Self-Determination

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A. Historical Background

1 The political origins of the modern concept of self-determination can be traced back to the Declaration of Independence of the United States of America of 4 July 1776, which proclaimed that governments derived ‘their just powers from the consent of the governed’ and that ‘whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it’. The principle of self-determination was further shaped by the leaders of the French Revolution, whose doctrine of popular sovereignty, at least initially, required renunciation of all wars of conquest and contemplated annexation[s] of territory to France only after plebiscites.

2 During the 19th century and the beginning of the 20th century the principle of self-determination was interpreted by nationalist movements as meaning that each nation had the right to constitute an independent State and that only nationally homogeneous States were legitimate. This so-called ‘principle of nationalities’ provided the basis for the formation of a number of new States and finally, at the end of World War I, for the dismemberment of the Austro-Hungarian, Russian, and Ottoman Empires. The principle of self-determination was also prominent in the unification processes of Germany and Italy, which to a large degree were based on national characteristics in which plebiscites played an important part (→ Germany, Unification of).

3 Self-determination further evolved when it was espoused by the socialist movement and the Bolshevik revolution. Defined and developed by Lenin and Stalin, the principle of self-determination was represented as one of international law. It should, however, be mentioned that the right of self-determination in Soviet doctrine existed only for cases where it served the cause of class conflict and so-called socialist justice; it was only a tactical means to serve the aims of world communism and not an end in itself.

4 During World War I, the President of the United States Wilson championed the principle of self-determination as it became crystallized in the → Fourteen Points of Wilson (1918). Although this proposal formed the basis of the peace negotiations with the Central Powers, self-determination was subsequently far from fully realized in the Paris peace treaties. It was, however, reflected in a number of plebiscites held by the Allies in some disputed areas and it was one of the basic components of a series of treaties concluded under the auspices of the → League of Nations for the protection of minorities (see also → Minority Protection System between World War I and World War II). Finally, in Art. 22 Covenant of the League of Nations, the → mandates system was devised as a compromise solution between the ideal of self-determination and the interests of the administrative powers. However, self-determination as a general principle did not form part of the Covenant of the League of Nations and therefore was, for the duration of the League of Nations, a political rather than a legal concept. This was confirmed by the Council of the League of Nations and its expert advisors in the → Åland Islands dispute of 1920–21 even though, in the particular circumstances of the case, → autonomy rights were granted to the population concerned (Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question 5).

B. Manifestations under the Aegis of the United Nations
1. Incorporation into the Charter of the United Nations

5 The principle of self-determination was invoked on many occasions during World War II. It was also proclaimed in the Atlantic Charter (1941) (Declaration of Principles of 14 August 1941), in which President Roosevelt of the United States and Prime Minister Churchill of the United Kingdom declared, inter alia, that they desired to see ‘no territorial changes that do not accord with the freely expressed wishes of the peoples concerned’ (Principle 2 Atlantic Charter), that they respected ‘the right of all peoples to choose the form of government under which they will live’ (Principle 3 Atlantic Charter) and that they wished to see ‘sovereign rights and self-government restored to those who have been forcibly deprived of them’ (Principle 3 Atlantic Charter). The provisions of the Atlantic Charter were restated in the Declaration by United Nations (United Nations (UN)) signed on 1 January 1942, in the Moscow Declaration of 1943 and in other important instruments of the time.

6 Ultimately, the provisions of the Atlantic Charter had a considerable influence on the work of the San Francisco Conference of 1945 where the concept of self-determination took shape and was incorporated into the United Nations Charter (‘UN Charter’). Art. 1 (2) UN Charter states that it is one of the purposes of the UN 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’. In Chapter IX UN Charter on International Economic and Social Cooperation, Art. 55 UN Charter lists several goals the organization should promote in the spheres of economics, education, culture, and human rights with a view, as is noted in the introductory clause, ‘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 UN Charter also implicitly refers to the principle of self-determination in the part concerning colonies and other dependent territories. Art. 73 UN Charter affirms that

[m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

7 Furthermore, Art. 76 (b) UN Charter provides that one of the basic objectives of the trusteeship system is to promote the ‘progressive development’ of the inhabitants of the trust territories towards ‘self-government or independence’, taking into account, inter alia, ‘the freely expressed wishes of the peoples concerned’ (see also United Nations Trusteeship System).

8 In trying to assess the legal significance of these provisions it should not be assumed that the concept of self-determination became a legally binding principle of conventional international law by the mere fact of its incorporation into the UN Charter. Although the provisions concerning non-self-governing and trust territories entail binding international obligations, the general principles of self-determination and of equal rights of peoples, which in the formula used by the UN Charter appear to be two component elements of the same concept, seem to be too vague and also too complex to entail specific rights and obligations. In particular, the UN Charter neither supplies an answer to the question as to what constitutes a ‘people’ nor does it lay down the content of the principle. In the absence of any concrete definition, and taking into account the highly various facts of international life, it cannot realistically be interpreted, applied or implemented like a legal norm and thus primarily possesses a very strong moral and political force in guiding the organs of the UN in the exercise of their powers and functions. This interpretation is supported by the fact
that self-determination is conceived in the text of Art. 1 (2) UN Charter as one among several possible ‘measures to strengthen universal peace’ and, in order to fulfil its instrumental function, must therefore be of a highly flexible nature.

