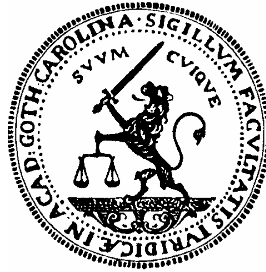
RAOUL WALLENBERG INSTITUTE
of HUMAN RIGHTS and HUMANITARIAN LAW



FACULTY OF LAW
LUND UNIVERSITY

The Basques – a "People" with Right to Self-Determination?

Madeleine Moise

Graduate Essay
20 points

Supervisor
Dr. Gudmundur Alfredsson

Field of study
International Human Rights Law

June, 2002

CONTENTS

1. **Introduction** 4
1.1. Purpose 6
1.2. Limitations 7
1.3. Method 8
1.4. Disposition 8

2. **The Self-determination Right of the Peoples** 10
2.1. The Law of Self-Determination 10
2.2. Who are the “people”? 17
2.2.1. The UN Charter and the "Twin" Human Rights Covenants Definition 20
2.2.2. The Decolonization Definition 21
2.2.3. The Representative Government Definition 22
2.2.4. The Ethnic Definition 24
2.2.5. Minorities 26
2.3. Types of Self-Determination 28
2.3.1. External Self-Determination 29
2.3.2. Internal Self-Determination 30
2.4. Secession and ethnic groups' claims to self-determination 31
2.5. New trends in the approach to the right to self-determination 32

3. **The Basque case** 37
3.1. Spain as a nation 37
3.1.1. Historical background 38
3.1.2. Franco's regime 40
3.1.3. The political transition 41
3.2. The Spanish Constitution of 1978 42
3.3. The Basque Autonomous Community 44
3.4. The Basques as an ethnic minority group 46

4. The Basques - a "people" with right to self-determination? 49

5. Conclusion 61

6. Bibliography 65

1. Introduction

"No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination."[1]

This quote comprises the issue of the right to self-determination in a nutshell. It has been one of the most controversial problems in international law, politics and ethics for numerous years. It has been present on the agenda of the international community ever since its commencement and its existence could probably be traced back to the time when states begun to take form. Although it has not always been addressed in the same way, it has been successful in achieving increasing influence over the years.

It is easy to understand why this issue is loaded with so many sentiments, which often lead to many tensions among the parties involved. After all, the question of self-determination is about the fate of a group of people who, usually possessing a certain degree of national consciousness, express their desire to form their own state and choose their own government. This however will come into conflict with other group's interests and will, to its more likelihood, amount to serious difficulties if not correctly handled.

By now there should be no doubt about its position in international law. If before its position in international law was a matter of controversy because of the uncertainty over its status, i.e. whether a mere principle of law or a legal right, according to current doctrine and state practice, self-determination is firmly established in international law as a legal right. This can be confirmed by a thorough analysis of the evolution and present status of self-determination, from a political principle with maintenance of peace as its main goal to a core principle and fundamental right in international law.

Nevertheless, some uncertainty still exists with regard to the application of the right to self-determination. Although it has been introduced in all the major international instruments, from UN Charter and human rights covenants to UN General Assembly (hereinafter UN GA) Resolutions, it has not expressly been defined, hence, it has been given different meanings by different people at different times. One of the main problems

---

[1] Danspeckgruber, Wolfgang, "The Self-determination of peoples - Community, Nation, and State in Global Interdependence", Lynne Rienner Publishers, 2001

when dealing with the right to self-determination has been the ambiguity with regard to the titleholders of this right. Taking a closer look at the mentioned international instruments it will soon become clear that at the same time as they refer to "all peoples", there is as yet no official definition of a "people". This in its turn has to some extent undermined its importance and has led to a case-by-case evaluation. While there is a need for some more concise and clear guidelines the usual approach has been to view the right to self-determination in a narrow sense, i.e. a process that provides the desired outcome only under certain limited conditions such as colonization or oppression of the people in question.

Maybe, we have come to a point where the best approach would be to view it in a broader sense, i.e. as a process providing a wide range of possible outcomes dependent on the situations, needs, interests and conditions of concerned parties. Thus, not limited only to the cases above mentioned. Such a development might help to find a solution to separatist movements, such as the one going on in the Basque Country.

The Basques are concentrated in the four northern Spanish provinces of Alava, Navarra, Guipuzcoa and Vizcaya, and in smaller numbers, in three southwestern departments in France, Labourd, Basse-Navarre and Soule. The three Spanish provinces, Alava, Guipuzcoa and Vizcaya form one of the seventeen Autonomous Regions of the Spanish State, known as *Comunidad Autonoma Vasca*, (The Autonomous Basque Community), while the region of Navarra is in itself another Autonomous Region known as *Communidad Foral Navarra* (The Foral Community of Navarra). The Basque provinces under French rule are void of any legal status, with no administrative power whatsoever.

The Basques' claim to external self-determination is deeply rooted in nationalist feelings. These feelings have been fostered since the time of Franco, the Spanish dictator, by the political separatist wing, Basque Country and Freedom (hereinafter ETA). In their struggle for independence reference is made to their historical rights and distinct language as the basis for the Basque nation. Although this organization has its origins in the Basque Nationalist Party (Partido Nacionalista Vasco, hereinafter PNV), it soon came to be sustained by other political parties such as *Herri Batasuna* which shares its more militant nationalist character than the former one. While the militant organization in France is modest and has little popular support among the relatively small Basque population there, its Spanish counterpart has been very active in its quest for a separate, socialist Basque state. It seems that their main aim is to claim a right to self-determination with the intent to

protect their national identity, mainly by saving their language. It is clear that the concern of unification of all four Basque Provinces has, at least for now a higher priority for the Basque nationalists than the unification of north (French Basque provinces) and south (Spanish provinces).

Although the Spanish Constitution is firm in the maintenance of the Spanish state unity, it does recognize the right to autonomy to 17 communities, among which, as we will later see, the Basque Country counts with the widest degree of autonomy. Despite this, the claim to self-determination advanced by ETA has not been abandoned although there has been an attempt to an indefinite cease-fire declared in 1998, which however came to an end in 1999.

1.1. Purpose

The purpose of this thesis is to evaluate the state of current international law in the light of the problems that might arise when dealing with a claim to the right to self-determination. This could be the case when trying to answer three main questions related to the application of the right to self-determination, such as what is its status under international law; who is legitimate to make such a claim; when and under which circumstances is such a claim justified?

Further after responding to the above questions, the aim is to search for any possibility of bringing the Basques under the concept "people" for the sake of investigating whether the right to self-determination could legally be applied in this particular case. This will be done in the analysis applying the different definitions of the "self" to the Basques. Thus, my goal is to address the problem from the most relevant perspectives, i.e. international law and legal doctrine, in order to provide the interested reader with all the necessary background for a better understanding of the issue at hand.

For purposes of this thesis and especially for the findings in the final analysis, the term *self-determination* refers primarily to the external aspect, i.e. to the right of a people to freely choose to secede from a sovereign State with the final goal of forming another independent, separate state. In this way it would be possible to distinguish between the unconditional and automatic right to self-determination of peoples of sovereign states, and the conditional right to self-determination of a certain people within such a state under determined political and social circumstances that in some cases could lead to secession.

1.2. Limitations

The core issue of the Basque conflict, i.e. the claim to external self-determination, is in my opinion more of a political rather than a legal issue. Throughout the thesis reference will be made to the claim of self-determination by which it is intended the claim to external self-determination, i.e. the right to eventually constitute an independent Basque state.

The Spanish Constitution of 1978 rules out any attempt of disruption of the Spanish unity through a claim to self-determination by any one of the 17 constituent Spanish Autonomous Provinces, thus maintaining the idea that self-determination originating in the Basque claim is not legitimate.

Since my intention with this thesis is primarily to focus on the legal debate that could be carried on with regard to the Basque conflict, one of my limitations has been the disregard of politically advanced arguments in favor or contrary to self-determination in this particular case. However, I had to touch upon the political aspect of the conflict between the Basques and the Spanish government from time to time, with the interest of giving a more comprehensive and complete picture to those who do not have a very good knowledge of the background to the conflict.

Another limitation, grounded on obvious reasons, is found in the main concentration upon the Spanish Basques provinces rather than the French provinces. This is due mostly to the fact that within France the Basques do not show any interest in the achievement of any kind of self-government in comparison to their counterparts in Spain. Thus, from many points of view the case of the Spanish Basques is more interesting than that of the French Basques.

I have not dealt with the issue of ETA in detail since it is has not been my goal to study the question of self-determination with regard to terrorism as a means to achieve the goal of self-determination. Although the claim of external self-determination originates from this organization the claim to self-determination regards the whole Basque community and not only the ones fighting for it. Therefore, when necessary, distinction has been made between ETA and the rest of the Basque community although this is more of a political rather that a legal aspect of the conflict.

Last but not least, it is important to mention that when dealing with the history part I have tried to use neutral sources although the accuracy of the facts here presented might be questioned. I urge the reader therefore, to remember that my goal with this thesis is to make an accurate legal assessment of the Basque case, assuming that the history behind the conflict is what I have found it to be.

1.3. Method

The method that I have employed has been the examination of norms and principles that might contradict the legality of a claim to self-determination in the Basque case. Thus, in the first part of this thesis I present the development and current state of these norms under international law with the intent to eventually consider whether it would be possible to apply them in this particular case.

The questions that I have tried to answer throughout this thesis and that I have kept imperative to consider before developing any argument with regard to the specific case of the Basques, have been such as who are the "peoples" entitled to the right to self-determination and is there such a thing as a universal accepted definition? How has this issue been addressed in the United Nations? Has the principle of territorial integrity come to make way for another principle, i.e. the principle of self-determination? Could we say that due to the internationalization of human rights and the recognition of certain fundamental human rights we are currently witnessing the emergence of a "right" of ethnic minority groups to self-determination? Has there been a consensus on this matter, either theoretically or practically? How can all these questions and answers be applied to the Basque claim of self-determination?

The attempt to answer these question to my best ability having as much information as possible has also been part of my method in determining *if* the Basques should indeed be granted the right to self-determination as a recognized "people" under international law.

