmer*, *op.cit.* 22, p.55 and *Mendis*, *supra*, 22, pp.124-125.

[27] *S.Arasarathnam*, 'Nationalism, Communalism and National Unity in Ceylon', in *P. Mason* (ed.) India and Ceylon: Unity in Diversity, A Symposium, Oxford UP: London/ New York/Bombay, 1967, p.262.

[28] *V.Samaraweera*, 'Land, Labour, Capital and Sectional Interests in the National Politics of Sri Lanka', 15 *MAS* 1981, p.140.

[29] *P.Tremayne*, 'Sri Lanka: The Problem of the Tamils' in Rusi and Brassey's Defence Yearbook, edited by the Royal United Services Institute for Defence Studies : London, p.217, 1987.

reject communal sentiments as barbarous and atavistic".[30] Thus the twin pillars of the new Congress, as K.M.De Silva points out, were, i) communal harmony, and ii) the national unity.[31] Congress leaders began to harness unity amongst the various communities in earnest. D.B.Jayatilaka (later, Sir D.B.Jayatilaka, a Sinhalese Buddhist scholar, who later become the President of the Congress, 1923-1924 and the leader of the State Council) emphasised that it was necessary that the Sinhalese and the Ceylon Tamils should fight shoulder to shoulder as one people.[32] During the years 1916-20, Sir P.Arunachalam repeatedly emphasised the importance of unity amongst all inhabitants of the island,[33] and urged the leaders of the different communities in the island that "we must all give and take, we must sink our differences and present a united front to achieve our object, to obtain immediately the beginning of responsible Government".[34]

The opposition to communal representation from both the Sinhalese and the Ceylon Tamils had been enormous during the period leading up to 1919. Sir P. Arunachalam stressed that it was necessary to eliminate racial representation in the election to the LC except in respect of the Europeans, Burghers and Moores. He said, "We all feel that racial representation is pernicious and has operated to widen cleavages in the community and to obstruct that unity and harmony which we should all do our best to

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[30] *Kearny, supra*, 26, p.27.

[31] *K.M.De.Silva,* 'The Ceylon National Congress in Disarray, 1920-1921: Sir Ponnambalam Arunchalam Leaves the Congress', 2 (2) *CJHSS* 1972, p.115.

[32] D.B.Jayatilaka's address to the Congress, the Hand-Book, p.237.

[33] Sir P.Arunachalam's address to the Annual General Meeting of Ceylon National Association on 2.4.1917, in the Hand-Book, p.86.

[34] *Ibid.* p.111.

promote".[35] Thus, the struggle for constitutional reforms during this period was a bi-partisan national approach with a strongly Ceylonese character. Communal identity was given only second place.[36]

11.2 *Communal Politics in Ceylon's Constitutional Reforms, 1917-1923*

During 1917-1918 separatist elements appeared to be gaining grounds amongst some Tamil politicians of the Jaffna Association (JA). Attacking the concept of territorial representation proposed by the Ceylon National Association (CNA) and the Ceylon Reform League (CRL) in 1918 (both these drawn from the Sinhalese and Tamil elite), the JA passed a resolution insisting that the existing proportion of Sinhalese and Tamil representation in the LC should be maintained in any future constitutional reforms (under the existing system Tamil representation in the State Council was equal to that of the Sinhalese[37]). It was said in the resolution:[38]

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[35] See Presidential address by Sir P.Arunachalam to the Conference on Constitutions Reforms convened by the Ceylon Reform League and Ceylon National Association, 15 Dec. 1917, in the Hand-Book, p.111.

[36] *Namasivayam, supra*, 12, p.18.

[37] *Mendis, supra*, 22, p.126. In the LC of 1912 the membership of the Unofficial members of the LC was as follows (in addition to 11 official members. Table 2

Nominated		Elected	
Low-Country Sinhalese	2	Europeans	2
Tamils	2	Burghers	1
Kandyans	1	Elected Ceylonese	1
Moores	1		

Sir P.Ramanathan (a Hindu Tamil) who was elected from 1912 to 1920 to represent the elected educated Ceylonese seat with the support of vast majority of Sinhalese voters. With this the ratio of the Tamils and the Sinhalese was 50 to 50.

"That...the scheme of constitutional reform contained in the joint memorial of the Ceylon National Association and the Ceylon Reform League adopted at the Conference held in Colombo on the 15th Dec. 1917, is not acceptable to the Tamil community, and that a memorial be forwarded to the Right Honourable the Secretary of State for the Colonies, praying, among other administrative reforms, for the reform of the Executive and Legislative Council of the Island on an extended elective basis, whilst maintaining as far as possible, the existing proportion of Sinhala and Tamil representation in the Legislative Council".

The Presidents of the CRL and the CNA begged the JA not to press for "the present system of racial representation" which in their view had a baneful effect on communal harmony.[39] These demands were temporally in abeyance with the formation of the Congress in 1919.

11.3 *Communal Politics and Governor Sir William H. Manning*

Sir William Manning (1918-1925) was one of the most reactionary Governors who ruled the island. He was not content with the constitutional reforms agitated for by the Congress, nor did he believe that the Colonial Government should delegate its powers to the natives. The Congress, in his view, was no more than a political instrument in the hands of a few manipulative low-country Sinhalese and some Ceylon Tamils. He was of

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[38] *K.M.De. Silva*, 'The Formation and Character of the Ceylon National Congress 1917-1919', *CJHSS* 10 (1/2) 1967, p.92.

[39] A letter was sent to JA through Sir Ponnambalam Arunachalam by the Ceylon Reform League and Ceylon National Congress, in *De Silva, ibid.* Appendix B, p. 102.

the view that the island could be governed with the assistance of Government Agents without creating problems for the British Empire.[40] Firstly, he tried to block any substantial constitutional reforms. Simultaneously, he tried to divide the Congress by exploiting communal differences amongst the leadership.[41] In this he succeeded in creating a permanent division amongst the various communities in the island, most notably amongst the Sinhalese and the Tamils which prevails to this day, with ensuing tragic consequences.

Within a few years of the setting up of the Congress the relationship between Tamil and Sinhalese leaders was deteriorating. To the enormous satisfaction of the Governor, Ceylon Tamil politicians, in particular of the JA, were gradually and yet decisively moving towards communal politics, reversing their earlier position on communal representation. Differences of opinion emerged amongst the leadership of the Congress as to demands of the Ceylon Tamils for a reserved seat in the Western Province, and "for further communal representation" so as to equal the Sinhalese in the LC.[42] An extra electorate for the Tamils in the predominantly Sinhalese inhabited Western province infuriated the Congress leadership.[43] In fact this demand was unjustifiable from the Congress's perspective even though it emerged that some leaders of the CRL and the

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[40] See Manning dispatches to Fiddes, 31 Dec. 1918, C.O 54/814; Manning to Milner, C.O 54/819, 17 May 1919, cited in *Silva, supra*, 31, p.98.

[41] *Ibid.* p.99.

[42] *Namasivayam, supra*, 12, p.18.

[43] See the Hand-Book, pp.540-544. See further *Kearney, supra*, 26, p.28. See *A.J.Wilson*, 'The Tamil Federal Party in Ceylon Politics', 4 (2) *JCPS* 1966, p.117. See also *R.N.Kearney*, 'Political Mobilization in Contemporary Sir Lanka', in *R.N. Kearney* (ed.), Political Mobilization in South Asia, Syracus University Press: 1973, p.44.

CNA promised to support such a demand. In the Colombo municipal council area out of nearly a quarter of a million, only the Ceylon Tamils were demanding a reserve seat. The reason alluded to by the Ceylon Tamils was that the Tamils in the Western Province occupied the most prominent positions as compared with other communities as bankers, merchants, capitalists, professional men, government servants etc. However this claim was considered by the Congress as "a proposition that can be justified on no principle".[44] The population of each group was in 1920 as follows:

Table 3

Population Group	Total Number
Tamils	24,600
Ceylon Moores	51,900
Indian Moores	16,000
Burghers	18,000
Sinhalese	150,000

source, the Hand-Book, p.541.

This was resisted by the leadership of the Congress arguing that the retention and extension of the principle of communal representation would do no good either for the struggle for self-government or for the building of a new Ceylonese identity.[45] Among other reasons given by the Congress were, 1) it was morally wrong to maintain communal representation and 'sectional interests', 2) in the case of the Sinhalese (both Kandyan and Low-country) and the Tamils, no such special provision was necessary, because, "These communities will largely preponderate in numbers of constituencies and will be able easily to elect men of their own communities if they so desire it", and 3) communal

[44] See the First Memorandum issued by the Ceylon Reform Deputation, May 1928, in the Hand-Book, p.540.

[45] The dispatches to Amery, Under Secretary of State for the Colonies on 2 August 1920 by the Congressmen, *ibid.* pp.312-317.

representation "tends to disturb the harmonious relations that have existed between the different sections of the people, and the proposed scheme constitutes an element of danger".[46] However in the case of the Europeans, Burghers and Moores, it was admitted, that some provision might be made" to secure their representation in the LC.[47] The Congress passed a resolution in 1920 that "the election must be on a territorial basis". [48]

The Governor Manning noticed "with deep interest and satisfaction" the emerging gulf between the elite groups of the Congress and the Ceylon Tamils. He reported to the Colonial Office[49] that the leaders were:

> "violently squabbling among themselves as to the representation of the Western Province electorates... .one of the most patent facts which has been brought out is that there is very considerable division between the Tamils and Sinhalese... ."

The constitutional reforms introduced by the Ceylon (Legislative Council) Order in Council, 1920 maintained this abhorrent policy of racial representation[50] at the insistence of the Governor Manning by abolishing the LC seat for an elected 'educated

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[46] Congress's dispatches to the Undersecretary of State for the Colonies, 2 Aug. 1920, *ibid.* p.316.

[47] Congress's Scheme of Constitutional Reform, 15 March 1920, *ibid.* p.297.

[48] The Ceylon National Congress Scheme of Constitutional Reform, 1920, *ibid.* p.297. See also Presidential address by Sir James Pieris to the Congress, 16 and 18 Oct. 1920, *ibid.* p.228.

[49] C.O 54/849, Manning's dispatch to J.R.Cowell, 14 Feb. 1921, cited in *Silva, supra*, 31, p.106. See also *C.T.Blackton*, 'The Empire at Bay: British Attitudes and the Growth of Nationalism in the Early Twentieth Century', in *Robert* (ed.), *supra*, 22, pp.363-385.

[50] See ss 5 (2), 5 (3) 5 (4) of the Ceylon (Legislative Council) Order in Council 1920

Ceylonese' thus effectively reversing the trend towards an elective element introduced in the 1912.[51] Representation for 23 unofficial members in the LC in 1921 was principally based on communal representation.[52] This was condemned by the Congress as the creation of "invidious distinctions between communities".[53]

In 1921 most Ceylon Tamil leaders, of whom most were of the JA, left the Congress.[54] They founded a Ceylon Tamil Maha Jana Sabhai (CTMJS, Tamils' Peoples' Union) on 15 August 1921, composed only of Ceylon Tamils, thus at the same time demarcating boundaries between the Tamils and the Sinhalese. This led to bitter communal politics during the period 1920-1940 and effectively ever since, keeping Sinhalese politicians and Tamil politicians at odds by hindering any attempt at establishing national unity or a Ceylonese identity in the island.[55] This was the turning point at which the new kind of communal politics began with Tamil politicians representing their own community through their own communal organisations and thus distancing themselves from mainstream politics.

Being dissatisfied with the constitutional reform to the LC in 1921, the Congress began to campaign more forcefully for territorial representation. As a matter of urgency, a motion was debated in the LC in 1921 to abolish communally based seats in the Western Province. It was defeated by the votes of Tamil members and the official members (all of them European), the latter influenced by the Governor. Furthermore, Manning declared

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[51] See the Ordinance enacted by the Governor with the advice and consent of the LC, no. 13, 1910, s.3.

[52] *Mendis*, *supra*, 22, p.125. *Namasivayam*, *supra*, 12, pp.18-19.

[53] *Farmer, op.cit.* 22, p.55.

[54] *Kearney*, *supra*, 26, p.44. See also *Jennings*, *supra*, 10, p.75.

[55] *Tremayne*, *supra*, 29, p.217.

his intention to appoint one member of each community to act as the committee of the LC.[56]

During 1921-1923 the Jaffna Tamils politicians intensified their agitation for communal representation with the open encouragement of Governor Manning.[57] Under the instructions of Manning a new organisation for constitutional reform, a 'Minorities Conference', was hastily formed by the unofficial Tamil members of the L.C. together with some Tamil leaders of both JA and CTMJS. They sent a joint memorial supporting the reform scheme of Manning, which was popularly known as the 'Minorities Scheme',[58] to the Principal Secretary of State for the Colonies W.Churchill urging that the pre-1921 communal representation in the LC be maintained in any future constitutional reform.[59] It was later revealed that the memorial was sent in upon the advice of Manning. One of the leaders of this new campaign P.Ramanathan insisted that "no two communities should be in a majority in the Council".[60] Later in a letter to Governor Manning, Sir P.Arunachalam, quite contrary to the stance taken in pre-1920s, also emphasised that his position had always been that there should be adequate safeguards for minorities, particularly a system based on a "communal representation which guarantees equal proportion of members".[61]

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[56] Hand-Book, p.439.

[57] *Tremayne, supra*, 29, p.217.

[58] It was submitted pretending that the 'Minorities Scheme' was approved and adopted by the European, the Burgher, the Tamil, the Moores and the Indian Tamils in the LC. the Hand-Book, p.447.

[59] See details in the Hand-Book, p.439.

[60] *Ibid.* p.445.

[61] Arunachalam's letter to Governor Manning, 13 June 1923, cited in *Silva, supra*, 31, p.115.

