



UNIVERSITY OF CAPE TOWN

School for Advanced Legal Studies

Private Bag X3, Rondebosch, 7701, South Africa

DEPARTEMENT OF PUBLIC LAW

THE RIGHT OF SELF-DETERMINATION AND THE USE OF FORCE IN PUBLIC INTERNATIONAL LAW

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Degree of Master's of Laws in International Law. The other part of the requirements for this degree was completion of a programme of courses.

By Jean de Dieu Zikamabahari

Student number ZKMJEA001

DEGREE LLM

Supervisor Professor Pierre de Vos

Co-supervisor E/Professor Derry Divine

I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

14 January 2010

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I, Jean de Dieu Zikamabahari, do hereby declare that this minor dissertation submitted for the degree of Master of Laws at the University of Cape Town has not previously been submitted by me at this or any other University, that it is my own work and that all sources and all referenced material in it have been acknowledged.

Jean de Dieu Zikamabahari

ACKNOWLEDGEMENTS

The research and writing of this thesis would not have been possible without the support and encouragement of my family and a number of my friends and colleagues. All in their own way made the achievement of this work possible. I cannot thank you enough for all you have done for me.

The highest thanks must go to Emeritus Professor Derry Devine and Professor Pierre de Vos for taking time from their busy schedule to supervise this thesis. Their invaluable scholarly advice and willingness to share the vast knowledge they have in this area coupled with comprehensive critiques of the various drafts, meticulous attention to detail, painstaking editing and constant support were all invaluable to the completion of this thesis.

Last but not the least, the financial assistance of the Government of Rwanda through the Student Financing Agency of Rwanda (SFAR) is acknowledged.

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
AULR	American University Law Review
CJIL	Chicago Journal of International Law
CWRJIL	Case Western Reserve Journal of International Law
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
EPLF	Eritrean People's Liberation Front
FLN	National Liberation Front of Algeria
FNLA	<i>Frante Naçional de Libertação de Angola</i>
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ILR	Intentional Law Review
JIL	Journal of International Law
KNP	Polish National Committee
MOLINACO	<i>Movement de Libération National des Comores</i>
NATO	North Atlantic Treaty Organisation
OAU	Organisation of African Unity
PLO	Palestine Liberation Organisation
<i>Polisario</i>	<i>Frente Popular par la Liberación de Sanguia el-Hamra y Rio</i>
SCOR	Security Council Official Records
SDAR	Sahara Arab Democratic Republic
SDILJ	San Diego International Law Journal
SFRY	Socialist Federal Republic of Yugoslavia
SWAPO	South West Africa People's Organisation (Namibia)
UCT	University of Cape Town
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United States Security Council
USA	United States of America
VJIL	Virginia Journal of International Law

WILJ	Wisconsin International Law Journal
YLJ	Yale Law Journal
ZANU	Zimbabwe African National Union
ZAPU	Zimbabwe African People's Union

ABSTRACT

Self-determination is a people's right to choose how they will organise and be governed. It is the legal foundation on which a people's struggle for national liberation is based. This dissertation examines how self-determination has developed from a political thought to a legal right in international law. It also assesses the legitimacy of the use of force by liberation movements to secure the right of peoples to self-determination. In international practice, self-determination has been subject to a conceptual evolution which began in the nineteenth century and accelerated in the 1960's due to the decolonisation process. Today, the principle of self-determination is part of customary international law and it is indisputably a norm of *jus cogens*.

While the concept has been liberally used as a slogan of universal application, its application always seems to be a rather complex matter with several obstacles. Article 2 (4) of the United Nations (UN) Charter laid down an absolute prohibition of the use of force except in case of self-defence or when the UN Security Council (SC) considers the use of force to be the ultimate resort. The Charter does not expressly mention self-determination as a situation where people may resort to the use of force for example against colonial, alien, or oppressive regimes. This dissertation looks at the history of, and circumstance surrounding, the use of force, and then examines the *jus ad bellum* regarding 'wars' of liberation movements.

Classical international law treats civil wars as purely internal matters. There was gap in international law in relation to the rule against rebellion. Article 2(4) of the Charter prohibits the threats or use of force by states against states. It is not so clear on the use of force by oppressed peoples in pursuit of self-determination. The idea that colonial or oppressed peoples may legitimately use force in pursuit of self-determination thus remains ambiguous. It is argued that if force was used to deprive peoples of their right to self-determination they would have the right to use force in self-defence. Apart from the Charter, the study analyses a number of resolutions regarding the right of self-determination. It finds that through state practice and *opinio juris* there is an emerging customary international law regulating the use of force in pursuit of self-determination.

TABLE OF CONTENTS

DECLARATION	i
ACKNOWLEDGEMENTS	ii
LIST OF ABBREVIATIONS	iii
ABSTRACT	v
TABLE OF CONTENTS	vi
CHAPTER ONE: INTRODUCTION	1
1.1 Background to the study.....	1
1.2 Statement of the problem	4
1.3 Objectives and significance of the study.....	6
1.4 Scope of the study	6
1.5 Literature review	7
1.6 Methodology	10
1.7 Structure of the study	10
CHAPTER TWO: THE RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW	11
2.1 The rise of the concept of self-determination in historical perspective	11
2.2 Self-determination in positive international law	14
2.2.1 The United Nations Charter.....	14
2.2.2 General Assembly Resolutions.....	16
2.2.3 The Right of Self-Determination under International Covenants on Human Rights	19
2.2.4 The Declaration on Friendly Relations.....	20
2.2.5 The International Court of Justice (ICJ)	21
2.3 The holders of the right to self-determination.....	24
2.3.1 The meaning of ‘peoples’	24
2.3.2 The meaning of ‘nation’	27
2.4 Emergence of customary international law on self-determination.....	28
2.4.1 State Practice	28
2.4.2 <i>Opinio juris sive necessitatis</i>	29
2.5 Concluding Remarks	30
CHAPTER THREE: THE USE OF FORCE BY PEOPLES IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION	33

3.1 Introduction	33
3.2 Brief overview of international law rules on the use of force	34
3.3 ‘Wars’ of liberation	35
3.3.1 National revolutionary movements and secessionist movements prior to the UN Charter	36
3.3.2 National liberation movements and secessionist movements in the Charter era	38
3.3.2.1 United Nation Charter	38
3.3.2.2 United Nation resolutions	41
3.3.2.3 Analysis	44
3.4 International humanitarian law and wars of national liberation	46
3.5 Emerging state practice in the case of wars of national liberation	50
3.5.1 Third state involvement in self-determination struggles	50
3.5.2 Recognition of national liberation and secessionists movements	53
3.6 Application of practice in specific cases	55
3.6.1 The case of Western Sahara	56
3.6.2 The case of Eritrea	57
3.6.3 The case of Yugoslavia	58
3.6.4 The case of Palestine	58
3.6.5 Analysis	60
3.7 Concluding Remarks	61
CHAPTER FOUR: CONCLUSION	65
4.1 Conclusions	65
4.2 The way forward	68
BIBLIOGRAPHY	69

CHAPTER ONE: INTRODUCTION

This study assesses the use of force in relation to self-determination in international law. Today, it is common that all peoples have a right to self-determination.¹ By virtue of the principle of equal rights and self-determination, peoples have the inherent right to struggle by all necessary means at their disposal against colonial, alien or oppressive regimes in the exercise of their right to self-determination.² In fact, they have the right to seek and receive outside support³ to achieve this objective. This chapter introduces the aims of the present study, it states the problem, and gives a brief backdrop to the right of self-determination and the use of force in international law.

1.1 Background to the study

In the beginning of history, there was the homogenous family.⁴ The families grouped together into the clan or tribe.⁵ The tribe begot the nation and the nations begot the kingdom.⁶ Eventually, kingdoms became empires and empires became nation-states.⁷ Conquest and subjugation of people as well as people's revolts resisting this state expansion and annexation have been a constant theme throughout history.⁸ In that time, these revolts and resurgences were known as self-determination.⁹

With the rise of nationalism and the establishment of nation-states in the sixteenth century, self-determination became an important force.¹⁰ The Treaty of Westphalia in 1648 represents the first known codification of these nationalistic principles into international law.¹¹ The nationalistic drives for self-determination were reinforced with the growth of empires during the eighteenth and nineteenth centuries.¹² Most commentators agree that the modern understanding of the principle of self-determination started with the dismantling of the

¹ GA Res. 1514 (XV) of 14 December 1960.

² GA Res. 2649 (XXV) of 20 November 1970.

³ GA Res. 2105 (XX) of 20 December 1965.

⁴ M J Kelly 'Political downsizing: the re-emergence of self-determination and the movement toward smaller, ethnically homogenous states' (1999) 47*DLR* 211.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ I V Porter 'Two case studies in self-determination: the Rock and the Bailiwick' (2003) 4 *SDILJ* 2.

⁹ *Ibid.* 'Self-determination is the legal term for the age-old force behind the Celtic, Pictish, and Jewish resistance to Roman domination; the Scottish revolts against the British Crown; the Arabic insurgence against the Ottoman Sultanate; and, the Native American fight against the United States'.

¹⁰ E Kolodner 'Essay, the future of the right to self-determination' (1994) 10 *CJIL* 153.

¹¹ *Ibid.*

¹² *Ibid.*

Ottoman and Austro-Hungarian empires after the First World War (WWI).¹³ The principle then served to maintain world order and peace; empires were divided into smaller nation-states in the belief that smaller and more culturally unified countries would better represent the will of those governed and therefore avert internal and international conflicts.¹⁴

The principle of self-determination crystallised under the leadership of the American President Wilson at the end of the WWI. He said that

‘No peace can last, or ought to last, which does not recognise and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property’.¹⁵

Notwithstanding this American engagement with the issue, the principle of self-determination was not fully accepted as part of international law at that time.¹⁶ The principle, however, became progressively part of international law by the end of the WWI. After the WWI, the League of Nations¹⁷ indirectly addressed it through the creation of a system of mandates pursuant to Article 22 of the League Covenant.¹⁸ Though the principle had thus made its first appearance on international stage, it was still regarded as a mere political principle. It was considered to be inferior to the more institutionalised international principles of state sovereignty and territorial integrity.¹⁹

The principle, is, however, mentioned twice in the UN Charter. In both occasions it is limited to the context of developing friendly relations among nations and in conjunction with

¹³ Lung-Chu Chen ‘Self-determination and world public order’ (1991) 66 *NDLR* 1287 at 1288.

¹⁴ Kolodner (note 10) 154.

¹⁵ See 54 Cong. Rec. 1741, 1742 (1917) (Address by President Woodrow Wilson, US Senate, Jan. 22, 1917). This concept was included among President Wilson’s Fourteen Points for peace. A similar principle was at the time articulated by the Soviet leader Vladimir Lenin. Although the concept of each president was the same, the philosophies behind the concept were vastly different. Lenin, while advocating violent secession, interpreted the principle as a means to liberate people from exploitative bourgeois governments in pursuit of a socialist regime. Wilson, on the other hand, gave the concept a peaceful meaning wherein the consent of the governed to their sovereign was ascertained. See Kelly (note 4) 214 at 215.

¹⁶ Although self-determination was advocated as a general principle after the First World War, neither President Wilson, nor the other Allies believed that the principle was absolute or universal. See H Hannum ‘Rethinking Self-Determination’ (1993) 34 *VJIL* 1 at 12.

¹⁷ The League of Nations was created in 1919 and sought to promote international co-operation, peace, and security. Because the United States and the Soviet Union refused to become members, the League of Nations was mainly a European-centered institution. It was formally dissolved in April 1946. See M N Shaw *International Law* 4ed (1991) 748 at 49.

¹⁸ H Hannum *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990) 6 ‘However, Article 22 itself refrains from mentioning the principle of self-determination’.

¹⁹ Kelly (note 4) 215 at 216.

the principle of equal rights of peoples.²⁰ It is commonly defined as the right allowing a people to ‘freely determine their political status and freely pursue their economic, social and cultural development.’²¹ The general view during the post-Second World War (WWII) period, and particularly since the 1960s, was that self-determination has emerged as an operative legal right in international law²² and had arguably acquired the status of *jus cogens*.²³

Usually, however, the character of self determination as a legal norm was narrowly confined to the case of people under colonial power. Now, it is recognised outside the colonial context.²⁴ It is argued that the beneficiaries of the right could be any distinct group that can be classified as a people, irrespective of whether they live under a colonial situation or not. In this respect, self-determination becomes an aspect of a human right, and is a necessary condition for the proper exercise of democracy.²⁵

The actual modes of implementing this right are clearly set out in the 1970 UN Declaration on Friendly Relations.²⁶ The relevant paragraph of the Declaration, which can be regarded as declaratory of customary international law, provides for ‘the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people.’²⁷ It follows that Resolution 1514 (XV) may be considered as a reflection of *opinio juris*.

By virtue of the principle of the equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.²⁸ Every state has a duty to promote, through joint and separate actions, realisation of the principle of equal

²⁰ Article s 1(2) and 55 of Charter of the United Nations, 26 June 1945.

²¹ This is a standard United Nations (UN) definition adopted in most GA resolutions on the subject. See GA Res. 545(XVIII) of 29 July 1954; see also GA Res. 1514(XV) (note 1).

²² *Legal consequences for states of continued presence of South Africa in Namibia (South-West Africa), (Advisory Opinion)*, ICJ Reports (1971); see also the *Western Sahara Advisory Opinion*, ICJ Reports (1975) para. 12 and 120 at 121.

²³ *Barcelona Traction, Light and Power Corporation (Belgium v Spain)*, ICJ Reports (1970) (separate opinion of Judge Ammoun); H G Espeill ‘Self-determination and *jus cogens*’ in A Cassese *UN Law/ Fundamental Rights: Two Topics in International Law* (1979) 167 at 174.

²⁴ Self-determination is a right for all people as such and not restricted to only colonial peoples. See generally R Rosentock ‘The Declaration of Principles of International Law Concerning Friendly Relations: a survey’ (1971) 65 *AJIL* 713.

²⁵ S Blay ‘Self-determination: a reassessment in the post-communist era’ (1993-1994) 22 *DJIL* 275.

²⁶ GA Res. 1514 (XV) (note 1).

²⁷ A Cassese *Self-determination of People: a Legal Reappraisal* (1995) 147.

²⁸ GA Res. 2625(XXV) of 24 October 1970.

rights and self-determination of peoples, in accordance with the Charter.²⁹ In the same vein, every state has the duty to refrain from any forcible action which deprives peoples of their right to self-determination or their freedom and independence.³⁰

If self-determination is a legal norm in international law, a crucial question arises whether an oppressed people is legally permitted to take some sort of action to enforce their right to self-determination. The Charter laid down a general ban on the threat or use of force.³¹ It is now universally accepted that there is a presumption in law against the use of force by states. This presumption may be rebutted in two clear exceptions: first, where such force is used by a state in self-defence and secondly, where the use of force is mandated by the Security Council (SC) under Chapter VII.³² There are, however, differences and difficulties in the interpretation of the actions to be taken in anticipatory self-defence.³³ It has been suggested that beyond the two exceptions above, the use of force may be used in situations of extreme humanitarian need.³⁴

A further point, of particular resonance today, is that the peoples entitled to the right of self-determination are authorised to use force to secure their right. This study examines the legal issues surrounding the right of self-determination and the use of force in public international law. A look at the history of self-determination and the use of force will lead to a critical analysis, and finally will answer the question of whether the peoples entitled to the right of self-determination have a right to resort to the use of force to secure their right in international law.

1.2 Statement of the problem

Article 2(4) of the UN charter obliges UN member states to ‘refrain in their international relations from the threat or use force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the UN’.³⁵ In the

²⁹ Ibid.

³⁰ Ibid.

³¹ Article 2(4) of the UN Charter (note 20).

³² Article 42 of the UN Charter provides that ‘the Security Council [...] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’.

³³ Article 51 preserves a state’s right to act in self-defence, but it does not expressly provide for the doctrine of anticipatory self-defence. According to the broader view, Article 51 itself, or at least customary international law alongside Article 51 permits anticipatory self-defence. This can be also derived from *Caroline* case. See The *Caroline* case in D J Harris *Cases and Materials on International Law* 6ed (2004) 921 at 925.

³⁴ M N Shaw ‘Self-determination and the use of force’ in N Ghanea and A Xanthaki *Minorities, Peoples and Self-determination* (2005) 35.

³⁵ Article 2(4) of the UN Charter (note 20).

Nicaragua case the International Court of Justice (ICJ) described Article 2 (4) as a peremptory norm of international law, from which states cannot derogate.³⁶ Nevertheless there are exceptions to this rule, which have found their way into the provisions of the Charter.³⁷ There are basically three possible exceptions in international law at present, namely SC authorisation under Chapter VII of the Charter, the case of individual or collective self-defence under Article 51 of the Charter and, more contested, the case of humanitarian intervention, which is not clearly regulated in the Charter, but which is an inchoate principle, occasionally tolerated by states without being endorsed.³⁸

The Charter does not expressly mention self-determination as a situation where people resort to force against colonial, foreign or racist domination.³⁹ There is debate over liberation movements which claim to have the authority to exercise the right to self-determination on behalf of a people, and more controversially, over the role of other states to assist them in their forcible action.

The status of liberation movements in international law has been the subject of much scholarly work through the years.⁴⁰ The increasingly progressive trend and view in international law and diplomatic circles is that such liberation movements are considered to have *locus standi* in international law in the context of the struggle of peoples against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.⁴¹ It follows that numerous questions must be examined to clarify the relationship between the concept of self-determination and use of force. First, there is the question of what exactly is meant by self-determination. Who are the people to whom the right to self-determination applies? What is meant by the exercise of one's right to self-determination? What is meant by struggles against colonial domination, alien occupation and racist regimes? What then is the role of third states in such conflicts? Can third states intervene to assist such peoples in their struggles, and is there in fact an obligation on them to

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)*, ICJ Reports (1986) p 14.

³⁷ See generally, Articles 42 and 51 of the UN Charter (note 20).

³⁸ Especially in cases where there is extreme humanitarian need, a right of humanitarian intervention might evolve. See Shaw (note 27) 803. In such extreme situations, the use of force is deemed to be justified under a customary international law principle of humanitarian intervention. Ibid 'The humanitarian interventions in Somalia (1992/3), Sierra Leone (1997/8), Northern Iraq (1991), Kosovo (1999) and East Timor (1999) have shown acceptance of this rule and support for its further application'. See also E Cannizzaro and P Palchetti *Customary International Law on the Use of Force: a Methodological Approach* (2005) 27.

³⁹ Shaw (note 17) 1036.

⁴⁰ H A Wilson *International Law and the Use of Force by National Liberation Movements* (1998) 9 at 179.

⁴¹ Ibid.

do so? This study will look generally at the circumstances surrounding the use of force to achieve self-determination; thereafter it will examine the *jus ad bellum* regarding 'wars' of liberation.

1.3 Objectives and significance of the study

The aim of this study is to describe the status and definition of the right of self-determination. As the way in which self-determination could be implemented, it examines if peoples who had been forcibly deprived of the right to self-determination were entitled to use force to secure it. It is argued that while self-determination is expressly enshrined in Articles 1(2) and 55 of the Charter, how to achieve this right is quite complex. Most UN General Assembly (GA) resolutions⁴² state that peoples who are deprived of their legitimate right of self-determination and complete freedom are entitled to pursue their right by all means at their disposal, and by virtue of which they may seek and receive assistance from other states. The study also critically analyses the wording 'by all means at their disposal', in order to highlight if GA was sanctioning the use of force in pursuit of self-determination without stating it explicitly.

This research therefore, critically analyses the UN Charter within the provisions regarding the use of force. Focus will be on GA resolutions as evidence of state practice and *opinio juris*. Analysing and comparing these instruments will lead to some conclusions based on my own understanding of customary international law regarding the use of force in pursuit of self-determination. Finally, this study hopes to make a contribution leading to a review of norms relevant to ensuring the right of self-determination.

1.4 Scope of the study

The principle of self-determination has developed in two distinct historical contexts during the twentieth century.⁴³ Following the WWI, the Allies initially emphasised self-determination as a basic right belonging to all peoples,⁴⁴ while following the WWII, self-determination was viewed as a right to freedom from colonial rule or foreign occupation.⁴⁵

⁴² See GA Res. 2105(XX) of 20 December 1965; GA Res. 2189 (XXI) of 13 December 1966; GA Res. 2326 (XXII) of 16 December 1967; GA Res. 2446 (XXIII) of 20 December 1968; GA Res. 2465 (XXIII) of 20 December 1968; GA Res. 2508 (XXIV) of 11 December 1969; GA Res. 2383 (XXIII) of 7 November 1968; GA Res. 2508 (XXIV) of 21 November 1969.

⁴³ The Logic of Secession (1980) 89 *YILJ* 802 at 804.

⁴⁴ A Cobban *The Nation States and National Self-determination* (1969) 39 at 57.