1.4. Disposition

The thesis has been divided in 5 main chapters. When dealing with a claim to self-determination, I believe it imperative to begin with the presentation of the right to self-determination. There are still many question marks regarding this right and therefore there is a need for some clarification of the issues involved.

Thus, the second chapter will deal with the law of the right to self-determination, from a general point of view, from its appearance on the international agenda up till present time. The main controversy still existing with regard to this right, i.e. the definition of the concept "people" is dealt with more extensively since it constitutes the core reference for the final analysis. Also the different types of self-determination as they have been addressed in the legal doctrine are presented since I believe that it is important to keep them apart. This is particularly true in the Basque case where the claim is of the right to external self-determination. This second chapter will end with a presentation of some new trends in the approach to the right to self-determination. Are we heading for a change?

Chapter 3 is dedicated entirely to the Basque case from a descriptive point of view. I believe that before taking a stand in a question as important as the one at hand, one should be aware of all the facts. Therefore, in this chapter I have chosen to present the historical and current situation of the Basque Country and also of the Basque peoples as such and their status in international law.

The final analysis of the main question in this thesis, i.e. whether the Basques can be seen as a "people" for the purpose of the right to self-determination, will be presented in chapter 4. I have tried to provide the reader with a thorough study of this issue parting from the different views and opinions expressed within the United Nations and the international legal doctrine.

Finally, chapter 5 concludes these findings, leaving no doubt to the questions posed throughout this thesis.

2. The Self-Determination Right of the Peoples

Words such as "self-determination", "right", "people" seem, at a first glance to be easily defined. However, this is not the case. They are often the reason to many internal confrontations, terrorism acts and most deplorable, the death of many innocent lives.

In the quest for a correct answer to the main question of this thesis I consider it important to first introduce some key concepts and give a fair explanation about their content. Hence, in the following I will introduce the right to self-determination as developed in major international instruments, with special emphasis on major United Nations instruments.

2.1. The Law of Self-Determination

The right to self-determination has initially emerged as a political principle and developed only gradually into a legal principle. It is often traced back to the American Declaration of Independence (1776) and the French Revolution (1789). When it was first introduced its main purpose was to allocate territories between the then existing states.[2]

However, it was US President Woodrow Wilson to first bring it on the international arena at the close of World War I. It came to be seen as the synonym of self-government, since the people of each State was to be granted the free right to select their own State authorities and political leaders, thus what later has been labeled as internal self-determination.[3] Further he advocated also the "external" aspect of the self-determination the way we know it by now, namely the right of a people to choose its sovereign. It was supposed to limit future conflicts on the Western European arena as a consequence of World War I and be thus the basis for future peace.[4]

However, the concept of self-determination as conceived by President Woodrow Wilson was not welcomed by the international community of that time and was often criticized even by the President's close collaborators, such as his own Secretary of State, Robert Lansing. He predicted that self-determination would become a source of political instability and domestic disorder and a cause of rebellion, as the concept according to him,

---

[2] Cassese, Antonio, "Self-determination of Peoples, A Legal Reappraisal", Cambridge University Press, 1995, pp. 11-13

[3] A convenient phrasing addressing this issue can be found in the UN GA Resolution 2131 (XX) on Non-intervention and which reads "*Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State*."

[4] Cassese, pp. 11-21

was raising hopes, which could never be realized.[5] Moreover, at the 1919 Paris Peace Conference, various delegations sought to discredit the concept of self-determination by interpreting it in its most extreme meaning, implying thus a right to political independence for every ethnic group no matter how small.[6]

This was of course not the interpretation President Wilson had in mind but in the aftermath of World War I the principle of self-determination was not given any real importance as neither the external nor the internal promises of the principle were fulfilled. This has often been motivated by the conceptual problems with the principle itself. It soon became apparent that the implementation of such principle would meet with problems based on the mixed population present in many territories, and thus the consideration of who was to be seen as part of the "self" created problems.

President Wilson's attempt to introduce the principle into the Covenant of the League of Nations failed soon as the Allies were unambiguously and unanimously against such an explicit mention into the Covenant. Instead, it was implicitly incorporated in article 22 of the Covenant with no real importance whatsoever from the legal point of view.[7]

Until World War II however, the principle of self-determination remained essentially a political concept, which was applied only to territories of the defeated powers. It seems that it was first after this war that the quest for self-determination became a dominant force in the Third World while many colonized people tried to free themselves from the control of “aliens” Europeans.

The principle had begun to win ground with the arrival of the United Nations since it was explicitly mentioned in the United Nations Charter adopted in 1945. After many critical remarks of such integration, it was agreed that the principle should no longer apply to the colonial territories of the defeated powers only, but to all colonial territories.[8]

In the UN Charter the principle has been included in articles 1(2), 55, 73 and 76. It was however agreed that the principle should only allow self-government of the people and not the right to secession.[9]

---

[5] Musgrave, Thomas, "Self-determination and National Minorities", Oxford University Press, 1997, pp. 30-31
[6] Halperin, Morton H; Scheffer, David J; Small, Patricia L, "Self-determination in the New World Order", Carnegie Endowment for International Peace, Washington D.C., 1992, pp. 16-17
[7] Musgrave, pp. 60-62; Article 22 of the League of Nations provided for mandates rather than for self-determination for those territories whose populations were not prepared for the "strenuous conditions of the modern world" (art 22 Covenant of the League of Nations)
[8] Cassese, pp. 38-39
[9] Cassese, p. 40

It is important to mention that the concept of self-determination within the United Nations framework did not enjoy the rank of a "right" from the beginning. In articles 1(2)[10] and 55[11] the wording there employed makes reference to a "principle" of self-determination instead of a "right" to self-determination. Article 73[12] and article 76[13] contained in the UN Charter's chapters XI and XII respectively, aimed at the territorial aspect rather than emphasizing the element of ethnicity for the implementation of the principle, which thus limited the "self" that was entitled to enjoy self-government.[14] Moreover, the Charter does not contain any definition of "self-determination" *as such,* nor does it make any explicit mention to the distinction between external and internal aspects of the principle.

It is therefore obvious that the drafters of the Charter did not intend to confer any legal right to self-determination and neither any direct and immediate obligations on the Member States to ensure its implementation. This undermined the force of the principle and thus as a mere goal of the Organization in its development of friendly relations, it would be subordinated to other competing principle such as the principle of territorial integrity. Nevertheless, the inclusion of the principle of self-determination in the UN Charter, although clearly void of any legal binding, laid down the ground for its further development in other legal documents.

Within the United Nations there has been a "battle" regarding the scope and application of the principle of self-determination. It was carried on, on one side, by the socialist view, which advocated the anti-colonial self-determination reinforced by the Third World States that advocated the "external" character of self-determination. On the other

---

[10] *"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"*

[11] "W*ith 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 (…)"*

[12] *"Members 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, and, to this end: to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;"*

[13] *"The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement"*

side, the Western States sustained that the principle in the Charter was just a principle and thus void of any juridical force, but had to revise their view as the voice of Third World States against colonialism was becoming louder and louder. They did finally agree, however only to the universal application of "internal" self-determination different from the "external" self-determination.

The development of the further recognition of self-determination in international instruments started with General Assembly resolutions. In 1952, the GA adopted resolution 637 (VII) entitled *The rights of peoples and nations to self-determination*, in which many interesting and relevant ideas were expressed, such as that the right of peoples to self-determination is a prerequisite to the full enjoyment of all fundamental human rights and that the UN Member States should uphold the principle of self-determination of all peoples and nations. Further meaning was given through the landmark resolution on decolonization, known as the General Assembly Resolution 1514.[15] It reads *"All the 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"*, however, it continues by stating that the territorial integrity must be maintained.[16]

To ensure that neither a minority group nor an ethnic group within a country made any attempt to disrupt itself from the state where it exists, the GA adopted Resolution 1541. This resolution upholds the principle of territorial integrity and limits the "self" to whom the self-determination could apply. It does not offer a proper definition of the right holders of it, however it states that a "non-self-governing" territory in the words of Chapter XI of the UN Charter must be "geographically separated" and "distinct ethically and/or culturally from the country administering it".[17]

The international recognition of self-determination as a right and not only as a mere principle, begun thus with the adoption of the above mentioned GA resolutions. However, it should be kept in mind that the GA resolutions as such do not posses any legally binding force, and it is thus up to the Member States to obey by them at their own discretion. However, in the colonial context there was an almost absolute support of such recognition.

---

[14] Halperin, p. 20

[15] UN GA Res. 1514 (XV), December 14, 1960 "On the Granting of Independence to Colonial Territories and Countries"

[16] *"Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".*

[17] UN GA Res. 1541 (XV), December 15, 1960

After more than a decade of discussions the UN's Member States adopted finally the two international human rights Covenants, one of economic, social and cultural rights, the other on civil and political rights, which however entered into force first in 1976.[18] The discussions often regarded the appropriateness of including a provision making reference to a right when the Charter only referred to a principle of self-determination. The fear was that by translating it into legal terms through a mandatory instrument this would raise problems of interpretation and also give rise to sensitive problems such as that of minorities and the right of secession.[19]

By including the right to self-determination in article 1[20] in both Covenants (hereinafter common article 1), the Western States, which initially were against it, sought to widen the scope and application of this right, thus providing some support for other claims of self-determination, i.e. from peoples in sovereign and independent states.[21] During the discussions held in the course of the preparation of the drafts various opinions were expressed with regard to the right to self-determination. Some maintained that it meant the right of a people to decide on its international status (access to independence, association, secession, etc.), and that it belonged to people fighting for their independence, while others hold that it was unnecessary to attempt to define self-determination, which should be proclaimed for all peoples. However, the language of the article has been kept neutral and has consequently left room for many different interpretations.[22]

The right to self-determination as it is defined in the two Covenants refers to the internal aspect of self-determination. It thus provides for the right of the people to choose their political leaders and legislators without any interference from the domestic authorities themselves.[23] Also foreign interference is ruled out and thus the respect for every state's political independence and territorial integrity is reaffirmed by common article 1(1). It should be noted however that it is not an absolute right. Further more it is neither self-

---

[18] GA UN Res. 2200A (XXI), International Covenant on Civil and Political Rights; GA Res. 2200 (XXII), December 16, 1966, International Covenant on Economic, Social and Cultural Rights

[19] Cristescu, Aureliu, "The Right to Self-determination - historical and current development on the basis of United Nations instruments", Study prepared by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, 1981, p. 8

[20] *"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."*

[21] Musgrave, pp. 68-69

[22] India hold the view that the article would only apply to people under foreign domination and not a secession of a people or nation, while the Netherlands objected and maintained the view that the right to self-determination as embodied in the two covenants is conferred upon all peoples.