2. Development through UN Practice

9 The first significant contribution made by the UN in developing the concept of self-determination was the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 1514 [XV] [14 December 1960]). According to this resolution, adopted by the United Nations General Assembly (→ United Nations, General Assembly; ‘UNGA’) without dissenting votes, all peoples have the right to self-determination. The administrative powers were called upon to take immediate steps to transfer without reservation all powers to the peoples in the trust and → non-self-governing territories or all other territories which had not yet attained independence, ‘in accordance with their freely expressed will and desire’ (Declaration on the Granting of Independence para. 5). The Declaration on the Granting of Independence represents the political and—in some observers’ view—the legal basis for the → decolonization policy of the UN for the implementation of which special institutions and procedures were created using plebiscites and elections as modes to determine the will of the peoples. In UNGA Resolution 1541 (XV) of 15 December 1960 the UNGA also elaborated a list of principles which were to guide members in deciding whether or not particular territories qualified as territories to which Chapter XI UN Charter applied.

10 A further step in the development of the concept of self-determination by the UNGA was the adoption of the → International Covenant on Economic, Social and Cultural Rights (1966) (‘ICESCR’) and the → International Covenant on Civil and Political Rights (1966) (‘ICCPR’). The identically worded Arts 1 (3) ICCPR and ICESCR restate the right of all peoples to self-determination, as defined in the Declaration on Granting of Independence mentioned above, and call upon the ‘States Parties... including those having responsibility for the administration of Non-Self-Governing and Trust Territories’, to promote and respect this right. In the same article they also state that 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 cooperation, based upon the principle of mutual benefit, and international law’, and that in ‘no case may a people be deprived of its own means of subsistence’ (Arts 1 (2) ICCPR and ICESCR). By being included in Arts 1 ICCPR and ICESCR, the concept of self-determination as a whole was given the characteristic of a fundamental human right or, more accurately, that of a source or essential prerequisite for the existence of individual human rights, since these rights could not genuinely be exercised without the realization of the—collective—right of self-determination. In their general formulation the ICCPR and ICESCR provide essential evidence of the meaning and content of the principle of self-determination even for States which are not parties to them.

11 In its → Friendly Relations Declaration (1970) (Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations), adopted by → consensus as UNGA Resolution 2625 (XXV) of 24 October 1970, the UNGA worked out the most authoritative and comprehensive formulation so far of the principle of self-determination. According to this document ‘the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations’ embraces the right of all peoples ‘freely to determine, without external interference, their political status and to pursue their economic, social and cultural development’ as well as the duty of every State ‘to respect this right in accordance with the provisions of the Charter’ (Principle 5 Friendly Relations Declaration). It further added that ‘the establishment of a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status...
freely determined by a people constitute modes of implementing the right of self-
determination (Principle 5 Friendly Relations Declaration), thus stressing, as the critical
issue, the methods of reaching the decision and not the result.

C. Status, Scope, and Content in Contemporary International Law

Both the UN and the majority of authors maintain that the principle of self-
determination is part of modern international law. There are indeed good reasons for
recognizing its legal character, as after its mere inclusion in the UN Charter the principle
has been confirmed, developed, and given more tangible form by consistent State
practice and was embodied among ‘the basic principles of international law’ in the Friendly
Relations Declaration. The point at issue seems to be to what extent the principle operates
as a legal right in contemporary international law and what other—more indirect—legal
consequences may be attributed to it.

1. Self-Determination as a Binding Rule of International Law

Four instances may inform the principle of self-determination with a legal dimension.

(a) Right to Self-Determination: Instances

(i) The principle of self-determination is binding upon the parties, whether they have
adopted it as the basis or as a criterion for the settlement of a particular issue or
dispute. In the peace treaties after World War I, and in the cases of Kashmir (after 1948), the Saar Territory (1955), and Algeria’s struggle for independence, the principle of self-determination was chosen as a basis for negotiation, and in the Agreement on Ending War and Restoring Peace in Vietnam (1973) the parties expressly recognized the South Vietnamese people’s right to self-determination.