Manning's scheme for the reform of the LC was based on communal representation. He described his reform scheme as a *balanced representation,* the *mantra* later repeatedly used by the Ceylon Tamil politicians whenever the reform of the LC or later of the State Council (SC) was raised by the Congress. His scheme was supported by the CTMJS (memo. nos.3 and 15), the Ceylon Tamil League (memo. no.4) and the Tamils of Ceylon (memo. no.14).[62] According to Manning's plan the seats in the LC should be allocated as follows:[63]

Table 4

Community	Population number	Seats
Europeans	8,300	3
Burghers	29,1000	2
Moores	265,000	3
Indian Moores	33,100	2
Indian Tamils	606,700	2
Ceylon Tamils	514,300	8
Sinhalese	3,016,400	14

In addition, Manning in his dispatches to the Colonial Office recommended a "communally elected Tamil seat for Colombo Town,"[64] which later extended to the entire Western Province. His recommendation was approved by the Secretary of State for the Colonies the Duke of Devonshire. He wrote back to Manning:[65]

[62] In fact the Ceylon Tamil League and Tamils of Ceylon were the brain child of the Ramanathan and Arunachalam brothers and were hastily created to press their demands for communal representation. The same members of the CJMJS and the JA operated in these two organisations, the origin of which was questioned by many. See the Hand-Book, p.544.

[63] *Ibid.* p.537.

[64] *Ibid.* p.540.

[65] Dispatch to Manning on 11 Jan. 1923, *ibid.* p.120.

"I am in accord with the opinion expressed by you that, in view of existing conditions and of the grouping of population in the Colony, representation must for an indefinite period of time be in fact communal, whatever the argument of constituencies may be; ... . It appears to me to be clearly established that in Ceylon the organization of society is communal, and that if this fact is not clearly expressed, one of the essential considerations on which my decision must be based might be obscured... ."

It later emerged that Manning had secretly collaborated with the above mentioned Tamil organisations in the preparation of his draft constitutional reforms.[66] Appreciating the vole being played by Manning, a leader of the JA and a member of the CTMJS Sir K.Kanagasabai said:[67]

"...it was His Excellency Sir William Manning who had actually fought their cause for them after having shown and advised them what they should do. And it was His Excellency who obtained for the Tamils the *preferential treatment and concessions* as outlined in the Draft Scheme of Reforms. Such being the case, he said, it was their bounden duty to show their gratitude to Sir William Manning and accord him a fitting welcome".

Governor Manning's reply to this welcome speech was reported as follows:[68]

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[66] See the memorial submitted to the Secretary of State, W.Churchill by the Congress on 31 Aug. 1922, *ibid.* p.439.

[67] Emphasis added. *Ceylon Daily News*, 12 June 1923.

[68] *The Times of Ceylon*, 13 June 1923.

"His Excellency replied at length and thanked the Tamils for the welcome given to him and supporting his reform dispatch and intimated that it would please them to hear that all his recommendations, including the seat in the Western Province, had been sanctioned and that the Secretary of State had further thanked the Tamils for simplifying his task. A high complement was paid to Sir Ponnambalam Ramanathen for the assistance rendered in drafting the reform proposals. The seats given to them, His Excellency said, was their birthright and they were justified in fighting for them".

Manning's actions which emphasised "the existing racial and other differences" was seen as a deliberate attempt to "arrest the growth of the sense of common citizenship" by giving new life to hitherto existing racial representation in the LC "originated and fostered" by his predecessors.[69] The Ceylon Reform Deputation complained:[70]

"In fact, the Governor's recommendations and the reasons with which he supports them offer plain encouragement to each community to go on fighting for its own advantage. Furthermore they invite the minorities to regard the possible predominance in the Legislative Council of representatives belonging to the majority population, namely the Sinhalese, as a latent source of danger against which they must combine for their own safety."

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[69] See the memorial submitted to the Principal Secretary of State W.Churchill by the Congress on 20 Sept. 1922, in the Hand-Book, p.439.

[70] The First Memorandum sent to the Duke of Devonshire KG, Principal Secretary, London, by the Ceylon Reform Deputation (created as a special body by the Congress to advance the reform scheme of the Congress) in May 1923, *ibid.* p.535.

A prominent Tamil politician, Dr. E.V.Rutnam, the President of the Colombo Tamil Association (which represented all sections of the Tamil community) sent a dispatch to the Colonial Secretary condemning the above scheme saying that the so-called memorialists did not have any authority to submit such a divisive scheme without the consent of all sections of the Tamil population in the island.[71] Another alleged signatory to the 'Minorities' Scheme', W.D.Duraiswamy (who was later knighted and became the Speaker of the SC) distancing himself from any alleged collaboration with the memorialists of the Minorities Scheme, said that he had no hand whatever in the Minorities Scheme. He said further, "My telegram to Sir Ramanathan shows that I was opposed to the very essentials of that absurd scheme.... No sane Tamil un-obsessed by personal magnificence could have been guilty of such a woeful exhibition of political absurdity".[72] Moreover, no sooner had the Minorities Scheme become known to the Ceylon Muslim Association it disassociated itself from any involvement with it stating that it had not authorised any of its members to collaborate with the Minority Scheme.[73]

The reforms introduced in 1923 by the Ceylon (Legislative Council) Order in Council, 1923, continued this racial representation. Of 23 elected members from the territorial constituencies, 11 were to be elected from specially created communal constituencies.[74]

In fact the concerns of the Congress proved to be correct as subsequent events demonstrated. Various communities in the island began to demand reserved seats on

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[71] *Ibid.* p.446.

[72] *Ibid.* pp.445-446.

[73] *Ibid.* pp.446-447.

[74] See *Namasivayam*, *supra*, 12, p.19.

communal lines. Manning also succeeded in creating mistrust and divisions amongst the low-country Sinhalese and the up-country Sinhalese (also called, Kandyan Sinhalese) emphasising that the up-country Sinhalese were high-caste and decent people who would suffer at the hands of manipulative low-country Sinhalese if they failed to secure representation to the LC as a separate community. He even managed to convince the up-country Sinhalese that, they like the Moores and the Tamils, were in fact a minority! Manning urged the Kandyan Sinhalese to unite with other minority groups and from a delegation to the Secretary of State for the Colonies, which they dutifully did. A delegation of the up-country Sinhalese informed the Secretary for the Colonies that the Congress had no authority to represent them because they were a separate community.[75] They demanded that the areas coming under Kandyan law be recognized as a separate Kandyan electorate. The Moores also demanded a separate electorate whilst the Christians combined to press for an electorate based on their religious identity.

Nonetheless, there were continuous attempts by the Congress to bring back the Ceylon Tamils into its fold "by offering to support far more members for the Northern and the Eastern Provinces than their population warranted" and by appointing C.E. Corea, an outsider to the Congress Colombo base who had good relations with the Tamils, as President of the Congress[76] (1924-1925). Consequently, in 1924, the Tamil leaders were able to make an agreement with the leaders of the Congress that future elections to the legislature should be based on two to one representation, that is two

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[75] Hand-Book, p.646. See further *L.A.Wickramaratne*, 'Kandyan and Nationalism in Sri Lanka: Some Reflections', *CJHSS* 5 1975, pp.49-67.

[76] See his Presidential Address, 20 Dec. 1924, the Hand-Book. pp.633-656. see also *Mendis*, *supra*, 41, p.126.

Sinhalese representatives to one Tamil.[77] Yet when it was debated in the Congress at its annual general meeting in 1925, the newly elected President Francis de Zoysa, KC (1925-1926) angrily remarked that "any pact between the two largest communities in the island guaranteeing to each a certain proportion of the loaves and the fishes is revolting in the extreme and deserves unqualified condemnation".[78]

It is worthy of note that the majority of the Sinhalese and the moderate Tamil liberal politicians in the Congress did not appreciate communal politics.[79] For example, S.Pasupathy (a Tamil, Kurunegala Association) said that communalism would not grant any benefit to anyone apart from the colonial government which used it to divide and rule in their strategy against the self-government movement. He stressed, "anyone who would surrender to that gilded glamour would be opposing the goddess of democracy. That would lead them down the incline of political moribundity. That was the travesty of history".[80] However, giving evidence before the Donoughmore Commission in 1927, the Congress leadership agreed that special representation could be permitted to continue if the Commission was satisfied that it was necessary as a temporary measures to redress

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[77] The Report of the Special Commission on the Ceylon Constitution, 1928, Cmd. 3131, HMSO: Colombo (hereafter, Donoughmore Report), pp.92-93, and the Report of the Commission on Constitutional Reform, 1945, Cmd. 6677, HMSO: London, (Soulbury Report), pp.66-67.

[78] Presidential address, 18-19 Dec. 1925, see the Handbook, p.686.

[79] See H.J.C.Pereira, Presidential address to the adjourned session of the Congress, 20-21 April 1923, *ibid.* p.499.

[80] His address to the adjourned session of the Congress, 20-21 April 1923, *ibid.* p.513.

genuine grievances of minority groups provided such measures would not be permitted to retard the establishment of self-government in the island.[81]

Disunity between the Congress and a section of Ceylon Tamils had undoubtedly delayed greater constitutional reforms on t(e island.[82] The main reason appeared to be that the Ceylon Tamil leadership "did not wish to exchange British domination for Sinhalese domination".[83] According to Sir Ivor Jennings, elite members of the Ceylon Tamils from the very beginning co-operated with the Congress, like the Scottish Conservatives alliance with the mainland's Conservative Party, self-consciously preserving their Jaffna Tamil identity.[84] Indeed there was evidence that some leaders of the Tamils did not want early independence, fearing that in an independent Ceylon their position and prestige would be diminished.[85]

The Ceylon Tamils' politics has since the first decade of the 20th century been inextricably tainted by communal loyalties. Their engagement with the Congress and their structural political organisations had a remarkable similarity to the Muslim League which advocated separatism at any cost in India during the pre-independence period in particular in the 1920s. Moreover, unlike the local Hindu Mahasabhas in India, the Ceylon Tamils were not regionally interconnected with other movements. The Tamils' communalist approach was diametrically opposed to the national politics advanced by the Congress.

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[81] Evidence before the Commission at the Town Hall, Colombo, on 22nd and 23rd November 1927, *ibid.* p.828.

[82] *Navasivayam, supra,* 12, p.10; *M.Roberts,* 'Ethnic Conflict in Sri Lanka and Sinhalese Perspectives: Barriers to Accommodation', 12 (3) *MAS* 1978, p.355

[83] *Jennings, supra,* 10, p.70.

[84] *Ibid.* p.68.

[85] *Silva, supra,* 38, p.78.

The JA and later CTMJS had of their own volition remained provincial political organisations interested in securing electoral gains by exploiting the religious and racial differences of the communities in the island. The paradoxical nature of this communal politics was that it was only the high-caste elite group of the Jaffna peninsula and the Ceylon Tamils in Colombo who were to benefit at the expense of ordinary Tamils. It is noteworthy that unlike non-Tamil regional organisations in the island, the JA and the CTMJS were not open to large numbers of ordinary Tamils due to deeply inherent caste divisions, and a reluctance to accommodate other low-caste and Indian Tamils. For instance, the Indian Tamils were intentionally marginalised and excluded from the mainstream politics for decades, even after independence. The Ceylon Tamils have never, until recently, tried to entice other Tamil speaking nations in the island, notably, the Moores to join them on a wider platform. Indeed, during the mid 19th century the Ceylon Tamils tried to convince the colonial government that the Moores were in fact converted Tamils, a claim which was strenuously rejected by the Moores. Thus in effect the Jaffna Tamil elite enjoyed a monopoly of politics behind the cloak of Tamil identity whilst at the same time staying detached from the large bulk of the Tamil population in the island. The Tamils who lived in the Eastern province were not welcome until the latter part of the 1950s. Yet, unashamedly the JA and later the CTMJS or subsequently All-Ceylon Tamil Congress (ACTC) have exploited prejudices associated with religion and race to the electoral advantage of the Ceylon Tamil elite.

11.4 *The New Face of Communalism, 1924-1946*

The campaign against British colonialism after 1924 turned into a bitter confrontation

between the Congress and the political parties led by the Ceylon Tamils. The JA and the CTMJS were not satisfied with any constitutional reforms which weakened their position in the LC and in the administration of the island. They pressed their demands before the Donoughmore Commission. The Commission rejecting these demands stated that: [86]

> "We have come unhesitatingly to the conclusion that communal representation is, as it were, a canker on the body politic, eating deeper and deeper into the vital energies of the people, breeding self-interest, suspicion and animosity, poisoning the new growth of political consciousness and effectively preventing the development of a national or corporate spirit... There can be no hope of binding together diverse elements of the population in a realization of their common kinship and an acknowledgement of common obligations to the country of which they are all citizens as long as the system of communal representation, with all its disintegrating influences, remains a distinctive feature of the constitution."

The Donoughmore Constitutional reform was opposed by minority members of the LC (17 to 19).[87] It was seen as a treacherous ploy to destroy gains won by the Tamils and other minority communities in the island. This led to forming strategies to seek, as Kearney says, "some means of curbing the potential powers of the Sinhalese majority".[88]

The majority and minority syndrome thus emerged in pre-independence Ceylon. During the first decade of the twentieth century, Tamil politicians had no reasons to believe that they were a minority. Their perception was that the Tamils and the Sinhalese

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[86] The Donoughmore Report, p.39,cited in *Bailey, supra*, 11, pp.140-141.

[87] *Wriggins, op.cit.* 21, p.87. See more details *I.D.S.Weerawardana*, Government and Politics in Ceylon (1931-1946), Ceylon Economic Research Association: Colombo, 1951;

[88] *Kearney, supra*, 26, p.32.

were the majorities on the island, whilst[89] communities like that of the Moores, Burghers, and the Europeans were regarded as minorities ("three minorities").[90] The JA especially insisted that the Ceylon Tamils should be treated on an equal footing with the Sinhalese. The memorandum sent to the Secretary of State for the Colonies by the JA on 2 Jan. 1918 stated that, "the Tamils of Ceylon have hitherto, in spite of their inferiority in numbers, maintained a position of equality with their Sinhalese brethren, whether in official or unofficial life".[91] Even Governor Manning considered the Tamils and the Sinhalese as majority communities on the island in the interests of the preservation of colonialism.[92] K.M.De. Silva points out that the JA and other Ceylon Tamil elites adopted this position as a political strategy which they could use to agitate for a balanced representation between the Tamils and the Sinhalese in any future constitutional reforms.