⁴⁵ *Ibid.*

This is known as external self-determination, and it gives those under the abovementioned circumstances the right to conduct their own affairs without any foreign interference. Yet, the right to self-determination is not limited to those under colonial rule or foreign occupation, but rather, it is given to all peoples, including minorities and indigenous people who live within the boundaries of an existing nation state.⁴⁶ This is known as internal self-determination and gives minorities and indigenous people the right to determine their own destiny.

However, there is disagreement as to the scope of the right to use force to secure the right of self-determination. Some scholars argue that 'peoples' represented by their liberation movements have the authority to use force in pursuit of self-determination.⁴⁷ Others assert that the use of armed force to attain self-determination may be a last and ultimate resort.⁴⁸ The main object of the study is to investigate the prospects of enforcement of that right. The intention is to go further than peaceful enforcement of the right of self-determination. It includes an in-depth analysis of the right to resort to the use of force to attain self-determination. Indeed, it concludes that the primacy of the right of self-determination as *jus cogens* may legitimise a 'war' of national liberation.

1.5 Literature review

This study intends to analyse the right of self-determination, and see whether it may justify the use of force. The right of self-determination is recognised by, and given priority in the UN Charter. Since its inclusion in the Charter it has become a cornerstone principle in international law. It is the right of a people to control their own social, political and cultural destiny, identity and development. It complements the principle of respect for human rights. The latter applies to the rights of the individual, while the former applies to the society as whole and concerns the culture of a group of individuals.

The right of self-determination also reflects the priority of the world community to get rid off racism and colonialism on a societal level as well as that of the individuals. It is important because it gives recognition to groups of people who are not yet organised as states, the traditional legal entity to which international law has been applied to since its creation. The

⁴⁶ E A Laing 'The norm of self-determination' (1992) 22 *CWILJ* 209 at 248.

⁴⁷ N Higgins and K O'Reilly 'The use of force, war of national liberation and the right to self-determination in the South Ossetian conflict' (2009) 9 *ICLR* 574.

⁴⁸ Cassese (note 27) 150 at 154.

willingness of the international community to monitor the human rights practices of nations represents a major departure in international law from the long-standing principle that states do not interfere in the internal or external activities of a fellow state unless they directly affect them.

The ICJ has taken an active role in recognising and protecting the right of self-determination. In the *Wall Advisory Opinion*,⁴⁹ the Court held that the principle of self-determination of peoples has been enshrined in the Charter and reaffirmed by Resolution 2625 (XXV), pursuant to which 'every state has the duty to refrain from any forcible action which deprives peoples of their right to self-determination'. Article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights reaffirm the right of all peoples to self-determination, and obliges states parties to promote the realisation of that right and to respect it, in conformity with the provisions of the Charter.⁵⁰

In the *Namibia Advisory opinion*, the Court emphasised that current developments in international law in regard to non-self-governing territories, as enshrined in the Charter of, made the principle of self-determination applicable to all such territories.⁵¹ The Court went on to state that 'these developments leave little doubt that the ultimate objective of the sacred trust' referred to in Article 22 (1), of the Covenant of the League of Nations 'was the self-determination of the peoples concerned'.⁵² The Court has referred to this principle on a number of occasions in its jurisprudence such as in the *Western Sahara Advisory opinion*.⁵³ In the *East Timor case*⁵⁴ the Court made it clear that the right of peoples to self-determination has an *erga omnes* character, and should be regarded as *jus cogens* norm.

It is useful to note that while there is a growing corpus of literature on peoples' right to self-determination in international law, there is scant in-depth analysis on the use of force by

⁴⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)*, ICJ Reports (2004) p136.

⁵⁰ The common Article 1 of the International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN, UN Doc A/6316 (1966), 999 UNTS 171, entered into force on 23 March, 1976; International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp No 16 at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force Jan. 3, 1976.

⁵¹ *Namibia Advisory Opinion*, ICJ Reports (1971) p 3.

⁵² *Ibid.*

⁵³ *Western Sahara Advisory Opinion*, ICJ Reports (1975) p 68. After analysing the Charter provisions and various GA resolutions, the Court concluded that the ties which had existed between Morocco, Mauritania and Western Sahara territory during the relevant period of the 1880s were not such as to affect the right to self-determination of Western Sahara people.

⁵⁴ *East Timor Case (Portugal v Australia) (Judgment)*, ICJ Reports (1995) p 102.

peoples as the means to achieve this right. However, some scholars, one of them being Gray⁵⁵ convincingly shows that there is support for the right to use force to attain self-determination in the context of decolonisation or illegal occupation, and less support for the right of ethnic groups to use force to secede from existing states.

Antonio Cassese⁵⁶ takes the same position as the above author as to what extent to which peoples entitled to external self-determination were authorised to use force to secure their right. To render this view consistent with the Charter system, Cassese argues that the use of force by peoples under colonial or racist regime is warranted as form of self-defence against armed aggression as constituted by colonial domination.

Conversely, others like Heather Wilson argue that the *jus ad bellum* in relation to 'war' of national liberation is quite complex and at time vague. Practice in the UN, particularly the Declaration on Principles of International Law and the Definition of Aggression, both adopted without vote, does not resolve the fundamental differences of opinion over the status of liberation movements and the extent of their authority to use force as a matter of law.

Brownlie⁵⁷ agrees with the above authors to the extent that the principle of self-determination is a legal principle. The author however stresses that self-determination is employed in conjunction with the principle of non-intervention in relation to the use of force. If armed forces are used to achieve self-determination, intervention against a liberation movement may be unlawful and assistance to the movement may be lawful.

The present writer agrees with the above authors to the extent that the peoples under colonial, alien, or racist regimes have the right to pursue self-determination by all means, including the use of force. It is submitted that it is justifiable for national liberation movements to use force against colonial powers, and in the case of non-democratic states, for secessionists against a government which does not respect human rights. This study intends to contribute to the above academic writings focusing on the legality of the use of force by national liberation and secessionist movements to secure self-determination.

⁵⁵ C Gray *International Law and the Use of Force* 3ed (2008) 59 at 66.

⁵⁶ Cassese (note 27) 1 at 372.

⁵⁷ I Brownlie *Principles of Public International Law* 7ed (2008) 579 at 583.

1.6 Methodology

The study is principally doctrinal-based research with no component of empirical study. The research was conducted by reviewing the existing literature on the subject, and by examining other relevant sources of law. Case law, international conventions and statutes have been used to gather information for the benefit of the study. Also, textbooks and law journals have been used to trace the historical development of the right of self-determination and to provide information on current trends and analyses. Finally, internet sources are used as a source of information on current activities in the field of study and of factual data compiled by the international community.

1.7 Structure of the study

The study contains four chapters. Chapter one describes the aim of the study and provides a statement of the problem. It also gives a brief background to the concepts of self-determination and the use of force. Chapter two provides an overview of the evolution of self-determination. It examines how self-determination evolved from a political thought into a legal right. In examining the concept of 'self-determination', this Chapter therefore assesses who the 'self' is that can exercise the right. Chapter three examines briefly the relationship between the principle of self-determination and the international legal framework relating to the use of force. It first looks at the history of, and circumstances surrounding, internal conflicts. Thereafter it examines the *jus ad bellum* regarding 'wars' of liberation. It also analyses the legality of the use of force by national liberation movements and secessionist conflicts. Finally, Chapter four offers a general conclusion and recommendations arising from the issues raised.

CHAPTER TWO: THE RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW

Self-determination is a thorny concept in international law with remarkable contradictions in its usage.⁵⁸ One of the controversial issues is whether it is a right in international law or simply a principle of political thought which has assumed great prominence in international affairs at various periods since the eighteenth century.⁵⁹ The principle of self-determination of peoples has been subject to a conceptual evolution which began in the eighteenth century and accelerated in the nineteenth century due to the decolonisation process.⁶⁰ This Chapter briefly describes the evolution of self-determination in theory and practice under international law.

2.1 The rise of the concept of self-determination in historical perspective

The first expression of self-determination as a political thought has not been clearly dated.⁶¹ It was expressed by Greek and Roman philosophers, and later by Machiavelli, Vitoria, Bodin and others, who either extended or restricted the concept.⁶² In 1690, John Locke noted that 'the government cannot be founded on anything but the consent of the governed.'⁶³ Rousseau later expressed his belief in self-determination and popular sovereignty by saying that 'it is making fools of people to tell them seriously that one can at one's pleasure transfer peoples from master to another, like herds of cattle, without consulting their wishes.'⁶⁴ Thus, according to these philosophers the nation was the only community to which the people would give their support, and still maintain their liberty. They have linked self-determination to freedom of peoples, nationalist and democratic principles.⁶⁵

⁵⁸ There is not a precise universally accepted definition of self-determination. According to Cobban 'The principle of self-determination, is, in general terms, the belief that each nation has a right to constitute an independent state and determine its own government, See A Cobban *National Self-determination* (1945) 4. Moore has defined the right of self-determination as 'the freedom of a people to choose their own government and institutions and to control their own resources.' See, J N Moore 'The control of foreign intervention in international conflict' cited in G H Tesfagiorgis 'Self-determination: its evolution and practice by the United Nations and its application to the case of Eritrea' (1987) 6 *WILJ* 76. See also, A Xanthak 'The right to self-determination: meaning and scope' in Ghanea and Xanthak (note 34) 15 at 33.

⁵⁹ Wilson (note 40) 55.

⁶⁰ J Castellinno *International Law and Self-determination* (2000) 11.

⁶¹ J A Collins 'Self-determination in international law: the Palestinians' (1980) 12 *CWRLIL* 138.

⁶² U Umozurike *Self-determination in International Law* (1973) cited in Collins (note 61) 138.

⁶³ M C Van Walt 'Tibet and the right of self-determination' (1979-1980) 26 *WLR* 281.

⁶⁴ J J Rousseau 'Political writing (1915) cited in Van Walt (note 63) 281.

⁶⁵ A Cobban (note 44) 138.

These combined principles of democracy, nationality, and self-determination formed the basic philosophy for the American and French Revolutions.⁶⁶ It seems to me therefore that as a term of art, self-determination may be traced back to the American Declaration of Independence of 1776 and was echoed in the French Revolution of 1789.⁶⁷ The core of the principle lies in the American and French insistence that the government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish.⁶⁸ Basically, it was a principle of democratic self-governance. This means that the people within a state should have the right to form their own government free from external interference.⁶⁹ In fact, it implied that a state's inhabitants should not be transferred from one state to another without their consent.

This principle spread from France to neighbouring countries. It was proclaimed as a serious element in international life during WWI.⁷⁰ At the end of the WWI, the victorious allies, led by Wilson, proclaimed their intention to redraw the map of Europe in at least a partial accord with prevailing notions of self-determination. It thus created both a challenge and an alternative to the large multinational empires of Russia, Austria-Hungary and the Ottomans, and provided an ideological justification for the unifications of Italy and Germany, and the independence of various Balkan states from Greece onwards.⁷¹

The more moderate version of the right to self-determination is associated with the former President of the United States of America Wilson and Head of State of the Soviet Union Vladimir Lenin. In Lenin's word, 'nations are sovereign and all nations are equal'.⁷² It means that only the nation itself has the right to determine its destiny. It is argued that no nation has the right to forcibly interfere in the life of another. According to Lenin, self-determination took on an 'external' dimension. The external aspect is concerned with the right of people to determine their nationality and statehood. In his words, the liberation of all colonies,

⁶⁶ Van Walt (note 63) 281.

⁶⁷ Cassese (note 27) 2.

⁶⁸ A Rigo Sureda *The Evolution of the Right of Self-Determination* (1973) 17.

⁶⁹ D Wippman *International Law and Ethnic Conflict* (1998) 8.

⁷⁰ Ibid.

⁷¹ Mazzini wrote that 'The map of Europe will be remade. The Countries of the people will rise, defined by the voice of the free, upon the ruins of the countries of Kings and privileged castes. Between these countries there will be harmony and brotherhood' cited in Cassese (note 27) 13.

⁷² Cassese (note 27) 14.

dependant, oppressed and non sovereign peoples is necessary for the maintenance of international peace.⁷³

Despite the external dimension of self-determination, Wilson intended the principle to apply immediately and unconditionally to the people as a standard for democracy.⁷⁴ On the international level Wilson thus propounded three deferent variants of self determination. First, he advocated the right of each people to opt for the form of government under which it would live.⁷⁵ The second version of self-determination was related to the states of central Europe in accordance with national aspirations.⁷⁶ Finally, Wilson championed self-determination as a criterion governing territorial change. He stated in his speech of 11 February 1918 that

‘Every territorial settlement in this war must be made in the interest and for benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states’.⁷⁷

It is clear that at the time that Wilson made his points, he was using the term ‘self determination’ as a pseudonym for a right to democracy. In modern literature, this has been classified as ‘internal’ self determination.⁷⁸ The internal self-determination aspect implies the right of the people of a state already recognised by international law to determine their own form of government.⁷⁹ It means that identifiable peoples or nations should be given the means to govern themselves, within the spirit of internal self determination. Peoples of each state were to be free to select state authorities and political leaders.

However, notwithstanding Wilson’s efforts, self-determination was not incorporated in the Covenant of the League of Nations,⁸⁰ and therefore, it could not obtain the status of a legal principle at that epoch.⁸¹ In the ten years before the Second World War (WWII), there was relatively little practice regarding self-determination in international law.⁸² It remained nothing more than a political principle in reality. In the *Aaland Islands* case, the Commission

⁷³ See Vladimir Lenin’s ‘Fourth Letter from Afar,’ March 25, 1917, cited in A Cassese *International Law in a Divided World* (1986) 131.

⁷⁴ Cassese (note 27) 19.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Wilson’s Ideals DC 1942 at 183 cited in Cassese (note 27) 20.

⁷⁸ Castellino (note 60) 13.

⁷⁹ Z Mustafa ‘Principle of self-determination in international law’ (1971) 5 *ILR* 480.

⁸⁰ The proposal made by President Wilson was challenged by powerful opposition, not least among some of Wilson’s own advisors, and was defeated. See J H Steiner and P Alston *International Human Rights in Context New York* (2000) 1254.

⁸¹ Cobban (note 44) 37.

⁸² See the Baltic Treaties, Martens *Recueil Général des Traités* 3ed (1928) 864.

established by the League of Nations rejected the notion that self-determination constituted a legal right as distinguished from a political principle.⁸³

To sum up, if someone reads the early history of self-determination, it seems evident that the Wilson approach was of restricted application, while the Leninist approach was gradually urged as an extension of the philosophy to anti-colonial patriotism. However, as discussed above, at that time self-determination was not a legal rule of international law, but purely a political concept. The international law governing it shifted substantially after WWII. In fact, the post-WWII period marked a clear transition from a political principle to legal norms. The impetus behind the transformation was the evolution of human rights norms in general and the need to create a legal vehicle for decolonisation in particular.⁸⁴

2.2 Self-determination in positive international law

The right of self-determination first appears in positive international law in Articles 1 and 55 of the Charter. It is also included in a number of GA resolutions such as 1514 (XV), 1541 (XV), and 2625 (XXV). Finally it is mentioned in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966. This section is devoted exclusively to self-determination in the context of positive international law.

2.2.1 The United Nations Charter

At its inception, the Charter clearly did not include any general 'right' of self-determination.⁸⁵ The Dumbarton Oaks proposals which originally constituted the basis of the Charter did not mention any article referring to self-determination.⁸⁶ This gives the impression that the Charter was destined, like the League of Nations Covenant, to be silent with regard to the rights of peoples. The inclusion of the word self-determination was the result of an amendment proposed by Soviet Union by the end of 1945, when the UN Conference on the International Organisation met in San Francisco. This amendment added

⁸³ P M Brown 'The Aaland Islands question' (1968) available at <http://www.jstor.org/stable/2187689?cookieSet=1> [accessed 25 November 2009] 268 at 272.

⁸⁴ Wippman (note 67) 10.

⁸⁵ M Pomerance *Self-Determination In Law and Practice: the New Doctrine in The United Nations* (1982) available at http://books.google.co.za/books?id=XGStW8qlMn4C&dq=At+its+inception,+the+UN+Charter+clearly+did+not+include+any+general+%E2%80%98right%E2%80%99+of+self-determination&source=gb_s_navlinks_s [accessed 23 November 2009] 9.

⁸⁶ Cassese (note 27) 38.

that relations between states should be based on respect for the principle of equal rights and self-determination of peoples.⁸⁷

After amending the Charter, self-determination was expressly mentioned in its Articles 1(2) and 55. Article 1(2) locates the principle among the purposes of the UN, when stating that

‘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.’ Furthermore, Article 55 provides that ‘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: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’⁸⁸

Even though the concept of self-determination was mentioned in a major multilateral treaty, it is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding norm. Some scholars such as Professor Lauterpach, held the view that the international legality of human rights is derived from the fact that they prominently figure in the statement of the purposes of the UN; and that member states are under a legal obligation to act in accordance with these purposes.⁸⁹ Another school of thought argued that human rights in the Charter had no judicial character, and therefore did not constitute legal norms under positive law.⁹⁰ Wilson argues that the Charter nowhere mentions a ‘right’ of self-determination, nor does it clearly define who the ‘self’ is that enjoys this right which should be respected by nations.⁹¹

However, despite of all these limitations and shortcomings, the principle of self-determination is mentioned twice in the Charter. It provides that relations among nations should be based on respect for the principle of equal rights and self-determination of peoples. The reference to peoples clearly encompasses groups beyond states and includes at least non self-governing territories whose peoples have not yet attained a full measure of self-government.⁹² It follows that the principle enshrined in the Charter established a right for

⁸⁷ Wilson (note 40) 58 at 59.

⁸⁸ Article 1(2) and 55 of the UN Charter (note 20).

⁸⁹ H Lauterpacht *International Law and Human Rights* (1950) 145 at 148.

⁹⁰ Mustafa (note 77) 480.

⁹¹ Wilson (note 40) 59.

⁹² Article 78 of the UN Charter (note 20).

colonial peoples and non self-governing territories to achieve political independence. This can be clearly inferred from Article 73, which provides:

‘Member states administer non self-governing territories will develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.’⁹³

With regard to the inhabitants of trust territories, Article 76 states that one of the basic objectives of the trusteeship system is to promote political, economic, social, and educational advancement towards self-government or independence. Therefore, it can be said that a systematic interpretation of the Charter would warrant the right of the peoples to be independent and free from outside interference.

In sum, the Charter marked an important turning-point in the evolution of the right of self-determination. It signalled the maturing of the political postulate of self-determination into legal norms. The existence of this principle within the Charter means its recognition as a fundamental principle of international law. Perhaps a distinction can still be made between ‘right’ and ‘principle’ in international law. It is the composite elements of this principle which have become ‘rights’. Hence a collective group has a right to choose freely a form of government while further developing their social, economic and cultural status. It must be finally noted that self-determination is not only a principle of international law, but it is also a right to be compared with those of self-defence and non-intervention.⁹⁴

2.2.2 General Assembly Resolutions

In the post-Charter era, UNGA resolutions lend credence to the above argument. Most significantly, two resolutions seem to bear this out. Both Resolutions 1514 (XV) and 1541(XV) acknowledge the existence of the right of self-determination. Resolution 1514(XV) affirms:

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

Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

⁹³ Article 73 of the UN Charter (note 20).

⁹⁴ Collins (note 61) 142.

All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.⁹⁵

The final operative paragraph of the Resolution stated that

All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non- interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.⁹⁶

An in depth examination of this Resolution reveals that self-determination is a legitimate right of all peoples. Paragraph 2 declares that all peoples have the right to self-determination. There is merit in this argument. The Charter speaks of principle, not a right, and certainly not a right to independence. Resolution 1514 (XV) is the most important resolution to associate the concepts of self-determination and decolonisation.⁹⁷ In its preamble it proclaimed that the peoples of the world passionately desire the end of colonialism in all its forms and manifestations, and that the process of liberation is irresistible and irreversible.

As to the question of whether Resolution 1514 (XV) applied only to the peoples under colonial rule, the interpretation of paragraph 5 provides an answer. It states:

‘Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom’.⁹⁸

From the wording of paragraph 5, self-determination could never be considered an exclusive right of colonial peoples. The text of the Resolution links it to ‘better standard of life and large freedom’.⁹⁹ In straightforward language, that Resolution proclaimed a right of ‘all peoples’. The Resolution does not limit the right of self-determination to a particular people. Furthermore, it calls for the transfer of all sovereign powers to trust and non-self-governing territories or all other territories which have not yet attained independence.

The next development of self-determination was Resolution 1541(XV) of 15 December 1960. Like Resolution 1514 (XV), the latter Resolution was definitely anti-colonial in nature. The purpose of this Resolution was to spell out a list of factors, known as ‘principles, to guide

⁹⁵ GA Res. 1514 (XV) (note 1) para 1at 4.