(ii) Self-determination—as a result of the practice of the UN under Chapters XI to XIII
UN Charter—clearly emerged as the legal foundation of the law of decolonization. As
expressly affirmed by the ICJ both in Legal Consequences for States of the Continued
Presence of South Africa in Namibia (South West Africa) notwithstanding Security
Sahara (Advisory Opinion) (1975) paras 54–59, it became applicable to non-self-
governing territories, trust territories and mandates, notwithstanding the differences
and the qualifications of the respective constituent instruments (South West Africa/
Namibia [Advisory Opinions and Judgments]; Western Sahara [Advisory Opinion]).
As such, it includes the right of the population of a territory freely to determine its
future political status. Furthermore, the Friendly Relations Declaration recognized
that the territory of a colony or other non-self-governing territory has, under the UN
Charter, reached a status separate and distinct from the territory of the State
administering it. It is generally concluded that, as a consequence of this qualification,
the use of force to prevent the exercise of self-determination of a colonial people has
become unlawful (see also Use of Force, Prohibition of), as has the assistance of
third parties to the metropolitan powers in their effort to frustrate self-determination.
On the other hand, it should be noted that armed support of colonial liberation movements is not considered legal by a number of States and was not recognized as
such, for lack of consensus, in the Friendly Relations Declaration. Furthermore, it
must be noted that the uti possidetis doctrine guided the process of decolonization
and thus contributed to the realization of self-determination in that it guaranteed that
borders between former colonies—or non-self-governing territories—or administrative borders that were drawn during colonization, would be maintained (see Frontier Dispute [Burkina Faso/Mali] paras 20-25; → Frontier Dispute Case [Burkina Faso/Republic of Mali]).

(iii) Self-determination might be considered to apply, as was suggested by the Commission of Rapporteurs in the Åland Islands case in 1921, in situations where the existence and extension of territorial sovereignty is altogether uncertain.

(iv) Self-determination includes the right of a people of an existing State to choose freely their own political system and to pursue their own economic, social, and cultural development. As such it does not, in light of the current state of international law, impose on all States the duty to introduce or maintain a democratic form of government, but essentially refers to the principle of sovereign equality of States and the prohibition of intervention which are already part of international law (→ Intervention, Prohibition of; → States, Sovereign Equality). However, recent scholarly work suggests a more nuanced approach to self-determination in this regard (see paras 33-39 and 41-44 below).

(b) Right to Self-Determination: Legal Issues

18 The above-mentioned instances make it obvious that any legal approach to self-determination must address a number of issues. Firstly, it must identify the holder of the right to self-determination. It must answer the question: Who is entitled to the right of self-determination? Who is ‘the people?’ Finding an answer to this question is obviously not an easy task, especially when bearing in mind the troubles that this sort of question causes in other domains of collective rights, such as with the definitions of the ‘minority’, the ‘indigenous population’, or the ‘nation’ (see also → Indigenous Peoples; → Minorities, International Protection). Unsurprisingly, no definition of the term ‘people’ has been generally agreed upon so far.

19 As with other collective rights, the lack of definition does not by itself mean that it is always unclear in concrete instances whether one or more peoples exist. Even though highly antagonistic claims of competing groups regularly clash when self-determination is at stake, the claim of a particular group to constitute a people often goes unchallenged. In particular, in the process of decolonization the uti possidetis principle—and more simply fait accompli—made certain distinctions possible: the UN and States could distinguish between peoples along the borders of former colonies or → protectorates. The ICJ followed suit in the Western Sahara Advisory Opinion in stating that ‘[t]he right of that population to self-determination constitutes therefore a basic assumption of the questions put to the Court’ (para. 70). In a similar way, the ICJ in the East Timor (Portugal v Australia) case took note of the fact that both parties to the dispute agreed that the people of East Timor had the right to self-determination (at paras 31 and 37) and thereby underscored that the population of East Timor is a people. Even outside the context of decolonization, where it is not self-evident that the right to self-determination applies (see paras 33-39 below), the existence of a people is sometimes accepted without further ado. Thus, the ICJ ‘observes that the existence of a “Palestinian people” is no longer in issue’ and that the rights of the Palestinian people ‘include the right to self-determination’ (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion] para. 118; → Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]). Likewise, the Independent International Commission on
Kosovo, author of one of the most authoritative documents on Kosovo, assumed without much discussion that there is a people of Kosovo: arguably, the strong moral and political duty on the part of the international community ‘extends to the realization of the right of self-determination for the people of Kosovo’ and ‘[t]he people of Kosovo must take over the running of their affairs’ (The Kosovo Report: Conflict, International Response, Lessons Learned 186 and 287 [emphasis added]).

20 The reason why parties—and the international community—concur in their assessment of whether a group constitutes a people or not is that different consequences can be drawn from the existence of a people. One should not assume that just because there is agreement about what constitutes a people that no complications arise concerning the application of the right to self-determination: it is the ‘how’ not the ‘who’ of self-determination that is argued about, notably in two regards: (i) how is the people made up, and (ii) how does it exercise its right? These questions must be held apart from the way the right to self-determination is implemented after it has been exercised. (iii) Finally, the identification not only of the holder but also of the duty-bearer of the right to self-determination is necessary.