The Tamil leaders tried to forge a new alliance with all other minority groups including the Burghers and Europeans against the Sinhalese community.[93] Their attempts to a certain extent succeeded. In 1935, the Ceylon Tamils together with the Indian Tamils and the Moores presented a petition to the Secretary of State for the Colonies denouncing the new electoral system as biased towards the Sinhalese.[94]

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[89] *J.D.Rogers,* 'Post Orientalism and the Interpretation of Premodern and Modern Political Identities: The Case of Sri Lanka', 53 (1) *JAS* 1994, p.18.

[90] P.Arunachalam's address to the Conference on Constitutional Reforms convened by the Ceylon Reform League and the Ceylon National Association on 2. April 1917, in Handbook, p.86 and p.110.

[91] *De Silva, supra,* 38, p.90, foot note, 50.

[92] *De Silva, supra,* 31, p.100.

[93] *K.M.De. Silva,* Managing Ethnic Tensions in Multi-ethnic Societies: Sri Lanka, 1880-1985, University of America: Lanham, Maryland, 1986, cited in *Rogers, supra,* 89, p.18.

[94] *Kearney, supra,* 26, p.34.

Animosity between the Sinhalese and the Tamils was further increased by the setting up of the ACTC in 1944 which was exclusively for the Tamils; and once the hard core elements of the Ceylon Tamils, in particular the Jaffna Tamil elite, had begun to dominate the ACTC a united front with the Congress was beyond anyone's capacity to achieve. Moreover, the efforts of the Congress to achieve a unitary State were misinterpreted by the ACTC as an attempt at "a merger, an absorption" by the Sinhalese.[95] They preferred limited constitutional reform with a balanced representation for both communities, the Sinhala and the Tamil, subject to a Governor with extensive executive powers.[96] More accurately, they saw the Governor functioning in a role similar to that of a cricketing umpire (it is worthy of note that was the standard game of the elite class during this period). It is not surprising therefore that 'The Ceylon Independence Bill' was opposed by the ACTC in the House of Representatives.[97] Even Michael Roberts, who is a stern critic of the Sinhalese Buddhist ideology and the sympathetic to the of separatist politics of the Tamils had to admit that:[98]

> "Nor were the paths of those Sinhalese who supported appeasement made easier by strategies and tactics pursued by the Ceylon Tamil associations. For instance, in 1930- 1931, at a time when the Congress leaders were disposed to permit concession in the delimitation of territorial constituencies, the Ceylon Tamil leaders seem to have spurned co-operation. Again, from the

[95] Memorandum from the President of All-Ceylon Tamil Conference to the Secretary of State for the Colonies, 14 July 1937, CO, 54 Series, cited in *Roberts, op.cit.*82, p.359.

[96] *Wriggins, op.cit.* 21, p.84.

[97] *Bailey, supra,* 11, p.153.

[98] *Roberts, op.cit.*82, p.375.

mid 1930s, G.G.Ponnambalam's 'fifty-fifty' demand and his strategy of collaboration with the British created an unfavourable climate for accommodation".

The leader of the ACTC, G.G.Ponnambalam had close connections with the British civil servants and actively sided with the colonial government by opposing every constitutional reform proposed by the Congress which was not alone communal lines to the satisfaction of the ACTC.[99] Furthermore, the ACTC launched a new aggressive campaign attacking the alleged supremacy of the Sinhalese in any future legislature.

With the appointment of the Soulbury Commission to examine constitutional reforms to the island, the pace of communal politics intensified. The ACTC wrote to the Soulbury Commission that: [100]

"The near approach of the complete transference of power and authority from *neutral British hands* to the people of this country is causing in the minds of the Tamil people, in common with other minorities, much misgiving and fear". (emphasis added).

The former Governor Manning's 'balanced representation' became the *mantra* used by G.G.Ponnambalam to justify the ACTC's demand for communal representation in the SC. Its famous 'fifty-fifty' demand[101] presented to the Soulbury Commission in the guise of

[99] *Ibid.* p.360.

[100] Soulbury Report, p.50.

[101] *Ibid.* p.68.

balanced representation involved "fractional representation on a race basis".[102] It proposed that the future State Council should have 100 elected members, half of whom should be elected from territorial constituencies, whilst 25 seats should be allocated to the Indian and Ceylon Tamils, and the remaining 25 to the other minority groups, that is the Burghers, the Moores and Europeans.[103] According to this proposal, any minority group could also contest the 50 seats allocated on a territorial basis whilst their own quotas remained intact. When this was opposed by the Sinhalese the ACTC amending its fifty-fifty proposal said that the SC membership should be divided equally between the Sinhalese and the rest of the minority groups. Pressing this proposal in the guise of 'non-discrimination' and 'balanced representation' the leaders of the ACTC tried to achieve two objectives, i) to secure a special status for the Tamil speaking peoples in the island, ii) by achieving equal representation to the SC to reduce the influence of the majority community in the island. In the view of the leaders of the ACTC, the political power of the Sinhalese could be effectively curtailed by constitutional manoeuvring.[104] Rejecting this "communal representation under another name,"[105] the Soulbury Commission declared:[106]

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[102] Governor Sir Andrew Caldecott' criticism, see Soulbury Report, p.20. The Governor criticising this proposal said that "any concession to the principle of communalism would perpetuate sectionalism". *ibid.* p.24.

[103] *Ibid.* prs.254-264, p.68. *Bailey, supra,* 11, p.149. See critical analysis, *S.L Gunasekara,* Tigers, Moderates and Pandora's Package, Multi Packs (Ceylon) Ltd: Colombo, p.31.

[104] *Tremayne, supra,* 29, p. 218.

[105] *Wriggins, op.cit.* 21, p.91.

[106] Soulbury Report, p.69.

"... it seems to us that under the 'fifty-fifty' scheme each General Election will inevitably produce a Legislature of the same complexion as its predecessor, and we cannot recommend a stereotype caste-iron division of the communities from which it would, in our judgement, be very difficult, if not impossible, ever to develop a normal Party system. But apart from a general consideration of this nature, we find it difficult to see how any stable Government could be formed or any head of a Government be able either to frame a policy or carry it out in a Legislature so constituted".

It was concluded:[107]

"We think that any attempt by artificial means to convert a majority into a minority is not only inequitable, but doomed to failure."

If this proposal were to be implemented, argued Gunasekara, the Sinhalese would remain a perpetual minority in the island whilst representing more than two-thirds of the population.[108] For their part the Sinhalese leaders opposed communal representation only because they realised the harmful effect would have on national unity. Sir Ivor Jennings writes:[109]

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[107] *Ibid.* p.70.

[108] *Gunasekara, op.cit,* 103, p.31.

[109] *Sir Ivor Jennings*, The Commonwealth in Asia, Clarendon Press: Oxford, 1956, pp.75-76.

"They were prepared for any compromise which gave the minorities adequate, or more than adequate, representation, provided that they were elected as representatives of the people and not as communal representatives".

However, a very favourable representation was maintained for minorities under the Soulbury system, that is 1 to 3. Out of 95 electoral seats 37 seats were assigned for minority communities. This electoral advantage for minorities was secured by an especially designed delimitation of electorates securing the representation of minority communities without accepting communal representation as such.[110] Nonetheless, whilst under the new system the Tamils' representation now reflected their presence in the total population of the island, for the Tamil leadership this represented a significant weakening of their position by comparison with the Sinhalese. In fact, from 1833 to 1930 Tamils' representation in the LC far exceeded their number in the whole population on the island. Navasivayam, a distinguished Tamil scholar, says:[111]

"From the thirties of the last century to 1931, the minorities were very well represented in the Legislative Council; throughout the last century, indeed, the native minorities had equal representation with the low country Sinhalese. The Ceylon Tamil representation was first equal to that of the low country Sinhalese and was subsequently in the proportion of 1:2; except for a short period during the operation of the 1920 Order in Council".

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[110] Soulbury Report, p.32.

[111] *Namasivayam, supra*, 12, p.59.

The constant bickering of the Tamil leaders resulted in angry exchanges between the Sinhalese members of the SC and its Tamil members. The President of the Board of Ministers, D.S.Senanayake (a Sinhalese and a member of the Congress) angrily asked in the SC, "Do you want to be governed from London or do you want, as Ceylonese, to help govern Ceylon".[112] Ministers in the SC firmly believed that ultimately "patriotism would transcend sectional difficulties".[113] But this did not materialise. Instead, from 1921, every projected political reforms became a contentious issue between the Tamil and the Sinhalese.[114]

11.5 *Allegations of Legislative and Administration Discrimination Against Tamils*

Since the 1920s the leadership of the Ceylon Tamils had been considering a constitutional strategy which could be used to preserve the advantaged position they had held so far in public life.[115] To achieve this they needed a valid justification. Their most virulent weapon was the allegation of "legislative and administrative discrimination" by the Sinhalese against the Tamils,[116] a strange concept in the politics of pre-independence Ceylon. Many such alleged discriminatory practices were highlighted. The distribution of finance to the Tamil inhabited areas, it was alleged, was blocked by the Sinhalese members of the SC, an allegation that was later found to be false by the Soulbury Commission. Another

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[112] *Ponnambalam, supra*, 9, p.65.

[113] Soulbury Report, p.29.

[114] *Mendis, supra*, 22, pp.182-183; see also, *Kearney, supra*, 26, p.29.

[115] *Wilson, op.cit*, 43, p.117.

[116] See *Kearney, supra*, 26, p.37. See further Soulbury Report, p.41.

complaint was that the government, under the influence of the Sinhalese, was trying to promote co-operative movements throughout the island to the disadvantage of Tamil traders. These allegations were also rejected by the Soulbury Commission.[117] In fact the Commission found after detailed investigation that, "on the contrary, having visited a number of these co-operative institutions, we are convinced that they are of great value, not only materially but educationally, to a large proportion of the poorer inhabitants of the island, Tamil as well as Sinhalese".[118]

The most serious allegation was that in the service sector the Tamils were discriminated against and the Sinhalese favoured. However, although at no time since the first census were the Ceylon Tamils more than 10-13% of the total population, yet it was the Ceylon Tamils (most of them Jaffna Tamils) who benefited most during the British colonial period[119] in the most sought after government services such as the Ceylon Civil Service, and in such professions as medicine, engineering, accountancy, and law. This is still the case. For example, in 1921 there were 10,185 Tamils employed in "public administration and the liberal arts".[120] Pfaffenberger noted that "at one time, for instance, it is said that every station agent on the Railway was a Jaffna Tamil".[121]

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[117] Soulbury Report, *ibid.* p.43.

[118] *Ibid.* p.43.

[119] *S.J.Thambiah,* 'Ethnic Representation in Ceylon's Higher Administration Services, 1870-1946', 12 *UCR,* 1955, p.127.

[120] *S. Arasarathnam,* The Historical Foundation of the Economy of the Tamils of North Sri Lanka, Thantai Chelva Memorial Trust: Jaffna, 1982, p.40.

[121] *B.Pfaffenberger,* 'The Political Construction of Defensive Nationalism: The 1968 Temple- Entry Crisis in Northern Sri Lanaka', 49 (1) *JAS* 1990, p.84.

According to the 1921 census, there were 861 Barristers, Advocates and Proctors in the island, of whom 408 were Sinhalese (nearly 50%) and 228 were Ceylon Tamils (28%). The 1921 Census reported that "the number of clerks supplied by Jaffna to the government services was out of all proportion to the size of population of the district".[122] The representation of the Ceylon Tamils in the civil service and the Public Works Department exceed their proportion in the total population as will be shown below in tables 7 and 8.[123]

Table 5, Ceylon Civil Service 1870-1946

	Ceylon Civil Service			
Year	Total	Sinhalese	Tamil	Burgher
1870	81	7	not recorded	not recorded
1907	95	4	2	6
1925	135	17	8	14
1946	160	69	31	

Table 6, Ethnic Representation in the Public Works Department, 1870-1946:

	Public Works Department			
Year	Total	Sinhalese	Ceylon Tamil	Burgher
1870	35			
1907	66	4 (District Eng)	2 (District Eng)	14
1925	73	6 (District Eng)	5 (District Eng)	13
1946	71	35 (Eng)	17 (Eng)	

In the medical profession the proportion of Tamils was extremely high. For example, in 1921, amongst physicians and other medical practitioners (not including native doctors) there were 281 Ceylon Tamils (44%). By 1925, of provincial Surgeons, and Grade I medical Officers, there were 10 Ceylon Tamils to 21 Sinhalese. At Grade II level, there were 66 Sinhalese and 48 Ceylon Tamils. In the Home Office in 1935 there were 16

[122] Census Ceylon, 1921, vol. 1, part II, p. 69.

[123] *Thambiah, supra*, 119, p.115.

Europeans, 13 Sinhalese and 11 Tamils. This high rate of representation was also remarkably evident in the judiciary. Among the District Court judges (DJ and ADJ) there were 10 Ceylon Tamils to 6 Sinhalese and 6 Burghers.[124]

As Thambiah admitted these numbers clearly show that in the areas mentioned above, the Ceylon Tamils "actually dominated", and "their contributions were always in excess of their numbers in the total population".[125] The Soulbury Commission after investigating the complaint made by the ACTC came to a similar conclusion. It was held that as late as 1938, the Ceylon Tamils occupied a disproportionate number of posts in the Public Services.[126]

However from the latter part of the 1930s the Sinhalese were making some progress in medicine, law and the civil service due to the expansion of English education in the areas inhabited by them. For instance, in 1946 the Sinhalese secured 69 places in the Civil Service as against 31 secured by Ceylon Tamils. The Sinhalese were also able marginally to increase their representation in the Supreme Court. There were 5 Sinhalese and 1 Ceylon Tamil Supreme Court judges. If this data is analysed purely numerically, then there were more Sinhalese in these professions than Ceylon Tamils. But if these numbers are analysed proportionally it was the Ceylon Tamils who were greatly over represented and were able to remain so for almost one and a half centuries. Analysing data from 1951, Wriggins says that "a service-wide census taken in 1951 showed that out of a total of 123,194 reported as employed directly by the central government, those with

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[124] *Thambiah, supra*, 119, p.132.