[23] Cassese, p. 53

executive nor unilaterally applicable, since it can be derogated from in virtue of article 4 of the Covenants.[24].

Another important GA Resolution in the context of the right to self-determination is Resolution 2625 (XXV), known as the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*.[25] It is an important Resolution since it expands the scope of the right to self-determination. It makes clear that decolonization is an important aspect of self-determination but it does not limit itself there. This resolution gives a wider meaning to the right to self-determination since in its sequent paragraphs it states that *"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter"*. It seems however that it would recognize a right of secession not for peoples at all, but for those territories that happened to be recognized by UN as colonies.

All in all, the reference made to "all peoples", "all States" and the enumeration of a goal that did not necessarily have anything to do with colonial situations, is evidence enough for the Western desire to extend the right to self-determination beyond the colonial context and to its universal application also advocated by the Western states.[26]

Another important link to self-determination in the wording of this resolution is the link to the principle of territorial integrity[27]. The language of the paragraphs dealing with the right to self-determination has given rise to different interpretation regarding the right's ranking in international law. It has been argued in the international legal doctrine that by linking self-determination to representative government and by making territorial integrity, as it seems, subject to maintenance of representative government, the resolution could be

---

[24] "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are nor inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin*."

[25] UN GA Res. 2625 (XXV), October 24, 1970

[26] Musgrave, p. 75

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

interpreted as giving the right to self-determination priority over the competing principle of territorial integrity. This especially in situations where the government does not represent the governed, creating thus a category of "peoples" possessing a right of self-determination outside the colonial context.[28] This interpretation however, does not corroborate with opinions expressed during the discussions prior to the adoption of the Resolution. At that time some representatives maintained that they did not think that the principle offered basis for asserting a right to secession from a State in general, let alone for a minority or an ethnic group.[29] A further support for this view is that the principle of sovereignty and inviolability of the boundaries of nation states has often been the doctrine most frequently advanced against self-determination. Secession seems to be the antithesis of territorial integrity and therefore, the wording in the UN instruments does not provide a direct link between self-determination and secession. This has had important consequences in the claims of ethnic self-determination around the world.

Here I tried to present the development of the principle of self-determination into a legal right. It appeared first in the context of decolonization but it was soon extended beyond it through many international instruments, especially GA resolutions. Based on these instruments international law today recognizes officially the right to self-determination to categories of peoples under colonial or alien domination and subjugation or racist regimes. It departs however from the terms the right to self-determination was first based on during the Wilsonian time, i.e. ethnicity.[30]

The question to whether the broad concept of self-determination also includes forms of self-government, autonomy and other arrangements within the framework of the state to other groups claiming this right, will be dealt with later in this thesis.

[28] Rosenstock, Robert, "The Declaration of International Law concerning Friendly Relations: A Survey", American Journal of International Law, vol. 65 (1971), p. 732; Nayar, Kaldharan, "Self-determination beyond the Colonial Context: Biafra in Retrospect", Texas International Law Journal, vol. 10 (1975), p. 337

[29] Cristescu, p. 11

[30] It has been argued that in the first period of self-determination claims following WWI, the peoples concerned in this period were ethnic communities, nations or nationalities mainly defined by language and culture and there it was legitimate to make claim to self-determination based on these criteria. (see Emerson, Rupert, *Self-Determination*, American Journal of International Law, 65, 1971, p. 461)

2.2. Who are the "peoples"?

The question of defining the concept of a "people" has traditionally been a source of difficulties. In the 19th century, the term "nation" was prevalently used, but although this term represented a much narrower concept, it did not prove possible to reach universal agreement on a definition. The concept of a "people", which is more vague, has proved even more difficult to define. In some instances a people is easy to identify from objective factors, but that is not always the case. Furthermore, even if certain peoples have a clear-cut identity, historical circumstances may create a close link between two or more separate communities. In such a case, the exercise of the rights by one of those communities, whether it constitutes the majority or the minority, cannot easily take place without harm to the rights of others.

In the contemporary international community and during the many discussions prior to the adoption of the right to self-determination in the GA resolutions, this has proved to be most difficult part to agree upon. Some representatives would opt for the broadest interpretation of the term, taking into account all peoples, allowing in exceptional cases peoples living, for example, in a regional geographically distinct and ethnically and culturally different from the rest of a State's territory, with appropriate safeguards to exercise their right to self-determination. Many did not share this view, since it was said to lead to interference in the domestic affairs of States and an encouragement to secession. Further it was believed that to proclaim the principle that any tribal, racial, ethnic or religious group had the right to self-determination would be to widen the scope of the principle to the point of absurdity.[31]

In its final wording the common article 1 of the two human rights Covenants reads "*All peoples* have the right to self-determination (...)". But then, who exactly are the right holders of this right in the context of a unilateral secession?

The right to self-determination has unambiguously been conferred upon those peoples who were dependent because they were living in non-self-governing territories and to those peoples subjected to alien subjugation, domination and exploitation. What about other universal claimants to the right to self-determination such as the groups which base their claims on the subjective conviction that the present rule is "alien" or "colonial", which no longer can be tolerated? Are they entitled to self-determination? It seems unlikely that,

[31] Cristescu, p. 12

despite singular cases, this could be held as the prevailing view within the international community. As mentioned before, also the term “alien domination” presents difficulties in being defined thus, making it more difficult to take into account such a consideration without any objective proof.

The arrival of the United Nations has meant a change in the approach taken when defining the term "people". It has vehemently been maintained that the "peoples" in question are not ethnic or national groups as before sustained by President Wilson, but multi-ethnic peoples under colonial rule. Also from the UN's practice it is possible to conclude that UN has opted for the territorial over the ethnic criterion, respecting thus the boundaries of the formal colonies and the principle of territorial integrity, as earlier mentioned.[32]

It must however be mentioned that this theory has not always been consistent with practice. United Nations has violated the territorial criterion of defining the holders of the right to self-determination in many instances, such as in British India, Ruanda-Urundi and the Northern Cameroon, among others.[33] It is not my intention here to discuss these cases in detail; instead my purpose is to bring to the attention of the reader the ambiguity existing in defining the "self" possessing the right to self-determine itself.

In general terms, based on the wording of the main UN's instruments, self-determination should be given a universal recognition as a right of all peoples whether or not they have attained independence and the status of a State. Nevertheless, it is understood that the application of the right to all peoples should not be interpreted as an encouragement to secessionist movements or irredentism, or as justifying activities aimed at changing a country's system of government.[34] This view seems to me, as much clarifying as confusing. It clearly rules out the external aspect of self-determination, but in a certain way also the internal aspect. How should it then be interpreted? Would it be right to say that these ambiguities only regard cases outside the colonial, racial and alien domination? It seems likely.

An important evidence of the uncertainty in the definition of a "people" in international law has further been acknowledged by the Supreme Court in the Quebec question regarding its possible right to unilateral secession based on its right to self-

[32] Pomerance, Michael, "Self-determination in Law and Practice", Martinus Nijhoff Publishers, 1982, p. 18
[33] Pomerance, pp. 20-24
[34] Cristescu, p. 39

determination. The Supreme Court stated that *"International law grants the right to self-determination to peoples. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain".*[35]

If departing from the territorial criterion it is possible to conclude that the "self" includes both objective and subjective components. The individuals in the group claiming self-determination must think of themselves as a distinctive group (the subjective component) and further, have in common characteristics such as, ethnicity, language, history and/or religion (the objective component). [36]

There have been many proposals for how to determine a "people" based on these components. One of these proposals is the one presented at the UNESCO International Meeting of Experts on further Study of the Concept of the Rights of Peoples, held in Barcelona, Spain, 1989. Justice Michael Kirby suggested that the holders of the right to self-determination should be based on the identification of a group of individual human beings who enjoy some or all of the following common features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life. Further, the group as a whole must have the will to be identified as a people or the consciousness of being a people, as the key subjective element. [37] This way of determining the meaning of "people" is by far the only one. It must be mentioned however, that none of them reflect UN's official view on the subject since there is no unanimous accord with regard to this issue.

In the following sub-chapters I will provide for the different definitions available in the international legal doctrine with special emphasis on the ethnic definition for the later discussion regarding the case of the Basque people.

[35] (1998) 1 SCR 217, at 281 (paras 123-4)
[36] Hannum, Hurst, "Autonomy, Sovereignty and Self-Determination", University of Pennsylvania Press, 1990

2.2.1. The UN Charter and the "Twin" HR Covenants Definition

Article 1(2) in the UN Charter does not explain, as already mentioned, the meaning of a "people" entitled to the right to self-determination. Is it supposed to be interpreted as Kelson suggested, as synonymous to the "state"[38] or should it be interpreted in accordance to the Vienna Convention on the Law of Treaties? This later states that terms in international legal instruments ordinarily are to be interpreted according to their plain meaning, which would then allow the reference of the right to self-determination to "all peoples".[39]

The *travaux preparatoires* to the UN Charter show that the drafters of the article in question did not intent the word to be understood as the equivalent of the notion of a "state", and neither to allow such a broad interpretation as literally "all peoples". Instead, the drafting committee has explained that the term "people" is separated from that of a "state". [40]

With regard to the two human rights Covenants, one can quickly conclude that no exact definition of the notion "people" is offered here either. It was considered that it would be difficult to define the "people" enjoying the right to self-determination and that further studies were needed in order to determine which other social groups to be included, if they were to be included in the definition beyond those already recognized, i.e. colonial people.[41]

However, as a matter of ordinary treaty interpretation applied to the common article 1(1) the legal doctrine holds that one cannot interpret the reference to "peoples" limited to colonial peoples only. Since article 3 deals expressly with colonial territories, it has been argued that when a text makes reference to "all peoples" and later in the same text says that the term includes the peoples of colonial territories, it is clear that the term is being used in its general sense.[42] This interpretation departs somewhat from the opinions expressed prior to the adoption of the Covenants. It was maintained that the right to self-determination should not be confused with the rights of minorities, since the authors of the Charter had

---

[37] UNESCO, International Meeting of Exports on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations UNESCO doc. SHS-89/CONF.602/7, pp. 7-8
[38] Musgrave, p.148
[39] Vienna Convention on the Law of Treaties, art. 31(1), UNTS 331
[40] Musgrave, 149
[41] Cristescu, p. 11
[42] Crawford, James, "The Right of Self-Determination in International Law: Its Development and Future", in "Peoples' Rights", ed. Alston, Philip, Oxford University Press, 2001, pp. 27-28

not intended to give that right to minorities since self-determination was not meant to be used so that the unity of a nation would be destroyed.[43] Thus interpreting "people" in its widest stretching would be against this view.