⁹⁶ GA Res. 1514 (XV) (note 1) para 7.

⁹⁷ T D Musgrave *Self-determination and National Minorities* (2000) 70.

⁹⁸ GA Res. 1514 (XV) (note 1) para 5.

⁹⁹ Castellino (note 60) 65.

member states in determining whether an obligation existed to transmit information under Article 73(e) of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.¹⁰⁰ It suggests also that the obligation to report on the situation exists as long as the territory concerned has not yet attained a full measure of self-government.¹⁰¹ The Resolution declared that the obligation to transmit information is of an international legal nature.¹⁰² In its principle VI, it sets out the way in which self-government could be achieved. Resolution 1541 did not place any conditions on the achievement of independence by non-self-government territories. It scheduled three alternatives: independence, free association with an independent state, or integration on a basis of equality with an independent state.

In summary, both Resolutions 1514 (XV) and 1541(XV) placed great emphasis on the achievement of independence as the normal outcome of self-determination. The former had declared independence to be the only way of achieving self-determination, while the latter obviously provides three available options. Nevertheless, self-determination as a 'right' in positive international law was not established conclusively by these Resolutions. It is argued that resolutions of GA and (SC) are normally not binding. Arguably, they are not treaties, and consequently, have the status of 'soft law'.¹⁰³ It has for instance been argued that the GA was not established as a law making body,¹⁰⁴ it can only make recommendations, and not decisions of a binding character.¹⁰⁵ It was however also argued that resolutions are sources of international law when they were adopted by states from all the three main political groups (Socialist, Western and neutralist).¹⁰⁶ This means that in order to be binding as a source of law, a GA resolution should have the consensus of all states; otherwise it remains a soft law.¹⁰⁷ Another thesis which is supported by the writer argued that a certain category of decisions of the GA are binding on members states, but not every resolution has binding

¹⁰⁰ GA Res. 1541 (XV) of 14 December 1960 Principle I.

¹⁰¹ GA Res. 1541 (XV) Principle II.

¹⁰² GA Res. 1541 (XV) Principle III.

¹⁰³ J O'Brien *International Law* (2001) available at

http://books.google.co.za/books?id=wY4T25cRwCEC&dq=The+UN+general+Assembly+resolution+as+soft+law&source=gbs_navlinks_s [accessed 27 December 2009] 99.

¹⁰⁴ Ibid.

¹⁰⁵ T O Elias *Africa and the Development of International Law* (1972) available at

<http://books.google.co.za/books?id=dfUjGVb0hk4C&pg=PA71&lpg=PA71&dq=General+Assembly+and+Security+Council+resolutions+in+international+law&source=bl&ots=K70o-KWBSe&sig=idVEqw0rxFmWzA2> [accessed 23 November 2009] 71.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

character.¹⁰⁸ Under the Charter, for example, SC resolutions are binding on member states if they are taken under Chapter VII, which regulates the use of force. For the purpose of this study, it must be noted that the development of the right of self-determination reached a high-water-mark with the adoption of the Covenants on Human Rights.

2.2.3 The Right of Self-Determination under International Covenants on Human Rights

The linkage of self-determination which was conceived as a political principle having weak legal content to the political status of peoples can be viewed as an important step towards its inclusion in the International Covenants on Human Rights afterwards. The right of self-determination is a keystone in the UN human rights treaties, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The first Article of both Covenants states that

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

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.¹⁰⁹

A first reading of this Article makes it clear that it presents self-determination as a human right. The wording of the first clause of Article 1(1) that all peoples have the right to self-determination affirms the universality of the right. The text and the *travaux préparatoires* support the view that the Covenants reach beyond the colonial situation.¹¹⁰ The Covenants do not limit the right to a colonised or oppressed people but include all peoples. In the context of Wilson's statement this clearly means that all states had the right to be democratic with the consent of people having elected a legitimate government which thereby gained legitimacy externally.¹¹¹ In short, there is no self-determination without democratic based decision-making system.

¹⁰⁸ Ibid.

¹⁰⁹ The Common Article 1 of ICCPR and ICESCR (note 50).

¹¹⁰ See the text of the General Comment in UN DOC. CCPR/C/21/Add.3.

¹¹¹ Wilson (note 40).

Furthermore, self-determination guaranteed to peoples, does not stop merely at political or civil rights. It is the gateway to economic, social and cultural rights.¹¹² In the same vein, Article 1(2) of both Covenants provides the right to control and benefit from a territory's natural resources. It means that the right of self-determination includes the simple and elementary principles that a nation or people should be master of its own natural wealth or resources. This right and the corresponding duty of the central government to use the resources in a manner which coincides with the interest of the peoples, is the natural corollary of the right to political self-determination.¹¹³ Finally, the Covenants call upon states parties, including those having responsibility for the administration of Non-Self-Governing and Trust Territories to promote and respect the norm of self-determination in accordance with the Charter.

It results from the preceding that Article 1 of both Covenants clearly and unreservedly recognises the right of self-determination to all peoples. It is undisputed that this provision must be construed as containing a positive right as opposed to a mere political principle of a collective nature; the right holders being peoples rather than individuals as such. This collective character differentiates the right of self-determination from other rights recognised in the Covenants, which are individual rights. This was the major sign of development of the concept of self-determination which had evolved from a political thought to a legal norm associated with human rights.

2.2.4 The Declaration on Friendly Relations

Four years after the adoption of the Covenants on Human Rights, self-determination made its appearance in Resolution 2625 (XXV).¹¹⁴ By virtue of this Resolution the right to self-determination had a wider meaning, as indicated by paragraphs 1 and 2, which provided:

‘By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter’.¹¹⁵

These provisions reiterate the duty of states to promote the realisation of the principle. They equally link this duty to the general aim of promoting friendly relations and co-operation between states, as well as the specific aim of ending colonialism. The use of the wording ‘all

¹¹² Castellino (note 60) 32.

¹¹³ Cassese (note 27) 56.

¹¹⁴ GA Res. 2625 (XXV) (note 28).

¹¹⁵ GA Res. 2625 (XXV) (note 28) para 1at 2.

peoples', coupled with the reference to 'all states', and the enumeration of goals which did not necessarily refer to colonial situations, were evidence of the Western desire to extend the principle of self-determination beyond the colonial context, and make it of universal application.¹¹⁶

In addition, paragraph 7 provides:

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

In terms of this provision self-determination is linked to representative government, and territorial integrity made subject to the maintenance of representative government. The fact that territorial integrity was predicated upon representative government implied that self-determination would be an ongoing process.¹¹⁷

2.2.5 The International Court of Justice (ICJ)

The principle of self-determination has figured in a number of decisions of the ICJ. The first was the *Case Concerning the Right of Passage over Indian Territory*.¹¹⁸ Both Portugal and India raised the issue of self-determination in their pleadings before the Court. Portugal referred to a declaration made on 6 September 1955 by the Indian Prime Minister that India would not 'tolerate the presence of the Portuguese in Goa even if the Goans want them to be there.'¹¹⁹ Portugal submitted that this statement constituted 'the very negation of the right of self-determination of peoples'.¹²⁰ Nonetheless, in its judgment the Court did not address any of the submissions relating to self-determination.¹²¹ Judge Spiropoulos was the only one to make any reference to self-determination, although he did not explicitly use the term.¹²²

¹¹⁶ Musgrave (note 97) 75.

¹¹⁷ Ibid.

¹¹⁸ *Case Concerning Right of Passage over Indian Territory (Portugal v India) (Merits)*, ICJ Reports (1960) p 6 at 16. This case involved the status of two Portuguese enclaves within India Territory. In July and August of 1954 an insurrection occurred in the Enclaves, whereupon India prohibited access to the enclaves by Portuguese authorities. Portugal sought a declaration from the Court that it possessed a right of passage to the two enclaves.

¹¹⁹ *Right of Passage* case, ICJ Pleadings (1960) Vol IV p 589.

¹²⁰ *Right of Passage* case, ICJ Reports (1960) p 6 at 16.

¹²¹ Musgrave (note 97) 77.

¹²² Judge Spiropoulos noted that 'it is a fact that after the departure of the Portuguese authorities, the population of the enclaves set up a new autonomous authority based upon the will of the population. Since the right of passage assumes the continuance of the administration of the enclaves by the Portuguese, the establishment of a new power in the enclaves must be regarded as having *ipso facto* put an end to the right of passage'. See the *Right of Passage* case, ICJ Reports (1960) p 53.

In the *Barcelona Traction* case¹²³, reference to self-determination was made by Judge Ammoun in his separate opinion. He stated that self-determination was one of the higher ideals of international law, and traced its development from the nineteenth century to its inclusion in the UN Charter and various GA resolutions, most notably Resolution 1514(XV). He concluded that ‘the law-making nature of such resolutions could not be denied, given that they reflect well-nigh universal public feeling’.¹²⁴

The issue of self-determination also appeared before the ICJ in the *East Timor* case.¹²⁵ The Court moved one step further noting that ‘Portugal’s assertion that the right of peoples to self-determination, as it evolved in the Charter and from the UN practice, has an *erga omnes* character, is irreproachable’.¹²⁶ It emphasised that the right of peoples to self-determination was ‘one of the essential principles of contemporary international law’.¹²⁷ It further stated that East Timor remained, with regard to both Portugal and to Australia, a non-self-governing territory and that its peoples continued to possess the right to self-determination.¹²⁸

The Court also dealt with the issue of self-determination in its 1971 *Advisory Opinion on the status of Namibia*.¹²⁹ The question was about the legal consequences for states of the continued presence of South Africa in Namibia, in spite of SC Resolution 276 (1970).¹³⁰ The Court pointed out the following:

‘The developments of self-determination leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this Court, if it has faithfully to discharge its functions, may not ignore it.’¹³¹

The Court thus emphasised precisely that the principle, which in the aftermath of the WWI had not yet acquired a foothold in the international community, had become an overarching

¹²³ *Barcelona Traction* case, ICJ Reports (1970) p 3.

¹²⁴ *Ibid.*

¹²⁵ In this case Portugal contested the right of Australia to conclude an agreement with Indonesia concerning the delimitation of the sea-bed boundary between northern Australia and East Timor. In 1975 East Timor, a non-self-governing territory administered by Portugal, was invaded and annexed by Indonesia. Portugal argued that Indonesia’s invasion of East Timor was illegal. By illegally invading and occupying East Timor, Indonesia had deprived the people of East Timor of their right of self determination. See *Case Concerning East Timor Case (Portugal v Australia) (Judgment)*, ICJ Reports (1995) p 90.

¹²⁶ *East Timor* Case, ICJ Reports (1995) p102.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Namibia Advisory Opinion*, ICJ Reports (1971) p 16.

¹³⁰ SC Res. 276 (1970) of 30 January 1970, which declared South African control over Namibia illegal. See V Lowe and M Fitzmaurice *Fifty Years of the International Court of Justice* (1996) 353.

¹³¹ *Namibia Advisory Opinion*, ICJ Reports (1971) p 16.

principle of the international community since 1945.¹³² Hence, it must apply to pre-existing legal institutions as well.¹³³ Self-determination, therefore, applies not only to current and future international relations, but also constitutes a fundamental standard of behaviour which, in a way, projects itself into past. Finally, the Court concluded that the development that was enshrined in the Charter, made the principle applicable to all non-self-governing territories.¹³⁴

In addition to the above jurisprudence, the Court dealt with the principle in its 1975 *Advisory Opinion on the Western Sahara*.¹³⁵ In this Opinion, the Court took up the statement made in the *Advisory Opinion on Namibia* to the effect that the principle of self-determination was applicable to all dependent peoples. All of them were entitled to opt for independence, if they so wished.¹³⁶ In this connection, the Court referred to self-determination provided in Article 1 and 55 of the Charter, and stated that the provisions had direct and particular relevance for non-self-governing territories.¹³⁷ The Court also discussed Resolution 1514(XV), and concluded that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.¹³⁸

Finally, the Court further dealt with the principle of self-determination in the *Wall Advisory Opinion*.¹³⁹ The Court recalled Article 2 (4) of the Charter and Resolution 2625(XXV). Article 2(4) provides that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Resolution 2625(XXV)¹⁴⁰ provides that ‘no territorial acquisition resulting from the threat or use of force shall be recognised as legal.’ As to the principle of self-determination, the Court pointed out that the principle has been enshrined in the Charter and reaffirmed by the

¹³² A Cassese ‘International Court of Justice and the right of peoples to self-termination’ in V Lowe and M Fitzmaurice *Fifty Years of the International Court of Justice* (1996) 351 at 357.

¹³³ Ibid.

¹³⁴ *Namibia Advisory Opinion*, ICJ Reports (1971) p 16.

¹³⁵ The Western Sahara had been a colony of Spain since 1884, and was formerly known as the Spanish Sahara. In 1966 the GA adopted Resolution 2229(XXI) which reaffirmed in paragraph 1 ‘the inalienable right of the peoples of Ifni and Spanish Sahara to self-determination in accordance with the Resolution 1514 (XV). Spain eventually agreed to hold a referendum in the Western Sahara in 1975. But, before this occurred, Morocco and Mauritania objected. These two states both claimed the territory over the West Sahara on the basis of historic title predating Spanish colonisation. The GA sought, at the instigation of Morocco and Mauritania, an Advisory Opinion from the ICJ as to whether the Western Sahara was *terra nullius* prior to Spanish colonisation [...] See *Western Sahara Advisory Opinion*, ICJ Reports (1975) p 12.

¹³⁶ ICJ Reports (1975) p 30 para 54.

¹³⁷ ICJ Reports (1975) p 12 at 68.

¹³⁸ Ibid.

¹³⁹ *Wall Advisory Opinion*, ICJ Reports (2004) p136.

¹⁴⁰ GA Res. 2625 (XXV) (note 28).

Resolution cited above, pursuant to which ‘every state has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution ...] of their right to self-determination. The Court also recalled its findings in the *East Timor* and *Barcelona Traction* cases, which emphasised that the current development in international law regarding non-self-governing territories, as enshrined in the Charter, made the principle applicable to all [such territories], and that the right of peoples to self-determination is today a right *erga omnes*.¹⁴¹

2.3 The holders of the right to self-determination

During the WWI President Wilson and Lenin referred to peoples and nations as the subjects of the right of self determination, but they did not specify which were those ‘peoples’ or ‘nations’. The UN Charter provides that ‘peoples’ are the selves to whom self-determination applies.¹⁴² This choice of subject was used in the vast majority of resolutions, declarations, decisions and agreements regarding self determination. However, it has never been defined in any comprehensive or satisfactory manner. Sir Ivor Jennings, in his oft-quoted-remark, noted that at first glance self-determination seemed pre-eminently simple and reasonable: let the people decide their own destiny.¹⁴³ The problem, however, was that ‘the people cannot decide until somebody decides who are the people.’¹⁴⁴ Rupert argued that the term ‘peoples’ had never attained any generally accepted meaning which can be applied to the diverse world of political and social reality.¹⁴⁵ This lack of ability to determine a generally accepted definition of the term ‘peoples’ means that the appropriate circumstances in which to apply the right often remain in doubt. This section considers the various definitions of the term ‘peoples’.

2.3.1 The meaning of ‘peoples’

The international instruments quoted above grant the right to self-determination to ‘peoples’, and despite their large number, no precise meaning of the term has been construed. The Canadian Supreme Court on the secession of Quebec attempted to ascertain the meaning of the term ‘people’ for the right of self-determination as follows:

‘It is clear that a people may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in

¹⁴¹ *Wall Advisory Opinion*, ICJ Reports (2004) p 136.

¹⁴² Article 1(2) of the UN Charter (note 20).

¹⁴³ S I Jennings *The Approach to Self-government* (1956) 5 at 56.

¹⁴⁴ *Ibid.*

¹⁴⁵ E Rupert ‘Self determination’ (1971) 65 *AJIL* 462.

documents that simultaneously contain references to nation and state. The juxtaposition of these terms is indicative that the reference to people does not necessarily mean the entirety of a state's population'.¹⁴⁶

Although the Court does not give a definition of the term 'people', it confirms that 'people' could point to other groups of individuals than the entire population of a state. Afterwards, the Court gives the reasons for its judgment:

'To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of the existing states, and would frustrate its remedial purpose'.¹⁴⁷

Attempts to give a definition of the term 'people' occurred in the drafting process of the UN Charter. Article 1(2) of the Charter provides that one of the purposes of the UN is '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'.¹⁴⁸ Further discussion about the meaning of these two terms occurred at the Coordination Committee stage. The UN Secretariat, in an attempt to interpret the terms nation and peoples, suggested:

'the word 'nation' is broad and general enough to include colonies, mandates, protectorates and quasi-states as well as states [...] the word 'nations' in Article s 1(2) and 55 seems preferable in order to emphasise the idea of friendly relations among all type of political entities. The word 'peoples' is used in connection with the phrase 'self-determination of peoples'- this phrase in such common usage that no other word seems appropriate'.¹⁴⁹

Apart from the above language, many scholars also attempted to define the term 'peoples'. In 1951 Kelsen made an early effort to define it. He noted that the term 'nations' in the formula of the preamble of the Charter means probably states; the term 'peoples' in Article 1(2) may have a different meaning; for in its connection with self-determination it may mean not the state, but one of the elements of the state: the population.¹⁵⁰

Cassese had initially defined 'peoples' in an ontological sense of the past:

'Since in this context the term 'a people' refers to a group of human beings united by ethnic, religious, cultural and historic ties, one may legitimately ask oneself which members of such a group can act upon international rules, put forward international claims, and so on'.¹⁵¹

¹⁴⁶ *Reference re Secession of Quebec*, (1998) para 124 cited in D Kumbaro 'The Kosovo crisis in an international law perspective: self-determination, territorial integrity and the NATO intervention' available at <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> [accessed 19 November 2009] 25.

¹⁴⁷ *Ibid.*

¹⁴⁸ Article 1(2) of the UN Charter (note 20).

¹⁴⁹ UNCIO DOCS (1945) 18 Vol.XVIII, p 657 at 658.

¹⁵⁰ H Kelsen *The Law of the United Nations: a Critical Analysis of Its Fundamental Problems* 1ed (1951) 51.

¹⁵¹ A Cassese *International Law in Divided World* (1998) 93.

Yoram Dinstein similarly defines a 'people' in term of ethnic criteria:

'Peoplehood must be seen as contingent on two separate elements, one objective and the other subjective. The objective element is that there has to exist an ethnic group linked by common history [...] It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such'.¹⁵²

In the above citations, the authors refer to ethnic links or religious groups. However, state practice as well as opinion expressed through the political organs of the UN suggests that the 'people' are not an ethnic or religious group, but a territorial one.¹⁵³ In the *Frontier Dispute* case,¹⁵⁴ the ICJ reinterpreted the principle of self-determination and defined the holders of the right on the basis of territoriality, and not on the basis of ethnicity.¹⁵⁵ The Court's stance in the *Frontier Dispute* case is indirectly linked to the *Nottebohm* case. In this case, the Court defined nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.¹⁵⁶

In the post-WWII period, the term 'people' was defined solely within the context of decolonisation. This means that the term can only mean the population of a non-self-governing territory. This is the position adopted by Rigo Sureda:

'At the present stage of the international community it has only been possible to reach a working consensus on colonies as territories deprived of their right to self-determination. This has been so in spite of solemn declarations whereby all peoples are said to be entitled to self-determination. In practice, all peoples are considered to have already exercised self-determination except those falling within the category of colonial peoples'.¹⁵⁷

Those who affirm that the term 'people' means only colonial or dependent people interpret Article 1(2) of the Charter by reference to Chapters XI, XII, and VIII, so that the word 'peoples' is understood to refer only to peoples in non-self-governing or trust territories.

Against the above argument, Resolution 1514 (XV) provides that the term 'peoples' is not only limited to colonial populations, but is also granted to a given population within pre-existing boundaries. This means that 'people' are defined by the territory of the non-self-governing territory in which they find themselves.¹⁵⁸ The fact that those found within such

¹⁵² Y Dinstein 'Collective human rights of peoples and minorities' (1976) 25 *ICLQ* 104.

¹⁵³ Wilson (note 40) 80.

¹⁵⁴ *Frontier Dispute Case (Burkina Faso v Mali) (Judgment)* ICJ Reports (1986) p 554.

¹⁵⁵ N Tzagourias *Transnational Constitutionalism: International and European Models* (2007) 213.

¹⁵⁶ *Nottebohm Case (Liechtenstein v Guatemala)*, ICJ Reports 1955 p 4.

¹⁵⁷ Rigo Sureda (note 68) 215.