21 (i) Problems regarding the precise composition of a people usually arise when the right to self-determination is invoked, in particular by way of referendum because then the focus shifts from the question ‘who is the people’ to ‘who belongs to the people’. The latter question reveals the nexus between the collective right to self-determination and the participatory right of the individual. In other words, the collective composition of the people and the individual right to vote in order to co-determine its collective destiny are simply two sides of the same coin. As a result, discussions regarding membership of a people usually arise when voters’ registers need to be established or a census is conducted. These arguments are not only further complicated by the individual’s free choice of its identity, based on human rights. They are also fuelled by—voluntary or forced—population shifts that typically happen in the context of self-determination situations and that cause more arguments about participation thresholds and qualified majorities to be applied in the referendum. Such a complex of problems can be witnessed in the controversy surrounding Western Sahara. The referendum in Western Sahara, to which Spain as former colonial power agreed, has been essentially blocked due to disagreement over who belongs to the people of Western Sahara. One side wants to rely on the census initiated by Spain in 1974, whereas the other side proposes more recent data including persons who have moved into the territory of Western Sahara after Spain left. Over thirty years of stalemate, during which several reconciliation attempts, notably by UN special envoy James Baker, failed, show the depth of the disagreement. In a similar vein, though outside the context of decolonization, the Montenegro referendum of 21 May 2006 in which it was decided whether Montenegro would separate from Serbia was accompanied by arguments over who had the right to vote and what participation threshold and qualified majority were required. In light of these experiences it seems that a prospect of self-determination referenda in other disputed regions, such as in Palestine or in Tibet where massive population fluctuations have occurred—in particular in terms of publicly sponsored relocations and of refugees—could only aggravate the situation.
(ii) How do peoples exercise their right to self-determination? This is the question about the act of self-determination and, more specifically, about the creation and expression of the free will of a people. While, in principle, the will of a people could be formed in various ways—through government decision or parliamentary resolution, possibly supported by a plebiscite, or through a referendum—understandably, given the circumstances of decolonization and the fact that it should be an act of self-determination, preference is accorded at least implicitly to referenda: Principle IX UNGA Resolution 1541 (XV) of 15 December 1960 states that ‘[t]he integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage’ (reaffirmed by the ICJ in the Western Sahara Advisory Opinion at para. 57; but nota bene the caveat in para. 59). Outside the context of decolonization however, preferences may be different (see paras 33–39 below). Apart from that, it is important to note that one act of self-determination does not exhaust the right. The right subsists and continues to be vested in the people.

(iii) The right to self-determination may be implemented in different ways. As Principle 5 Friendly Relations Declaration puts it: ‘The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people’. Clearly, these modes of implementation are meant to apply to territories that are to be decolonized. They show that the right to self-determination may be exercised internally, within the confines of a State, or externally, in creating a new State (see also → New States and International Law). This distinction in the implementation of the right to self-determination basically enables the extension of the right to self-determination beyond the domain of decolonization (see paras 33–39 below).

(iv) A right must not only have a holder but also a duty-bearer: who is entitled must be distinguished from who is obliged (at least according to the Hohfeldian approach; see Hinsch and Stepanians 119). The ICJ in East Timor answered the question of the duty-bearer for the right to self-determination by referring to the highly controversial concept ‘erga omnes’ developed in the → Barcelona Traction Case: ‘In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable’ (East Timor para. 29; see also Barcelona Traction (Second Phase) para. 33). It remains unclear, however, what exactly the legal consequences of this qualification are. What exactly is the duty of everyone (omnes)? The ICJ in East Timor only held what → erga omnes did not mean—namely that, when self-determination is at stake, the ICJ has jurisdiction despite the lack of consent of a State: ‘[E]rga omnes character of a norm and the rule of consent to jurisdiction are two different things’ (at para. 29). However, after the East Timor case the ICJ, in the Israeli Wall Advisory Opinion, went on to clarify what kind of obligations for third States followed from the violation of the right to self-determination:
Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end (Israeli Wall Advisory Opinion para. 159).

Despite this clarification it remains difficult to establish how and by which act the right to self-determination is violated in the first place. Even though the ICJ held in the Israeli Wall Advisory Opinion that the right to self-determination was breached by creating the ‘risk of further alterations to the demographic composition of the Occupied Palestinian Territory’ (at para. 122) and because ‘the route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements’ (at para. 122), it is far from clear why the right to self-determination is breached and what the connection in concreto to the right is. In fact, the fragmentary nature of the ICJ’s reasoning only reflects the basic uncertainties about the content of the right to self-determination, at least outside decolonization situations. Certainly, the erga omnes nature of the right to self-determination adds to this uncertainty. Yet, it must be noted that Judge Weeramantry in his dissenting opinion in East Timor came to positive conclusions as to the erga omnes obligation (East Timor [Portugal v Australia][Dissenting Opinion of Judge Weeramantry] 139).

2. Self-Determination and the Interpretation and Development of International Law

The considerable problems with the right to self-determination are, of course, not by themselves an argument against the legal dimension of self-determination. But they show that legal and extra-legal aspects are probably more strongly intermingled in self-determination than with other rights and principles. In light of this, one seems well advised to look beyond the mere status issue of self-determination. Whether self-determination is to be understood as a right or not does not seem to be the decisive issue. The broader dimension of self-determination seems relatively more important. To understand self-determination as a principle that is flexible, that underlies the whole international order, and that informs, shapes, and contributes to the development of international law, seems a more promising approach. Only in this way can self-determination develop its full potential.