Said this and confronted with reality, the conclusion remains that the UN instruments dealing with the subject of the right to self-determination remain unclear on the true meaning of the term "people". It is a deplorable reality since it leads to many question marks and few answers.

2.2.2. The Decolonization Definition

The attempt to identify the right to self-determination to the process of decolonization has its origins in the post-war period. The initiative came from the socialist countries and many newly independent Third World countries. This approach intended to limit the meaning of the concept "peoples" to those groups of people living in non-self-governing territories. Its legal basis was the interpretation of the term "peoples" in article 1(2) in the UN Charter with reference to the Charter's chapters XI, XII and XIII.[44]

However, with reference to the GA Resolutions dealing with this subject matter, Resolution 1514 (XV) and Resolution 2625 (XXV), the reach and the validity of this approach can be questioned. As mentioned before the Friendly Relations Resolution enumerates goals which apparently extent beyond decolonization. Therefore it would be erratic to conclude that the term "people" was supposed to be given this content only.

Despite their initially non-legal binding character the GA resolutions remain indicative of widely held views. The legal nature of the resolutions adopted by the GA has been debated in many UN organs. Although the idea that these resolutions, like treaties, are made binding by the mere fact of adoption has been challenged, it is obvious that they do lay down rules which in time become part of customary law, thus binding on the Member States.

A further support for the exclusion of this narrow definition is the reference made by the General Assembly to the recognition of the right to self-determination for many non-colonial peoples such as "the people of South Africa" and "the people of Palestine".[45]

---

[43] Cristescu, p. 5
[44] Musgrave, p.149-150
[45] UN GA Resolution 2396 (XXII) December 2, 1968; UN GA Resolution 2672C (XXV) December 8, 1970

Thus, room has been left for a further interpretation of the term "people". Would it however be sufficient to apply it to groups within sovereign and independent States aspiring to self-determination in the form of secession? It does not appear to be the case, or at least not with reference to current international instruments.

2.2.3. The Representative Government Definition

The article in the Friendly Relations Resolution concerned with the right to self-determination, which indirectly states a right to internal self-determination, contains also a saving clause.[46] The question often posed regards whether it also gives rise to external self-determination.

Antonio Cassese has proposed a different way of approach in the quest for the right interpretation of the saving clause. He suggests that one should "turn it around", and analyze it from a positive wording. It would imply a reading with the result that a government is in compliance with the principle of self-determination if it is representative of the whole population. This is the case if everybody has access to the political decision-making process and no group is kept out on ground of creed, race and color.[47]

In the event of drafting the said article the discussion behind it involved different points of view. They came from both the Western States, which wanted to expand the right to self-determination as much as possible (the right to internal self-determination) and the socialist counterparts supported by many developing countries, which on the other hand wanted to restrict this right. In the end however, the majority's view, represented by the last two groups, prevailed and the result is what we can read in the mentioned article. As the socialist states were against a universal recognition of the right to self-determination, this undermined the possibilities of any other group not considered to be racial or religious, to enjoy the right of internal self-determination on the basis of the Friendly Relations Resolution.[48]

The first conclusion to be drawn is that, with regard to the right to internal self-determination, it is not universal in that it is not hold by the entire people of an authoritarian

---

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

[47] Cassese, p. 112

[48] ibid

state, but only by racial and religious groups. A second conclusion is that the saving clause does not award equal rights to those that could come under its application, but only equal access to government, which may have its implications (remember that civil and political rights are independent from the right to an equal access to government). The third conclusion regards the right to external self-determination. The answer to the question whether one could read such a right in the saving clause must, at a first glance, be considered negative. The territorial integrity would prevail in most cases, but as always, there are some exceptions. Therefore, it has been argued that the Friendly Relations Resolution implicitly authorizes secession, but that it must be interpreted restrictively.[49]

It has been argued that this Resolution links external self-determination to internal self-determination in very special cases. It would however, not suffice with the "mere" denial of the basic right to representation of a racial or religious group. The government must openly and consistently refuse the representation of the group, deny them their fundamental rights and further negate a peaceful solution within the existing State structure.[50]

This "representative government" definition has been further stated in the 1993 Vienna Declaration and Programme of Action, section 1.2, which reads as follows, *"All peoples have the right to self-determination. (...) In accordance with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind"*. On the advice of the Commission on Human Rights, a claim sustaining that members of a group, distinct from the majority, living within the territory of a sovereign State, are not represented by the government of the State in question could be examined at the international level. This could be made either by the Committee on the Elimination of Racial Discrimination (CERD) or

[49] Cassese, pp. 114-120
[50] ibid

by the Human Rights Committee, and if the State is a member of the Council of Europe, such claim could be addressed under the European Convention on Human Rights.[51]

I believe that this is true evidence for the development achieved in this field. It is no longer enough that the State sustains its representative character but it also has to ensure and to some extent prove that this is the case. The remedy in the case of finding a State government not representative of its entire people is that discrimination would have to end. Thus, there is no mention of the right to self-determination and secession of those discriminated against. However, in my opinion, it could be seen as a notice for States that if nothing is done to redress the situation, may be that such a remedy is not that far away.

Up till now we have been able to see a certain development in the interpretation of the concept "people", a certain widening of its meaning away from the colonial context and into the sovereign and independent States. This practice however is still very limited due to the fear of state dismemberment. I believe therefore that in the event of claims for secession based on this particular definition, these will be evaluated very closely and carefully on a case-by case basis. I will come back to the discussion of the representative government when discussing the Basque case.

2.2.4. The Ethnic Definition

Conceptualizing ethnicity is not the easiest thing to do. There have been attempts to distinguish it from "race" with direct reference to cultural ties and with or without distinct physical characteristics. Here and for the rest of the thesis a broad definition of ethnicity will be used, i.e. one that includes cultural, linguistic, racial and/or religious boundaries. An ethnic group then is a group, which uses one or more of these categories to distinguish itself from others and whose members identifies as part of this group.

In some cases this consciousness of peoples of belonging to a certain distinct group has given rise to nationalist movements, leading often to ethnic struggles within multinational states seeking thus independence.

Considering this ethnic element in defining a "people" for the purpose of the right to self-determination implies without doubt a confrontation with the salient principle of territorial integrity. This last one has, as we have seen before, been the thrust in the UN's practice with regard to self-determination.

---

[51] Eide, Asbjorn, "Protection of Minorities", Report for the Commission on Human Rights,

Before proceeding I believe it is important to clarify the difference between an ethnic group within a non-self-governing territory and an ethnic group within an independent state. Before the 1960 the UN had adopted a certain open-minded view. It would allow deviations from the principle of territorial integrity in those cases when within a non-self-governed territory ethnic differences were a real danger to the future stability within the territory.[52] This on the other hand, has not been awarded to ethnic groups within sovereign states.

Once GA adopted the Colonization Resolution 1514 (XV) this practice was no longer under the auspices of the principles and norms advocated by UN. Although it stated a right to self-determination to peoples within non-self governing territories, it did not allow the continuance of previous UN practice with regard to the ethnic groups, since it made special reference to the provision of territorial integrity.[53] In consequence, the term "peoples" would no longer include ethnic groups in the specific context of self-determination.

Although the GA has not continued its practice it has neither officially ruled out the application of its resolutions to ethnic groups as well when this is considered relevant. Many scholars who continue to associate the term "people" with ethnic groups share this view.[54] Thus, Ian Brownlie defines a "people" in terms of ethnic criteria.[55] The International Commission of Jurists set up in 1972 to deal with the events in East Pakistan interpreted the term "peoples" from the ethnic point of view. It stated that there are certain common characteristics, which acts as a bond between the members constituting a "people", but that none of the elements concerned is by it sufficient to prove that a certain group is a "people". It asserted, "a people begins to exist only when in becomes conscious of its own identity and asserts its will to exist".[56]

E/CN.4/Sub.2/1993/94

[52] Musgrave, p. 157

[53] UN GA Resolution 1514 (XV), paragraph 6 "Any attempt to disrupt the national unity and the territorial integrity of a country in incompatible with the purposes and principles of the Charter of the United Nations".

[54] Musgrave, p. 160

[55] "The principle of self-determination appears to have a core of reasonable certainty. This core consists in the right of a community, which has a distinct character to have this character reflected in the institutions of government under which it may live. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate", Brownlie, Ian, "The Rights of Peoples in Modern International Law", in "the Rights of Peoples", ed. Crawford, James, 1998

[56] Musgrave, pp. 161-162

That a certain group is held to be an ethnic group raises the issue not so much of internal self-determination as of external self-determination and secession. This is true not only for the ethnic groups within non-self-governing territories but also for the ethnic groups within sovereign states. The Western States have been reluctant to recognize secession as part of self-determination as stated in the UN instruments, while their socialist counterparts, with the Soviet Union as the main advocator, maintained that certain ethnic groups did posses this right.[57] This view however was held up until the post-war period after which there was a unanimous antipathy of states to secession, which can be viewed in the practice of the UN, in the case of Congo (1968) and the case of Northern Cyprus (1983), among others. The territorial integrity is upheld as the salient and thus, the prevailing principle.

The obvious conclusion to draw from the above is that ethnic groups are not entitled whatsoever to secession based on the right to external self-determination. Therefore any attempt by an ethnic group to claim self-determination, should lead to a negative answer. This will undeniably cause a lot of tension between the principle of territorial integrity, on one hand, and the claim from the ethnic group to its right to determine its own political status, on the other, which will have deep consequences if not properly addressed.