¹⁵⁸ Musgrave (note 97) 150.

territories may comprise the most diverse and disparate cultural, linguistic, or religious group does not make them any less a 'people' under this definition.¹⁵⁹ It is finally argued that the GA has not limited its use of term 'people' to colonial situations, but also recognised a right of self-determination for many non-colonial peoples, such as 'the people of South Africa' and 'the people of Palestine'.¹⁶⁰

2.3.2 The meaning of 'nation'

The concept of a nation is similar to a people.¹⁶¹ In the romantic theory of self-determination the nation is briefly defined as a human group conscious of forming a community, sharing a common culture, attached to a clearly demarcated territory, having a common past and a common project for the future and claiming the right to rule itself. As Smith has written:

'Each nation defines the identity of its members, because its specific culture moulds the individual. The key to that culture is history, the sense of special patterns of events peculiar to successive generations of a particular group. An historical culture is one that binds present and future generations, like links in a chain, to all those who preceded them, and one that therefore has shaped the character and habits of the nation at all times. A man identifies himself, according to the national ideal, through his relationship to his ancestors and forbears, and to events that shaped their charter. The national ideal therefore embodies both a vision of a world divided into parallel and distinctive nations, and also a culture of the role of unique event that shapes the national character'.¹⁶²

On the basis of this definition, nationalism can be viewed as the identification of a considerable number of people with a particular nation. A state based upon a nationalist ideology is thus a nation-state.¹⁶³ Such state will, in most cases, also contain a part of the population who are not members of that nation in question.

In light of the above description, the meaning of the word 'nation' is understood within the romantic theory of self-determination. It is argued that the romantic meaning of nation was the dominant understanding of the world for nearly all of the nineteenth century and the first half of the twentieth century.¹⁶⁴ Furthermore, the American and the French Revolution saw the nation defined in a manner consistent with the classical theory of self-determination. In this theory, because an individual's identity is tied to the state or territorial unit, self-determination takes place within the confines of an existing state or territory. This means that

¹⁵⁹ Ibid.

¹⁶⁰ See GA Res. 2396 (XXII) of 2 December 1968 and GA Res. 2672 (XXV) of 8 December 1970.

¹⁶¹ The term 'nation' is defined as a large community of people of mainly common descent, language, history etc., usually inhabiting a particular territory and under on government'. See J Summers *Peoples and International Law* (2007) 2.

¹⁶² A D Smith *Nationalism in the Twentieth Century* (1979) 2 at 3.

¹⁶³ P Radan *The Break-up of Yugoslavia and the International Law* (2002) 12.

¹⁶⁴ Ibid.

it takes place when the population of that state or territorial unit elect a representative government of its choice.¹⁶⁵ It is finally argued that self-determination takes place when the nation obtains its own state.

2.4 Emergence of customary international law on self-determination

A rule of customary international law can be defined as that which is evidenced by a general practice (state practice), and accepted as law (*opinio juris*).¹⁶⁶ With regard to these elements, this section is comprised of two main subsections: a discussion of state practice on the principle of self-determination, then identification and discussion of *opinio juris* in light of state practice related to self-determination.

2.4.1 State Practice

State practice is considered as repetition of a particular act by an increasing number of states.¹⁶⁷ The practice must be general, but universality is not required. This means that a limited number of states may establish customary rights and duties *inter se*. For instance, in the *Asylum* case,¹⁶⁸ it was accepted that the right of diplomatic asylum was limited to Latin American states, and the *Right of Passage over Indian Territory* case established that only two states can create a local custom.¹⁶⁹ It is also possible for a single state to establish a rule of customary law by asserting a particular practice in which other states acquiesce.¹⁷⁰

The ICJ's decisions show that a state which relies on an alleged international custom practised by states must, generally speaking, demonstrate to the Court's satisfaction that this custom has become so established as to be legally binding on the other party. In the *Asylum* case, the Court held that evidence must be produced to support 'a constant and uniform usage practised by the states in question'.¹⁷¹ Completely uniform behaviour is not required, and in practice it would be impossible to prove. Hence, in the *Nicaragua* case, the ICJ held that a custom does not require:

¹⁶⁵ Musgrave (note 97) 96 at 102.

¹⁶⁶ Statute of the International Court of Justice, June 26, 1945.

¹⁶⁷ Cassese (note 27) 69

¹⁶⁸ *Asylum Case*, ICJ Reports (1950) p 266.

¹⁶⁹ *Right of Passage Case*, ICJ Reports (1960) p 6.

¹⁷⁰ In the *Anglo Norwegian Fisheries* case, for example, the Norwegian government delimited its territorial sea by drawing straight base lines linking the outermost points of land, a method that was contrary to the normal practice. The ICJ found nothing in international law to prevent Norway from determining its base lines in this manner, primarily because there had been no objection by other states. See the *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951) p 116.

¹⁷¹ *Asylum Case, Judgment of November 27th, 1950*, ICJ Reports (1950) p 395.

‘absolutely rigorous conformity with the rule. The conduct of states should in general be consistent with such rules, and [...] instances of state conduct inconsistent with a given rule should generally have been treated as breaches and not recognition of a new rule.’¹⁷²

It follows that when discussing customary rules in the area of self-determination, special emphasis should be on the UN practice. State practice supporting customary international law can be found in the activities of states before and during adoption of the GA resolutions regarding self-determination. Furthermore, in the area of colonisation, the UN has organised, and often supervised, elections and plebiscites in non-self-governing territories, before their accession to independence, association or integration with other states.¹⁷³ In this respect, the plebiscites or elections in British Northern Cameroons in 1961, in Rwanda-Burundi in 1961, in Western Samoa in 1962, in Equatorial Guinea in 1968, must be mentioned as examples.¹⁷⁴ In sum, seventy territories achieved independence between 1945 and 1979. In almost all these cases the whole population of a colonial or non-self-governing territory exercised the developing customary right of self-determination. And in most cases the practice of colonial powers was to grant self-determination.

2.4.2 *Opinio juris sive necessitatis*

Apart from state practice, the customary international law of self-determination is built on *opinio juris*. In order to form customary international law, states must act with the belief that their actions are rendered obligatory by the existence of a rule of law. They must be not motivated only by considerations of courtesy, convenience or tradition.¹⁷⁵ It is clear that states should believe that they must conform to the practice not for economic, political or military reasons but because they are confirming to an international rule.

The emergence of the customary international law of self-determination can be explained exclusively through GA resolutions. These may be seen as declaratory of custom, or they may crystallise custom.¹⁷⁶ In this connection, the GA adopted a number of resolutions regarding to the right of self-determination of colonial peoples and non-self-governing territories. In 1960 the GA implicitly recognised the right in Resolution 1514 (XV). In 1970, also it adopted the most radical Resolution 2625(XXV). These resolutions, however, should

¹⁷² *Nicaragua case*, ICJ Reports (1986).

¹⁷³ D Prechtel *Minorities in International Law today* (1999) Unpublished LLM Dissertation UCT 10.

¹⁷⁴ *Ibid.*

¹⁷⁵ *North Sea Continental Shelf, Judgment*, ICJ Reports (1969) p 3.

¹⁷⁶ This position is similar to that concerning GA resolutions: statements made by states during the drafting process, the agreed treaty text, may be seen as *opinio juris* indicative of custom. See Harris (note 33) 35.

not be looked at *per se*, but within the general framework of their adoption.¹⁷⁷ The pronouncements of the views of states before, during, and after their adoption, in conjunction with their actual behaviour in international relations, constitute important element of *opinio juris*. Strictly speaking, these resolutions show the emergence of general standards of political will on the part of a majority of member states. In addition, the very conduct of states, their action and their firm belief that there is an obligation to act in this way by reason of a rule of law are proof of the existence of a customary right to self-determination.¹⁷⁸

In sum, the right to self-determination is recognised both under conventional and customary international law. Some authors even argue that it now constitutes a *jus cogens* norm.¹⁷⁹ This means that it is an imperative rule of international law from which no one can derogate, even by treaty.¹⁸⁰

2.5 Concluding Remarks

This Chapter has argued that the right of self-determination of people is a legal right in international law. The principle evolved from an essentially political concept into a legal norm. It originated from the American and French Declarations which suggested that the consent of the governed can make a government legitimate. President Wilson used the ideas of self-governance and 'democratic entitlement' to formulate the political principle of self-determination. This principle was articulated in the Versailles Settlement and had, as its major thrust, the protection of the oppressed in the aftermath of the WWI. In the post-WWII era, with the end of the League of Nations, and the creation of the UN, the principle of self-determination made its re-appearance with the growths of democratic values and fundamental human rights.

¹⁷⁷ It must be recognised that Resolution 1514 (XV) was adopted by 89 votes in favour, 0 against, and 9 abstentions. The 1970 Declaration was adopted by consensus. Its passage through the GA had such consensus that it has been suggested that it can be considered as encompassing norms of *jus cogens*. See Castellino (note 60) 34 at 35; see also Cassese (note 27) 70.

¹⁷⁸ ICJ Reports (1995) p 108.

¹⁷⁹ A F Bayesky *Self-Determination in International Law: Quebec and Lessons Learned* (2000) 425; see also Cassese (note 27) 133 at 140.

¹⁸⁰ A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. See Article 55 of the Vienna Convention on the Law of Treaties, 1969 (1969) 8 ILM 679.

It is apparent from the above that the political postulate of self-determination only entered the sphere of international law in 1945, when it was asserted in Article 1(2) of the UN Charter. Since then it has become a cornerstone legal principle throughout international law. Later, it became a prime right in the ICCPR and ICESR. More specifically, the Covenants enshrined the right of the whole population of each contracting state to internal self-determination, that is, the right freely to choose their rulers.

At the UN Organisations level this process culminated in the adoption of Resolutions 1514 (XV) and 1541(XV). By virtue of these, self-determination became narrowly associated with process of decolonisation. However, Resolution 2625 (XXV) declared that self-determination was a right applicable to all peoples. It appears that this right is not limited to the colonial context, but rather applies to all peoples. The ICJ has also affirmed the existence of the principle of self-determination. In the *Namibia Advisory opinion*, it was emphasised that ‘the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter made the principle applicable to all of them’.¹⁸¹ It is apparent from the latter wording that the rule codified in the above documents, had been confirmed by subsequent state practice making it a rule of customary international law. The ICJ has also qualified the right of self-determination as *erga omnes* norm.¹⁸²

It is therefore no longer correct to regard the right of self-determination as merely a political aspiration of peoples. Nevertheless, its exercise has challenged fundamental bases of the international order: the sovereignty of states and the ban on the use of force. In this regard, Gardam¹⁸³ argues that in all probability there is a significance connection between the principle of self-determination and the use of force.

The next chapter primarily concentrates on the crucial question whether subjects of the right of self-determination are legally authorised to use force to achieve it. In this regard, many questions arise, namely: is there a right to use force in self-defence against colonialist, alien and or racist regimes? What is meant by armed struggle of a dissent movement representing a

¹⁸¹ *Namibia Advisory Opinion*, ICJ Reports (1971).

¹⁸² *Wall Advisory Opinion*, ICJ Reports (2004).

¹⁸³ J G Gardam *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993) available at <http://books.google.co.za/books?id=MGT2hJFS9MkC&pg=PA75&lpg=PA75&dq=the+exercise+of+self-determination+and+the+law+of+the+use+of+force&source> [accessed 24 November 2009] 68.

component people to achieve the right of self-determination? What then is the role of third states in such conflicts? Can third states intervene to assist such peoples in their struggles, and is there in fact any obligation on them to do so? Finally, can such support include use of force? These questions are the object of the following chapter.

CHAPTER THREE: THE USE OF FORCE BY PEOPLES IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION

3.1 Introduction

Efforts to limit the use of force in international relations have a lengthy history. Greek literature and philosophy contained protests against war, and the practice of states was to assign a cause for starting a war.¹⁸⁴ Beginning at least as early as the arbitration treaties of the late nineteenth and twentieth centuries, continuing through the Covenant of the League of Nations and the Kellogg-Briand Pact after WWI, and culminating in the UN Charter, states have several times formally limited the use of force.¹⁸⁵ The *jus ad bellum* is strictly regulated under the Charter. Article 2(4) provides that

‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.¹⁸⁶

However, there are certain limited circumstances when recourse to the use of force is legal, and when a state is said to have a right to resort to it. To wage ‘war’ in the Charter era requires a degree of justification, namely Security Council authorisation under Chapter VII, or individual or collective self-defence under Article 51. While the two established exceptions to Article 2(4) are accepted without question, other claims for a genuine *jus ad bellum*, as for instance when force is used in pursuance of the right to self-determination in wars of national liberation, is not as clear-cut.

In the post-Charter era, many states have made claims to use force in circumstances other than self-defence if the purpose is to promote self-determination.¹⁸⁷ Many less developed countries, for example, have advocated the use of force to assist peoples fighting colonial and racist regimes.¹⁸⁸ This chapter considers the relationship between the prohibition on the use of force under the Charter and ‘wars’ of self-determination. Can a theory of just resort to force in such struggles co-exist with the Charter? The status of the use of force by the parties involved, including state intervention in such conflict, is analysed to determine the legality of the resort to use of force in such conflicts, and thus the content of such a just war theory.

¹⁸⁴ I Brownlie *International Law and the Use of Force by States* (1963) 3 at 4.

¹⁸⁵ A M Weisburd *Use of Force: the Practice of States since World War II* (1997) 1.

¹⁸⁶ Article 2(4) of the UN Charter (note 20).

¹⁸⁷ A C Arend and R J Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* 2ed (1993) available at

<http://books.google.co.za/books?id=j4w9AAAAIAAJ&pg=PA40&lpg=PA40&dq=The+use+force+by+peoples+in+pursuit+of+the+right+to+self+determination&source> [accessed 24 November 2009] 40.

¹⁸⁸ *Ibid.*

3.2 Brief overview of international law rules on the use of force

The norms for the use of force have developed over the last few centuries.¹⁸⁹ The theory and practice on the use of force before the 19th and 20th centuries was that of *bellum justum*. The *bellum justum* doctrine traces its way back to St. Thomas of Aquinas, who wrote in *Summa Theologia* in the thirteenth century about war, stating the three basic elements for the presence of a just war: lawful authority, just cause, and right intention.¹⁹⁰ A main characteristic of the law on the use of force was the thinking in balance of power mechanisms in order to maintain the *status quo* and to minimise the resort to force, or at least its application.

In the aftermath of WWI, a different approach to the use of force in international law was established. The Covenant of the League of Nations placed the resort to war under international supervision, and rendered it unlawful in certain situations.¹⁹¹ It has been argued that while the League system outlawed the use of force, it was still subject to Article 15.¹⁹² With the signing of the Kellogg-Briand Pact of 1928¹⁹³ the real breakthrough to condemning war in international law was made. This Treaty provided that the High Contracting Parties:

‘Solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations to one another’.¹⁹⁴

Therefore for the first time war as such was to be seen as no proper and lawful instrument of national policy.¹⁹⁵ The Pact did not of course prevent WW II. Nevertheless it had an effect, as

¹⁸⁹ Brownlie (note 184) 3 at 49.

¹⁹⁰ H M Hensel *The Just War Tradition and the Customary Law of Armed Conflict* (2008) 15 at 16. Some scholars attributed the lawful authority to wage war only to an emperor or in some cases to the Pope. Pope Innocent IV also concluded that the right to use force belongs to the authorities who have no superior to them. See also, F H Russel *The Just War in the Middle Ages* (1975) 298 at 299.

¹⁹¹ Under the League of Nations, use of force was unlawful in four situations: (1) when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League; (2) when begun before the expiration of three months after the arbitral award or judicial decision or Council Report; (3) when commenced against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report; (4) under certain circumstances, when initiated by a non-member state against a member state. See League of Nations Covenant, June 28, 1919, Article 12 ff reprinted in: JAS Grenville and B Wasserstein *The Major Treaties of the Twentieth Century* (2001).

¹⁹² ‘If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.....’ Article 15 of the Covenant of the League of Nations, 1919.

¹⁹³ The General Treaty for the Renunciation of War as an Instrument of National Policy, (Kellogg-Briand Pact), Signed in Paris, August 27, 1928, entered into force 24 July 1929 Stat.46, 2343, TS No. 796, 94 LNTS 57.

¹⁹⁴ Article 1 of Kellogg-Briand Pact, 27 August 1928.

it formed the basis for 'crimes against peace', which, after WW II, were described in the Charter of the Nuremberg Tribunal as those crime aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.¹⁹⁶

The more recent development of the law on the use of force is to be found in the UN Charter. Article 2(3) provides that all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Furthermore, Article 2(4) provides for the ban on the use of force. In the *Nicaragua* case, the ICJ described Article 2 (4) as a peremptory norm of international law, from which states cannot derogate.¹⁹⁷ Thus, the effect of Article 2 (3) and (4) is that the use of force can only be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN's purposes.

3.3 'Wars' of liberation

If the people of a particular territory are regarded by international law as possessing a legal right of self-determination, but the state administrating that territory refuses to let them exercise that right, they may need to fight a war of liberation in order to achieve the right in practice.¹⁹⁸ There are two situations in which peoples may resort to force in achieving their right of self-determination. First, force may be used in conflicts between these peoples and colonial or alien powers, and secondly, force may be used against non-democratic regimes which do not respect the human rights of their people. In practice it has been national liberation or secessionist movements which claimed to have a right to use force on behalf of peoples.¹⁹⁹ Resort to force occurs generally where these movements have been formed in order to achieve self-determination for the peoples they represent. The purpose of this section is to explore the concept of *jus ad bellum* prior to the Charter and its post-Charter expansion by looking at particular cases of peoples. Basically, this expansion may best be illustrated by instances wherein the right to use armed force has been asserted.

¹⁹⁵ T Remler *The Right of Anticipatory Self- defence and the Use of Force in Public International Law* (2008) Unpublished LLM Dissertation UCT 6.

¹⁹⁶ The Charter of the Nuremberg International Military Tribunal, August 8, 1945.

¹⁹⁷ *Nicaragua case*, ICJ Reports (1986) p 14 at para 190.

¹⁹⁸ K. Ginther 'Liberation Movements' (1982) cited in P Malanczuk *Akehurst's Modern Introduction to International Law* 7ed (1997) 336.

¹⁹⁹ Wilson (note 40) 91.

3.3.1 National revolutionary movements and secessionist movements prior to the UN Charter

In international life, liberation movements are the representatives of peoples not yet constituted as state.²⁰⁰ In fact, Sluka points out that

‘There have been national liberation movements since the evolution of the first states. States have proven to be the most efficient form of social and military organisation ever devised by human beings for the pursuit of conquest or predatory expansion. The history of states is the history of empire, and from their beginning they spread by conquest and subjugation of neighbouring peoples until today all of the formerly independent nations or peoples have been conquered and included within their boundaries’.²⁰¹

The late eighteenth century, for instance, saw conflict between American settlers and their British rulers, while in the early nineteenth century, the Latin American countries fought against the rule of Spain and Portugal.²⁰² Cassese argued that the ‘war’ of liberation was in use as far back as the early nineteenth century,²⁰³ and indeed, the use of force by peoples under oppressive regimes is certainly not a twentieth century phenomenon. Both the Declaration of the Cause and Necessity of Taking Arms (1775) and the American Declaration of Independence (1776) contain assertions of this right, and several constitutions of states such as of the United States of America (USA) consistently recognised the right of the people ‘to reform, alter, or abolish government’ at their convenience.²⁰⁴ In this respect, 25 million Kurds are divided among six states: Iran, Iraq, Turkey, Syria, Armenia, and Azerbaijan, and have been fighting for an independent homeland since 1880, over a century.²⁰⁵ It is worth stressing that most of these states gained their independence either directly or indirectly through wars of national liberation.

These liberation movements²⁰⁶ see themselves as ‘freedom fighters’, waging a war of national liberation²⁰⁷ on behalf of their people against an established oppressive government

²⁰⁰ M Bedjaoui *International Law: Achievements and Prospects* (1991) available at http://books.google.co.za/books?hl=en&lr=&id=jrTsNTzcY7EC&oi=fnd&pg=PA101&ots=11buH1BLm&sig=kEKAA_3QT_UWwakR2c1PZ1g9xn0#v=onepage&q=&f=false [accessed 26 November 2009] 107.

²⁰¹ J Sluka ‘National Liberation Movements in Global Context’ available at http://www.tamilnation.org/conferences/tamil_eelam/96_new_zealand/jeffsluka.html [accessed on 2009-11-27]

²⁰² N Higgins ‘The Application of International Humanitarian Law to Wars of National Liberation’ available at http://www.jha.ac/Article_s/a132.pdf [accessed 27 November 2009] 2.

²⁰³ A Cassese ‘Wars of national liberation and humanitarian law’ cited in Higgins (note 199) 2.

²⁰⁴ Ibid.

²⁰⁵ States and Nations (2004) available at <http://www.canadatyo.org/reach/issue/1newsletter16june.pdf> [accessed 27 December 2009] 4.