Two ‘intermediate’ functions seem particularly important in this regard: the aid provided by the principle of self-determination in the interpretation of existing international law (see paras 28–29 below; see also Interpretation in International Law) and its character as a basic source of legitimation for the development and alteration of international law (see paras 30–44 below). Applications of the latter function can be seen in the expansion of the principle of self-determination beyond decolonization, accompanied by a focus on (i) internal self-determination; (ii) in the application of the principle to a people that lives in two separate States, thus enabling (re-)unification; and (iii) in the controversy surrounding the right to secession, fuelled by the Kosovo case (see paras 41–44 below).
(a) The Interpretative Function

28 An important function of the principle of self-determination stems from its inclusion among the purposes of the UN proclaimed in Art. 1 UN Charter. As such it appears as a guiding principle in clarifying the functions and powers of the organization and the rights and duties of its members. In some provisions the UN Charter refers either explicitly or implicitly to these purposes. Therefore the terms of Art. 2 (3) UN Charter, according to which all members are obliged to ‘settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered’ (emphasis added) might be understood to refer, among other things, to the principle of self-determination. The same idea is more clearly expressed in Art. 14 UN Charter by virtue of which the UNGA may recommend measures for the peaceful adjustment of any situation...which it deems likely to impair the...friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

29 Similarly the United Nations Security Council (‘UNSC’; → United Nations, Security Council) is called upon in Art. 24 (2) UN Charter to ‘act in accordance with the Purposes and Principles of the United Nations’ in discharging its duties among which an important role is played by the peaceful settlement of disputes regulated in Chapter VI UN Charter (→ Peaceful Settlement of International Disputes; → United Nations, Purposes and Principles). Furthermore, Arts 4 and 6 UN Charter concerning the admission and expulsion of members might be interpreted in the light of the principle of self-determination. Besides these examples, the principle of self-determination should be considered as an essential guideline in determining the activities of the UN and its organs, among which the efforts of the United Nations Secretary-General (→ United Nations, Secretary-General) in offering his → good offices such as the arrangement or supervision of a plebiscite in a boundary dispute, or in providing → conciliation and → mediation seem to be especially relevant.

(b) Self-Determination as a Guiding Principle for the Development of International Law

30 The principle of self-determination in its modern conception also appears as a principle of → legitimacy underlying and inspiring the evolution of international law. Thus, self-determination is proclaimed by the UN and especially by the → developing countries as an essential feature of the emerging international law of development and in particular in the establishment of a → new international economic order (NIEO) (see also → Development, International Law of). In its economic context the principle is understood as the right of peoples to economic development and to full and effective exercise of State sovereignty, including, as a basic constituent, the right of any State to reintegrate its national wealth and resources into the national assets and to use them in the interests of the economic development and well-being of its people.

31 Self-determination also served as a guiding principle in the process of redrawing the Eastern European and Balkan map after the end of the → Cold War (1947-91). Here, international law seems to have developed in a new, important direction: based on the Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ adopted by the Council of Ministers of the European Community, and inspired by the relevant → Organization for Security and Cooperation in Europe (OSCE) documents such as the Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter of 21 November 1990, the international community only seems to recognize the statehood of the newly emerging entities in Eastern Europe and on the Balkan if certain substantial preconditions—apart from self-determination, also protection of human rights, → rule of law, democracy, and protection of...
minorities—are fulfilled. Thus, according to this new approach, when a new State is to be recognized, an assessment must be made to see whether the new entity has earned sovereignty and statehood or not. The principle of self-determination is one important element that needs to be taken into account in this assessment.

32 The international community obviously involved itself in guiding and accompanying the process of restructuring former Yugoslavia in an extensive way (see also → Yugoslavia, Dissolution of). Thus, the Arbitration Commission of the Conference on Yugoslavia (→ Badinter Commission (for the Former Yugoslavia)), set up by the Council of Ministers of the European Economic Community on 27 August 1991, handed down important legal opinions, inter alia Opinion No 2 on the right to self-determination of the Serbian population in Croatia and → Bosnia-Herzegovina. Moreover, the UN engaged in large-scale → peacekeeping as well as peace-enforcement operations with humanitarian aid as one of their main goals (UN Protection Force; ['UNPROFOR']) and, on the basis of the Dayton Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina), the → North Atlantic Treaty Organization (NATO) was mandated to safeguard security with the help of military units (Implementation Force; ['IFOR']; Stabilisation Force; ['SFOR']), whilst the OSCE was commissioned under the Dayton Agreement to ensure the implementation of human rights and to monitor elections (see also → Election Monitoring, International). In Kosovo, based on UNSC Resolution 1244 (1999) of 10 June 1999, the UN is in charge of the interim administration (UN Interim Administration Mission in Kosovo; ['UNMIK']) while the NATO and the Member States are in charge of the security presence (Kosovo Force; ['KFOR']). However, notwithstanding this involvement of the international community, it must be noted that the impact of the principle of self-determination in the dismemberment of both the Soviet Union and Yugoslavia was relatively low (see also → Dismemberment of States). Rather, these processes seem to have been factual rearrangements of power that were taking place outside the formal structures of international law and that were recognized ex post.