[125] *Thambiah, ibid.* pp.129-130. See also *H.Hannum* (ed.), 'Sri Lanka', in Documents on Autonomy and Minority Rights, Martinus Nijhoff: Dordrecht/Boston/London, 1993, p.496.

[126] Soulbury Report, p.49.

Tamil backgrounds represented 21,768. Of the remaining 20,000 who had an exclusively English educational background, it would be plausible to assume that 10,000 were Sinhalese, 5,000 Burghers, and 5,000 Tamils. This would make a total of 27,000 Tamils out of a total government strength of 123,000 or roughly 22 per cent."[127]

If any significant breakthrough was made by the Sinhalese it was at the expense of the Burghers, whose population and representation in the main professions was decreasing alarmingly. Yet the representation of the Ceylon Tamil professionals in the main professions remained virtually intact. Nonetheless, they feared that in post colonial independent Ceylon their domination of the prestigious professions would not be maintained.[128] This was the strongest reason for their attempt to secure a balance of power in every corner of public services as well as in the government.

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[127] Department of Census and Statistics, Report of the Census of Government and Local Government Employees 1951, Colombo, cited in *Wriggins, supra*, 21, p.235.

[128] From the 1970s the Tamil leaders diverted their campaign alleging that the Tamil students were discriminated against in the university entry program, the allegation that does not have any credibility as will be shown below. Table 7, Admission Figures 1981-1983 (S, Sinhala: T,Tamil: O, others)

	1981	1981	1981	1982	1982	1982	1983	1983	1983
	S	T	O	S	T	O	S	T	O
Physics	63.5	31.8	4.7	61.1	33.5	5.5	73.4	23.1	3.6
Biology	72.5	24.3	3.2	71.7	26.1	2.2	70.3	23.1	3.6
Engineering	67.2	28.1	4.7	66.9	28.5	4.5	66.4	28.1	5.1
Medicine	72.7	23.1	4.3	72.4	25.3	2.3	72.8	22.1	5.1
Law	73.0	16.2	10.9	68.8	24.0	7.3	78.5	11.5	10.0

source: Division of Planing and Research University Grant Commissions, 1983, cited in *Thambiah, op.cit.*9, p.154.

11.6 *From Federalism to Eelam, Post 1947 Politics*

There was, however, no violence during the heyday of Congress between the Tamils and the Sinhalese. Their differences had been conducted in a most civilized way. The leaders of both communities emerged from the upper classes of society, gaining ascendancy over ordinary people by means of their English education and connection with the civil servants of the Colonial Government. They were simply, as recorded by the then Governor of the island Sir Henry McCallun, "a product of the European administration".[129] Most of them appreciated parliamentary traditions that operated within those grandiose building of the Westminster Parliament. Thus, their educational background influenced the leaders of both communities to conduct their self-government campaign in conformity with the fine traditions of liberal democracy which they learnt during their studies in Britain or from their experience of administration in the island. Their approach to constitutional reform was in contrast to that of their Indian counterparts in the Indian National Congress. Instead of non co-operation with the colonial government or violence against its personnel (through both *satyagraha* and *hartals*), the leaders of both communities adopted a non-violent democratic path which involved sending dispatches, memoranda and delegations to the Secretary of State for the Colonies and to the Governor, and engaging in debates in the LC and SC with admirable forensic skills.[130]

Ordinary peoples of both communities also had some sort of mutual understanding with each other which itself helped maintain peace in the island. Remarkably, as noted by Governor Sir Andrew Caldecott, the ordinary civilian population conducted day to day

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[129] See, Dispatches from Sir Henry McCallum to the Earl of Crew, in Bandaranaike, Handbook of the Ceylon National Congress, the Hand-Book, p.48.

[130] *Sir Ivor Jennings, supra,* 10, pp.81-82.

life without any involvement in communal politics. He said in 1938: "It is said on all sides that sectionalism (i.e., communalism) has increased under the present Constitution, but my observation is that its increase is limited to the political field and has not extended to the every day walks of life where there is a large measure of fellowship and understanding".[131]

This civility lasted until 1956 or perhaps, more correctly, until S.J.V.Chelvanayakam (a Christian Jaffna Tamil) began to dominate politics in the Tamil inhabited areas; and with the emergence of nationalist Sinhala dominated political parties in the 1950s.

11.7 *Ascendancy of Federalist Politics through Communalism: The Chelvanayakam Legacy*

The 1946 General Election was fought by the main Tamil party, the ACTC, in the Tamil-speaking areas, notably in the Jaffna peninsula and the eastern province, by "whipping up racial feelings" amongst Tamil voters.[132] None of the candidates tried to convince the ordinary Tamil voters that in post-colonial Ceylon it was the responsibility of all communities to work together moving away from tribal politics to the welfare of all the people on the island. Kearney commented that, "This election served as an early indication of the Tamil voters' preference for exclusively Tamil parties".[133]

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[131] Great Britain, Colonial Office, Correspondence Relating to the Constitution of Ceylon, Cmd. 5910, 1938, HMSO: London, p.8, cited in *Kreaney, supra*, 26, p.40.

[132] *Ibid.* p.66.

[133] *Kearney, op.cit,* 43, p.45.

As independence was granted to the island on 4 February 1948 by the Ceylon Independence Act of 1947, the future Eelam struggle was unofficially declared by a faction of the ACTC led by Chelvanayakam, refusing to join the new government led by United National Party (UNP) of which the leader was the formerly active member of Congress D.S.Senanayake. In fact the UNP was formed on a non-communal basis composed of many organisations of the Sinhalese, the Tamils and the Moores.[134] The leader of the ACTC, Ponnambalam later accepted a cabinet post in 1948 changing his former uncompromising stance in the State Council days of the 1930s and 1940s with an apparent understanding that it was imperative for both communities to work together in independent Ceylon. Indeed Ponnambalam stressed that his party was prepared to work with the Sinhalese "on the basis of responsive co-operation" to the betterment of both communities.[135] Yet, Chelvanayakam and his supporters refused to follow Ponnambalam, nor were they committed to a unitary State, Ceylon.[136]

Even before the island was granted independence the possibility of setting up an independent Tamil State was considered by Chelvanayakam. On the 26th of November 1947 moving an amendment to the Crown Speech he asked "if Ceylon is fighting to secede from the British Empire why should not the Tamil people if they feel like(it, secede from the rest of the Country?"[137] Two years later, on 15 February 1949 at a political rally in his constituency, Kankesanturai, he stressed that the "Tamil must govern itself" and

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[134] *Bailey, supra*, 11, p.149.

[135] *A.J.Wilson*, Politics in Sri Lanka, 1947-1973, Macmillan: London, 1974, p.163

[136] *Kearney, op.cit.*43,p.46.

[137] Hansard, 26 Nov. 1947, colmn. 232, cited in *Goonasekara, op.cit.* 11, p.35.

argued further that there was "the elementary right of small nations to have self-determination".[138]

Meanwhile his separatist ideology was given impetus by the passage of three Acts, i) the *Ceylon Citizenship Act*,(no.18 of 1949, ii) the *Indian and Pakistani Residence (Citizenship) Act*, no.3 of 1949, and iii) the *Ceylon (Parliamentary Elections) Amendment Act*, no.48 of 1949. The objective of the first two Acts was to regulate Ceylonese citizenship by curbing illegal immigration from the south India and to limit the influence of the Indian labourers (nearly one million) who refused or did not adopt Ceylonese citizenship by using the opportunity offered by the *Indian and Pakistani Resident Act*. In particular, with the support of the majority of MPs in the ACTC the latter introduced new laws with regard to eligibility for the register of electors. S. 4 (1) of the *Ceylon Parliamentary Elections Act* postulated that "no person shall be qualified to have his name enacted or retained in any register of electors in any year if such person - a) is not a citizen of Ceylon, or if he is by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to any foreign Power or State which is not a member of the Commonwealth". Within the *Indian and Pakistani Residence (Citizenship) Act* there were provisions which offered citizenship to the above individuals on proof of i) ten years continued residence in Ceylon prior to 1946 without a break of more than 12 months in respect of unmarried persons, or ii) seven years continued residence for married persons. Two years (the deadline being 5 August 1951) were given to those who wanted to apply for citizenship by registration. This was rejected at the

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[138] *A.J.Wilson*, Chelvanayakam and the Crisis of Sri Lanka: Tamil Nationalism, p.29, cited in Goonasekara, *op.cit.* 103, p.35.

insistence of the Indian Ceylon Tamil Congress (ICTC) which argued that the citizenship law violated s.29 (2) (b) and (c) of the *Ceylon (Constitution) Order in Council*, 1946 (Ceylon Constitution). S.29 (2) (b) states that the Ceylon Parliament does not have power to make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions.

Instead of taking of the advantages offered by the above two Acts, the Indian Tamils sought to challenge their validity in *Kodakan Pillai* v *Mudanayake*,[139] alleging that their intention was to prevent Indians acquiring Ceylonese citizenship. When the Attorney-General pointed out that the above citizenship Acts provided an opportunity for Indians to acquire citizenships the appellant surprisingly argued that the Indian and Pakistani Resident Act "might be *ultra vires* as conferring a privilege upon Indian Tamil within s.29 (2) (c) of the Constitution Order-in -Council... ."[140] Refusing the appeal the Privy Council held that "It is a perfectly natural and legitimate function of the legislation of a country to determine the composition of its nationals... . The migratory habits of the Indian Tamils are facts which, in their Lordships' opinion, are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community".[141] Their Lordships concluded that "the Ceylon legislature did not intend to

[139] [1953] 2 *WLR* 1142, PC.

[140] *Ibid.* p.1148.

[141] *Ibid.* p.1149.

prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island".[142]

There is no doubt these three Acts affected a large number of Indian Tamils and Pakistanis who preferred to stay as Indians or Pakistanis without acquiring Ceylonese citizenship.[143] However, like the Sinhalese, the Ceylon Tamils acquired their citizenship by birth, *jus soli*. Therefore, the above Acts in no way affected them. Nonetheless, this provided an excellent opportunity for Chelvanayakam to launch his campaign for a federal sub-Tamil State arguing that "Today it is the Indian Tamils. Tomorrow, it will be the Sri Lankan Tamils who will be axed".[144]

In December 1949 Chelvanayakam, C.Vanniasingham and E.M.V.Naganathan (all of them were MPs in the first post independent Parliament) with their followers formed a new political party entitled, Ilankai Tamil Arasu Kadchi (Tamil National State, later known as the Federal Party or FP) breaking away from the ACTC. The FP was exclusively for Tamil nationals. In fact, the main goal of the FP, as it was stated in public, was to create two States federated along Swiss lines.[145] However there was a hidden agenda behind the promotion of the FP as admitted by a staunch federalist Professor A.J. Wilson.[146] Leading federal activists, according to Wilson, advocated federation of the

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[142] *Ibid.* p.1143.

[143] *Wilson, supra*, 135, pp.30-31.

[144] See *Ponnambalam, supra*, 9, p.78.

[145] *Treymayne, supra*, 29, p.219.

[146] Wilson was Professor of Political Science at the University of Ceylon. He was not only a close ally and member of the new political party he later married a daughter of Chelvanayakam. He was in the 1980s appointed together with Dr.N.Thiruchelvam (now an MP), as spokesman and theoretician of the FP.

Tamil speaking areas with a future Dravidian sovereign State of Madras,[147] the first irredentist attempt known in 20th century Ceylonese politics. However, this idea was abandoned due to lack of encouragement from India.[148] In its first pamphlet the FP's future objective was declared as, "the attainment of freedom for the Tamil-speaking people of Ceylon by the establishment of an autonomous Tamil State on the linguistic basis within the framework of a federal union of Ceylon".[149] Chelvanayakam also invited other minority groups to follow him. Addressing the Young Mens' Muslim Association at Fort, Colombo in 1945 Chelvanayakam said:[150]

> "It is better to have our own territory, our own culture and self-respect than be a minority in the island living on the good fortune of the majority community".

The demands of the FP marked a significant change in the democratic politics that had hitherto existed in Ceylon.[151] "They began to think in terms of an economic future for the Ceylon Tamils...in the preservation and development in isolation of a Tamil homeland".[152]

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[147] *Wilson, supra*, 135, p.165.

[148] It is noteworthy that in 1945 Nehru demanded that Ceylon should be part of the Indian federation "since she was culturally, racially and linguistically as much a part of India as any province of India". However in 1949 Nehru abandoned this idea giving assurances to Ceylonese leaders that India did not want to annex Ceylon. See *Bailey, supra*, 11, p.158.

[149] See, The Case for a Federal Constitution for Ceylon: Resolutions Passed at the First National Convention of the Ilankai Tamil Arasu Kadchi, 1951, Ilankai Tamil Arasu Kadchi: Colombo, p. 19. See details, *Kreaney, op.cit.* 43, p.46; *Wilson, supra*, 43, p.123.

[150] *Wilson, supra*, 135, p.50.

[151] *Wilson, supra*, 43, p.118.

[152] *Ibid.* p.118.

In 1951 at the annual Convention of the FP at Trincomalee, the leadership emphasising that as a separate nation they had an "inalienable right to political autonomy", called for a plebiscite to determine "the boundaries of the linguistic states in consonance with the fundamental and inalienable principle of self-determination".[153]

As its 1956 election manifesto further amplified, the FP wanted Ceylon to consist of two federal States, on the Swiss model, one for the Sinhalese and the other for the Tamils. The FP also wanted "Tamil pockets in Sinhalese areas like Puttalam, Wellawatta (urban cities in the Western Province), Nawalapitiya and Hatton" (Up-country) and the Tamil-speaking areas inhabited by the Moores in the eastern province to become cantons or half-cantons of the Tamil State.[154] From then on the leadership moved from federalism to secession. For instance, in 1962, some members of the Working Committee, which was described by Wilson as "the nerve centre of the FP", openly flirted with the idea that the party should move away from federalism to secession. According to Wilson this was not adopted by the majority,[155] or perhaps the leadership wanted it withheld from the public due to its certain detrimental effects. Thus, with the formation of the FP ethnic politics intensified with the Tamil parties vying "to assert adversarial courage toward the Sinhalese".[156] However, it was the FP which emerged as the dominant force committed to wining a separate State for the Tamils.