²⁰⁶ Regarding the term ‘national liberation movement’ see Sluka’s comment in Higgins (note 192) 1. The use of the term ‘liberation movements’ has political implications, particularly when the groups so named are generally referred to by states and the media as terrorists. No one opposed to or critical of these movements calls them liberation movements because liberation (freedom) has positive value connotations for most people. Nowadays,

to fulfil their legitimate right of self-determination. In view of the preceding lines, the principle of self-determination by 'liberation movements' developed as a natural corollary of developing nationalism in the eighteenth and nineteenth centuries.²⁰⁸ As the central authorities of the Ottoman, Austrian, German, and Russian empires pursued increasingly assimilationist policies or began to weaken militarily and politically, initially demands for greater autonomy or local self-government often led to demands for independence.²⁰⁹ With the disintegration of the Austro-Hungarian and Ottoman empires during the WWI, their territory acquired new sovereigns. It should be noted that the principle of self-determination became the obvious vehicle for the re-division of Europe by the victorious powers.

There have also been cases in the twentieth century when states have accepted the use of force by non-state entities.²¹⁰ Poland's emergence after WWI is a relevant example. Having been partitioned for a century and a half, Poland ceased to exist as a state. The war between Germany and Russia reopened the Polish question. In late 1915 Roman Dmowski came from Petrograd to the West to seek recognition of the Polish national committee, the KNP, as the exclusive representative of the future government of Poland. On June 4, 1917 the President of the French Republic issued a decree providing for the creation of an autonomous Polish Arms, fighting under its own colours. Shortly thereafter a Polish National Committee was established in Paris, with the approval of the French Government, which was recognised as the Polish official organisation by the Government of France, Great Britain, Italy and United States.²¹¹ The establishment of the Polish State took place in late autumn of 1918 by way of a definite delimitation of its separate legal identity.

It is important to note that the rebirth of Poland was part of a general principle of the universal application of national self-determination in Eastern Europe. The idea that liberation movements representing peoples may resort to the use of force as an international right also attracted support. As evidenced by state practice during the two world wars, this idea was not new. An examination of the above conflicts permits one to deduce the existence of certain rules of customary international law. The conclusion is that the norms for the use

in the conservative global new right era we live in, most academics seem to prefer the term armed separatist (or secessionist) movements, which they claim is a more objective or neutral description.

²⁰⁷ A war of liberation has been described as: the armed struggle waged by a people through its liberation movement against the established government to reach self-determination. See N Ronzitti 'Resort to force in war of national liberation' cited in Higgins and O'Reilly (note 47) 575.

²⁰⁸ C A McCartney *National States and National Minorities* (1934) 92 at 156; see also Hannum (note 18) 27.

²⁰⁹ Ibid.

²¹⁰ Wilson (note 40) 92.

²¹¹ G H Hackworth *Digest of International Law* (1940) 319.

armed force in national liberation conflicts have developed over the last few centuries to a point today where use of force to settle disputes is virtually under the UN system.

3.3.2 National liberation movements and secessionist movements in the Charter era

3.3.2.1 United Nation Charter

Thus far, it has been said that Article 2(4) laid down a general ban on the threat or use of force. It means that states should refrain from the threat or use of force in their international relations. The only exceptions to this Article are in Article 51 and Chapter VII of the Charter.²¹² Article 51 guarantees ‘inherent right of individual or collective self-defence if an armed attack occurs [...]’ The argument over whether subjects of the right of self-determination are entitled to self-defence, raised bitter divisions between states during the decolonisation period. It was usual that the supporters of liberation movements attempted to use Article 51 to legitimise their struggles against colonialism. The war and victory in Algeria, the invasion of Goa, the frustration caused by continued colonial domination and the radical position of an independent Algeria all provided a catalyst for the development of theories regarding national liberation struggles.²¹³

Supporters of the liberation movements were hampered by the reference to ‘armed attack’ as being a precondition for exercise of the inherent right of self-defence. Many scholars, one of them being Hans Kelsen, favoured a restrictive interpretation of Article 51. He argued that self-defence is valid, only if, and that implies after, an armed attack occurs.²¹⁴ Indeed, Brownlie point out that self-defence is only legitimate following an armed attack.²¹⁵ The problem is that as colonialism is regarded by many states as being morally wrong, it is not in itself an armed attack or imminent armed attack. Many Third World States thus attempted to change the notion of what constitutes a use of force which would justify the exercise of self-defence.²¹⁶

The drive to recognise a war of national liberation as an act of self-defence, was led by Ghana, India and Yugoslavia during the meeting of the Special Committee on Friendly

²¹² The former gives the right of self-defence – either individual or collective in the event of an armed attack whilst the latter calls upon Security Council to take collective action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

²¹³ R E Gorelik ‘Wars of national liberation: *jus ad bellum*’ (1979) 11 *JIL* 73.

²¹⁴ Kelsen (note 150) 914.

²¹⁵ Brownlie (note 184) 225.

²¹⁶ Gorelik (note 213) 74.

Relations in Mexico in 1965.²¹⁷ Developing countries, supported by socialist states, argued that armed force by dependent peoples to free themselves from colonial power was authorised by Article 51. This argument was however rejected by Western States. They argued that self-defence could only be invoked in international relations, and that relations between a colonising power and the colonised people were not international.

Against the Western argument, Kenya claimed that if force was used to deprive colonial peoples of the right to self-determination, they would have the right to rebel.²¹⁸ If the colonial power initiates the use of force to prevent the exercise of the right, it would seem to follow, as a matter of logic, that the people were said to have the right to use force in self defence. Abi-Saab places a particular emphasis on the preceding argument. He argues that

‘Armed resistance to forcible denial of self-determination- by imposing or maintaining by force colonial or alien domination- is legitimate. In another words, liberation movements have a *jus ad bellum* under the Charter’.²¹⁹

The argument that colonialism is permanent aggression represents another attempt to surpass the restrictive terms of Article 51. A number of scholars, one of them being Summers, argued that ‘the mere existence of colonialism was inherent aggression to which people were entitled to self-defence by whatever means necessary’.²²⁰ These scholars perceived of colonialism not as aggression in the present, but as occurring in the past.²²¹ The basis is that at its inception, the colonial regime was installed by armed force and that as long as the effects of this armed force continues, so does the initial aggression. This thesis was argued by the National Liberation Front of Algeria (FLN) in 1954. The FLN claimed that they were fighting a delayed war of self-defence against the French invasion of 1830.²²² Similarly, in justifying India’s annexation of Goa before the Security Council in 1961 the Indian delegate argued that it had acted in self-defence against the continued aggression of colonialism against the Goan people, who are one and the same as the Indian people.²²³

The American representative responded that it was true that self-defence would legitimise the use of force, but denied that it was applicable because Goa was ‘a defenceless territory,’ and

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ G Abi Saab ‘Wars of national liberation and the laws of war’ cited in Wilson (note 40) 98.

²²⁰ Summers

(note 159) 227 at 232.

²²¹ Abi Saab (note 219) 98.

²²² Wilson (note 40) 131.

²²³ 16 UN SCOR (987 thmtg) para 77, at 8, UN Doc. A/P.V. 987 (1961).

as such posed no threat to India.²²⁴ The Security Council was divided and unable to pronounce on the Goan incident. It must finally be noted that the argument that colonialism presents permanent aggression was not used much by the anti-colonial states during the debates on Friendly Relations and on Aggression. Its main fault seems to have been the difficulty of providing that military conquest was a *delictum juris gentium* during a time when this method of territorial acquisition was not only legally respectable, but even morally compelling. The debates were marked by progression towards homogeneity of thought among the Afro-Asia states, which was represented in the school advocating a broad interpretation of Article 51.

The ICJ in the *Nicaragua* case also supported the view that the use of force against peoples exercising their right to self-determination is a breach of Article 2(4) of the Charter.²²⁵ It is argued by some states which support the legitimacy of the resort to use force in the exercise of the right of self-determination that, as the colonial regime itself was installed by force, its maintenance is an act of 'permanent aggression' against the original state.²²⁶ The right of self-defence under Article 51 of the Charter is therefore available to peoples who are the victims of such aggression. Classical instances include the anti-colonial movements in Angola, Algeria, Mozambique, Zimbabwe, Guinea Bissau, Eritrea, East Timor and Western Sahara. In most of these cases the UN recognises some of the competing groups as legitimate or authentic representative of the peoples' struggles for self-determination.

The last theory stressed that Article 2(4) is inapplicable to wars of national liberation, and that such cases of the use of force were legitimate.²²⁷ It is argued that Article 2(4) prohibits the use of force and threat of force in international relations only. It is possible that the wars of liberation are not covered by the prohibition of the use of force set out by Article 2(4). This was a predominant interpretation among Africa, Asian and Socialist states.²²⁸ This school of thought however, did not get a consensus of a whole community. The Latin Americans hesitate to support the Afro-Asian outside the domain of self-defence. They argued that this interpretation is certainly contrary to the spirit of the Charter which wished to make all uses of force illegal aside from cases of self-defence. In the view of the writer however, Article 2(4) is not clear enough on this matter, its nature depends on how states read

²²⁴ Gorelik (note 213) 78.

²²⁵ Gardam (note 183) 74.

²²⁶ Ibid.

²²⁷ Gorelik (note 213) 80 at 81.

²²⁸ Summers (note 161) 227.

the Charter. If the Charter's purposes and principles were to prohibit the threat or use of force by state against another state, it follows therefore that the use of force by liberation movements is not contrary to the provision of the Charter.

Thus, while it could be argued that the rules on wars of liberation movements obviates further inquiry as to their true nature, the underlying lack of state consensus demarcating the concepts involved in the self-determination and the use of force in national liberation conflicts, does little to discourage the occurrence of liberation wars.²²⁹ Further, it can be stressed that the international norms regarding armed classification struggles for self-determination took a step forward in UN resolutions.

3.3.2.2 United Nation resolutions

During the decolonisation period, the international community gave much theoretical support to those involved in struggles for self-determination. This support took the guise of multifarious resolutions adopted by the UN. Many of these messages of support were founded on the Declaration on the Granting of Independence to Colonial Countries and Peoples.²³⁰ The declaration reads in relevant part as follows:

‘The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.’

‘All armed action or repressive measures of all kinds directed against dependent peoples shall cease to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.’²³¹

With regard to the above provisions, the use of force to prevent the exercise of self-determination is probably unlawful. However, Resolution 1514(XV) does not sanction the use of force for the purpose of realising the right to self-determination.²³²

In the four years following the adoption of 1514(XV), jurists and statements from the Third World Countries accepted that the use of force in pursuit of self-determination was legitimate. A resolution adopted in 1964 by the Conference of Jurists of Afro-Asian Countries held in Conakry stated that

²²⁹ E Chadwick *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (1996) 43 at 63.

²³⁰ GA Res. 1514 (XV) (note 1).

²³¹ GA Res. 1514 (XV) (note 1) Para 1 and 4.

²³² Pomerance (note 85) 48.

‘All struggles undertaken by the peoples for the national independence or for the restitution of the territories or occupied parts thereof, including armed struggle, are entirely legal.’²³³

Resort to armed force by colonised peoples was also recognised by the Conference of Non-aligned countries in 1964 in Cairo. It stated that

‘The process of liberation is irresistible and irreversible. Colonised peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if colonial powers persist in opposing their natural aspirations’.²³⁴

The idea that the achievement of liberation was irresistible was echoed in many UN resolutions issued by the GA from 1965 onwards, which reaffirmed the legitimacy of the struggle for self-determination and thus for national liberation, e.g. GA Resolution 2105 (XX) of 1965.²³⁵ Following this trend, Resolution 2625 (XXV) was adopted in 1970.²³⁶ This Resolution is significant with regard to the world community’s view on self-determination, and indeed on wars of national liberation, because its drafting Committee worked on the basis of consensus and it was also adopted by the GA by consensus.

The adoption of this Resolution illustrates that by 1970, the international community had recognised the principle of self-determination as a legal right. It was important not only because of its most positive contribution to the debate on the status of self-determination but also because of its reference to the use of force regarding self-determination and the legality thereof. It should be noted that based on the 1970 Declaration, liberation movements have *locus standi* in international law and that their wars were armed conflicts of an international character. Firstly, wars of national liberation could no longer be viewed as domestic conflicts. The 1970 Declaration itself states that

‘Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.’²³⁷

Regarding this provision, the present writer argues that liberation movements have a right to use force in international law. The 1970 Declaration also leads to the conclusion that the

²³³ Wilson (note 40) 95.

²³⁴ Declaration adopted by Conference (1964) 4 *IJL* 603 cited in Wilson (note 40) 95.

²³⁵ GA Res. 2107 (XX) of 21 December 1965; GA Res. 2189 (XXI) of 13 December 1966; GA Res. 2326 (XXII) of 16 December 1967; GA Res. 2465 (XXIII) of 20 December 1968; GA Res. 2383 (XXIII) of 7 November 1968; GA Res. 2396 (XXIII) of 2 December 1968; GA Res. 2548 (XXIV) of 11 December 1969; GA Res. 2507 (XXIV) of 21 November 1969; GA Res. 2508 (XXIV) of 21 November 1969; GA Res. 2547 (XXIV) of 8 December (1969).

²³⁶ GA Res. 2625 (XXV) (note 28).

²³⁷ GA Res. 2625 (XXV) (note 28).

whole *corpus* of the *jus in bello* should apply to wars of national liberation as they are to conflicts of an international nature.²³⁸

Resolution 2649 (XXV)²³⁹ is another famous resolution on the legitimacy of the struggle for national liberation. It states that peoples under colonial, alien, or racist regimes are themselves entitled to restore the right to self-determination by any means at their disposal. This sentiment was also reflected in Resolution 2787 (XXVI),²⁴⁰ which confirmed the legality of a people's struggle for self-determination. Resolution 3070 (XXVIII)²⁴¹ categorically affirmed the right to pursue self-determination 'by all means, including armed struggle.'

In the same vein, GA Resolution 3103 (XXVIII)²⁴² stated in its preamble that 'the continuation of colonialism in all its forms and manifestations is a crime and that all colonial people have the inherent right to struggle by all necessary means at their disposal against colonial powers and alien dominations in the exercise of their right to self-determination.' Its first paragraph stated that 'the struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law'. The intention of the Resolution was not only to grant legitimate combatant status to the members of liberation movements according to the Geneva Convention, but also to secure their right to self-determination to allow them to use force in accordance with international law.

In this respect, the GA and CS adopted resolutions regarding specific instances of struggles for self-determination and national liberation. For instance, Resolution 2787 (XXVI) mentions Zimbabwe, Namibia, Angola, Mozambique, Guinea-Bissau and the Palestine people. Both the GA and the SC have also recommended, and in one instance ordered, sanctions against colonial or alien powers, and have also recommended the provision of aid to national liberation movements. It states that conflicts of the type in which these movements are involved should be regarded as legitimate, and opposition to it is unlawful.

²³⁸ Abi-Saab (note 219) 372.

²³⁹ GA Res. 2649 (XXV) of 30 November 1970.

²⁴⁰ GA Res. 2787 (XXVI) of 6 December 1971.

²⁴¹ GA Res. 3070 (XXVIII) of 30 November 1973.

²⁴² GA Res. 3103 (XXVIII) of 12 December 1973.

This issue was tackled again in 1974 by the Special Committee on the Question of Defining Aggression. Article 3 of the Definition of Aggression enumerates acts of aggression. The acts of national liberation movements were not considered as aggression. Article 7 states that 'Nothing in this definition, and in particular Article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of those peoples to struggle to that end to seek and receive support in accordance with the principles of the Charter and in conformity with the above mentioned Declaration.'²⁴³

Resolution 2105 (XX) recognises the legitimacy of national liberation struggle, and invites all states to provide material and moral assistance to the national liberation movements in colonial territories.²⁴⁴ Resolution 32/147²⁴⁵ narrowly reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the UN.

3.3.2.3 Analysis

The resolutions described above speak in terms of 'by all available means at their disposal' and the 'legitimacy of their struggle'. The term 'struggle' was problematic in its interpretation and varied considerably among states.²⁴⁶ In the late 1960's there was still strong disagreement on what kind of 'struggle' exactly was accepted as legitimate. The Western states argued that the word 'struggle' may not necessarily mean 'armed struggle', it may also mean 'peaceful struggle'. Third World countries, however, interpreted 'struggle' as 'armed struggle'. It follows that the form which this 'struggle' could take was not precisely elaborated. The obvious inference was that resistance to forcible action would likewise involve force. This argument reached a high-water-mark with a number of resolutions, one of

²⁴³ GA Res. 3314 (XXIV) of 14 December 1974.

²⁴⁴ GA Res. 2105(XX) of 20 December 1965.

²⁴⁵ GA Res. 32/147 of 6 December 1977.

²⁴⁶ Canada considered that 'struggle' meant 'struggle by peacefully means'. Yugoslavia argued that peoples could use 'all means at their disposal', including armed force. And Yemen specified that it encompassed 'armed force'. See Summers (note 161) 232.

these being Resolution 3070 (XXVII), reaffirming 'the legitimacy of the people's struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle'.²⁴⁷

There was also discussion about what legal effects UN resolutions sanctioning the use of force in pursuit of self-determination have. There was a tendency to consider them as only a 'subsidiary' source of international law. It has therefore been argued that the use of force by peoples with a right of self-determination is not legitimate. Though, such resolutions do not generally create legal obligations, they have considerable legal significance. For instance, they may be cogent evidence of state practice and *opinio juris*. It should be noted that, when voting for these resolutions, the aim of states in the UN General Assembly was to declare customary international law regarding the use of force by national liberation movements.

As has been said earlier, rules of customary international law consist of two elements: the general practice of states which is followed out of sense of legal obligation or *opinio juris*. In this context, the idea of legitimate authority in international law is closely linked with recognition.²⁴⁸ In the case of liberation movements there have been two tendencies in state practice since WWII in regard to recognition, namely premature recognition of government formed by liberation movements or recognition of liberation movement itself.²⁴⁹ To deal with the theory of recognition is not the aim of this section, and it is reserved for later examination.

Since 1945 state practice regarding secession of territories claiming to have a right of self-determination has been wholly consistent. The East Indies, which is now Indonesia, was a Dutch Colony until occupied by Japanese forces in the WWII. After the collapse of the Japanese administration, Indonesian nationalists declared their independence in August 1945. In the meantime, Indonesia was recognised by Egypt, Syria, Iran, the United States, United Kingdom, Australia, and China.²⁵⁰ By gaining independence through the use of armed struggle, Indonesia constituted the first example of its kind after WWII. Similar cases are Algeria, Guinea Bissau, Eritrea, Vietnam and Bangladesh. In each of these conflicts, national liberation movements used force to achieve independence. One may thus draw the conclusion

²⁴⁷ GA Res. 3070 (XXVIII) of 30 November 1973.

²⁴⁸ M Wight 'Systems of states' (1977) cited in Wilson (note 40) 104.

²⁴⁹ M Dixon *Textbook on International Law* (1990) 70.

²⁵⁰ H W Briggs *The Law of Nations* 2ed (1953) 73.

from the preceding that there is an emerging customary international law on the use of force in pursuit of self-determination.

Following the above contention, there is agreement that peoples who have a right to self-determination are entitled to fight a war of national liberation against their forcible denial.²⁵¹ As concerns the *jus in bello*, they are subject to the law governing relations between belligerents, and between them and third parties, in its entirety.

3.4 International humanitarian law and wars of national liberation

The traditional law of armed conflict,²⁵² which was designed to regulate traditional inter-state wars, was largely unable to regulate internal conflicts effectively. They were exclusively governed by the municipal law.²⁵³ It was not until the adoption of the Geneva Conventions for the Protection of War Victims of 1949²⁵⁴ that provisions of international humanitarian law could be seen to be applicable to non-international conflicts including wars of national liberation. The four Conventions of 1949, focusing on the wounded and sick on land and at sea, prisoners of war and civilians, apply to conflicts of an international character. But there is one exception to this limitation on application. Common Article 2(3) of the Conventions provides:

‘Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall be bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.’²⁵⁵

If the terms ‘Power’ or ‘Powers’ in the above provision can be taken to encompass national liberation or secessionist movements then these movements could be bound by the Geneva

²⁵¹ P Malanczuk (note 198) 336.

²⁵² In particular the Hague Conventions of 1899 and the 1907: Convention I for the peaceful adjustment of international differences; Convention II regarding the laws and customs of wars on land annexed Regulations; Convention III for the adaptation to marine warfare of principles of the Geneva Convention of 1864. 1907: Convention I for the pacific settlement of international disputes; Convention III relating to the opening of hostilities; Convention IV respecting the laws and customs of war on land, and annexed Regulations; Convention V respecting the rights and duties of neutral powers and persons in cases of war of land; Convention IX respecting the bombardment by naval forces in times of war; Convention X for the adaptation to naval war of the principles of the Geneva convention; and Convention XIII concerning the rights and duties of neutral Power in naval war. See Chadwick (note 226) 69.