I will come back to this discussion again when I will be analyzing the situation of the Basques as an ethnic group within the territory of Spain.

2.2.5. Minorities

One should keep in mind that as yet there is no clear definition of what constitutes a minority, although it has been agreed that it should include both objective and subjective elements. Probably the most widely accepted definition is the one proposed by the Special Rapporteur Capotorti: "*a minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the state - posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language*".[58]

[57] Musgrave, pp. 104-105
[58] Thornberry, Patrick, "International Law and the Rights of Minorities", Clarendon Press, 1991, p. 6

As a consequence of the uncertainty due to many definitions of "minority", many such groups, especially in Europe, the so-called "national" minorities[59], do not want to be called minorities because it might undermine their efforts to assert the right, as "peoples", to self-determination.[60] This, of course, leaves room for irritation in the consideration of the right to self-determination.

Are then minorities, "peoples" in the context of the right to self-determination? The State practice has been to maintain these two concepts separated and thus, denying that minorities would be entitled to the right to self-determination, right as we have seen has reserved to only a handful of groups of "peoples".

The example of the dynamics of the dichotomy between "minorities" and "peoples" can be illustrated with reference to the International Covenant on Civil and Political Rights article 1 and article 27. The first one deals with the dynamic development of a "people" while article 27 ensures the enjoyment of the members of a minority of their own culture, language and religion, and thus falls short of the right to self-determination. Also the Helsinki Declaration keeps separate "minorities" and "peoples", so that the dismemberment of the state through the claim of self-determination of different minority groups will not occur.

In the international legal doctrine other views can be found, which assert that minorities constitute "peoples". Buchheit has advocated the theory of the "right to reversion" which, states that a minority is not per se “a people” but it can gain this status if oppressed.[61]

Thus, whenever a minority is denied the peaceful enjoyment of the rights and guarantees conferred upon it by the international human rights instruments, it can act as a people in order to determine its own political status by virtue of the right to reversion. The Commission of Rapporteurs in the Ålands Islands case has articulated this, and it has been

[59] there have been many discussions on the appropriate term to be used with regard to minorities, whether "ethnic", "racial" or "national", it seems that in accordance with the travaux preparatoires of the Covenant on Civil and Political Rights, "ethnic" is the broadest term, thus "racial" and "national" are to be included in "ethnic" minority

[60] Barsh, Russel Lawrence, "Minorities: the struggle for a universal approach", p. 14, in "The Living Law of Nations, Essays on refugees, minorities, indigenous peoples and the human rights of other vulnerable groups", ed. Gudmundur Alfredsson and Peter McAlister-Smith, N. P. Engel Publisher, 1996

[61] Buchheit, Lee, "Secession: The Legitimacy of Self-Determination", Yale University Press, 1978, p. 72

argued that the saving clause in the Friendly Relations Resolution includes this right of reversion as well.[62]

However, despite of what these views might suggest about the relationship between minority rights and "peoples" in the context of self-determination, international law still insists that while minority rights are covered by article 27 in the ICCPR, the self-determination issues remain the right of peoples as found in article 1 of the same Covenant.

Thus, in conclusion, although minorities continue to claim self-determination, international law does not support their argument since self-determination is strictly reserved to peoples and there is no mention about minorities.

These findings will be relevant later on in the context the Basques' claim for self-determination in form of secession.

2.3. Types of Self-Determination

From the findings in the last sub-chapter we can conclude that the contemporary international law is reluctant to adopt an expansive point of view with regard to what constitutes a "people" in the context of self-determination.

It is important however, to present the two types of self-determination claims, external and internal, in order to better understand this narrow point of view. It is easier to draw a dividing line between these claims in theory than it is in practice. In the drafting of the Friendly Relations Resolution, the Western States had suggested that the conjunction between "external" and "internal" self-determination should not present any difficulties since, in the presence of a democratic regime, claims to external self-determination would loose their weight. This view however, was not shared by the developing countries since they felt that it was an attempt of the Western World to impose on them their own political persuasions on constitutional law. Therefore, the language of the saving clause is enough ambiguous as to allow interpretations for the benefit of not only internal self-determination but also external as earlier showed.

[62] Musgrave, p. 171

2.3.1. External Self-Determination

External self-determination can be summarized as the right to political independence and seems to include the right to secession. However, extending external self-determination beyond the context of decolonization has proven difficult. Through State practice and UN resolutions, external self-determination has been awarded also to peoples subject to foreign occupation. The difference is evident from the case of minorities and ethnic groups. It is evident from the wording of the Friendly Relations Resolution, which refers to colonialism and subjugation of people to alien subjugation, domination and exploitation.[63] Although the definition of "alien subjugation", "domination" and "exploitation" present at a first glance interpretation problems, the UN's practice after the adoption of its resolution may serve as a guiding-line. It came to be accepted that intervention by use of force and military occupation is the right meaning of the concept "foreign domination". The view advocated by a minority of UN Member States, that even economic exploitation should be considered as giving rise to a justifiable claim of self-determination, was however rejected.[64]

Beyond these here mentioned situations, which could give rise to the right to self-determination, the international community is not all that eager to accept the divisive forces that encourage state disintegration.

As an example, at a UNESCO-experts meeting some participants argued that external self-determination was an instrument of decolonization, which has little applicability under existing international law beyond that situation and that of occupied territories.[65] Under this understanding, therefore, few people are entitled to claim the right to external self-determination.

Therefore, there have been many actions addressed towards protecting the status of minorities and ethnic groups, such as many international instruments dealing with the explicit rights of minorities. In practice as in theory the right to self-determination has not at all meant that such minorities are granted a right to secede.[66] A point which is worth mentioning since the many claims of external self-determination arrive nowadays from the

---

[63] Cassese, p. 90
[64] Cassese, p. 93
[65] UNESCO International Meeting of Experts on further study of the concept of the Rights of Peoples, final report and recommendations, UNESCO doc. SHS-89/CONF.602/7. 1998
[66] Cardenas, Emilio and Canas, Maria, "The Limits of Self-Determination", in Danspeckgruber, p. 102

many minority groups in the world, claiming thus peoplehood in the wording of the many international instruments dealing with the right to self-determination.

2.3.2. Internal Self-Determination

Compared with external self-determination, internal self-determination is regarded to be a narrower right, however, an ongoing process, which being of a somehow defensive nature, relates to the basic political right to choose one's government, without any interference, domestic or foreign.

Having secured freedom from external domination the whole population is free to choose the forms and structures of government that would best serve it. It is unlikely that there would be unanimity in regard to these choices. Therefore, it is the majority's democratic choice that will prevail.[67]

Here the question regards whether dissenting minorities are entitled to internal self-determination. The choice in respect of the nature and form of the political and economic regime, if made democratically, would be the decision of the majority. Therefore, any opposing minority will have to abide by the decision and work out arrangements that best suits its interests within the framework of the majority's decision. The argument is that in the case of awarding dissenting minorities the right to internal self-determination, which would most probably lead to the creation of a political and economic regime separate from that determined by the majority, there would be several political and economic regimes within the same country.

This view is also seen in the *Algiers Declaration on the Rights of* Peoples from 1976. The essence of this Declaration is that for internal self-determination to be satisfied the whole population must freely and democratically choose its preferred form and structure of government. They must democratically elect a government that is representative of the whole population, and it is the duty of the elected representatives to ensure that they reflect the will of the people at all times. Moreover, the Algiers Declaration maintains that if the freedom to make these choices freely is denied, the right of internal self-determination along with fundamental freedoms and human rights is violated.[68]

[67] Cassese, p. 101
[68] Cassese, p. 298

As already mentioned, the saving clause in the Friendly Relations Resolution gives rise to the right to equal access to government for racial and religious groups but not to linguistic or national groups within an independent state.

The conclusion is thus that the internal self-determination is awarded to the whole people as such, represented by the majority's democratic choice and no such right is allowed to dissenting minorities.

2.4. Secession and ethnic groups' claims to self-determination

The concern of the whole international community with regard to claims of external self-determination regards the issue of secession. Leaving aside the groups that are entitled to such a right due to, as we have seen, foreign domination, it has been argued that widening the range of the peoples including thus also ethnic groups, would only lead to the territorial dismemberment of existing states. The rationale behind this narrow approach is that ethnic self-determination *per se* implies the possibility of secession, since the recognition of a group as a people in the context of the right to self-determination gives it the right to determine its own political status.[69]

The supremacy of the principle of territorial integrity is therefore absolute, (at least in theory) and it is uphold in both UN practice and instruments. This is in conformity with the early statement of the Commission of Rapporteurs back in 1921, when it totally ruled out the right of secession for minorities, position that has been restated ever since.[70] No successful development could be registered in this respect in international law along the years.

Once again, the saving clause in the Friendly Relations Resolution gives us an idea of the classification of an ethnic group's claim to the right to secession. It seems therefore, that lack of representation on ethnic grounds would not qualify under the saving clause.

Some commentators do not agree with this view, and adopt instead a broader view, which argues that oppression legitimize secession.[71] Through this "oppression theory", the right of secession would be recognized to a group although the criteria in the saving clause

---

[69] Musgrave, p. 180-181

[70] *"To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity"*, Report of the Commission of Rapporteurs, 16 April 1921, League of National Council, mentioned in Cassese, p. 123

[71] Buchheit, p. 222, Musgrave, p. 189

of the Friendly Relations Resolutions would not be fulfilled. The problem is determining what constitutes “oppression" sufficient enough to legitimate secession, which is still to be determined.[72]

Returning to the ethnic groups' claim to external self-determination it is argued that the right of self-determination should rather rest on the unanimous will of the members of the ethnic group to be governed by those like oneself, than on the existence of oppression.[73]

An interesting proposal comes in the advance of the "internal theory" as a ground to secession on ethnic criteria. This theory, which originates in the principle of non-interference, established in article 2(4) and 2(7) of the UN Charter, makes secession an issue of domestic concern only, leaving outside thus any international consideration. The validity of this theory is however highly questionable when the result of division of a state in consequence of a civil conflict may become of international concern after all. The international community will have to react to the secession and either recognize or not the seceding entity. There are two theory of recognition governing secession, one declaratory and one constitutive, with different results. Although, there is no consensus on which of the two prevails in the international community, the most advanced argument goes in favor of the declaratory theory, which would then necessarily imply acceptance of the “internal theory” with regard to secession.[74]

In conclusion, the claim of self-determination on ethnic grounds is still a matter of discussion in the legal doctrine without any practical application by the international community mostly due to the fear of state dismemberment.