(i) Internal Self-Determination

33 The driving force of the principle of self-determination manifests itself in recent suggestions to focus more on internal self-determination. More emphasis is laid on intra-State relations and on the internal aspects of the principle: on processes, models, and methods to realize the principle of self-determination in a broad sense—i.e allowing for a variety of options—within the framework of State constitutions. Self-determination would thus acquire a new ‘constitutional’ dimension. On this basis it is further submitted that self-determination should be re-construed or developed to encompass a ‘right to democratic governance’ on the level of the nation State (see Franck). In a similar vein, it is suggested to interpret self-determination as a people’s ‘right to be taken seriously’ in internal affairs (see Klabbers).

34 These proposals must be seen in light of the applicability of the principle of self-determination. Decolonization has always been the firm ground on which the right to self-determination was applied. Outside the context of decolonization, however, it is by no means self-evident that the principle applies as well. Yet, the UNGA has expanded the scope of the immediate applicability of the principle of self-determination beyond the traditional context of decolonization by recognizing the right of self-determination of the Palestinians and of the inhabitants of South Africa (see, among others, UNGA Res 48/94 [20 December 1993]). This practice has been opposed by a number of States, though. But the scope of the Friendly Relations Declaration was not limited to the context of decolonization. And the Badinter Commission, in its Opinion No 2, apparently assumed that the principle of self-determination applied in the restructuring of Yugoslavia. In the Israeli Wall Advisory Opinion the ICJ tacitly followed the same approach in applying the right to self-determination to the Palestinian people (at para. 118; see para. 19 above). As Judge Higgins
pointed out in her separate opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion] [Separate Opinion of Judge Higgins] para 30): ‘The Court has for the very first time, without any particular legal analysis, implicitly also adopted this second perspective’ (ie the post-colonial perspective of self-determination).

35 The modern theories of self-determination, mentioned above, build on this body of practice. However, the principle of self-determination taken beyond the context of decolonization has an explosive potential: administered territories have separated from their parent State and a transposition of this process to other, non-decolonization situations would imply that separations in general could be possible under the principle of self-determination. Due to this, the implementation of self-determination is said to take a different form outside the context of decolonization: self-determination is to be implemented internally, without entitling the people to its own, independent State. The Supreme Court of Canada in the landmark ruling Reference re Secession of Quebec followed this approach when it was asked whether Quebec had a right to secede from Canada (→ Secession). It pointed out that ‘[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination’ (at para. 126). In addition, the principle of self-determination would enable a people to separate from a State only exceptionally, when the rights of the members of the people are violated in a grave and massive way. Arguably, an enabling clause for this exception could be found in the Friendly Relations Declaration in an e contrario argument: The Friendly Relations Declaration does not authorize ‘any action which would dismember … independent States conducting themselves in compliance with the principle of … self-determination of peoples … and thus possessed of a government representing the whole people … without distinction as to race, creed or colour’ (Principle 5 Friendly Relations Declaration). A similar argument can be drawn from The Aaland Island Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, in which the Commission of Rapporteurs declared: ‘The separation of a minority from a State of which it forms a part and its incorporation into another State can only be considered an exceptional solution, a last resort when a State lacks either the will or the power to enact and apply just and effective guarantees’ (at 28).

36 However, considerable uncertainties remain as to this development of self-determination: In how far is there a right to internal self-determination? Is there any difference to the traditional notion of the people? When exactly is a situation outside the context of decolonization? When does internal turn into external self-determination? When does a government not represent ‘the whole people … without distinction as to race, creed or colour’ and what are ‘just and effective guarantees’? In light of these complex issues one can probably only find that the focus of attention shifts further away from self-determination as a legal right to self-determination as a principle and a process of legitimacy.

37 Two further comments are in order as to this development. Firstly, indeed a principle of democratic governance seems to be evolving in international law according to which State power is only considered legitimate if it is rooted in the will of the people (see also → Democracy, Right to, International Protection). This will must have been freely developed, genuinely expressed, and fairly recognized in accordance with the standards provided for in Art. 21 → Universal Declaration of Human Rights (1948) and in Art. 25 ICCPR. Both of these have been further elaborated on by international practice, above all within the UN, the OSCE, and the → Council of Europe (COE). The fact that the international community recognized neither Southern Rhodesia (→ Rhodesia/Zimbabwe) before elections on the basis of ‘one man, one vote’, nor the Bantustans established on the territory of South Africa (→ South African Bantustan Policy), as well as the above mentioned → conditionality applied
in the case of → recognition of new States seem to be confirming the new approach (see para. 31 above), at least in the sense that a State established in violation of the principle of self-determination, and basic human rights such as racial discrimination, would be a → nullity in international law (→ Racial and Religious Discrimination). Other illustrations of a principle of democratic governance can be seen in the actions taken by the UN to secure democratic elections in Haiti (1990), in Cambodia (1993), El Salvador (1994), or the Democratic Republic of the Congo (2007) (→ Haiti, Conflict; → Cambodia Conflicts (Kampuchea); → Congo, Democratic Republic of the). Apart from these broadly publicized cases, a general tendency is shown in the increasing effort of the international community to monitor elections and plebiscites and generally to promote democracy within States.