²⁵³ Ab-Saab (note 208) 217.

²⁵⁴ 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

²⁵⁵ Common Article 3 of four Geneva Conventions.

Conventions under Common Article 2(3) thus bringing the whole corpus of *jus in bello* into application in wars of national liberation.

It should be mentioned that the term 'Power' usually denotes a state in diplomatic language. It has occasionally been used in a wider sense to include some other entities not having this character and, therefore, in that sense, liberation movements can become parties to the Conventions especially so that a wider interpretation is more compatible with the humanitarian objective and purpose of the conventions which, to be fully realised, commend universal application.²⁵⁶

In the realm of humanitarian law to be applicable to wars of liberation, the GA adopted Resolution 3103(XXV), which deals with the legal status of combatants struggling against colonial and racist regimes for the right to self-determination. Under it such struggles are legitimate and in full accord with the principles of international law.²⁵⁷ Attempts to suppress struggles against colonial and racist regimes are incompatible with the UN Charter, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples as well as with the Principles of International Law concerning Friendly Co-operation among States.²⁵⁸ Such attempts constitute a threat to peace and security. Captured combatants are to be accorded the status of prisoners of war under the Third Geneva Convention.²⁵⁹ The use of mercenaries against national liberation movements is a criminal act.²⁶⁰

The application of the laws of war to liberation movements has also been a popular subject for study, particularly since the 1974-1977 Diplomatic Conferences which led to the adoption

²⁵⁶ Abi-Saab (note 219) 492.

²⁵⁷ GA Res. 3103(XXV) of 12 November 1973, first paragraph provides that 'the struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law.' See also International Humanitarian Law and Human Rights available at <http://www.ohchr.org/Documents/Publications/FactSheet13en.pdf> [accessed 01 December 2009].

²⁵⁸ GA Res. 3103(XXV) para 2.

²⁵⁹ GA Res. 3103(XXV), paragraphs 3 and 4 provides:

The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.

The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949.

²⁶⁰ GA Res. 3103(XXV) para 5.

of two additional protocols to the 1949 Conventions.²⁶¹ The first Protocol pertains to international armed conflicts, and would supplement all four Geneva Conventions in various respects.²⁶² The second pertains to non-international armed conflicts and would supplement common Article 3 of the Geneva Conventions by specifying in some detail new norms regulating them.²⁶³ These two Protocols are concerned with the *jus in bello* and indirectly touch upon the question of the *jus ad bellum* regarding wars of national liberation. Article 1 of Protocol I provides:

The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²⁶⁴

Basically, the relevant provision here is Article 1 (4) regarding wars of national liberation which has a restrictive scope.²⁶⁵ In order for the Protocol to apply to a war of liberation, the conflict must be an armed conflict in which a people is struggling against a colonial, racist or occupying power and the struggle of that people must be in order to exercise its right to self-determination against a party to the Protocol. An analysis of the drafting history illustrates that it was the intention of the framers to strictly limit the application of the provision to only the three categories of wars of national liberation, colonial domination, alien occupation and racist regimes when the 'peoples' oppressed by these regimes are fighting for self-determination. In the light of the above, Article 1 (4) must apply the customary law

²⁶¹ Wilson (note 40) 149.

²⁶² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

²⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

²⁶⁴ Article 1 of the Protocol I.

²⁶⁵ C Greenwood 'Terrorism and humanitarian law: the debate over Additional Protocol I' cited in *Israel Yearbook of Human Rights* (1989) 193 at 194.

governing the conduct of hostilities to wars of liberation and the protection of war victims in inter-states conflicts.²⁶⁶

Apart from Protocol I, Protocol II of 1977 supplements and develops common Article 3 of the Geneva Conventions of 1949, and deals with non-international conflicts. Its Article 1 provides that

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.²⁶⁷

This provision constitutes the keystone of the instrument. According to this Article, the Protocol applies to conflicts between a dissident group and the central government. This makes the scope of application of Protocol II narrower than that of Common Article 3. It should be noted that Additional Protocol II goes a long way to putting flesh on the bare bones of common Article 3 of the 1949 Geneva Conventions. In particular, it contains the first attempt to regulate by treaty the methods and means of warfare in internal conflicts.²⁶⁸ Peoples struggling for liberation have certain international rights and obligation, most notably those recognised by Protocol in the sphere of *jus in bello*.

It should be finally mentioned that Article 3 of the four Geneva Conventions and Additional Protocol II was applicable to internal conflicts in El Salvador, the Philippines, Algeria²⁶⁹ and to aspects of the fighting in the former Yugoslavia.²⁷⁰ Furthermore, in some wars of national liberation, generally after a period of repression, states or national liberation movements have

²⁶⁶ Ibid.

²⁶⁷ Article 1 of the Protocol II.

²⁶⁸ M R Rwelamira 'The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949' cited in Higgins (note 202) 63.

²⁶⁹ The war was conducted mainly through guerrilla action and sabotage operations. Inhumane practices and the widespread use of torture led increasingly to calls for the application of the 1949 Geneva Conventions. As a minimum, the application of Common Article 3 to the Geneva Conventions was required. This article applies to armed conflict not of an international character, and requires observance of minimum standards of humanity. See Chadwick (note 229) 48.

²⁷⁰ Greenwood (note 265) 5.

a duty to treat detainees like prisoners of war. In particular cases, the PLO and its component groups have openly agreed to grant prisoner-of-war status and treatment to Israelis in their custody.²⁷¹ The PLO has far more to gain by according prisoner-of-war status to detained combatants and declaring its adherence to the Geneva Conventions than does the established government.²⁷²

3.5 Emerging state practice in the case of wars of national liberation

It has been said earlier that the right of self-determination is qualified as a *jus cogens* norm. As the Court indicated in the *Barcelona Traction* case, such norms are by their very nature ‘the concern of all states’ and, ‘in view of the importance of the rights involved, all states can be held to have a legal interest in their protection’.²⁷³ It means that states may support the right in various ways. However, this connotation raises the issue whether third states can play any role in the enforcement of the right of self-determination. If any, what is the role as far as they are concerned? Is there an obligation on states to do so? Can this support include use of force? Next in time comes the issue of recognition of national liberation or secessionist movements, or governments which have been formed by these movements.

3.5.1 Third state involvement in self-determination struggles

Whether international law allows it or not, there have always been states which were involved in national liberation wars.²⁷⁴ This involvement sometimes takes the form of assistance to the state involved in its struggle to maintain the existing regime. Or it may take the form of assistance to liberation movements.²⁷⁵ It must be noted that third states are duty-bound to refrain from assisting a state denying self-determination to a people or a group entitled it.²⁷⁶ Conversely, they can provide economic, political, and logistical support to national liberation movements. To deal with the specific issue of third states assisting the oppressive state is not deeply analysed here, and it remains reserved for further examination. It investigates however, how external support is developed and how states react to liberation movements.

²⁷¹ Wilson (note 40) 160.

²⁷² Ibid.

²⁷³ The *Barcelona Traction Case*, ICJ Reports (1970) p 33.

²⁷⁴ Gardam (note 183) 76.

²⁷⁵ For examples the Palestine Liberation Organisation (PLO), in its armed struggle with Israel, relies on the support of Syrian and Iran. See Gray (note 55) 64.

²⁷⁶ Cassese (note 27) 141.

In the international arena there is duty not to assist armed bands that operate on the territory of another state. To render this duty consistent with the Charter, GA adopted a number of resolutions which support it. The three most famous of them can be cited in this study. The second paragraph of Resolution 2131(XX) provides that

‘No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.’²⁷⁷

The 1970 Declaration on Friendly Relations which interprets Article 2(4) of the Charter provides that

‘Every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.’²⁷⁸

Finally, Article 3(g) of the Definition of Aggression qualified as acts of aggression as following:

‘The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’.²⁷⁹

Regardless of the above provisions, there are some saving clauses in both the 1970 Declaration and the Definition of Aggression which provide that ‘in their actions against, and resistance to, such forcible action in pursuit of self-determination, such people are entitled to seek and receive outside support’.²⁸⁰ Here is, therefore, the appearance of the two diverse rules in the resolutions. It follows that the guerrilla manner of operation of liberation movements is the source of controversy.

The practice of states of intervening in self-determination struggles is widespread.²⁸¹ This interference sometime takes the form of assistance to insurgent forces.²⁸² It may consist of measures of a political or economic nature, or it may constitute armed intervention with training or provision of troops, arms and materials. The issue of third party assistance to support peoples seeking to implement a right to self-determination leads logically to a consideration of the concept of intervention in international law.²⁸³ The principle of non-

²⁷⁷ GA Res. 2131(XX) of 21 December 1965 para 2.

²⁷⁸ GA Res 2625 (XXV) of 24 October 1970 para 1.

²⁷⁹ GA Res. 3314 (XXIX) of 14 December 1974.

²⁸⁰ E U Olalia ‘The status in international law of national liberation movements and their use of armed force’ available at <http://www.iapl.net/statements/nlm.pdf> [accessed 21 November 2009] 11.

²⁸¹ Gardam (note 183) 76.

²⁸² Ibid.

²⁸³ Gray (note 55) 60.

intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states.²⁸⁴

However, the question may be posed as to whether armed assistance may be provided to liberation movements struggling to attain self-determination. This question of third party assistance to people fighting for self-determination is highly controversial and has been the subject of disagreement between Western and some Third World States.²⁸⁵ Hence, there are a number of GA resolutions which call upon states to provide assistance to such peoples.

The GA has expressed its support for liberation movements in a long series of annual resolutions. Both, the 1970 Declaration on Friendly Relations and the Definition of Aggression provide that 'people in pursuit of the exercise of their right to self determination are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'.²⁸⁶ This implies that a third state could legally support national liberation movements. The same pattern is evident in numerous resolutions. In Resolution 3328 (XXIX), the GA urges all states and specialised agencies of and other organisations of the UN system to provide moral and material assistance to all peoples under colonial and alien domination struggling for their freedom and independence, in particular to liberation movements in Africa.²⁸⁷

Furthermore, the UN Security Council has made a number of pronouncements in support of liberation movements in Africa. With respect to Rhodesia, the Security Council reaffirmed the inalienable rights of people of Southern Rhodesia to self-determination and urged all member states of the UN to render moral and material assistance to them in their struggle to achieve freedom and independence.²⁸⁸ Again in Resolution S/445,²⁸⁹ the Security Council commends the People's Republic of Angola, Mozambique and the Republic of Zambia and other front-line states for their support of Zimbabwe in their just and legitimate struggle to achieve independence.

This development reached a high-water-mark with the *Nicaragua* case where the Court held that 'the Court is not here concerned with the process of decolonisation; this question is not in

²⁸⁴ The *Gorfu Channel Case*, ICJ Reports (1949) p 4; the *Nicaragua Case*, ICJ Reports (1986) p14 and 106.

²⁸⁵ Chanea and Xanthki (note 34) 60.

²⁸⁶ GA Res. 2625 (XXV) (note 28).

²⁸⁷ GA Res. 3328 (XXIV) of 16 December 1974.

²⁸⁸ SC Res. 253 (1968) of 29 May 1968.

²⁸⁹ SC Res. S/445(1975) of 18 August 1975.

issue in the present case'.²⁹⁰ However, Judge Schwebel touched on the problem of assistance to liberation movements in his dissenting opinion. He stated that 'it is lawful for a foreign state to give to a people struggling for self-determination political, logistical, and humanitarian assistance; but it is not lawful for a foreign state to intervene in that struggle with armed force'.²⁹¹

The above statement shows that material assistance to a liberation movement by way of provision of arms, training, funds and logistical support seems to be lawful. It should be added that it is in the *Nicaragua* case, that one can find which kind of support could be accorded to national liberation movements. As noted earlier, the 1970 Declaration as well as Article 7 on the Definition of Aggression left undefined the type of the assistance which can be rendered to people who struggle for self-determination. The 1970 Declaration simply said that such people are entitled to receive support.

The basic point at issue is whether GA resolutions supporting the liberation movements legally oblige states to support them or simply permit them to infringe the non-intervention rule. It is the writer's view that such support depends on the discretion of the states concerned. GA resolutions are not binding in themselves. But, the strongest argument that the GA resolutions described above have given rise to legal obligations on the part of individual states to support liberation movements is that they are evidence of customary international law requiring such support.²⁹² It could finally be argued that a norm has developed, or is in the process of developing, which permits states to assist people to implement their right to self-determination.

3.5.2 Recognition of national liberation and secessionists movements

The idea of a legitimate right in international law is closely linked with recognition.²⁹³ In international relations it is the recognition of states, government, or liberation movements which confer to them an international legal personality,²⁹⁴ and as such an entity is capable of acquiring international rights and contracting international obligations.²⁹⁵ However, the legal significance of recognition is controversial. According to the one view it has a 'constitutive'

²⁹⁰The *Nicaragua Case*, ICJ Report (1984) para 206.

²⁹¹*Ibid.*

²⁹²P J Travers 'The legal effects of United Nations action in support of the Palestine Liberation Organisation and the National Liberation of Africa' (1976) 17 *HLJ* 576.

²⁹³Wight (supra note 248) 104.

²⁹⁴Brownlie (note 57) 86.

²⁹⁵W R Slomanson *Fundamental Perspective on International Law* 3ed (2000) 76.

effect.²⁹⁶ It is argued that through recognition only and exclusively an entity becomes an international person and a subject of international law.²⁹⁷ The other view is that the granting recognition to an entity is not a 'constitutive' but a 'declaratory' act.²⁹⁸ This means that it does not bring into legal existence an entity which did not exist before.

In the case of liberation movements, there have been two types in state practice since the end of the WWII with regard to recognition. First, there has been a tendency to recognise prematurely²⁹⁹ governments established by liberation movements which represent a people considered to have a right to self-determination.³⁰⁰ The second tendency is to recognise a liberation movement itself as a representative or the representative of its people.³⁰¹ In one or the other case, recognition is essentially an expression of intention by a recognising state to treat a liberation movement as a subject of international law.

In the case of premature recognition, states have demonstrated a tendency to recognise governments even before they have complete control over the territory in issue. Indonesia,³⁰² Algeria,³⁰³ Guinea-Bissau,³⁰⁴ and the Western Sahara³⁰⁵ are the most obvious examples of this tendency.³⁰⁶ Palestine can be mentioned among states which were prematurely recognised. At the 19th session of the Palestine National Council in 1988, the independent State of Palestine was proclaimed, with Jerusalem as its capital. All Arab states, except Syria,

²⁹⁶ Harris (note 33) 144.

²⁹⁷ Oppenheim *International Law* 8ed (1995) cited in Harris (note 167) 1440.

²⁹⁸ The declaratory theory is adopted by most modern writers. It is also supported by arbitral practice in particular, the *Timo Arbitration*. See Harris (note 33) 145.

²⁹⁹ Premature recognition is recognition accorded before the basic factual conditions for statehood which are specified in the Montevideo Convention on Rights and Duties of States, Signed at Montevideo, 26 December 1933, Entered into Force, 26 December 1934.

³⁰⁰ This recognition has sometimes been extended to governments and provisional governments even when they are located outside the territory which they are fighting to control. See Wilson (note 40) 104.

³⁰¹ *Ibid.*

³⁰² The East Indies which is now Indonesia was a Dutch colony until it was occupied by Japanese forces in the WWII. After the collapse of the Japanese administration, Indonesian nationalists declared their independence in August 1945. Thereafter, Indonesia was recognised by Egypt, Syria, Iran, the United States, Britain, Australia, and China. The most important thing here is that Indonesia enjoyed certain status in international law before the formal grant of independence to her on 27 December 1949. See M Şahin 'The use of force in relation to self-determination in international law' (1999) available at <http://www.foreignpolicy.org.tr/documents/periodicals/vol23.pdf> [accessed 21 November 2009] 37 at 38.

³⁰³ On 19 September 1958 the FLN (*Front de Liberation Nationale Algerienne*) established the provisional Government of the Algerian Republic in Tunis, and 29 states recognised the new Government. See J Crawford *The Creation of States in International Law* (1979) 248.

³⁰⁴ The GA recognised the State of Guinea Bissau in November 1973, when its liberation movement (PAIGC) was only in control of two-thirds of the territory. See M N Shaw *Title to Territory in Africa* (1986) 248.

³⁰⁵ On 27 February, the Polisario Front proclaimed the formation of the Saharan Arab Democratic Republic (SDAR) with a government in exile based in Algiers. By July 1980 the SDAR had been recognised by 35 states. See Wilson (note 40) 114 at 105.

³⁰⁶ *Ibid.*

a number of non-aligned states and China immediately recognised the Palestine State.³⁰⁷ On 25 June 1991, Croatia declared its independence when it only controlled 1/3 of its territory. The member states of European Communities, Austria, and Switzerland recognised Croatia on 15 January 1992.³⁰⁸ In reality, by premature recognition, the view of most of the recognising states was to render a 'people' that had a right to self-determination, a separate entity in international law with the authority to use force similar to sovereign states.

In addition to the premature recognition, the other state practice was to recognise liberation movements as representatives of their people and to include them as observers, associate members, and members of international organisations.³⁰⁹ In this respect, in 1971 the OAU recommended the leaders of national liberation movements to participate in the 1973 Session as observers.³¹⁰ In October 1974, the GA invited the PLO, the representative of the Palestinian People to participate in the deliberation of the GA on the question of Palestine in plenary meeting.³¹¹ One month later the GA again invited the PLO to participate in the sessions and the work of the GA in the capacity of observer.³¹² In December 1976 the GA granted observer status in plenary session to SWAPO in similar terms to those it used in 1974 with the PLO.³¹³ It is interesting to mention that this resolution was passed with no opposing votes and only thirteen abstentions.

From the above practice, one can conclude that the extension of observer status at the international organisations level to liberation movements was certainly a political victory in their drive to internationalise their struggle. It is also important to note that they started to have some limited right and duties under international as result of the above resolutions.

3.6 Application of practice in specific cases

This section illustrates a brief overview of the history, nature, cause and significance of liberation movements in the territory of Western Sahara, Eritrea, Former Yugoslavia and Palestine. In selecting these case-studies, I have concentrated on situations where armed force

³⁰⁷ See M Sahin (note 302) 38.

³⁰⁸ See R Rich 'Recognition of states: the collapse of Yugoslavia and the Soviet Union'(1993) 4 *EJIL* 36 at 65

³⁰⁹ Wilson (note 40) 117.

³¹⁰ In the 1973 session ZANU, ZAPU, FNLA, SWAPO, and MOLINACO participated as observers in the Committee's deliberation. See Wilson (note 40) 118.

³¹¹ GA Res. 3210(XXIX) of 14 October 1974.

³¹² GA Res. 3237(XXIX) of 22 November 1974. The Resolution also provided for its participation in any international conference convened under UN patronage. See Wilson (note 40) 119.

³¹³ GA Res. 31/152 (1976) of 20 December 1976.

has been used or is still being used by peoples in pursuit of self-determination, against colonial, alien, or racist regimes.

3.6.1 The case of Western Sahara

The Western Sahara is that fringe of the Sahara Desert that is on the coast of the African continent. It became a Spanish colonial territory in 1884, following the Spanish occupation of the coast and the conclusion of several agreements with the chiefs of local tribes.³¹⁴ In the 1960s a nationalist anti-colonial movement began, and in 1973, the Polisario Front, was created.³¹⁵ From 1973 to 1975 the Polisario began military operations against the Spanish to secure Western Saharan independence.³¹⁶ When Spain announced its intention to withdraw from the area in 1974, Morocco and Mauritania claimed the territory based on historical ties. These claims led the GA to request an advisory opinion from the ICJ. The Court held that although Mauritania and Morocco had historical ties to Western Sahara, those ties did not apply to 'self-determination through the free and genuine expression of the will of the peoples of the Territory'.³¹⁷

In 1976 Spain withdrew from Western Sahara, and in that year Morocco and Mauritania partitioned the territory.³¹⁸ By 1976, however, Polisario's enemy had changed.³¹⁹ From 1976 until 1979 the Polisario, strongly supported by Algeria and Libya, fought against Moroccan and Mauritanian occupation. In 1976, Polisario proclaimed the independence of the Western Sahara under the name Saharan Democratic Arab Republic (SDAR).

The response of the UN was effective. The GA adopted Resolution 3458A (XXX), which reaffirmed the inalienable right of the people of Western Sahara to self-determination.³²⁰ In 1979, Mauritania gave up the fight, and recognised the SDAR.³²¹ Only Morocco remained.³²² In 1980 The OAU as an organisation and several of its member states recognised SDAR as the rightful government of Western Sahara, which took its seat at the 1989 OAU Summit, at

³¹⁴ For more details, see Sureda (note 68) 212 at 215; see also the *Advisory Opinion on the Western Sahara*, ICJ Reports (1975) p 12.

³¹⁵ Wilson (note 40) 113.

³¹⁶ Cannizzaro and Palchetti (note 38) 46.