2.5. New trends in the approach to the right to self-determination

Up till now we have been able to trace the concept of self-determination back to World War I when its prominence increased due to President Wilson and his famous Fourteen Points plan for peace. We have further followed the development of the concept self-determination from a principle so mentioned in the UN Charter to a legal right as it is referred to in the two human rights Covenants.

By now some scholars and political leaders view the self-determination norm as self-liquidating and in fact, now nearing its life-end since the project of decolonization is

[72] Musgrave, p. 192
[73] ibid
[74] Musgrave, p. 195

completed. If the decolonization definition applies, the principle has served its original purpose and has very little relevance to contemporary world. It would only remain applicable to "uncontested" splits, on which all parties agree to create one or more states (e.g. the breakup of Czechoslovakia into the Czech and Slovak Republics), or to reunion of previously split territories (e.g. Germany). These are, however, exceptional and uncontroversial cases.

Others view self-determination as a permanent and vital instrument in global affairs. In international law or practice, there has been no definitive clarification of the term "self-determination of peoples", which could be concluded from the above presentation. However, under the UN's auspices the principle generally has applied to territories and not to peoples.

Has then the right to self-determination reached the status of an outdated concept? Well, not if we consider some new trends with respect to the broadening of its application following the Helsinki Declaration adopted in 1975, the Algiers Declaration adopted in 1976 and the Vienna Declaration on Human Rights adopted in 1993. Save their non-legal binding character all these three instruments illustrate the new trend emerging within the international community towards a broader concept of internal self-determination.

The Helsinki Declaration was adopted in 1975 by thirty-five governments and thus has a political and moral weight in comparison with the Algiers Declaration of 1976 adopted by a group of individuals having no official governmental status.[75]

Vital to the discussion on the right to self-determination is principle VIII, of the Helsinki Declaration. It reads, *"The Participating States will respect the equal rights of peoples and their right to self-determination, acting all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States. By virtues of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of*

[75] Cassese, p. 296

peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle".

At a first glance, the wording of this principle is much wider than the previous articles on the right to self-determination in international instruments. It embraces both an explicit reference to internal and external self-determination and its application is not limited to oppressed peoples but instead it applies to all peoples thus also to those within sovereign and independent states. Therefore, it has been agreed that principle VIII provides a definition of self-determination that breaks new grounds in international relations.[76] With regard to external self-determination it proclaims that the whole population of each Member State to the Declaration has this right. However, it has been maintained and emphasized that no right to self-determination is granted to any minority or ethnic group and that the territorial integrity of the Member States is absolute. Thus no right to secession against the will of the whole people of the State in question is awarded under the wording of the Declaration. This was agreed unanimously since the signatory states did not want to go that far as to grant national minorities a right to self-determination because this would have led to a claim of secession.

Instead, the Algiers Declaration of 1976 is wider with respect to both internal and external self-determination. The article relevant for the present discussion is article 7, which reads *"Every people has the right to have a democratic government representing all citizens without distinction of race, sex, belief or color, and capable of ensuring effective respect for the human rights and fundamental freedoms of all."* It has been argued that the internal self-determination has been widened further through the wording of this article. Since the drafting parties were in no official government position and thus not bound of any political view, the Declaration states that political oppression of a people constitutes the denial of its right to self-determination.[77] Although it does not explicitly refer to external self-determination, article 7 read in conjunction with article 27, which reads *"The right of minorities must be exercised with full respect for the legitimate interests of the community as a whole and cannot authorize impairing the territorial integrity and political unity of the State, provided the State acts in accordance with all the principles set forth in this Declaration"*, can be said to confer on minorities the right to external self-determination in form of secession. This is of course revolutionary since, although void of any legal binding

[76] Cassese, pp. 286-287

character, it is for the first time that secession is permissible as the only way to ensure a minority's survival and the survival of its culture, religion and political identity.[78] Further, it even grants peoples the right to use force as a last resort, in their struggle for their self-determination.

As seen, both Declarations are revolutionary each in a different way. The common premise is the strengthening and improvement of international norms governing self-determination by linking it to human rights. The Helsinki Declaration paves the way for a wider understanding of internal self-determination, while the Algiers Declaration makes a bold proposal for the right of secession granted to a national minority when the State in question does not award it the proper protection.

Later on, with the adoption of the Vienna Declaration on Human Rights adopted by consensus of 160 UN Member States, the international community went as far as reaffirming the article on self-determination contained in the Friendly Relations Resolution, with some important modifications. The article on self-determination contained in this Declaration reads as follows *"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. (...) In accordance with the Declaration on Principles International law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the theory without distinction of any kind".* The modification was made with regard to the last part of the article, which states "without distinction of any kind". In comparison with the Friendly Relations Resolution it does not limit its application to racial and religious oppressed people but it is universal in that it gives rise to a pluralistic representative democracy.[79]

All in all, the international community seems to consider and accept a certain re-establishment and reaffirmation of the right to self-determination in a new phase of its

[77] Cassese, pp. 296-297
[78] ibid
[79] Cassese, p. 306

existence. Thus, save the lack of legal weight, self-determination seems not to be such an outdated term as some commentators have affirmed. Maybe we are witnessing new slow but firm opportunities for the updating of the term so that it can keep up with the fast developments on the arena of international relations. I do not believe however, that with regard to external self-determination for national minorities there will be any real future development, since the fear for phenomenon of Balkanization is a reality.

3. The Basque Case

Materials on Spain and the Basque Country differ in content depending on the authors' origins and point of view. There are many points of divergence and contention among scholars in general, on the Basque Country issue.

Before discussing the core question in this thesis, i.e. the right to self-determination and the case of the Basques, I hold it imperative to first present some background information on Spain and the Basque Country. Therefore, I propose to continue with an analysis of Spain's formation as a state from a historical point of view, and also in relation to the criteria that has contributed to define the characteristics and boundaries of the right to self-determination within Spain. At the same time, reference will be made to the Basque Country in order to provide for a more complete point of reference.

This will help us to better understand the difference in opinions between Spain and the Basques nationalists that has characterized the internal situation in Spain for more than two decades. Once

Once again, however, I remind the reader of the difficulties involved in assessing the truth behind history. Therefore, I invite the reader to a certain moderation in his or hers criticism on the historical facts presented in this thesis. Moreover, one should keep in mind that in this particular case a major part of the conflict concerns the claim of a historic right to independence put forward by the a fraction of the Basques, represented by the militant ETA.

3.1. Spain as a nation

When reading materials on Spain and the Basque Country one has to put attention into the neutrality of the material. One point of divergence is the homogeneity of Spain seen from the nationality point of view. The official statement holds that within Spain there is only one official nationality, while the Basque view is that Spain is rather a pluri-national state. It has been held that presently, there are at least three specific nations included in Spain, e.g. Catalan, Galician and the Basque Country.[80]

[80] Landa, Kepa; Goirizelaia, Jone, "The Spanish Constitution and the Right to Self-determination of the Basque Country", Pais Vasco, p. 15

3.1.1. Historical background

According to history writings the political situation during the 15th century in the territory known as Iberian Peninsula was far from being a unity. The union through marriage of the two feudal kingdoms, Castilla and Aragon, coincided with the ending of the Recoquista.[81]

The unification of Spain was driven by the need of Christian opposition to Muslim threat. In a period of territorial transition its main goal was to seek military hegemony, since until then these two kingdoms, Castilla and Aragon, had had different interests and orientations. This political act was endowed with a religious element that would give it the strength that the marriage itself lacked (known as the "Catholic Monarchs").[82]

There were two other kingdoms in the peninsula that coexisted with this union, namely Portugal and Navarra. The territory of the latter was the settlement of the Basque people. Seated on both sides of the Pyrenees Mountains, west of those mountains to where they descend to the Cantabric Sea, the Basque community (vascones) is one of the oldest in Europe. Although it has a long oral tradition, there is no concrete data concerning the age of settlement, but it has been mentioned in the early writings of other civilizations or culture from the Western Europe that had left written history.[83]

At the same time that this new kingdom created by the Catholic Monarchs was expanding overseas, basically towards America, and also Europe and Africa, through conquest and heritage, there was a tendency to unification and political control within the peninsula itself. The Catholic Monarchs conquered and integrated the kingdom of Navarra into their kingdom in 1512. However, within the next three centuries, the internal situation of this new unity, "Las Españas" (Spain), was anything but a unity regarding the economic, political and social behavior. The kingdom of Navarra maintained its autonomous political institutions (County Council of the Kingdom, Councils), its own Courts of Justice and its own public finance (Chamber of Comptos). It also maintained its distinct multi-secular liberties (fueros), which were created by and for the Basque people and were not seen as privileges granted by the Spanish king but rather as rights born among the people. It was a common feature among the Basques that they did not obey directly under the Spanish king,

[81] Carr, Raymond, "Modern Spain 1875-1980", Oxford University Press, 1985
[82] Heiberg, Marianne, "Urban Politics and Rural Culture, Basque Nationalism", in Rokkan, Stein and Urwin, Derek (eds.), The Politics of Territorial Identity, Studies in European Regionalism, Sage Publication, 1982, p. 354
[83] Czrr, see footnote 81

in accordance with this special treatment that they held through the *fueros*. Also the rest of the territories of the Basque settlements not included in the Kingdom of Navarra, lived in a similar situation maintaining their identifying marks.[84] This is an important element to mention since it is evidence of an early-accepted type of autonomy that the Basques had been granted.