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[153] *Gunasekara, op.cit.* 103, pp.33-34.

[154] *Wilson, supra,* 43, pp.123-124.

[155] *Ibid.* p.122.

[156] *L.Sabaratnam,* 'The Boundaries of the State and the State of Ethnic Boundaries: Sinhala-Tamil Relations in Sri Lankan History', 10 *Ethnic and Racial Studies* 1987, p.307.

At the other end of the spectrum there emerged a Sinhala Buddhist movement which saw it as their historical and religious responsibility to protect the island from subversive forces. They opposed federalists' demands fearing that the Tamils would subsequently secede or join the South Indian Tamils with a view to creating a Tamil-State which in the 1950s was called *Dravidastan* (a Tamil State covering Madras, parts of both Andrapradesh and Kerala, and the Tamil speaking areas of Malaya, and Ceylon). In particular, the FP, and its close association with the South Indian Dravidian separatist movement frightened the Sinhalese Buddhists. The South Indian separatist political party *Dravida Munnetra Kalazagam* (DMK) set up branches in Ceylon in the 1960s.[157] Sinhalese Buddhists now feared that the Ceylon Tamils would ultimately capture the whole island unless the Sinhalese Buddhists united against separatist Tamil forces. These concerns were expressed by the chief Buddhist priest in the Ramanya Nikaya (one section of the Buddhist clergy) - "If the Tamils get hold of the country, the Sinhalese will have to jump into the sea. It is essential, therefore, to safeguard our country, the nation, and the religion and to work with that object in mind".[158]

By 1956 the stage was set for communal violence to enter Ceylon's politics for the first time in the 20th century. The newly formed *Mahajana Eksath Peamuna* (Peoples' United Front, MEP, a coalition of various factions including Sinhala nationalist groups and the SLFP) introduced on 5 of June 1956 a Bill to make Sinhalese the only official language with a clause containing provisions for the reasonable use of Tamil.[159]

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[157] *Ponnambalam, supra*, 9, p.142 and *Farmer, op.cit.*22, p.69.

[158] Cited in *S.U.Kodikara*, 'Communalism and Political Modernization in Ceylon', 1 *MCS* 1970, p.103.

[159] This Act was passed into law as the Official Language Act no.33 of 1956.

Chelvanayakam saw that it was the perfect launching pad for his separatist federal campaign because it provided him an ideal opportunity to win the Tamil voters. On the same day that the above Bill was introduced to Parliament, the FP staged a Ghandian style *Satyagraha* (so-called non-violent campaign) in the island for the first time in its history. Violence inevitably followed. It is estimated that at least 150 people from both the communities were killed. Subsequently in 1958 communal violence in which both Tamils and Sinhalese extremists were involved engulfed the north, east, west and other connurbations of Tamil settlements in and the upper reaches of the hill country.[160] The FP this time adopted *hartal* (civil disobedience) on the language issue and demanded regional assemblies for the North and East. In April 1961 again violence spread amongst the Sinhalese and the Tamils due to the FP's *hartal* and its attempt to set-up a symbolic Tamil self-government by establishing a 'Tamil Arasu (Government) Postal Service',[161] which provoked the Sinhalese nationalist groups. This was, as stated by the FP, a response to the Government's attempt to implement the Sinhala as the official language.

11.8 *The Language Issue in the Privy Council*

Section 29 of the Constitution of Ceylon was subject to much debate in the Privy Council and the Supreme Court of Sri Lanka in a number of cases involving both the Tamils and the Sinhalese. S.29 (1) provides that "Subject to the provision of this Order Parliament shall have power to make laws for the peace, order and good government of the island". S.29 (4) provides that "In the exercise of these powers under this section, Parliament may

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[160] See on this, *T.Vittachi*, Emergency '58: The Story of Ceylon Race Riots, Andre Deutsh: London, 1958.

[161] *Ponnambalam, supra*, 9, p.122.

amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the island".[162] However, these powers, as held in *Liyanage*, must be exercised in accordance with the terms of the Constitution from which they derive.[163] Nonetheless, Parliament cannot amend or abolish existing provisions or introduce new laws or regulations in contravention of s.29 (2) (b) (c) and (d).[164] These provisions were incorporated to guarantee the rights of religious and racial minority groups in the island, and were considered "cast-iron guarantees given to the minorities".[165] S. 29 (3) stipulates that any law made in contravention of subsection 2 of this section is *null* and *void* and has no legal effect.[166] Lord Pearce interpreting this section held in *Ranasinghe* that racial and religious matters coming under it "shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of

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[162] A similar provision was included in s.2 of the Ceylon Independence Act, 1947.

[163] *Liyanage et al* v *Regina* [1966] 2 WLR p.682, PC.

[164] Article 29 (1) provides, "Subject to the provisions of the Order, Parliament shall have power to make laws for the peace, order and good government of the island". Article 29 (2) provides, "No such law shall - (a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religins; or (d) alter the constitution of any religious body except with the consent of the governing authority of that body : Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body". Article 29 (3) stipulates that "Any law made in contravention of subsection(2) of this sectin shall to the extent of such contravention, be void".

[165] *M.L.Marasinghe*, 'Ethnic Politics and Constitutional Reforms : The Indo-Sri Lanka Accord', 37 *ICLQ* 1988, p.557.

[166] *Ibid.* p.556.

Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution".[167]

Thus it is apparent that the Official Language Act, 1956 (Act no. 33) was in contravention of the Article. 29 (2) (b) and (c) of the Constitution of Ceylon because not only did it impose certain conditions which adversely affected the rights of minority groups but it also conferred on persons of one community (in this case the Sinhala) a privilege or advantage over other communities.

The legality of the regulations introduced by the Official Language Act was challenged not by the FP but by a humble government clerk of Tamil origin, Mr.Chelliah Kodeeswaran.[168] He refused to take the Sinhalese proficiency exam as was required by the Treasury Circular, no.560 of 4 of Dec. 1961, issued to implement the Official Language Act. He was therefore denied an increment of salary with effect from April 1, 1962. By challenging this apparently unjustifiable requirement in the District Court his counsel argued that the regulations in question were in violation of Article 29 (2) (b) and (c). His complaint was upheld by the District Court. The Attorney-General appealed to the Supreme Court arguing that the Crown could not be sued by its employees. In the Privy Council[169] it was held that according to Roman Dutch law employees could sue their employers. Other constitutional issues were therefore not considered, and the case was remitted to the Supreme Court to hear the issues raised by the appellant including the issue of constitutional significance. The Government realizing it had made a serious error,

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[167] *Bribery Commissioner* v *Pedrick Ranasinghe* [1964] 2 *WLR* 1305, PC

[168] *Kodeeswaran* v *AG of Ceylon* [1970] AC 1111, PC.

[169] *Ibid.* p.1111.

repealed the regulations in question and Kodeeswaran was promoted.[170] However, the validity of the Language Act was never challenged by Tamil political parties in courts of law. It is puzzling why the FP, with all the brilliant QCs at its disposal, most of whom were experts in constitutional and civil law,[171] did not challenge the Official Language Act in the courts instead of adopting an extra-judicial approach which, they should have known, would lead to violence.

However the *Kodeeswaran* case had a revolutionary effect on language policy in the island which had hitherto favoured only one community, the Sinhalese. In 1966 the right to use the Tamil language in the North and East was regulated in terms of the Tamil Language (Special Provisions) Act, 1958. The Tamil language was recognised by the 1972 Constitution as a national language. In 1988, by the 13th amendment to the Constitution of the Democratic Socialist Sri Lanka, 1978,[172] it was upgraded to "an official language". The demands for regional government along federalist lines were also constitutionally recognised thereby establishing provincial government in accordance with the Indo-Sri Lanka agreement.[173] But the Tamil separatist parties were not ready to adopt anything less than a separate State of Eelam as will be shown below.

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[170] *Marasinghe, supra*, 165, p.561.

[171] Chelvanayakam was himself a QC. Most of the senior members of his party were eminent civil and constitutional lawyers in the island.

[172] See Article 18 (2). Article 19 reads that "the national languages of Sri Lanka shall be Sinhala and Tamil".

[173] See chapter XVII A, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 amended by the 13th amendment.

11.9 *Defensive Politics by the FP in the Jaffna Peninsula*

From the latter part of the 1970s militant secessionist movements among Tamil youths emerged in the Jaffna peninsula first as pressure groups against elite Jaffna Tamil politicians and later developing into secessionist campaigns against Sri Lanka and the Sinhalese. As some researchers note, the emergence of these groups was due mainly to the oppressive caste system prevalent on the Jaffna peninsula and the coastal areas of the north east. There had been for centuries a deep division between high caste *Vellalars* and low caste Tamils, mainly *Pallavar, Nalavar*, and *Karraiyar*. The latter were considered "non-Tamils or aboriginal people of a despicably low status",[174] who had nothing to with the Dravidian identity and culture. They were enslaved and socially excluded by the *Vellalars* in almost every aspect of day to day life. The fate of the low caste Tamils was described by Holmes:[175]

> "In Jaffna in the 1940s and 1950s, for instance, minority Tamils were forbidden to enter or live near temples; to draw water from the wells of high-caste families; to enter laundries, barbershops, cafes, or taxis, to keep women in seclusion and protect them by enacting domestic rituals; to wear shoes; to sit on bus seats; to register their names properly so that social benefits could be obtained; to attend school; to cover the upper part of the body; to wear gold earrings; if male, to cut their hair; to use umbrellas; to own bicycles or cars; to cremate the dead; or to convert to Christianity or Buddhism."

This barbaric practice of caste seclusion gave rise to aggressive campaigns in the latter part of the 1960s and 1970 against the high caste Jaffna Tamils, who had dominated the

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[174] *Pfaffenberger, supra*, 121, p.82.

[175] *W.R.Holmes*, Jaffna (Sri Lanka) 1980, St. Joseph's Press: Jaffna, 1980, *ibid.* 4, p.82.

whole economy and the professions in the Tamil inhabited areas for centuries. Some attempts by the *Pallars* and *Nalavars* to acquire higher caste status resulted in violence, long drawn-out *hartals*, and in extreme cases, killings of both high and low castes. As stated by Pfaffenberger, "minority Tamils who attempted to raise their position would find their communities victimised by Vellalar-organised gangs of thugs, who burnt down properties and poisoned wells".[176] Thus these rigorous and inhuman social customs were enforced by intimidation and violence:[177]

> "To enforce these restrictions extra-legally, Velars have fielded gangs of thugs to punish upwardly mobile Pallars or Nalawars. These groups pollute untouchables' wells with dead dogs, faecal matter, or garbage; burnt down untouchable fences or houses; physically assault and beat minority Tamils, and sometimes kill them".

To campaign against social disability and discriminatory practices, low caste Tamils organised under the 'All-Ceylon Minority Tamils' United Front'. One of the protest campaigns organised by minority Tamils with the help of Shanmuganathan (a Tamil politician) and his Communist Party was 'the Maviddapuram Temple-entry movements' which shook the social fabric of Jaffna Tamil society, perhaps irretrievably. The low caste Tamil campaigners tried to enter by force the Maviddapuram Hindu Temple (hitherto reserved only for high caste Tamils) to worship there. This campaign resulted in a long-drawn-out and violent struggle between high-caste Tamils and untouchables which gained extensive publicity in Colombo based newspapers.

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[176] *Ibid.* p.80.

[177] 17 Feb. 1968, *Times of Ceylon*, cited in *Pfaffendberger, ibid.* p.82.

In direct challenge to this aggressive campaign of minority Tamils, the high caste Tamils in the Jaffna peninsula set up a new organisation in 1968 entitled, 'All-Ceylon Saiva Practices and Observances Protection Society' to combat ideologically as well as, if necessary, physically the low caste Tamils. The FP failed to provide any viable solution to this crisis. In fact in 1968, the leader of the FP, Chelvanayakam was challenged by some low caste Tamils to stand down from his parliamentary seat and contest it again. Other leaders of the FP, S.Nadaraja, A. Amirthalingam (the latter became the leader of the FP after the death of Chelvanayakam), and later the Tamil United Liberation Front (TULF)) failed to respond to the increasingly frustrated youth faction of the low caste Tamils. By 1968, the minority Tamils had lost almost all faith in the FP.[178]

Colombo based political parties also became involved in this dispute at the request of the All-Ceylon Minority Tamils' United Front. The SLFP (the main opposition party in Parliament) introduced a parliamentary bill in 1968 urging the government to inquire into discriminatory practices imposed on the low caste Tamils and demanded that the *Prevention of Social Disabilities Act of* 1957 be amended to combat these attitudes and customs.[179] Minority Tamils even demanded that the opposition parties should oppose the District Development Council Bill, the aim of which was at the request of the FP, to devolve power to the regions at district level. They argued that political and administrative power devolved to the Jaffna peninsula and to other Tamil conurbations in the coastal area of north-east would operate to the detriment of the minority Tamils.

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[178] *Times of Ceylon*. 9 Aug. 1968, cited in *Pfaffenberger, ibid.* p.92.

[179] *Ibid.* p.90.

Meanwhile, there had been a strong campaign amongst Sinhalese political parties against the proposed District Council Bill arguing that the devolution of power to the north and east would erode the sovereignty of Ceylon. Large gatherings and marches were organised in Colombo to oppose the Bill, leading to the death of a Buddhist monk,[180] and later dominating the general election held in 1970 to the lower house of Parliament. The opposition of both the Sinhalese political parties and the Tamil minorities in the Jaffna Peninsula resulted in the abandonment of District Council Bill in 1968, an event seen by the Ceylon Tamils, both elite and youth league, as an act of betrayal by the Sinhalese dominated government.