38 Secondly, the principle of self-determination certainly has considerable federalist potential. To be sure, international law neither recognizes a federal right of self-determination nor a right to autonomy as such. But as the composition of most States is heterogeneous and pluralistic, the essence and spirit of self-determination would be well served if a certain measure of cultural or even political autonomy was granted within the State. In this sense, the creation of the new Swiss canton Jura in 1979 can be seen as an example in which the principle of self-determination was implemented within the confines of a federal state (→ Federal States). The canton Jura was created and its actual proportions were determined in a series of referenda on all three levels of the State: federal, regional, and local level. In addition to such autonomy arrangements based on democratic decision-making, it would in some circumstances be politically fair to grant special rights to groups of people in order to enable them to participate effectively in decision-making on the central State level. On the whole, the full realization of internal self-determination would certainly require to bid farewell to systems of governance based on the majority principle and on the rule ‘one man, one vote’ in the sense of a ‘winner-takes-it-all majoritarianism’. Structures of group interaction and representation, based on compromise rather than confrontation, seem to be better suited to accommodate all parts of pluralistic societies.

39 However, such concepts of group protection and promotion are, at best, in statu nascendi (→ Group Rights). Regimes of minority protection at least show the way in the right direction. The protection of minorities in Art. 27 ICCPR as well as the guarantee concerning political liberty in Arts 19, 21, 22, and 25 ICCPR could for instance be read in the light of the principle of self-determination of Art. 1 ICCPR. In adopting such a wider approach minority rights might be interpreted in an innovative way. At present, only few instruments clearly advance special protection for minorities and they do not enjoy universal acceptance. Examples include the → International Labour Organization (ILO)Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (paras 32 and 34), the COE Framework Convention for the Protection of National Minorities of 1995, and the COE European Charter for Regional or Minority Languages of 1992, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNGA Res 47/135 [18 December 1992]), along with the UN Declaration on the Rights of Indigenous Peoples (UNGA Res 61/295 [13 September 2007]).

(ii) Reunification

40 A further issue of the principle of self-determination is related to the right of self-determination of peoples or nations living in → divided States. It has been strongly advocated that a nation that has been divided into two States by outside interference and without the clear consent of the population still possesses the inherent right of self-determination including the right of reunification. The reunification in 1990 of the Federal Republic of Germany and the German Democratic Republic obviously lends weight to this argument. This case can clearly be considered as a self-evident and peaceful manifestation
of the principle of self-determination. Other actual cases however, such as the case of North and South → Korea, are usually connected with far-reaching political controversies, pushing the legal considerations of self-determination to the background.

(iii) From Self-Determination to Secession?—Implications of Kosovo

The case of Kosovo is infamous for challenging one of the core principles of the international legal order: the prohibition of the use of force, as stipulated in Art. 2 (3) and (4) UN Charter. When the NATO, in order to bring to an end the massive human rights violations against civilians, used force in the air strikes against Serbian forces without authorization by the UN Security Council in 1999, the dilemma of → humanitarian intervention was (re-)raised. Subsequently, the commitment of the UN and the NATO in civil and security presence (UNMIK and KFOR), based on UNSC Resolution 1244 of 10 June 1999, also brought up issues of nation building. In all these developments, the principle of self-determination was not at the forefront. Hence, to ask the question what the impact of the principle of self-determination in the Kosovo incident was would be daring and an answer to it risks amounting to an ex post legitimation of certain acts. Conversely, the impact of the Kosovo incidence on the principle of self-determination could well be huge. This is the ‘precedent issue’.

When considering the precedent issue, it is important to take the context into account. The separation of Kosovo from Serbia culminated in the declaration of independence, unilaterally proclaimed by Kosovo on 17 February 2008. This declaration was made possible by a number of circumstances. Among these circumstances is the fact that UNSC Resolution 1244 (1999) of 10 June 1999 was ambiguous as to the end status of Kosovo. In ‘[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia’ as well as ‘the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo’ (Pmbl. UNSC Res 1244 [10 June 1999]) the resolution did not explicitly exclude independence. Furthermore, the attitude of a large part of the international community gradually shifted away from support for the territorial integrity of Serbia towards backing the independence of Kosovo. Evidence of this development can be seen in the Kosovo Report—[t]he Commission has concluded that the best available option for the future of Kosovo is “conditional independence” (Kosovo Report 9)—and in the elaboration of the concept of conditional independence in the Ahtisaari Plan (Comprehensive Proposal for the Kosovo Status Settlement, presented by UN Special Envoy Martti Ahtisaari; note that the plan, by presenting a blueprint for minority protection in a multi-ethnic society, might gain significance even beyond Kosovo). There are multiple reasons for this change of attitude, including the irreversibility and extent of concessions made to the politicians of Kosovo and the more promising outlook for a disengagement of those actors involved in Kosovo. Yet, the development from ‘substantial autonomy and meaningful self-administration’ to conditional independence, together with the ambiguity of the wording of UNSC Resolution 1244 of 10 June 1999 and the fact that the UNSC is blocked, made it possible for Kosovo, after the Ahtisaari Plan had failed at an early stage, to achieve acceptance from all parties involved, to declare independence.