This disparate political arrangement was institutionalized in the *Pacto Monarquico*, which granted formal recognition to and respect for the autonomy of the different regions under the Castillan crown, thus contributing to internal peaceful coexistence. The regions thus included within the union had to some extent a contractual rather than a subordinated position to the central authority. It has been argued that it was this respect for the Basque identity that explains how the Basque people settled on a small passage territory and have been able and allowed to maintain their differentiated identifying marks.[85]

When Spain began to loose control over the mechanism of imperial power resulting in the dismemberment of the so-called Spanish Empire the old regime disappeared and the centralist mechanism made its appearance. It was then that the need for a more explicit administrative unification became acutely apparent and the internal standardization started to take place, which caused a confrontation with the Basque people, who saw its identifying marks - its self-government, language, culture - in danger.[86]

During late 19th century the Basque nationalism started to take a more concrete form. It was under the leadership of Sabino Araña that Partido Nacionalista Vasca (PNV) was founded. One of the main concepts shaping the nationalist ideology was the idea of the Basque race, the foundation of the nation, with a natural right to self-government.[87]

Later on, beginning of the 20th century, there had been some attempts by Basque nationalists to establish an autonomous government. Thus when the Spanish Republic, established in 1931, granted autonomy to Catalonia, the Basque nationalists inspired by Sabino Araña, began a large scale, well planned campaign for Basque autonomy. Proposals to an autonomy statute were drafted both by the Basque nationalists, who had appointed a special Commission for the occasion, and by the central Spanish government. As it will be seen later on, it was not until early '30s, just a few weeks before the Spanish Civil War

[84] ibid
[85] Landa, p.16
[86] Landa, p. 17
[87] Rokkan, pp. 367-368

started, that an autonomy statute was approved by the republican government, and a Basques regional government was organized under the statute.[88]

3.1.2. Franco's regime

This special treatment offered to the Basques under the republican government came to end with the victory of General Franco. Although the Basque Government did not enjoy full independence from the central government in Madrid and did not include the entire Basque territory within the peninsula (Navarra was not included) was as a consequence sent into exile. This Basque government had had important powers and exemplified the differentiability of an ethnic community. It had enacted legislation to promote the Basque language, establish law and order, and economic development. [89]

However, when General Franco imposed a fascism system of organization and government of the state, one of his most important concerns was the nationalism, which "goes against the unity of the country". As a consequence the entire Spanish Basque Country was subjected to repression. Thousands of nationalists were killed or imprisoned, Basque names forcibly changed to Spanish (*castellano*) while the use of the language *Euskera* was banned and driven underground. Basque language books, journals, newspapers, speeches, sermons, street signs were outlawed. Likewise, casual street conversation in Basque could entail police harassment and summary fines. Above all, the formal education in Basque language was forbidden and the education system largely placed in non-Basque hands.[90]

PNV opposed Franco's regime vehemently till 1959, when a splinter group, ETA was founded. As its start ETA had to choose between two alternative nationalist models: that of the European ethnic minorities, or that of the emerging third world nationalism. The former defines its strategy from the perspective of restructuring and reforming European national states in order to attain a federal Europe made up of different peoples. The latter bases its entire strategy on a radical and absolute antagonism between the dominant country and the colony, such that resolution of the conflict must inevitably lead to the violent expulsion of the colonizer and the substitution of the old colonial power for a new,

---

[88] Medrano, Juan Diez, "Divided Nations - Class, Politics and Nationalism in the Basque Country and Catalonia", Cornell University Press, 1995, p. 135
[89] ibid
[90] Medhurst, Ken, "Basques and Basque Nationalism", in National Separatism, Williams, Colin (ed.), University of British Columbia Press, 1982, p. 244

autochthonous power. This "colonialist model" gave ETA its ideological framework and military justification.[91] Its initial goal had been the preservation of the Basque language and culture. This came to change when due to internal conflicts the composition of the organization changed and was afterwards dominated of a romantic nationalist point of view, which gave priority to the achieving of Basque independence.[92]

3.1.3. The political transition

With Franco's death the time had come to make way for a transition period under which Spain could regain its forces and dignity. A clear dichotomy was present between the formulas to be applied to the reality of the state: rupture or reform. The defender of the former thought it as the only way to end a situation of absolute oppression of human rights and liberties, both individual and collective. It was seen and the only way to create a new composition of what it had been a unitary state that did not accept the practice of the right to identity and existence for those nations that were included within it. Finally, however, the decision was to adopt the reformist option.[93]

Although it might have been supposed to be an important change for the Spanish, it did not solve the Basque problem concerning the question of self-determination. As we will see later on, this will be reflected in several ways, but especially, the significance of the ultimate expression of the confrontation, the persistence of an armed struggle with the state.

Although PNV had in many aspects taken distance from its earlier ideology and was now more secular, it still continued to show concern about the political role of the Basque Country within the Spanish State. As a consequence it stressed three claims, namely the right to self-determination, the attainment of broad autonomy and the attainment of independence in an indefinite future.[94] The negotiations with the new Spanish government were not that successful and controversy over the Basques' right to self-determination persisted. Although this did not impede the approval of the Basque statute of Autonomy, which granted to the Basques more autonomy than it had ever enjoyed before, it made its implementation very difficult. Moreover, tension between the central government and the

[91] Rokkan, pp. 377-378
[92] Medhurst, p. 247
[93] Landa, p. 18
[94] Medrano, p. 144-149

PNV and within the PNV itself concerning the violence conducted by ETA aggravated further the situation.[95]

In the post-Franco period it soon became clear that a stable Spain required a decentralized approach to the formation of the new democratic state, although the demand for autonomy was not as strong in all regions as it was in Catalonia, Galicia and the Basque Country. In this latter the struggle for autonomy by some groups was not as radical as for other groups, e.g. ETA, which sought full independence and secession. It should be mentioned that the entire population of the Basque Country has not shared this view, since some provinces have been less radical than Vizcaya and Guipuzcoa. Further the province of Navarra remained divided between those in the north, more sympathetic to Euzkadi and those in the south that did not share the radical view of an independent Basque Country.[96]

Therefore, the new central government understood that the new Constitution had to meet the requirement of autonomy in order to avoid any radical decentralization that could take place endangering the process of democratization. That it is equally incompatible for the State to deny a region or nationality its statute of autonomy, as it is for a region to proclaim its independence, follows clearly from the wording of the Constitution.

3.2. The Spanish Constitution of 1978

"The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions which make it up and the solidarity among all of them."

(article 2, Spanish Constitution, 1978)

"The mission of the Armed Forces, comprising the Army, the Navy and the Air Force, is to guarantee the sovereignty and independence of Spain and to defend her territorial integrity and the Constitutional order."

(article 8, Spanish Constitution, 1978)

It follows clearly that the Spanish Constitution recognizes the Spanish nation as the only political subject and its indissoluble unity. It is further obvious that, in conformity with national constitutional law, it does not accept the right to secession in the internal legal order.

---

[95] see Organic Law 3/1979, December 18th, B.O.E. (Official State Gazette), 22.12.79.

The Preamble of the Constitution proclaims the "will to protect all Spanish citizens and nations in the exercise of human rights, their own culture and traditions, language and institutions". It goes on however, proclaiming that it is the "Spanish nation" who proclaims this and the idea that there is only one nation in Spain follows also from the article 1.2 that establishes that "the national sovereignty resides in the Spanish people".[97]

The use of the notion "nationality" in article 2 of the Constitution was never the subject of any type of definition or even clarification by the legislator. However, it seems obvious that the use of the term "nationality" should not be interpreted as "nation", given that the posterior articulation of the state will be based on the administrative decentralization or autonomic map, giving autonomy to nationalities or "classical" ethnic communities (Basques, Catalans, Galicians).

Following from the wording of article 8 of the Constitution, it is obvious that the second of the three missions mentioned there refers directly to the self-determination of a part of the State, leaving the matter thus subject to the force of the Spanish army. These provision does not look to the outside but to the interior of the same state, applied to those nations that would want to put into practice the right to self-determination and question the "the unit and indissolubility of the mother country".[98]

It could be of interest to mention that under the adoption of the Constitution in 1978 there was a proposal coming from the Basque nationalist Letamendia Belzuce, representing Euskadiko Ezquerra, to include an amendment to article 2 through which the right to self-determination would be introduced into the said Constitution. The final goal of this amendment was, once the autonomous community had been established and two years after the Statute of Autonomy of the autonomous community entered into force, to give the Legislative Assembly the possibility to start the process for the application of the right to self-determination. The said process would require the absolute majority of votes both within the Assembly and in the referendum that would necessarily have to proceed. However, this amendment was rejected by all the participants in the Constitutional Commission in 1978, except for the representation of the Partido Nacional Vasco (PNV).

[96] Hannum, p.268
[97] Rodrigo, Ruiz Segundo, "La Teoria del Derecho de autodeterminacíon de los pueblos", Centro de Estudios Politicos y Constitucionales, 1998, p. 117
[98] Rodrigo, p. 118

The reason behind this support was the recognition of the right to self-determination as a theoretical right, but not with the ultimate goal to introduce it in the Constitution.[99]

On the other hand, the socialist representator Gregorio Peces Barba, explained that there was no need for such an amendment since the Basques people in reality do enjoy the right to self-determination through the elections and referendum with regard the Constitution and the Autonomy Statute for the Basque Country.[100] Thus, it seems that the right to self-determination was interpreted differently by the different parties. While the Basque representatives were aiming for the gradual recognition of external self-determination, other parties, such as PSOE, were aiming at the internal aspect of the right to self-determination as it can be inferred from the above.

Further, in order to emphasize the national unity as a founding principle of the new regime, the Constitution maintains the idea of national unity throughout its articles. This can be seen through a set of principles that includes the principle of solidarity (article 2 and article 138.1 CE), and the principle of equality (article 139.1 and article 149.1 CE) and finally, the principle of economic unity (deducted *sensu contrario* from article 139.3 CE).

It is thus clear that there was no intent whatsoever to include in the Constitution any kind of reference to the right to external self-determination with a following right to secession. Instead, besides the constitutional recognition of regional autonomy, the unity of Spain is unambiguously the core of the Spanish Constitution.

3.3. The Basque Autonomous Community

As earlier stated, the Basque Country was recognized its Statute of Autonomy in 1979. It was meant to represent a proposed political solution to the serious historical controversy, which had significantly affected relations between the Basque Country and Spain. It was believed that autonomy generous enough to the wishes of the Basques representatives would end terrorism and serve to integrate a territory that had traditionally been reluctant to take part in the Spanish political sphere.