These crisis culminated in the withdrawal of the FP from the coalition government in September 1968 to focus on the unity of the Tamils and to develop new strategies with which to face the Colombo based Sinhalese dominated government. A few low caste minority Tamils were recruited to the FP and later, some were selected as candidates for parliamentary elections. The FP was temporally able to unite the various factions by exploiting the decline of government employment opportunities for Tamil youth, and by highlighting perceived discrimination against the Tamils. It was emphasised that Tamils of all persuasions and political beliefs should come under one wing to defeat Sinhalese chauvinism and to build up a Tamil State in the north and east where the traditional Tamil homeland was considered to be. This politics of defensive nationalism was branded by some as "a last ditch attempt to unite a community that would otherwise fall to pieces".[181]

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[180] This tragic incident was immediately exploited by the main opposition parties (SLFP, CP and the LSSP) who set up a monument in memory of the monk on the place at which he was killed by a policeman.

[181] *Pfaffenberger, supra*, 121, p.80.

Nonetheless, the FP had to pay a price. It was forced to accommodate these low caste warring factions but could only depend upon the high-caste *Vellarlars* who controlled lands and held high government positions. The newcomers increasingly became more powerful and militant, and tended to violence. They began to express their opposition both to the traditional leadership of the FP and to non-Tamil nationals on the peninsula. This was vividly demonstrated in the General Election of 1970. The FP suffered a heavy losses for the first time since the 1956 general election. The Chairman of the FP S.M.Rasamanickam and the deputy leader E.M.V.Naganathan were defeated whilst the leader Chelvanayakam only narrowly won his seat. [182]

In 1972 the coalition government led by the SLFP enacted a new constitution by which Ceylon became a Republic (since then the Republic of Sri Lanka). The FP's demand for five federal States in the new Republic, one for the Tamils, one for the Moores and three for the Sinhalese in the new Republic, was refused by the Constitutional Assembly.[183] Article 2 of the new Constitution, 1972 proclaimed that "the Republic of Sri Lanka is a unitary State". This further infuriated the FP and its followers.

A new political movement entitled the 'Tamil United Front' (TUF) was hastily launched on 14 May 1972 bringing together the FP, ACTC, CWC (Ceylon Workers Congress) and other smaller fractions of the Tamil movement to achieve a Tamil Eelam. This new political party even allowed hitherto untouchable Indian Tamils who lived in the hill country (the central part of the island) to gain membership. In fact, the leader of the Indian Tamils, S.Thondaman, was elected as one of the leaders of the TUF. By 1977 the

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[182] *Ponnambalam, supra*, 9, p.154.

[183] *Ibid.* p.162.

strength of the radical Tamil youth movements, many of which by this time were actively engaged in secessionist activities, was evident within the TUF. In 1975 to appease the militant Tamil youths and other Eelamists TUF proclaimed that from then on its main goal was to achieve an independent Tamil Eelam.[184] This was officially announced by the Vadukoddai Resolution of 14 May 1976. The title of the TUF was changed to the Tamil United Liberation Front (TULF). Consequently, the 1977 general election was fought by TULF on the platform of a *Tamil Eelam* covering the north-east provinces of the island.

The radical and subversive nature of the political slogans used by the leadership of TULF during the General Election of 1977 provided an ideological breeding ground for the militant Tamil movements. Secessionist groups had begun to organise as underground guerrilla movements to secede from the Republic of Sri Lanka. As pointed out by Pfaffenberger, many Jaffna Tamil youths were of the firm belief that the moderate and conservative policy of the Tamil elite was not working. Some even criticised the old federalist leaders for failing to achieve a Tamil State after four decades of 'futile politics'. The policy adopted in post-independence Ceylon by the Tamil leadership was seen as timid, self-serving and neglectful of the interests of ordinary Tamils.[185]

In fact, most of the leaders of the newly emerged guerrilla groups were low-caste Tamil youths. The leader of the LTTT, V.Prabhakaran, is a low-caste Tamil *Karaiyar*. New militant Tamil guerrilla groups have turned against the traditional Tamil leadership (TULF) and later against its ordinary members. This started in 1978 with the assassination

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[184] See Chelvanayakam's statement in Jan. 1975, cited in *Ponnambalam*, *ibid.* pp.182-183.

[185] *A.Balasinham*, Liberation Tigers and Tamil Eelam Freedom Struggle, Jaffna Liberation of Tigers of Tamil Eelam: Jaffna, 1984, p.25. Balasingham is the chief theoretician to V.Prabhakaran, the leader of the LTTE.

of Thiagarajah, an MP and another liberal Tamil politician, Alfred Duraiyappah. The reasons for these crimes were that the former had joined the UNP after deserting the TULF whilst the latter had attempted to convince the Tamil voters that for the betterment of both communities the Tamils should join "the mainstream of Ceylonese politics" by abandoning isolationist and communal politics.[186]

The political campaign for a Tamil Homeland thus turned to a violent guerrilla war from the latter part of the 1970s. The strategy of achieving a *Tamil Eelam* composed of ethnically pure Tamils is carried on through terrorism involving ethnic cleansing and genocide. In the Jaffna peninsula (the main Tamil conurbation in the north) ethnic cleansing has already been accomplished by the LTTE with remarkable ease. First, all non-combatant civilian Sinhalese population were expelled. Many fleeing Sinhalese refugees were brutally killed by the Tamil guerrillas. According to Tamil sources there were 20,402 Sinhalese in the Jaffna in 1971.[187] This number shrank to 4,615 in 1981 due to terrorism against the Sinhalese.[188] There were 8710 Sinhalese in Mannar in 1981. Now not even a single Sinhalese is allowed to live in Jaffna and Mannar. Ethnic cleansing

[186] *Kreaney, op.cit.* 43, p.29.

[187] Memorandum of the Ceylon Institute for National and Tamil Affairs, cited in *Ponnambalam,supra,* 9, p.107.

[188] Table 8, Ethnic Breakdown in the Northern province at 1981:

North	Total	Sinhalese	Tamils	Moores	Indians	Others
Jaffna	831,112	4,615	792,246	13,757	20,001	43
Mannar	106,940	8,710	54,106	28,464	14,072	18
Vavnia	95,904	15,876	54,541	6,640	18,592	255
Mullaittivu	77,512	3,948	58,904	3,777	10,766	117
Total	1,111,468	33,149	959,797	52,638	63,431	2,453
Percentage	100	2.98%	86.35%	4.73%	5.71%	.23%

* Source: Census of Population and Housing 198, cited in *Thambiah, op.cit.* 9, p.166n

against the Sinhalese and Moores living in Vavuniya, the Mulaitivu districts, and some villages in the Eastern province is still being carried on.

The LTTE and other secessionist groups also turned on both Indian and Ceylon Moores who have been living in the Jaffna Peninsula for centuries. They were subjected to brutal violence since the latter part of the 1980s culminating in the expulsion of the whole Moore population from the Jaffna Peninsula.[189] The UN Special Rapporteur Eide writes:[190]

> "The Tigers, in their secessionist actions against the territorial integrity of Sri Lanka, have sought (with limited success) to obtain support from Tamil Nadu in India. Ethnic cleansing, directed both against Sinhalese and against Moores in the territory claimed by the Tigers has formed part of their policy".

With the murder of 13 Sinhalese soldiers on the night of 23 July 1983 in Thinnevely on the Jaffna peninsula, there followed bloody violence against the Tamils by Sinhalese mobs instigated by a section of the Government.[191] This provided yet further incentive for the Eelamists to intensify their terrorist activities.

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[189] *Rogers, supra*, 89, p.19. See further *Gunasekara, supra*, 103, pp.22-23.

[190] *A.Eide*, 'In Search of Constructive Alternatives to Secession', *in C.Tomuchat* (ed), Modern Law of Self-determination, Martinus Nijhoff: Dordrecht/ Boston/London, 1993, p.144.

[191] *E.Meyer*, 'Seeking the Roots of the Tragedy', in *J.Manor* (ed.), Sri Lanka: In Change and Crisis, Croom Helm: London and Sydney, p.139.

Since then only armed secessionist groups[192] have engaged in politics in the Jaffna Peninsula and other Tamil conurbations. From the 1986 political activities of all other Tamil political parties (including the TULF), both traditional and terrorist, were proscribed by the LTTE in the North and East provinces. Many Tamil political leaders and MPs have been killed. In 1986 the leader of the TELO, another secessionist group, Sabarathnam, and 150 leaders of its cadres were killed. Seventy senior members of the EPRLF were also killed in the same year. The leader of the PLOT, Uma Maheswaran, was killed whilst he was hiding in Colombo. The leader of the TULF, A. Amirthalingam (MP) and many of his fellow Tamil MPs were killed by the LTTE. Disobedience of LTTE's edicts invariably resulted in death. Government agents, Head Masters, Judges, and leading members of the Citizens' Committee, Members of Parliament were particularly targeted.[193]

Thus the modern era of political killing started with unprecedented brutality spread like a cancer engulfing every community on an island which was once described as a pearl in the Indian Ocean and its inhabitants as friendly, peace-loving and civilised people having "a highly productive and culturally rich civilization".[194]

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[192] See details *E.O'Ballance*, Cyanide War: Tamil Insurrection in Sri Lanka, Brasseu's Defence Publishers: London, 1989; *A.Shastri*, 'The Material Basis for Separatism: The Tamil Eelam Movement in Sri Lanka', 49 (1) *JAS* 1988, pp.56-77.

[193] See more details, *Gunasekera*, *op.cit.* 103, pp. 24-25.

[194] *Wriggins*, *op.cit.* 21, p.11.

11.10 *Response of the Sri Lankan Government, Autonomy as an Alternative to Tamil Eelam*

In 1966 Ceylon's UN delegate Mr Shanmuganathan (a Tamil) stated that there might be a possibility of recognising a right to secession where States were composed of more than one national community.[195] There may be cases, in his view, where 'peoples' could be considered synonymous with 'States' and minorities could be viewed as 'peoples'. He argued that nothing was permanent, even the most sacred principles enshrined in the UN Charter and other UN resolutions and declarations. "No political or international arrangements, no sacred Troy - are exempt from this eternal law".[196] This is the only occasion in which any Sri Lankan delegate has ever supported secession in public. Generally Sri Lanka is opposed to secession and does not it identify autonomy in terms of the right to self-determination. Sri Lanka's views on this have been in agreement with other Afro-Asian and Latin American States. If we were to interpret the right to self-determination in ethnic terms, argued Mr T.B.Subasinghe (Ceylon's UN delegate) in his address to the GA during the debate on the Congo crisis, the democratic structure of nation-States would be in danger. He emphasised the need to avoid the fragmentation of newly established nation-States. Secessionist tendencies such as the Katangan separatist movement would, in his view, "prevent the building up of modern progressive and viable States" or obstruct the progress of States "which are gaining their independence".[197] This position was reiterated by Ceylon during the debate on the Bangladesh insurrection in 1971. Its delegate Mr Amarasinghe said that no compromise on the preservation of the

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[195] A/C.3/SR.936, 22 Nov. 1966, pr.17, p.217.
[196] *Ibid.* pr.19, pp.218-219.
[197] A/PV.961-965, 4 April 1961, p.162.

integrity and unity of the State of Pakistan could be made. He stressed that Pakistan should not be expected to negotiate with "secessionists" because the Bangladesh insurrection was not a "liberation movement in the classic and universally understood sense of the term". Any recognition of secessionist attempts by member States "would be creating a deadly precedent." Another significant danger, argued Amarasinghe, was that even minorities might begin to believe that they would be entitled to have their own States. He said, "most countries in the Assembly have substantial minorities - my country has - and must bear in mind the implications of treating the East Pakistan Awami League Movement as a liberation movement".[198] This position has continually been maintained by Sri Lanka.. Its delegate, Mr.Palimakkara, during the debate on the proposals for autonomy submitted by Liechtenstein urged that the application of the doctrine of the right to self-determination be limited to "foreign occupation and colonial domination". If it was interpreted in a broader way as suggested by the proposal it would give "legitimacy to groups advocating armed conflicts" which are "lacking popular electoral support". Proliferation of economically unstable and politically fragmented entities, argued the Sri Lankan delegate, "would run counter to efforts to promote good governance and democratic pluralism world-wide". He also reminded the General Assembly that such an endeavour would undermine social cohesion and democracy, and encourage the ethnic, religious or linguistic segregation of communities.[199] It was argued again by Mr. Palimakkara in 1995 that the international community:

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[198] A/PV.2003, and Corr.1, 7 Dec. 1971, pr.23, p.3.

[199] A/C.3/48/SR.22, 3 Nov 1993, pr.18-22, p.5.

"opposes any attempt to create racial tensions or violate the territorial integrity of a nation under the pretext of safeguarding self-determination; such attempts only intensified racial conflicts, which might trigger war and regional conflict and, ultimately, threaten international peace and security".[200]

The secessionist armed struggle of the LTTE and other armed groups has been referred to by the current Government as "illegitimate"[201] and "terrorism".[202] The current Minister for Foreign Affairs warned members that any "fashionable theories about the need to limit national sovereignty" would be disastrous. He stated that the legitimate genuine "grievances of the Tamils" could be addressed "through democratic means", and stressed that, "We are working on a set of proposals introduced by my Government to address minority grievances, which includes far reaching constitutional changes."[203]

However, Sri Lanka recognises the necessity of the "progressive application of the right to self-determination" by introducing decentralisation of power to the regions and provinces.[204] This is a reflection of views on autonomy for Sri Lanka expressed for nearly three decades by some politicians of Sinhalese dominated parties. They principally admit that there should be a comprehensive devolution of power to the North and East of the island. The dilemma is how this can be implemented without destroying the territorial integrity of the island and without arousing the anger of the majority community, the

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[200] A/C.3/50/SR.4, 16 Oct. 1995, pr.29, p.7.

[201] Statement made by the current Minister for Foreign Affairs Laksman Kadiragamar (distinguished Tamil lawyer) during the GA debate. A/51/PV.II, 26 Sept. 1996, p.3.

[202] President Chandrika Bandaranaike's statement, A/50/PV.35, 22 Oct. 1995, p.9.