Even before the declaration of independence, the issue was on the table whether Kosovo would constitute a precedent. The argument is that, because most of the → international community accepted Kosovo’s independence, other groups may claim the same favourable reception. As to this argument three qualifications are important from the perspective of international law: (i) it is obvious that the Kosovo incidence constitutes a precedent in the sense that everyone is free to refer to it. In fact, one can already see this happening in places like → South Ossetia and → Abkhazia in Georgia, or Transnistria in Moldova. However, from an international legal perspective it is not enough that there is an incidence; to be binding the incidence must give rise to a right to secede from a State. (ii)
Prima facie, the right to self-determination could be a valid legal basis for such a claim. Yet, it must be noted that the application of the right to self-determination to Kosovo is far from self-evident. Arguments could be made that the population of Kosovo is not a people in the sense of the principle of self-determination. Moreover, with Kosovo not constituting a traditional case of self-determination for being outside the context of decolonization, if anything, the principle of internal self-determination would have to be applied to Kosovo. Deriving the right to secession e contrario from the Friendly Relations Declaration of the UNGA (‘possessed of a government representing the whole people...without distinction as to race, creed or colour’ [at Principle 5]) which is strictly speaking a legally non-binding act, seems to stretch the argument far. Further confirmation by international practice would be needed in order to assume customary legal status (see also → Customary International Law); for the latter, one separate, probably inconclusive incidence does not seem to be enough. Here, it may also be argued that Kosovo is distinct from other cases in important regards, notably in that the international community has administered Kosovo for almost ten years. Furthermore, it does not seem sound either to infer the necessary opinio juris from the recognition of Kosovo as a State: not only is recognition by many States still pending, but also, where it has been granted, it can hardly be construed as including recognition of a general right to independence. Rather, it should be seen as an acknowledgment of the fact that a new State has come into existence, regardless of how that State was created. (iii) Even if a right to secession could be inferred from the Kosovo incidence, the vast extent of the human rights violations that have taken place in Kosovo would have to be taken into account. Surely, this would be a high threshold. It would amount to an important qualification of a right to secession.

44 Although independence has now been proclaimed by Kosovo, the situation is unlikely to be resolved in the immediate future. Uncertainty over the international status of Kosovo will persist, because many States are definitely unwilling to grant recognition. For these States everyday working relationships with Kosovo may be possible, as recognition as a State is not necessarily implied. However, Kosovo’s future participation in multilateral organizations, fora, and agreements causes problems which are going to persist for the time being, even though the extent of the problems caused depends on the modalities of the admission to each instrument.

D. Outlook

45 The principle of self-determination is only one of the elements of the world’s constitutional order. Even though it is laid down in the text of Arts 1 ICCPR and ICESCR in an unrestricted form, it does not have an absolute character. The UN Charter refers to self-determination in the context of international security and stability in Art. 1 UN Charter and of human rights in Arts 55 and 56 UN Charter. It should therefore be interpreted and applied in the light of these, and other basic principles and rules which together form the constitutive core of the international legal order. This contextual approach relies on the function of the principle of self-determination to maintain and promote stability and justice in international relations. It seems more productive to conceive self-determination in such a broad and functional fashion, than to lay much emphasis on neuralgic points, such as its possible dogmatic qualification as a peremptory norm of international law (see also → Ius cogens).

46 In Europe supranational and international integration is prevalent. It creates functional structures of interaction that diffuse and share power among a multitude of organs of governance. In this system the States are only one type of actor among many others. They lose some of their prerogatives and hence the scope for political decisions taken directly or indirectly by the people is more and more limited. Similar phenomena can be witnessed in other parts of the world where the degree of integration is lower. In light of this trend, it is
to be expected—or at least hoped—that issues of (external) self-determination lose some of their saliency.

But self-determination is still prominent, and prone to abuse. Still the post-Cold War world is faced with eruptions of ‘ethno-nationalism’. The ethno-nationalistic vision, according to which an ethnically pure group is supposed to be the constituent entity of political order, counteracts the basic principles of human dignity (→ Human Dignity, International Protection) and human rights insofar as it is characterized by exclusive policies, such as deportation, abrogation, arbitrary restrictions of citizenship, etc, and inclusive practices, eg forced assimilation (→ Assimilation, Forced), manipulation of decision-making, etc. It is incompatible with the spirit of self-determination, which proclaims political freedom of and democratic decision-making by the people on the basis of free deliberation, political consciousness, and political will.

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