³¹⁷ ICJ Reports (1975) p 68 para 162.

³¹⁸ Wilson (note 40) 114.

³¹⁹ Weisburd (note 185) 244.

³²⁰ GA Res. 3458A (XXX) of 10 December 1975; see also Tesfagiorgis (note 58) 96.

³²¹ Cannizzaro and Palchetti (note 38) 47.

³²² Cassese (note 27) 216.

which point Morocco left the AOU in protest.³²³ On the face of it, the right to self-determination of the people of Western Sahara remains uncertain. As of now, the SDAR's Government is still in exile. Morocco remains in control of the area. Polisario responded by launching an armed struggle against this foreign occupation, and continued the struggle to assert the right of self-determination and independence.

3.6.2 The case of Eritrea

As early as the Kingdom of Axum, Eritrea was part of Abyssinia. Between the eleventh and nineteenth centuries, Eritrea became a part of Ethiopia.³²⁴ It was occupied by Italy from 1885 to 1889. Following the treaty of Ucciale of 1889 with Ethiopia, Eritrea became an Italian colony in 1890.³²⁵ When Italian colonial rule came to an end, Eritrea was administered by the United Kingdom under trusteeship from 1941 to 1952. The British administration ended in 1952, and at the same time the Federation was established.³²⁶ The Federation was however short-lived for the Eritrean Assembly voted in 1962 for the incorporation of Eritrea into Ethiopia; Eritrea thus became a province of Ethiopia.³²⁷

In 1961, the people of Eritrea set up an Eritrean Liberation Front (ELF), followed in the 1970s by the Eritrean People's Liberation Front (EPLF). These liberation movements engaged in an armed struggle with the Ethiopia. In their fighting, they received outside assistance from such as China, Cuba, and some Arab states.³²⁸ Following the collapse of the Mengistu government, Eritrea's liberation movements acquired full control over Eritrea, and after a referendum in 1993, proclaimed their independence. The EPLF is one of the liberation movements which used armed force to attain self-determination outside the colonial context. In this milieu, present writer can argue that there is right to use force to secede from existing states, if those states systematically commit widespread violations of human rights.

³²³ Ibid.

³²⁴ Kumbaro (note 146) 31.

³²⁵ Cassese (note 27) 219.

³²⁶ In March 1952 an Eritrean Assembly adopted a constitution providing for federation with Ethiopia. In August the constitution was ratified by the Ethiopian Emperor, who then approved the Ethiopia 'Federal Act'. Ibid

³²⁷ Kumbaro (note 146) 31.

³²⁸ E Gayim *The Eritrean Question: the Conflict Between the Right to Self-determination and the Interests of States* (1993) 469 at 598.

3.6.3 The case of Yugoslavia

Yugoslavia was a federation of six republics³²⁹ and two autonomous regions.³³⁰ It was formed under Tito's Communist partisan army at the end of WWII.³³¹ Since Tito's death in 1980, the country was plagued by surging nationalism and separatism and federal authority gradually diminished. With the end of the Cold War, the Socialist Federal Republic of Yugoslavia (SFRY) began to splinter.³³² After stalled talks regarding an asymmetric union, Slovenia and Croatia declared independence on 25 June 1991.

Fighting broke out in Yugoslavia on 25 June 1991 when federal troops moved against secessionists in Slovenia. Slovenia declared a 'state of war', and appealed for international support. By July, hostilities were occurring in Bosnia. The Security Council met, and unanimously adopted Resolution 713³³³ which provided that the continuation of the situation constituted a threat to international peace. However, it appears that, the secessionists were seen in a favourable light as was confirmed by the European Commission's (EC) original formula for the recognition of Croatia, Slovenia, Bosnia-Herzegovina, and Macedonia.³³⁴

It should be noted that these new republics have achieved self-determination and independence primarily through the use of force. The use of force in the break-up of Yugoslavia can be opposed to the colonial context.³³⁵ It could be further argued that there is right of 'peoples' to use force to secede from existing states which do not respect human rights in general, and rights accorded to minorities in particular.³³⁶

3.6.4 The case of Palestine

The history of settlement in Palestine is very obscure.³³⁷ Both Jews and Palestinian Arabs claim an existence in Palestine since earliest recorded history. Many Jews firmly hold that

³²⁹ Republics of Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia.

³³⁰ Kosovo and Vojvodina.

³³¹ Cassese (note 27) 268.

³³² M Weller 'The international response to dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *AJIL* 596.

³³³ SC Res. 713, UN SCOR 46th Sess. 3009th mtg. Supp., UN Doc. S/713 (1991).

³³⁴ EC recognition was scheduled for 15 January 1992. Slovenia and Croatia were accordingly recognised. Macedonia was recognised on 06 April, as was Bosnia-Herzegovina, despite Bosnian Serb opposition. On 22 May, the GA admitted the Republic of Slovenia (Res. 46/237), the Republic of Bosnia-Herzegovina (Res. 46/23237), and the Republic of Croatia (Res. 46/238). See Chadwick (note 229) 50.

³³⁵ Gray (note 54) 58.

³³⁶ See generally Higgins and O'Reilly (note 47) 567 at 583.

³³⁷ Collins (note 61) 155 at 156.

their patriarch, Abraham, first settled the area around 1800 BC.³³⁸ Palestinians claim the Canaanites as their ancestors and date their occupation of Palestine as around 3000 BC.³³⁹ Before WWI, Palestine was part of the Ottoman Empire, and consisted of Arabic, heterogeneous and otherwise divided people.³⁴⁰ The diverse peoples living in Palestine, including Sunni Muslims, Shiites and Druze, as well as Greek Orthodox, were frequently at odds with one another³⁴¹

At the beginning of the twentieth century, an increasing number of Jews began to settle in Palestine.³⁴² Jews did not seek Ottoman Empire citizenship, but held the idea of national unity and identity.³⁴³ Existing Palestinian-Arabs resented the large migration of Jewish settlers,³⁴⁴ while Palestinians often sold their land to Zionist³⁴⁵ landowners.³⁴⁶ Following the dictates of the Sykes-Picot Agreement,³⁴⁷ and the defeat of the Ottoman Empire at the close of WWI, Palestine became a mandate of United Kingdom in 1922.³⁴⁸

Following the Nazi atrocities of WWII, the GA adopted Resolution 181 on November 29, 1947, which called for the creation of separate Arab and Jewish states within a partitioned Palestine.³⁴⁹ At the same time, Arab armies entered Israel: The Egyptian army moved through Gaza and the Negev; the Lebanese went into Galilee, the Iraqis moved alongside the Arab Legion; and the Syrians remained at their border.³⁵⁰ By 1949 the war was over, with Israel occupying part of Palestine and Egypt in possession of the Gaza Strip,³⁵¹ and 750,000

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ I J Bickerton and C L Clausner 'A concise history of the Arab-Israeli conflict (1995) 15 at 18 cited in 'Nationalism, self-determination, and Nationalist movements: exploring the Palestine and Quebec drives for independence, (1997) 20 *BCIL* and *CLR* 97.

³⁴¹ Ibid.

³⁴² G E Bisharat 'Land law and legitimacy in Israel and the occupied territories' (1994) 43 *AULR* 467 at 476.

³⁴³ Bickerton and Clausner (note 340) 27.

³⁴⁴ Bisharat (note 345) 496 at 502.

³⁴⁵ Zionism has been defined as nineteenth and twentieth century Jewish nationalism, generally, but not exclusively, taking the form of support for Israel as a Jewish state. See D Gerner *One Land, Two Peoples* (1991) 201.

³⁴⁶ Bisharat (note 342) 502.

³⁴⁷ The 1916 Agreement, conducted between a British and French diplomat, respectively sought to divide the Ottoman Empire at the end of WWI into zones where both countries could exercise either direct, or indirect, influence. See Gerner (note 345) 29 at 32.

³⁴⁸ Ibid.

³⁴⁹ The United States and the Soviet bloc, together with several other nations including France and Australia, supported the partition. The Muslim countries voted against partition. See Bickerton and Clausner (note 340) 91.

³⁵⁰ Ibid.

³⁵¹ Cassese (note 27) 234.

Palestinians were in exile.³⁵² The Arab-Israeli war in June 1967 led to a further displacement of Palestinians, as Israel gained control of the so-called occupied territories.³⁵³

In 1964, the Palestine Liberation Organisation (PLO) was created to represent these Palestinians.³⁵⁴ In 1969 the GA adopted Resolution 2535/B (XXIV), which recognised the inalienable right of the people of Palestine. Also, Resolution 2672C (XXV) provided that the people of Palestine were 'entitled to equal rights and self-determination in accordance with the Charter'.³⁵⁵ Remarkably, the GA proclaimed the right of Palestinians without specifying how it should be implemented. The adoption of the Resolution 2728 (XXVI), affirmed the legality of the Palestinian's struggle for self-determination and liberation from alien occupation by all available means consistent with the Charter.³⁵⁶ In this connection, the wording 'by all available means' has been interpreted to include 'armed means' of asserting the right to self-determination.

In fact, the PLO has received active outside support since its creation. In 1973, Arab heads of states recognised it as the only legitimate representative of the Palestinian People. In 1974, the GA passed Resolution 3236(XXIX), which reaffirmed the Palestinian right to self-determination, and conferred on the PLO observer status in the Assembly and other international conferences held under UN auspices.³⁵⁷ It must however be noted that notwithstanding the UN efforts and practice of its members, self-determination for the Palestinian people is still infringed. Recently, in its *Advisory Opinion*,³⁵⁸ the ICJ held that the construction of the wall on the Occupied Palestine Territory impedes the right of Palestinians to self-determination. The Court recommended Israel to its breach of international law. As of now, the Palestine right to self-determination has not been yet achieved, with Israel continuing to occupy the West Bank, including East Jerusalem and Gaza.

3.6.5 Analysis

In the above conflicts, liberation movements used force to achieve, or attempt to achieve self-determination. Two of the cases were struggles for independence against colonial and alien occupation. And the other two cases were basically the struggle for secession from states. In

³⁵² Ibid.

³⁵³ The occupied territories included the Western Bank, the Gaza Strip and East Jerusalem. Ibid.

³⁵⁴ Collins (note 61) 163.

³⁵⁵ GA Res. 2672C (XXV) of 8 December 1970.

³⁵⁶ GA Res. 2728 (XXVI) of 15 December 1970.

³⁵⁷ Cassese (note 27) 239.

³⁵⁸ *Advisory Opinion*, ICJ Reports (2004) p 136.

each of these cases, liberation movements enjoyed a fair degree of third-state support. Indeed, state practice gives some support to the argument that it is unlawful for colonial powers to receive outside support. Further, states providing aid to liberation movements have never been sanctioned for doing so. The fact that many states have aided liberation movements without encountering any sanction strengthens the position that such assistance is not unlawful. It seems clear that, as matter of general practice, liberation movements were recognised by international organisations such as UN and OAU as observers in plenary session.

An examination of state practice in favour of liberation movements leads one to deduce the existence of certain rules of customary international law. To understand the preceding argument, it is helpful to analyse the *opinio juris* as constitutive of customary international law alongside general practice. The basic point at issue is whether UN activities supporting the African movements and PLO oblige states to recognise those movements as legitimate representatives of oppressed people, and to offer support to them, or at least to refrain from supporting their adversaries in unlawful opposition to them. To answer this question, it must be taken into account that GA resolutions are not binding, they are soft law. But, they are evidence of customary international law. It is argued that when UN member states vote for resolutions such as measures of support for liberation movements, they have thereby established rules of customary international law regarding their use of force. The great majority of those voting for UN measures in support of the liberation movements probably believe that in doing so they were either helping to create or reaffirm rules of international law.

3.7 Concluding Remarks

Since the beginning of history there have been regimes that have engaged in practices against peoples that are so bad, so cruel, so unjust and so destructive of the individual dignity of men and women. Prior to the UN Charter era, especially, by the mid-nineteenth century, the rights of man, especially those envisaged by the American Declaration of Independence and the French revolution, began to shift to nations. Liberation movements in Europe, such those in Poland, Ireland, Norway and Czechoslovakia, claimed self-determination, and threatened the stability of the Austro-Hungarian and Russian Empires.

As one commentator has noted, it is essential, if the rights of peoples are not recognised by a tyrannical regime, the rights should be protected by the rule of law.³⁵⁹ Otherwise by way of exception,³⁶⁰ there is no obvious rule against rebellion in international law. The right of peoples to revolt against tyranny and oppressive regimes is an internationally recognised right. Those whose struggle is acknowledged to be for self-determination, and against tyrannical regimes are deemed to be waging a 'legitimate' struggle: a *just war*.

In so far as use of force is concerned, the UN Charter has been adopted with Article 2(4), which prohibits the threat or use of force. The only exceptions to this Article are the resort to force either in individual or collective self-defence (Article 51) or in collective action under Chapter VII. In some cases liberation movements and their supporters attempted to use Article 51 to justify the use of force. The more common argument to support the plea of self-defence is that the colonialism, by its very nature, is regarded by many states as being morally wrong, and is permanent aggression. The present writer argues that armed revolution is a form of self-defence for an oppressed people, and the principle of necessity and proportionality should apply during the war of liberation. It should be noted that the *jus in bello* applies in general.

Such a wide interpretation of Article 51 was not in accord with the views of Western States. They were of the opinion that this Article applied to the right of self-defence of states. Nevertheless the present writer asks whether liberation movements have a right to use force in international law against colonial, alien, or racist regimes, realising that international law is still a matter of consent, not consensus. From a legal perspective the GA has expressed its support for liberation movements in a long series of annual resolutions.³⁶¹ The first resolution claimed to assert a right to use force was passed in 1964 in response to denials of self-determination by Portugal, South Africa and Rhodesia. Resolution 2105 recognises the

³⁵⁹ Olalia (note 280) 6.

³⁶⁰ Some scholars argue that classical international law and the definition of aggression were inapplicable to wars of liberation, and that in such cases the use of force was legitimate. The basis for this legitimacy was what is called the rule of exception. See Gorelick (note 213) 81.

³⁶¹ GA Res. 2646 (XXV), affirms the legitimacy of the struggle of peoples under colonial, alien, or racist domination, recognises them as being entitled to the right to self-determination and to restore to themselves that right by any means at their disposal. Under the 1970 Declaration, peoples in their action against such regimes are entitled to seek and to receive outside support. In this respect, the GA urges all states and specialised agencies and other organisations within the UN system to provide moral and material assistance to all peoples under colonial and alien domination struggling for their freedom and independence. See GA Res. 3328(XXIX). In Resolution 2787 (XXVI), the GA calls upon all states dedicated to the ideals of freedom and peace to give all their political, moral and material assistance to the peoples struggling for liberation, self-determination and independence.

legitimacy of their struggle, and invites all states to provide material and moral assistance. It is important to note that here and elsewhere the word 'legitimacy of the struggle' was repeated. Those resolutions, whether general or passed in response to a specific conflict, expressly spelled out the right to use force to attain self-determination met and with opposition from colonial powers, and Western states.

It should also be noted that resolutions on the use of force reveal continuing disagreement between states; consensus was attained in the practice of ambiguity. Many states accepted the use of force by liberation movements, and in some situations actively supported the use of force politically, financially, and in extreme situations militarily. For instance, France supported Biafra's secession from Nigeria during the secession years.³⁶² The former USSR, Cuba, Saudi Arabia, Syria, Libya, Egypt, Sudan, and a number of Arab countries supported Eritrea's independence during the armed struggle years in varying degrees.³⁶³ The USA, Israel and Iran supported the Iraqi Kurdish independence movement in Northern Iraq until 1975 with almost all possible means.³⁶⁴

Recent events show that cross border military, humanitarian, and political assistance are on the increase to minorities which have a majority in neighbouring states. These neighbour states use the people's right to self-determination as their reason to assist them. The Serbian assistance to the Serbs and intervention in Bosnia and Croatia, Croatian intervention and assistance to the Croats in Bosnia, Armenian intervention and assistance to the Armenians in the Nagorno-Karabakh region of Azerbaijan, Russian intervention and assistance to the ethnic Russians living in the Dniester region of Moldova, and intervention in Georgia and assistance to Abkhazians can be counted among them.

Some limited support for the doctrine of the right of a people to seek self-determination against alien occupation can also be seen in regard to Lebanon. Syria and Iran repeatedly distinguish between terrorism and legitimate resistance to foreign occupation, and they refuse to condemn Hezbollah on the ground that it was struggling against Israel's continued occupation of Lebanese territory it had occupied by force in 1982.³⁶⁵

³⁶² C R Nixon 'Self-determination: the Nigeria/Biafra case' (1972) available at <http://www.jstor.org/stable/2010453> [accessed 10 December 2009] 473 at 497.

³⁶³ Cassese (note 7) 218 at 222.

³⁶⁴ A Heraclides *The Self-determination in Law of Minorities in International Politics* (1991) 250 at 263.

³⁶⁵ See Report of the UN Secretary-General S/2004/777 para 19 cited in Gray (note 55) 64.

Recently, with the growth of the legal principle of self-determination, liberation movements have gained special status. In the *jus in bello*, liberation movements in their struggle against colonial, alien, or racist regimes may be conferred with combatant status and prisoner-of-war status in the event of capture. Another basic practice supporting of liberation movements is to grant to them observer status. UN recognition of the PLO in 1988, and SWAPO demonstrated this.

Customary international law can be briefly defined as a constant and uniform usage (state practice), accepted as law (*opinio juris*). With regard to these elements, the former was discussed above. As far as *opinio juris* is concerned, Resolution 3328 (XX) was adopted with 118 votes in favour, zero against and ten abstentions. Resolution 3295 on Namibia received 112 in favour, zero against, and 15 abstentions. Resolution 3297 on Rhodesia received 111 in favour, zero against, and 18 abstentions. And finally, the Resolution 3300 on implementing the 1970 Declaration by the specialised agencies was adopted by consensus. The great majority of those voting for those resolutions in support of liberation movements probably believed that in doing so they were either helping to create new norms or else change old ones. If so, these resolutions may be seen as a reflection of *opinio juris*. It can thus be concluded that there is emerging customary international law regarding the use of force in pursuit of self-determination.

CHAPTER FOUR: CONCLUSION

4. 1 Conclusions

This study sought first to analyse the right of self-determination of peoples, and then to examine the *jus ad bellum* from the perspective of liberation movements involving peoples in their struggle for self-determination. This has been done in the context of international law standards. The conclusions at the end of each chapter provide specific answers to the questions posed. Here, the chapter states briefly the thrust of the arguments advanced.

The first chapter provided an introduction to the question whether peoples under colonial, alien, or racist regimes recognised as being entitled to the right of self-determination have right to use force to restore that right. It also stressed that such peoples should receive appropriate external support. The chapter further gave a brief historical background to the right to use force in pursuit of self-determination.

Chapter two described the evolutionary stage of self-determination from a political theory to a legal right. The study shows that the concept is ancient and can be traced as far back as Greece and Roman empires. It also shows that in modern times it was first proclaimed, at national and international levels as a political guideline for state action. It was argued that the American and French revolutions gave it political expression, by establishing that government should be based on the will of the people. Under this approach peoples were to have a say in the conduct of domestic and foreign affairs. In fact, peoples were entitled to be free from external oppression, mostly in the form of colonial or alien domination.

The chapter also illustrated that there was relatively little practice regarding self-determination in international law before the WWII. It remained no more than a political principle and did not generally form part of international law. Clearly, this situation changed after WWII, when it was written into the UN Charter and other major international instruments. It was proclaimed as a right of 'all peoples' in the first Article of the ICCPR, ICESCR and in several GA resolutions. As for jurisprudence, it was shown that the ICJ contributed substantially to the concept. In a number of cases it held that the right as defined in the Charter and several GA resolutions was one of the essential principles of contemporary international law. In this connection, the chapter demonstrated how self-determination evolved from the Charter, practices in the UN and ICJ decisions to reach an *erga omnes*

character, and arguably to be one of the few peremptory norms of international law, referred to as *jus cogens*, the set of rules from which no state may derogate for any reason.

The chapter further analysed the meaning of 'peoples'. This was necessary because the right of self-determination allows, *inter alia*, a 'people' to establish *inter alia* a sovereign and independent state. It has been argued that the references to 'peoples' in the Charter were simply references to states, but this interpretation was not accepted by the writer. Instead, the term 'people' was recognised as being distinct from that of a state. Since the adoption of the Charter a strong body of opinion has argued that a 'people' should be defined as the total population of a colonial or a non-self-governing territory. The present writer also did not fully support this view but considered that the term 'peoples' was not limited to colonial or dependent populations, but also covered a given population within pre-existing boundaries. Given that Resolution 2625(XXV), ICCPR and ICESCR use the term 'all peoples' in relation to self-determination, then *prima facie*, such peoples have the right to self-determination.