[203] Kadiragamar's stement, *supra*, 201, p.3.

[204] A/C.3/48/SR.22, 3 Nov. 1993, pp.5-6.

Sinhalese and powerful Buddhist clergy. Most importantly, the uncertainty about the degree of autonomy to these provinces has also hindered any significant progress.

Since 1977 there has been remarkable progress on the devolution issue. The former President, J.R.Jayawardane was sympathetic to the Tamil homeland demands. However, the government refused any claim for Tamil Eelam based on the right to self-determination. The President's brother and chief adviser, the later H.W.Jayawardhane responded to secessionist demands:

> "...if the demand that the proposal for a political settlement should recognise the right of the Tamils for self-determination extends to the point of an absolute right it can only mean the totally unacceptable claim for a separate state by whatever name it is called. If it means the granting of *a reasonable degree of autonomy under the existing constitution* according to Sri Lanka's concept of a participatory democracy, the government is prepared to grant such autonomy and has founded its proposals on these basic principles." (emphasis added).

In 1987 by the thirteenth amendment to the Constitution of 1977 in pursuant to the Indo-Sri Lanka Accord of July 1987[205] the government introduced autonomy as an alternative to Tamil Eelam thus devolving power to provincial level.[206] Under this 'Provincial Councils' were established which were empowered to pass any laws within their competence identified in the 'List 1 of the 9th Schedule, 'the Provincial Council Lists' (article 154 G). The delegation of autonomous power to provinces is considered

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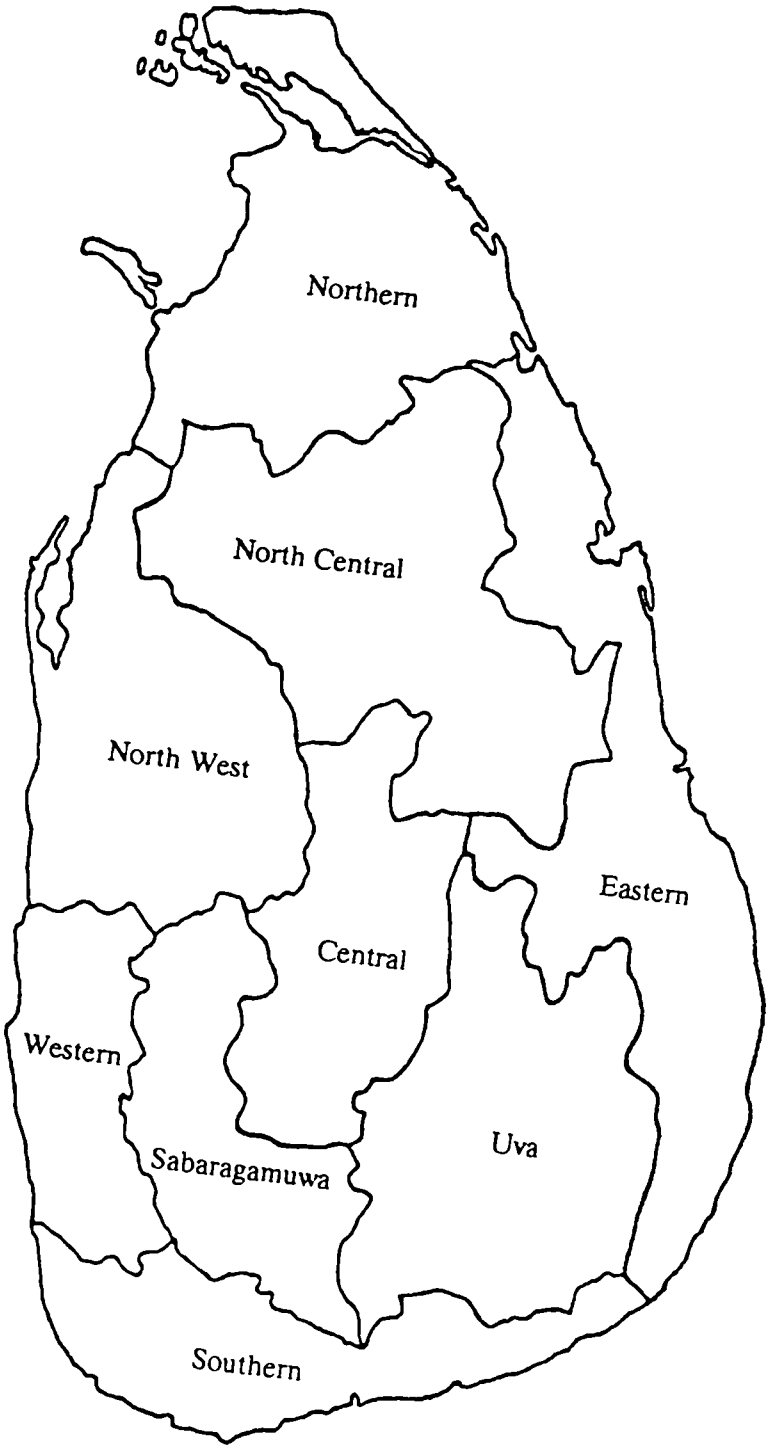
[205] See *Marasinghe, supra*, 165, pp.551-587.

[206] See articles 154 A to 154 T of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1977 as amended by 1987, published by Parliament Secretaries. See also map 2, Provinces in Sri Lanka.

Map. No. 2

Provinces of Sri Lanka



one of the most extensive constitutional changes made in post-independence Sri Lanka. Every Provincial Council has a regional government with executive, legislative and judiciary. The Chief Minister with his Board of Ministers can virtually control every aspects of the lives of the citizens living in these provinces except defence and security which come under the central government.

More controversially this constitutional amendment allowed both North and East Provinces to merge as one territorial unit. The new Provincial Councils were established in 1990 and for the first time there was a Tamil led government in the north and east of the island controlled by a Tamil Chief Minister and his cabinet style government. Yet the most powerful secessionist group the LTTE refused to take part in the provincial election nor did it allow the elected government to function. Satyendra, one of its spokesman, unequivocally stated its position in opposing autonomy:

> "And, so let us talk about the right to self-determination of the Tamil... . And whatever may the limits of the right of self-determination it is nowhere denied that it includes the right of a subjugated people to free themselves from an alien subjugation. And let us say that today, the Tamils of Sri Lanka are by any test a subjugated people, living in fear for the safety of their lives and their property. And let us tell the Sri Lankan government: Please, do not confuse the right to self-determination with the way in which we may choose to exercise it".[207]

This led to a power struggle between the newly elected north-east government and the LTTE. Consequently this gave rise to a unilateral declaration of secession by the

[207] *N. Satyendra*, undated, The Tamils of Sri Lanka, Kurds and Bhutans, Tamil Times, Special Supplement, London, p.19.

provincial government led by the EPRLF only few months after their election to avoid the allegation made by the LTTE that the EPRLF had abandoned the Eelam struggle. The Chief Minister, K.Pathmanabha, and his whole cabinet and supporters later fled to South India to escape from the LTTE. Consequently they were killed whilst they were hiding in Tamil Nadhu by the LTTE with the tacit approval or complicity of the Dravida Munnetra Kalazagam Party, DMK.[208] This led the government to dissolve the provincial government in 1990.

The present government, the Peoples' Alliance (PA), seems to be prepared to go beyond any previous governments' experiment with autonomy. It came to power promising a peaceful and constitutional solution to the island's ethnic conflict. Addressing the General Assembly President Chandrika Kumaratunga said, "We have been traumatised by forces of terrorism and chauvinism. Nonetheless, my Government is resolved to fulfil its mandate by seeking through political negotiations, solutions to our problems that would enable our people to live in peace, security and freedom".[209] She declared in 1996 that her government would pursue peace for the island through three 'D's - devolution through dialogue, development in war-torn areas, and the devolution of power. Her commitment to constitutional and peaceful settlement was again emphasised proclaiming that "We are willing to talk, I don't like to settle this by war".[210]

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[208] See 18 *Sri Lankan Monitor* 1997, p.4.

[209] A/50/PV.35, 22 Oct. 1995, p.9.

[210] See her interview with the Indian journalist Ram, *surpa*, 7, pp.2-6.

The proposed constitutional reforms (popularly known as 'the constitutional package')[211] were presented as a solution to ethnic conflicts. It allows an unprecedented scale of autonomous power to the Northern and Eastern provinces[212] in Sri Lanka within a federal structure. The new proposals include a permanent merger of the Northern and Eastern provinces of the island as one territorial unit allowing the Tamils to control virtually one third of the land of the island and the two thirds of its territorial waters. The proposal is considered by independent observers as "the furthest-going and most progressive attempt"[213] to date, and in fact it goes far beyond anything attempted by what the Bandaranaike-Chelvanayakam Pact of July 1957,[214] the Dudley Senananayake-Chelvanayakam Pact of 1965[215] and the Provincial Councils created in 1987. Both the 1957 and 1965 proposals involved the delegation of autonomy to Tamils at district level.

The present proposal involves delegation to 'Regions' at provincial level with extensive autonomy within a loose federal structure,[216] with their own governments with

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[211] Select Committee's Report on Constitutional Reforms presented to Parliament on 24 Oct. 1997. See a critical examination of the package in *Gunasekara, op.cit.* 103, pp.116-221.

[212] See chapters XIV (the Constitutional Council), XV (Devolution of Power to Region), XVI (State Land, Waters and Minerals), XVII (the Judiciary), in the Select Committee's Report , *ibid.*

[213] See *Ram, supra,* 7, p.2. See also CFSP Presidency statement, Brussels, 30 July 1996, Nr 9455/96 (Presse 224) CSFP: 66/96. It says that the European Union remains of the view that the Sri Lankan Government's wide ranging proposals for constitutional reforms could constitute a solid basis for a peaceful solution.

[214] *Wriggins, op.cit.*21, pp.265-266; *Ponnambalam, supra,* 9, pp.110-112.

[215] *Ponnambalam, ibid.* pp.135-136.

[216] *Ram, supra,7,* p.12.

executive, legislature and the judiciary.[217] According to the new proposal, "Sri Lanka is a united and sovereign Republic and shall be an indissoluble Union of Regions" (art.1). Each Region or Union State has its own government elected by the citizens of the Region. Region has its own Governor (art. 129), Chief Minister and the Board of Ministers (art. 134), Executive Committee for each Ministry (art. 135), Regional Attorney-General (art. 136) and a judiciary independent of the central government (art. 146). In fact article 159 (1) says that any interference with the Regional Judicial Service is an offence punishable by fine and imprisonment. Law and order within each province comes under the devolved Regions (art.25). State lands within the Province "shall vest in the Region and shall be at the disposal of the Regional Council" (art. 143, 150, 155). This is considered as one of the most controversial provisions in the package. The regional Judicial Commission (art.163), Regional Public Service Commission (art.200), Regional Public Service (art.203), Regional Police Service and Regional Police Commission (art.217) are other important institutions coming within the competence of each Region. The Regions are granted power to borrow money from international and domestic institutions (art.210). With the exceptions of defence, national security, and foreign affairs, all other powers are vested with the Regions.[218] In addition, education, health service, agriculture and agrarian services, irrigation, animal husbandry, fisheries and aquatic resources, forestry and the protection of the environment, regional industrial development and energy, transport, minor ports and harbours, roads and waterways, housing and constructions, urban

[217] See chapter XV, The Devolution of Power to Regions.

[218] See critical analysis on this, *Gunasekara, op.cit.*103, pp.115-234. See also Australian Centre for Sri Lankan Unity (ACSLU), 'A Critique', http:// www. member.tripod. com /~ sosi/devolu.html.

planning and public utilities, rural development, local government, co-operatives, broadcasting and media including television, social security, State lands and its alienation or disposal, regional police and law and order, regulations of societies within the region, regional financial and credit institutions, taxes and mineral rights, stamp duties, and motor vehicle registrations are some of the most important powers coming under the authority of the Regions.

The 'constitutional package is strongly opposed both by the LTTE and most of the Sinhalese. The latter argue that "more power to the North and East is only a stepping stone to a separate State".[219] The majority view of the Sinhalese is that "this country does not want a division of Sri Lanka whether by force or legislative process".[220] In place of talking peace to 'terrorists' they are pressing for a complete military crackdown on the secessionist LTTE to protect the unitary character of the island. The so-called ethnic problem is seen by some liberal politicians as "a myth that was created, nurtured and propagated by those racist Tamil political parties".[221] Many Sinhalese dominated political parties are unwilling to support the 'constitutional package' due to perennial fear that if the Tamils are granted political power at provincial level they will either secede from Sri Lanka or subjugate the whole island.

Not surprisingly, the LTTE has already rejected the proposals saying that they will not accept anything less than Tamil Eelam.[222]

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[219] *The Sri Lankan Monitor*, no.97, Feb.1996, published by British Refugee Council: London, p.1.

[220] *P.Gunawardhana,* 'Chandrika Has Mismanaged N-E Crisis', *The Island,* 30 April 1995.

[221] *Gunasekera, op.cit.*103, p.7.

[222] See Sri Lankan Monitor, no. 115, August 1997, p.3.

Conclusion

The secessionist campaign in Sri Lanka is one of the oldest and violent armed struggles in the contemporary world and therefore can be used as a sample case for the analysis of secessionist movements elsewhere. By comparing the Sri Lankan secessionist struggle with other secessionist movements common characteristics can be identified. First of all many contemporary secessionist campaigns start with minimum demands, that is, autonomous powers for the region inhabited by the secessionist groups as in the case of Sri Lanka. Amongst other characteristics, violence, long-drawn out armed struggles, and the destruction of State's property and perceived enemy groups are prominent.

More significantly, one lesson that can be learnt from the Sri Lankan secessionist struggle is that when a section of a population of a State loose its faith in the existing political structure or is no longer prepared to share power with the majority community and decides to break away from it, it is difficult to suppress such movements. More power to the regions or to minority groups or the democratisation of the political structure, as has been seen in the case of Sri Lanka and elsewhere, may not suffice to appease secessionists or lure them back to democratic politics. No such movements are worried about the concerns of the UN or the legitimacy of secession in terms of international law. In the long run, as in the case of Tamil Eelamists in Sri Lanaka, many believe that their secessionist struggles can be justified in terms of the right to self-determination and will therefore achieve legitimacy through the UN. Secession is seen as the most effective option available to them.

12 Minorities' Claims: From Autonomy to Secession: Conclusion

Both autonomy and secession, as has been seen in chapter 3, and 8, are controversial concepts. Although autonomy is increasingly being considered as a pragmatic political solution to ethnic conflicts and minorities' grievances, as explained in chapter 6.3, secession is not favourably seen either by the UN or other international organisations or by nation-States. Instead, protection of minorities and less controversial rights such as religious, cultural and linguistic rights are recommended as means of addressing issues relating to minorities.

In fact, the protection of minorities and promotion of their ethnic, cultural, religious and linguistic identities have become an integral part of the international protection of human rights.[1] Contemporary pluralist societies are required in good faith,[2] and "to ensure respect for the rights of minorities"[3] to take steps to ensure "the survival and continued development of the cultural, religious and social identity

[1] Article, the Framework Convention for the Protection of National Minorities, 1995 (Framework Convention, 1995); the preamble of the UN Declaration on Minorities, 1992.

[2] Article 2, the Framework Convention, 1995.

[3] The Badinter Commission, Opinion no.2, 30 *ILM* 1494 [1992] p.1498.

of the national minorities concerned"[4] by creating appropriate and favourable conditions,[5] if necessary, through legislative, judicial or administrative authorities.[6] In respect of indigenous groups, their traditional way of life associated with the use of land resources, including such traditional activities as fishing or hunting and the right to live on reserves or native lands are now recognised,[7] as explained in chapter 4.3. Moreover their claim to participate, if they so choose, "at all levels of decision-making in matters which affect their rights, lives and destinies" is recognised as a legitimate right.[8]

As has been seen in chapters 4, 6 and 8.8 minorities' rights moved beyond article 27 of the ICCPR as making significant progress has been made in extending the scope of minority rights.[9] In Europe, specially, much progress has been achieved

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[4] General Comment, no. 23/50 on article 27 / minority rights, adopted by the Human Rights Committee under article 40, pr. 4 of the ICCPR, pr.9 See the full text, 15 (4-6) *HRLJ* 1994, pp. 234-236. See article 2, the UN Declaration on Minorities, 1992.

[5] Article, 4 (2) of the Framework Convention, 1995; Article 4 (1) (2) and (3) and Article 16, 28 and 37 of the Draft Declaration on Indigenous Peoples, 1994.

[6] Article 1 (2) of the UN Declaration on Minorities, 1992.

[7] See article 12, 13 and 14 of the Declaration on Indigenous Peoples. See *Erica-Irene Daes*, Protection of the Heritage of Indigenous People, UN: New York and Geneva, 1997.

[8] Article 20 and 21, *ibid.*

[9] Rights promoted by article 27 have appeared in many other subsequent declarations or conventions. See articles 11 (1) (2) (3), 12 (1) (2), 14 (1) (2) of the Framework Convention, 1995; articles 2, 4 (2) (4) of the UN Declaration on Minorities, 1992; the European Charter for Regional or Minority Languages, 1992; articles 12 (culture), 13 (religious rights), 14 (language) of the Declaration of Indigenous Peoples and Principle 67 of the Declaration on the Principles of International Cultural Corporation (UNESCO), 1966, reprinted in *Erica-Irene Daes*, *supra*, 7, pp. 28-29.

as described in chapter 8.8.[10] However, some academics and most minority groups, as examined in chapter 5, are of the view that the rights mentioned above are not sufficient to prevent ethnic conflicts in pluralist societies, nor do they meet the aspirations of minority groups most of whom believe, as has been seen in chapter 7, that the ultimate solution to their problems is to have their own States.

As described in chapter 6.3 autonomy within existing nation-State structures is the maximum international organisations and most States are prepared to allow. Even military action may not suffice to compel reluctant States to compromise their territorial integrity in favour of greater autonomy for minority groups as in the case of the present Balkan conflict (see chapter 9.4). But how far can a greater autonomy be used as a solution to minorities' problems? In cases where there is a danger to minorities' existence or minorities are not sufficiently represented in decision making and the political process, constitutional arrangements and international treaties involving autonomy may be an option that can be employed. Van Dyke, a prominent collectivist, sees autonomy as the "most prominent and widespread political arrangement" employed to provide a solution to ethnic conflicts in modern plural societies.[11] According to Suksi, a model similar to that of the Aaland autonomy

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[10] See the Charter for Regional or Minority languages, 1992 and the Framework Convention, 1995.

[11] *V.V.Dyke*, 'The Cultural Rights of Peoples', *Universal Human Rights*, 2, 1980 p.5. See further *T.Varady*, 'Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Case', 19 (I) 1997 *HRQ* p.49.

could be used as a solution.[12] A prominent federalist Elazar[13] and the Special Rapporteur Eide[14] also agree that territorial subdivisions through federalism can be used to defuse ethnic tensions and to accommodate the genuine concerns and grievances of ethnic groups (see chapter 3.6). However, Eide argues that any autonomy model involving territorial subdivision has to be implemented carefully since such arrangements may endanger the State structure.[15]

Eide concludes that any decentralization of power in territorial terms should be "coupled with genuine pluralist democratic governance in each territorial unit".[16] As set out in chapters 6 and 10, from the States' point of view, the importance of internal and external territorial integrity is however a *sine qua non* in any territorial realignment in plural societies.[17] Territorial subdivisions, as Eide correctly points out, should not be designed merely on ethnocratic lines because they might be used by ethnocratic politicians for their own political ends as explained in chapters 6 and

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[12] *M.Suksi*, 'The Constitutional Setting of the Aaland Islands Compared', in *L. Hannikainen* and *F.Horn* (eds.), Autonomy and Demilitarisation in International Law: The Aaland Islands in a Changing Europe, Kluwer Law International: The Hague/London/Boston, 1998, p.99.

[13] *D.J.Elazar*, Federal Systems of the World,: A Handbook of Federal, Confederal and Autonomy Arrangements, Longman Group: London, 1991, p.34, Introduction, p.viii. See also *L.B.Sohn*, 'The Concept of Autonomy in International Law and the Practice of the United Nations', 15 (2) *ILR*, p.190 and *I.Brownlie*, 'The Rights of Peoples in Modern International Law', in *J.Crawford* (ed.), The Rights of Peoples, Clarendon Press: Oxford, 1992, pp.1-16..

[14] Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems involving Minorities, E/CN.4/Sub.2/1993/34, 10 August 1993, pr.247, p. 54.

[15] *Ibid.* pr.247. p.54.

[16] *Ibid.* pr. 253, p. 54.

[17] *Ibid.* pr. 246, p. 53.

10.[18] There are other valid reasons, a), autonomy based on ethnicity may be abused by minority groups to discriminate against other ethnic communities, b) it may also encourage segregation and exclusion rather than diversity, c) and this might give rise to more ethnic rivalries and polarization of ethnocratic movements,[19] as in the case of Sri Lanka (see chapters 6.2 and 11). Thus, autonomy may indirectly institutionalise separatism creating ethnic enclaves in which the dominant ethnic group does not usually welcome outsiders or aliens and though the latter resides in the same territory.[20] Steiner says such models "resemble more a museum of social and cultural antiquities than any human rights ideals".[21] Steiner therefore argues that autonomy is the least worst solution for preventing minority groups from seeking separation.[22]

It is difficult to determine whether autonomous arrangements can be used as a panacea for modern ethnic conflicts. Although in some countries, for instance, South Tyrol in Italy and the Basque and the Catalan provinces in Spain,[23] a decentralization of power to the regions or provinces has been able to defuse ethnic tensions to a certain extent, it is too early to say that they can be seen as examples which can be used elsewhere. On the other hand, autonomy may not be able to

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[18] *Ibid.* pr. 251, p. 54.

[19] *R.Stavenhagen,* Ethnic Conflicts and the Nation State, Macmillan Press Ltd in association with UNRISD: London, 1996, p.263.

[20] *Ibid.* p.1551.

[21] *Ibid.* p.1553.

[22] *Ibid.* p.1557.

[23] Spanish autonomous arrangements are seen as example of 'extraordinary success' by some. See *Elazar, supra,* 13, p. viii.

appease certain minority groups as is evident from the Kosovans and Quebecois. The behaviour of the latter is a classic case in point. The Quebec provincial government's extensive autonomous power has been significantly enhanced in recent times. Yet, as set out in brief in chapter 6.5, a significant proportion of Quebecois are not satisfied with it. Their perception is that only independence will provide an environment within which they can flourish as a new nation.

The success of autonomous models hinges upon the willingness of the parties to back them fully. "Even when autonomy appears to function satisfactorily for some time, a cleavage may occur when suddenly - due to a change in the psychological climate - the impulse for independence becomes prevalent".[24] When autonomous regions spin out of control of the federal or central government it is not that easy to bring them within the ambit of the centre again, as was the case with the Republic of the former USSR (see chapter 6.1), and it may be impossible where autonomous arrangements have been imposed upon the parties by force or without the consent of the parties involved. The classic example is that of the Eritrean autonomy during 1952-62 which at the time hailed as a "Swiss federation adapted to an African absolute monarchy". The experiment failed miserably creating "one of Africa's longest wars, which killed tens of thousands of combatants and civilians and created several hundreds of thousands of refugees".[25] The only outcome of this experiment was that the autonomous model awakened new ethnic particularism which later

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[24] *Y.Dinstein*, 'Models of Autonomy', in *Y.Dinstein* (ed.), The Protection of Minorities and Human Rights, Kluwer Academic: Dordrecht, 1992, p.295.

[25] The United Nations and the Independence of Eritrea, Department of Public Information, UN: New York, 1996, p.3.

resulted in a long drawn- out- war ultimately breaking up Ethiopia (see chapter 6.1), perhaps with the assistance of both the UN and the Organisation of African Unity.[26]

Autonomy may not work where a effective alliance between democracy and national feelings cannot be found. In such cases different ethnic groups may try to achieve their aspirations by moving in different directions at the expense of national unity. Centuries old rivalries and competing cultures may also undermine any political rearrangements in the form of autonomy. e.g. in Kosovo, Chechnya and Sri Lanka, as has been analysed in chapters 9.4, 9.8 and 11 respectively. It is well known how autonomy models have failed tragically in Lebanon and Cyprus to meet the needs of different minority groups.[27] The strong presence of centrifugal forces is not fertile ground for any experiment using autonomy as a device to defuse ethnic tensions.

Secession, as explained in chapter 8, is not a recognised legal concept in international law. It is considered as a solution to contemporary ethnic conflicts neither by most States as has been seen in chapter 10, nor by some prominent jurists, as set out in chapter 6.4. In general, States try to preserve the *status quo* at whatever cost as is evident in the current Balkan crisis and in many other similar conflicts in Asia, Africa and Latin America. Continued Indo-Pakistan border clashes (see chapter 6.5) and the armed conflicts between Eritrea and Ethiopia (see chapter 1.6) demonstrate that secession rather than solving ethnic conflicts may be a trigger for persistent clashes between the

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[26] The Organization of African Unity Observer Mission on 26 of April 1993 stated their approval of the independent Eritrea. See details *ibid.* p.295.

[27] *J.C.Steiner,* 'Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities', 66 *NDLR,* p.1542.

parties where secession is accompanied by acrimony. It seems that the majority of Ethiopians are not prepared to forget the fact that it was Eritrea that broke up the Empire of Greater Ethiopia. On the other hand, Eritreans are resentful of Ethiopia for having held Eritrea in a colonial situation for decades. Thus, instead of good-will, lingering bitterness, and a sense of betrayal may continue to torment resentments. It is not surprising therefore that the majority opinion, both amongst States and scholar, as has been seen in chapters 10 and 8 respectively, is that secession should not be applied as a solution to modern ethnic conflicts. Otherwise, "the result would be the fragmenting of states and the multiplication of frontiers and barriers among nations".[28] Cristescu warns that no State, whether new or old, can consider itself free from this danger if secession is recognised as a legal right.[29] He stresses that "even those states, which are ethnically the most homogeneous, may find themselves the object of covetousness or of designs to dismember them".[30] Moreover, if secession is legally recognised as a solution to ethnic conflict, it may encourage separatism for its own sake. From the standpoint of States, the outcome of such a scenario could be disastrous for the stability of modern plural societies. As argued by many States (see chapters 10.5 and 10.6), no one can turn a blind eye to a possible scenario of total chaos and absolute anarchy. Any attempt to legitimize

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[28] *A.Cassese,* 'The Self-Determination of Peoples', in *L.Henkin* (ed.), The International Bill of Rights, Colombia UP: New York, 1981, p.93.

[29] *Cristescu Report*, E/CN.4/Sub.2/204/Rev.1, pr.275, p.40.

[30] *Ibid.* p.31.

these tendencies, wrote Higgins, by the misapplication of legal terms runs the risk of harming the very values that international law is meant to promote.[31]

Some critics also point to the social and economic cost arising from such movements. Cobban noted that any attempt to divide the world into micro-States would only results in chaos and consequently, in his views, it would increase internal and international tensions. He stated that, "to give all the nations and fragments of nations political independence as sovereign States would involve the maddest balkanisation of the whole world".[32] Such illogical and dangerous endeavours, in the view of former Secretary-General Ghali, would be an obstacle to peace, security and economic well-being for all.[33] Solutions can only be found in the maintenance of democratic institutions and principles for the benefit of all and is maintaining the integrity of the nation-State system that respects the diversities of sub-groups, in particular, ethnic, religious and linguistic minorities.

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[31] *R.Higgins*, 'Minorities, Secession and Self-Determination', in *Justice* (Autumn), 1992, p.3.

[32] *A.Cobban*, The Nation State and National Self-Determination, Oxford UP: London/ New York, 1944, p.259.

[33] Agenda for Peace, GA Sec Re, A/47/277, S/24111, 17 June 1992, pr.11.

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