Chapter three examined briefly the relationship between the principle of self-determination and the international law relating to the use of force. It first gave a brief historical overview of the *jus ad bellum* in the international sphere. The chapter showed that the theory and practice of the use of force before the 19th and 20th centuries was that of *bellum justum*. The *bellum justum* doctrine, which originated in the Middle Ages, legitimised the resort to violence if three conditions were fulfilled: the authority of a sovereign, just cause and the right intention but these conditions had fallen away by the ninetieth century.

As has been noted, the manner of a conducting war changed with the Covenant of the League of Nations. Under the Covenant, the use of force was declared illegal in certain circumstances. The chapter showed that the Covenant system did not prohibit the use of force or war as such, but did set forth a procedure designed to limit wars in a reasonable way. It showed for the first time that 'war' was to be seen as unlawful under the Kellogg-Briand Pact. Because the Pact did not prevent WWII from happening, the logical conclusion is that the mechanism set forth therein was inadequate. The chapter finally analysed the use of force under the UN Charter, the *Caroline* case, the *Nicaragua* case, and state practice in post-Charter era. It found that the law on the prohibition of the use of force is a rule of customary international law. It showed that the only exception is individual or collective self-defence or collective action under Chapter VII of the Charter.

The chapter further examined the history of, and circumstances surrounding, internal conflicts, and then examined the *jus ad bellum* regarding 'wars' of liberation to secure the right of 'peoples' to self-determination. It found that prior to the UN Charter, there was no rule against rebellion in international law. It follows from the preceding that international law did not prohibit wars of liberation. Therefore, 'peoples' had a right to revolt against alien or racist regimes.

The chapter thereafter analysed the use of armed measures to assert the right of self-determination in the Charter era. First, it analysed the principle of self-defence. It was pointed out that some scholars argued that liberation movements have the authority to use force in self-defence. Western Countries, however, rejected this argument. Also, GA resolutions in this matter were analysed. The right to resort to armed force by liberation movements was considered in several resolutions relating to the right of self determination. In most of these resolutions, it was stated that if peoples subjected to colonial, foreign or racist regimes were forcibly denied self-determination, such peoples were entitled to resort to armed force to realise it. The Western view, particularly that of the colonial powers contested such an interpretation. The present writer however relying upon state practice and evidence of *opinio juris* found in the GA resolutions, conclude that there was an emerging customary international law allowing the use of force in pursuit of self-determination.

The right of liberation movements to seek and to receive outside support as stated in a number of GA resolutions was equally assessed. It was noted that a number of states provided such aid to several liberation movements, but the study focussed on Eritrea, Western Sahara, Palestine, and Yugoslavia as particular case studies. It found that states provided such aid without encountering sanctions from third states. For this reason, it is safe to say that customary law in this area was established by virtue of acquiescence, unless there is support to the contrary. As the writer found none, the conclusion is then that where there has been consistent practice by a number of states, then silence by others may be interpreted as acquiescence in the development of rules of customary international law.

Despite the GA resolutions and state practice shown above, a powerful minority of states still do not accept that liberation movements have the right to use force in international law. The study explored state practice since the WWII, and found that some states, particularly the Third World Countries, have recognised governments prematurely and accepted liberation movements. Also, it showed that the UN and OAU practice supported the 'justness' of such

struggles, and gave them observer status in most conferences under their auspices. Acceptance of these movements by a large number of states challenged the idea that sovereign states are the only international actors. For now, at least, wars of liberation are widely considered to be international wars to which international law must apply.

4.2 The way forward

Even though impressive progress is taking place in the development of the right of self-determination, there is a growing need for it to be clarified. For instance the term 'people' has never been defined precisely. While decolonisation has been universally accepted as an essential part of the law of self-determination, the legal status of its other aspects remain unclear. Thus, the study suggests that, as the right of 'all peoples', self-determination should apply also to peoples who for many years have suffered difficulties within states such as grave violations of human rights. The right of self-determination is an indispensable precondition for the enjoyment of human rights and freedoms, for achieving progress and development. Its violation undermines peace and security. However, the peoples of Palestine and the Western Sahara are still under alien occupation and they cannot exercise their right of self-determination. The writer submits that the right violated by the occupiers Morocco and Israel, is a right *erga omnes*, and as such violation of it are 'the concern of all states'. It is further submitted that Israel's construction of the wall is in breach of the Palestinian people's right to self-determination, and that all states are under an obligation not to recognise the division of territory Israel seeks to achieve temporarily. They should not render aid or assistance in maintaining the situation created by occupation. It is also suggested that Israel should terminate its breach of international law and withdraw from the occupied Palestinian territory in order to let the people exercise their right to self-determination.

Considering the character and the importance of the right of self-determination (*erga omnes* and *jus cogens*), it is also an obligation of all states, while respecting the Charter and international law, to ensure compliance by alien occupiers and oppressive regimes with the principle of self-determination as embodied in the Charter. It is submitted that every state has a duty to refrain from the use of force to deprive peoples of the right to self-determination. If colonial, alien or racist regimes use force to deny self-determination, the peoples represented by liberation movements should have a right to use force to attain it. It is finally suggested that in their action against such forcible action, peoples should be supported by third states in various ways without infringing the rules relating to non-intervention.

BIBLIOGRAPHY

Cases and Advisory Opinions

Corfu Channel Case (Merits), ICJ Reports (1949).

Asylum Case (Judgment), ICJ Reports (1950).

Anglo-Norwegian Fisheries Case (Judgement), ICJ Reports (1951).

Nottebohm Case (Liechtenstein v Guatemala), (Judgement), ICJ Reports (1955).

Case Concerning Right of Passage over Indian Territory (Portugal v India), (Merits), ICJ Reports (1960).

North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), (Judgments), ICJ Reports (1969).

Case Concerning Barcelona Traction, Light and Power Corporation (Belgium v Spain), (Merits), ICJ Reports (1970).

Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), (Advisory Opinion), ICJ Reports (1971).

Western Sahara (Advisory Opinion), ICJ Reports (1975).

Case Concerning the Frontier Dispute Case (Burkina Faso v Mali), (Judgement), ICJ Reports (1986).

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), (Merits), ICJ Reports (1986).

Case Concerning East Timor Case (Portugal v Australia), (Judgment), ICJ Reports (1995).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), ICJ Reports (2004).

International instruments

Convention with Respect to the Laws and Customs of War on Land (Hague, II) (29 July 1899), entered into force September 4, 1900.

Convention Respecting the Laws and Customs of War on Land (Hague IV) (18 October, 1907), entered into force January 26, 1910.

Covenant of the League of Nations (Adopted 28 June 1919).

The General Treaty for the Renunciation of War as an Instrument of National Policy, (Kellogg-Briand Pact), Signed in Paris, August 27, 1928, entered into force 24 July 1929.

Montevideo Convention on the Rights and Duties of States, signed at Montevideo, 26 December 1933, entered into Force, 26 December 1934.

Charter of the United Nations, June 26, 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

Statute of the International Court of Justice, June 26, 1945.

Charter of the International Military Tribunal at Nuremberg, 82 UNTS 279, August 8, 1945.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN, UN Doc A/6316 (1966), 999 UNTS 171, entered into force on 23 March, 1976.

International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force Jan. 3, 1976.

Vienna Convention on the Law of Treaties, 1969 (1969) 8 ILM 679.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Resolutions

GA Res. 545 (XVIII) of 29 July 1954.

GA Res. 1514 (XV) of 14 December 1960.

GA Res. 1541 (XV) of 15 December 1960.

GA Res. 2105 (XX) 20 December 1965.

GA Res. 2107 (XX) of 21 December 1965.

GA Res. 2131 (XX) of 21 December 1965.

GA Res. 2189 (XXI) of 13 December 1966.

GA Res. 2326 (XXII) of 16 December 1967.

GA Res. 2383 (XXIII) of 7 November 1968.

GA Res. 2396 (XXII) of 2 December 1968.

GA Res. 2446 (XXIII) of 20 December 1968.

GA Res. 2465 (XXIII) of 20 December 1968.

GA Res. 3314 (XXIV) of 24 February 1969.

GA Res. 2508 (XXIV) of 21 November 1969.

GA Res. 2507 (XXIV) of 21 November 1969.

GA Res. 2547 (XXIV) of 8 December 1969.

GA Res. 2548 (XXIV) of 11 December 1969.

GA Res. 3103 (XXVIII) of October 1970.

GA Res. 2625 (XXV) of 24 October 1970.

GA Res. 2649 (XXV) of 30 November 1970.

GA Res. 2646 (XXV) of 30 November 1970.

GA Res. 2672 (XXV) of 8 December 1970.

GA Res. 2787 (XXVI) of 6 December 1971.

GA Res. 3210 (XXIX) of 14 October 1974.

GA Res. 3237 (XXIX) of 22 November 1974.

GA Res. 3328 (XXIV) of 16 December 1974.

GA Res. 3458A (XXX) of 10 December 1975.

GA Res. 31/152 of 20 December 1976.

SC Res. 253 (1968) of 29 May 1968.
SC Res. 276 (1970) of 30 January 1970.
SC Res. S/445 (1975) of 18 August 1975.
SC Res. 713 (1991) of 25 September 1991

Books and Journals

- Bayesky, Anne *Self-Determination in International Law: Quebec and Lessons Learned* (2000) Kluwer Law International.
- Bisharat, George E 'Land law and legitimacy in Israel and the occupied territories' (1994) 43 *AULR* 1-79.
- Blay, Sam 'Self-determination: a reassessment in the post-communist era' (1993-1994) 22 *DJIL* 275-316.
- Briggs, Herbert W *The Law of Nations* 2ed (1952) Appleton-Century-Crofts, Inc.
- Brownlie, Ian *International Law and the Use of Force by States* (1963) Oxford University Press.
- Brownlie, Ian *International Law and the Use of Force by States* (1963) Oxford University Press.
- Brownlie, Ian *Principles of Public International Law* 7ed (2008) Oxford University Press.
- Cannizzaro, Enzo and Palchetti, Paolo *Customary International Law on the Use of Force: a Methodological Approach* (2005) Martinus Nijhoff Publisher.
- Canuel, Edward 'Nationalism, self-determination, and Nationalist movements: exploring the Palestine and Quebec drives for independence, (1997) 20 *BCIL & CLR* 85-122.
- Cassese, Antonio *International Law* 2ed (2005) Oxford University Press.
- Cassese, Antonio *International Law* (1979) Oxford University Press.
- Cassese, Antonio *International law in a Divided World* (1988) Oxford University Press.
- Cassese, Antonio *Self-determination of People: a Legal Reappraisal* (1995) Cambridge University Press.
- Cassese, Antonio *UN Law/Fundamental Rights: Two Topics in International Law* (1979) Sijthoff & Noordhoff International Publisher.
- Castellinno, Joshua *International Law and Self-determination* (2000) Martinus Nijhoff Publishers.
- Chadwick, Elisabeth *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (1996) Martinus Nijhoff Publishers.
- Cobban, Alfred *The Nation State and National Self-determination* (1969) Fontana.
- Collins, John 'Self-determination in international law: the Palestinians' (1980) 12 *CWRLIL* 137-167.
- Crawford, James *The Creation of States in International Law* (1979) Oxford University Press.
- Dinstein, Yoram 'Collective human rights of peoples and minorities' (1976) 25 *ICLQ* 102-120.
- Dinstein, Yoram and Domb, Fania *Israel Yearbook of Human Rights* (1989) Martinus Nijhoff Publishers.
- Dixon, Martin *Textbook on International Law* (1990) Oxford University Press.

- Emerson, Rupert 'Self determination' (1971) 65 *AJIL* 549-475.
- Gayim, Eyassu *The Eritrean Question: the Conflict Between the Right to Self-determination and the Interests of States* (1993) Iustus Förlag AB, Appala.
- Gerner, Deborah *One Land, Two Peoples* (1991) Westview Press.
- Ghanea, Nazila and Xanthaki, Alexandra *Minorities, Peoples and Self-determination* (2005) Martinus Nijhoff Publisher.
- Gorelik, Robert E 'Wars of National Liberation: *Jus Ad Bellum*' (1979) 11 *JIL* 71-94.
- Gray, Christine *International law and the Use of Force* 2ed (2004) Oxford University Press.
- Gray, Chritine *International Law and the Use of Force* 3ed (2008) Oxford University Press.
- Grenville, John A and Wasserstein, Bernard, *The Major International Treaties of the Twentieth Century* (2001) Routledge Publisher.
- Hackworth, Green H *Digest of International Law* (1940) United States Government Printing Office.
- Hannum, Husrt 'Rethinking Self-Determination' (1993) 34 *VJIL* 1-69.
- Harris, David J *Cases and materials on International Law* 6ed (2004) Sweet & Maxwell Limited.
- Hensel, Howard M *The Just War Tradition and the Customary Law of Armed Conflict* (2008) Ashgate Publishing Limited.
- Heraclides, Alex *The self-determination in Law of Minorities in International Politics* (1991) Routledge Publisher.
- Higgins, Noelle and O'Reilly, Kieran 'The use of force, war of national liberation and the right to self-determination in the South Ossetian conflict' (2009) 9 *ICLR* 567-583.
- Hiwet, Gebre 'Self-determination: its evolution and practice by the United Nations and its application to the case of Eritrea' (1987) 6 *WILJ* 78-128.
- Inge, Porter V 'Two case studies in self-determination: the Rock and the Bailiwick' (2003) *SDILJ* 1-32.
- Jennings, Sir Ivor *The Approach to Self-government* (1956) Cambridge University Press.
- Kelly, Michael J 'Political downsizing: the re-emergence of self-determination and the movement toward smaller, ethnically homogenous states' (1999) 47 *DLR* 209-278.
- Kelsen, Hans *The Law of the United Nations: a Critical Analysis of Its Fundamental Problems* 1ed (1951) Stevens & Sons Limited.
- Kolodner, Eric 'Essay, the future of the right to self-determination' (1994) 10 *CJIL* 1-12.
- Laing, Edward A 'The norm of self-determination' (1992) 22 *CWILJ* 209-248.
- Lung-Chu Chen 'Self-Determination and World Public Order' (1991) 66 *NDLR* 1287-1298
- Macartney, Carlile A *National States and National Minorities* (1934) Oxford University Press.
- Malanczuk, Peter *Akehurst's Modern Introduction to International Law* 7ed (1997) Routledge Publisher.
- McCorquodale, Robert *Self-determination in International Law* (2000) Dartmouth Publishing Company Limited.
- Musgrave, Thomas *Self-determination and National Minorities* (2000) Oxford University Press.
- Prechtel, Dietmar *Minorities in International Law today* (1999) Unpublished LLM Dissertation, University of Cape Town.

- Radan, Peter *The Break-up of Yugoslavia and the International Law* (2002) Routledge Publisher.
- Remler, Thomas *The Right of Anticipatory Self-Defence and the Use of Force in Public International Law* (2008) Unpublished LLM Dissertation, University of Cape Town.
- Rigo, Sureda A *The Evolution of the Right of Self-Determination* (1973) AW Sijthoff-Leiden.
- Roland, Rich 'Recognition of states: the collapse of Yugoslavia and the Soviet Union' (1993) 4 *EJIL* 36-65.
- Rosentock, Robert 'The declaration of principles of international law concerning friendly relations' (1971) 65 *AJIL* 713-735.
- Russel, Frederic H *The Just War in the Middle Ages* (1975) Cambridge University Press.
- Shaw, Malcolm N *International Law* (2003) Cambridge University Press.
- Shaw, Malcolm N *International Law* 4ed (1997) Cambridge University Press.
- Shaw, Malcolm N *Title to Territory in Africa* (1986) Cambridge University Press.
- Slomanson, William R *Fundamental Perspective on International Law* 3ed (2000) Wadsworth/Thomson Learning.
- Smith, Anthony D *Nationalism in the Twentieth Century* (1979) Canberra, Australia National University Press.
- Steiner, Henry J *et al International Human Rights in Context New York* (2000) Oxford University Press.
- Summers, James *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations* (2007) Martinus Nijhoff Publishers.
- Tesfagiorgis, Gebre H 'Self-determination: its evolution and practice by the United Nations and its application to the case of Eritrea' (1987) 6 *WILJ* 75-128.
- Travers Patrick J 'The legal effects of United Nations action in support of the Palestine Liberation Organisation and the National liberation of Africa' (1976) 17 *HLJ* 561-580.
- Tsagourias, Nicholas *Transnational Constitutionalism: International and European Models* (2007) Cambridge University Press.
- Vaughan, Lowe and Malgosia, Fitzmaurice *Fifty years of the International Court of Justice* (1996) Cambridge University Press.
- Weisburd, Arthur M *Use of Force: the Practice of States since World War II* (1997) The Penn State Press.
- Weller, Marc 'The international response to dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *AJIL* 569-607.
- Wilson, Heather A *International Law and the Use of Force by National Liberation Movements* (1998) Oxford University Press.
- Wippman, David *International Law and Ethnic Conflict* (1998) Cornell University Press.
- Zubeida, Mustafa 'Principle of self-determination in international law' (1971) 5 *ILR* 479-487.

Internet sources

- Bedjaoui, Mohammed *International Law: Achievements and Prospects* (1991) available at http://books.google.co.za/books?hl=en&lr=&id=jrTsNTzcY7EC&oi=fnd&pg=PA101&ots=11buH1BLm&sig=kEKAA_3QT_UWwakR2c1PZ1g9xn0#v=onepage&q=&f=false [accessed 26 November 2009].
- Clark, Anthony and Beck, Robert *International Law and the Use of Force: beyond the UN Charter Paradigm* 2ed (1993) available at <http://books.google.co.za/books?id=j4w9AAAAIAAJ&pg=PA40&lpg=PA40&dq=The+use+of+force+by+peoples+in+pursuit+of+the+right+to+self-determination&source> [accessed 24 November 2009].
- Edre, Olalia 'The status in international law of national liberation movements and their use of armed force' available at <http://www.iapl.net/statements/nlm.pdf> [accessed 21 November 2009] 1-36.
- Gail Gardam, Judith *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993) available at <http://books.google.co.za/books?id=MGT2hJFS9MkC&pg=PA75&lpg=PA75&dq=The+exercise+of+self-determination+and+the+law+of+the+use+of+force&source> [accessed 24 November 2009].
- Hannum, Hurst *Autonomy, Sovereignty, and Self-Determination: the Accommodation of Conflicting Rights* (1990) available at http://books.google.co.za/books?id=gOq52_guRUoC&pg=PA27&lpg=PA27&dq=Autonomy,+Sovereignty,+and+Self-Determination:++the+Accommodation+of+Conflicting+Rights [accessed 23 November 2009].
- Higgins, Noelle 'The application of international humanitarian law to wars of national liberation' (2004) available at: www.jha.ac/Articles/a132.pdf [accessed 10 December 2009] 1-90.
- International Humanitarian Law and Human Rights available at <http://www.ohchr.org/Documents/Publications/FactSheet13en.pdf> [accessed 01 December 2009].
- Kumbaro, Dejena 'The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention' (2001) available at <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> [accessed 19 November 2009] 1-75.
- Marshall, Brown P 'The Aaland Islands Question' (1968) available at <http://www.jstor.org/stable/2187689?cookieSet=1> [accessed 19 December 2009] 268-272.
- Nixon, Charles 'Self-Determination: The Nigeria/Biafra Case' (1972) available at <http://www.jstor.org/stable/2010453> [accessed 12 October 2009] 473-497.
- O'Brien, John *International Law* (2001) available at http://books.google.co.za/books?id=wY4T25cRwCEC&dq=The+UN+general+Assembly+resolution+as+soft+law&source=gbs_navlinks_s [accessed 27 December 2009].

- Olawale Taslim, Elias *Africa and the Development of International Law* (1972) available at <http://books.google.co.za/books?id=dfUbGVb0hk4C&pg=PA71&lpg=PA71&dq=General+Assembly+and+Security+Council+resolutions+in+international+law&source> [accessed 19 December 2009].
- Pomerance, Michla *Self-Determination in Law and Practice: the New Doctrine in The United Nations* (1982) available at http://books.google.co.za/books?id=XGStW8qIMn4C&dq=At+its+inception,+the+UN+Charter+clearly+did+not+include+any+general+%E2%80%98right%E2%80%99+of+self-determination&source=gbs_navlinks_s [accessed 23 November 2009].
- Şahin, Mustafa 'The use of force in relation to self-determination in international law' (1999) available at <http://www.foreignpolicy.org.tr/documents/periodicals/vol23.pdf> [accessed 21 November 2009] 1-47.
- Sluka, Jeff 'National Liberation Movements in Global Context' available at http://www.tamilnation.org/conferences/tamil_eelam/96_new_zealand/jeffsluka.html [accessed 27 November 2009] 1-15.
- The Logic of Secession (1980) available at <http://www.jstor.org/stable/795983?cookieSet=1> [accessed 19 December 2009] 802-824.