In accordance with the wording of article 2 and title VIII of the Spanish Constitution, there is a hierarchical structure wherein the Constitution enjoys the highest

[99] Rodrigo, p. 119
[100] ibid

ranking and the autonomy statutes are legally subject to it, but superior to any state law or administrative order.[101]

What does the Basque Autonomous Statute contain? The Spanish Constitution is quite open-ended, in that it refrains from defining the terms and scope of autonomy to rigidly. This has meant a flexible approach, which at the same time as it has facilitated the negotiations concerning the content of the Statute in question it has led to some imprecision when legally interpreting the statutory precepts.

The Basque Statute appears to be conditioned by these two factors. It clearly pushes to the limit all possibilities provided by the Constitution, while some of its key percepts are rather vague. Meanwhile, the statutory text is characterized by legal imprecision. From a formal point of view, the Statute is a legally faulty document, and it repeatedly suffers from a lack of technical quality. Its imprecision reflects the Statute's own indefiniteness, which makes sense given its creation and discussion. After all, many arduous negotiations preceded it and once adopted it was the first one to be approved after the Constitution with no model to follow.[102]

Within the framework of the constitutional attributed competencies, the Basque Autonomous Statute presents some fundamental aspects. The Basques are referred to as a nationality, but with no legal effect whatsoever. This is due to the fact that the constitutional text limits itself to recognizing the existence of nationalities and regions, without ever legally defining the distinction between these two concepts. Although void of any legal effects, it does have important political connotations, since the expression "nationality" is linked to the uniqueness of the Basque demand for a nation, which is reflected in the Additional Resolution of the Statute.[103]

It follows from the latter that the acceptance of the autonomy regime does not entail a renunciation by the Basques to the rights which as such could have corresponded to them in virtue of their history, rights which can be updated in accordance with what is established by legal ordinance. That this declaration has important material effects can be seen from the granting of significant and distinct powers, whose approval is directly based on the admission of historical rights. This was the case with education (article 16) and the autonomous police (article 17) as well as with respect to the economic contract (article 14)

---

[101]Suksi, Markku, "Autonomy - Applications and Implications", Kluwer Law International, 1998, p.203
[102] Castells, Jose Manuel and Jauregui**,** Gurutz, Political autonomy and conflict resolution: the Basque Case, available at www.unu.edu/unupress/unupbooks/

which constitutes the most obvious expression of the acknowledgment and application of Basque historical rights.[104]

Considering this and the fact that within the Autonomous Statute there are 39 material competencies falling exclusively under the authority of the Autonomous Community, it is obvious that this expresses the capacity for real self-governance, but does it in any way, leave space for external self-determination? I will come back to this question in my analysis.

3.4. The Basques as an Ethnic Minority Group

Before, dealing with the core question of this thesis, I believe it imperative to consider the status of the Basques under the current international law. Do they posses the characteristics of a nation, a national minority, a linguistic, religious or cultural minority or an ethnic minority group?

It should be no problem in asserting that they do not constitute a nation under the Spanish Constitution, as seen above. Let us however take one step further and see how a "nation" is to be considered according to international doctrine.

Although there is no such thing as a correct definition of "nation", there are some characteristics that can, when considered together, give an idea of what it is meant by a "nation". Thus, it has been suggested that a nation is "a group of people who recognize one another as belonging to the same community, who acknowledge special obligations to one another, and who aspires to political autonomy - this by virtue of characteristics they believe they share, typically a common history, attachment to a geographical place, and a public culture that differentiates them from their neighbors"[105]. But then, if one stresses the importance of culture, the common sense of a common history and the historical attachment to a particular territory as the "homeland" with the aspiration to practice some form of self-governance, one could wonder about the Basques. Don't they share a common culture, a common history and a particular territory? It has been stated, there are more nations than feasible nation-states. Due to the fact that on the same territory there might be a mix of different peoples and that although possessing the characteristics mentioned above, a nation

---

[103] ibid
[104] ibid
[105] Miller, David, "Secession and the Principle of Nationality", in Moore, Margaret (ed.), National Self-determination and Secession", Oxford University Press, 1988, p. 65

might be "too small, or too poor or too much without infrastructure to form a viable state".[106] This could be the case of the Basques.

On the other hand, national minorities are said to be different from both nations and ethnic groups. It is maintained that like nations they are historically rooted in a state, but that unlike a nation they do not seek political autonomy and no form of self-government.[107] Having considered the case of the Basques above, we can conclude that this is not an appropriate definition.

Further, considering the case of a linguistic, religious or cultural minority, it is obvious that also this sort of community would fall short of the aspirations of the Basques. While the former seeks the recognition, preservation and respect of its characteristics, be it language, culture or religion the latter, the Basques seek more than that, although it is not excluded that they do constitute also a linguistic minority. They seek additionally a form of self-governance, seeing themselves as a political community.

It remains thus only one category under which for the purpose of this thesis, we could consider the Basque people, namely as an ethic group. It is important to clarify this classification, as it will come in handy in the analysis of the application of the right to self-determination to the Basques. An ethnic minority group is, by definition, distinguished by a commonality of culture, religious, linguistic or other characteristics, besides the belief that membership in the group is rooted in descent, with regard to ones ancestors.[108] In that case, examining the Basques, the natural conclusion is that they do constitute an ethnic minority group. They constitute a minority since the regions inhabited by the Basques, divided between Spain and France, are not politically unified and are not self-governed. Further, according to the findings of anthropologists and archaeologists, the Basques are a racially and genetically distinct group, whose origins are unrelated to those of their French and Spanish neighbors.[109] Moreover, the most important defining characteristic of the Basques is their unique language, *Euskera.* There have been many studies made on the origin of this language, and the opinions presented hold almost unanimously, that it has no connection to

[106] Nielson, Kaj, "Liberal Nationalism and Secession", in Moore, p. 104-105
[107] ibid
[108] Nielsen, p. 107; Carter, Michael, "Ethnic Minority Groups and Self-determination: the case of the Basques", in Columbia Journal of Law and Social Problems, vol. 20, no. 55, 1986, p. 62-63
[109] Carter, p. 63

any other known language, and that it has always been distinct and isolated in the western Pyrenees.[110]

Having concluded that the Basques do constitute an ethnic minority group, now the next question is whether, as such, the Basques may be considered a "self" for purposes of application of the principle of self-determination.

[110] ibid

4. The Basques, a "people" with right to self-determination?

We have by now come to the point where, based on the previous chapters, it should be clear that trying to fit the Basques under the concept of a "people" for the application of the right to self-determination is quite a dare think to do. Nonetheless, a thorough analysis of this issue is in place.

The main problem here is the following: do the Basques really have the right to self-determination, i.e. do they constitute a "people" as required by the wording of the relevant international instruments? This is very important, because it seems that in Spain this rather than being considered a legal issue it is seen as a political question. Spain does not want to loose one of its most developed regions, and in accordance to the Spanish Constitution it will thus uphold the principle of state unity.

However, as I have already mentioned, my analysis of this case will be done in the light of international law, thus, as far as possible, trying to avoid the political discourse and any kind of related issues.

The Basques have been categorized in international law doctrine, for obvious reasons that have been presented here in a previous chapter, as an ethnic minority group. Simply put then, the Basques do not enjoy the right to self-determination and any attempt to change this view would thus be in vain. But, can it be that easy?

We have been able to witness from the wording of international instruments, especially UN's instruments, that self-determination is usually described as a right of "peoples". However, we have also taken notice of the lack of a proper definition of the term "people", which of course in practice leads to many different interpretations. My suggestion is to revise the different definitions presented earlier keeping now in mind the case of the Basques and also seek further support in the different views presented by different UN organs concerning the right to self-determination. Having exhausted this part we should then have a fair idea of the position of the Basques in international law with regard to self-determination.

To begin with we can agree on the fact that the Basques also are peoples. That they might not be a people in the sense of "people" for the purpose of the right to self determination is another question, to which I will try to answer through the method of exclusion along the presentation of the mentioned definitions and views.

The right to self-determination as it is envisaged in different international legal instruments is thus accorded to all peoples. It is clear from the reading of the UN Charter and other legal instruments of the UN and from the Organization's consistent practice, that all peoples posses the right in question. This gives support to the conclusion that the principle of self-determination should be understood in its widest sense. It signifies the inalienable right of all people to choose their own political, economic and social system (known as "internal" right to self-determination) and their own international status (also known as "external" right to self-determination). It possesses thus a universal character recognized by the Charter, as a right of all peoples whether or not they have attained independence and status of a State. Understood then this way, the right to self-determination should be seen as another fundamental human right applicable to all, even to the Basque people.

However the very concept of self-determination is very wide. As it follows from the reading of the UN Charter the right of peoples to self-determination seems to derive from the principle of equal rights, and the meaning and scope of the former should therefore be interpreted in the light of the latter. Consequently, the right to self-determination should not be restricted in a manner, which might infringe upon the equal rights of all peoples. Similarly the Charter should, if one is to be consistent, not be interpreted as confining that right to a particular category of people because, the wording used in art. 1(2) of the Charter does not leave room for any kind of exclusion and it keeps clear that the word "people" encompasses all peoples. Also article 55 of the Charter, establishes clearly that the "peoples" to whom the principle applies include, in fact, all peoples. However, there is no official interpretation that could back this view up, which of course undermines its significance and which makes it more difficult to apply it to the Basque case, or even to other claims of self-determination for that matter.

There is thus no such thing as an accepted definition of the concept "people" and neither is there a way of defining it with certainty and the Charter is of little help on this point because it gives no details or explanations of this word. There is no text or recognized definition from which to determine what is a "people" possessing the right in question. Consequently, there is a lot of uncertainty and tension arising in the event of a claim to right to self-determination with the scope of achieving independence. In the Basque case it would be impossible to even aspire to a clear answer of how the claim to self-determination

should be viewed and why should it be handled in that way, without continuing to explore the different views on the content of this only term, i.e. "people".

Earlier in this thesis some definitions of the term "people" have been presented based on the practice of UN and international doctrine. When within UN the question of a definition of the term "people" has been examined widely varying opinions have been expressed. One body of opinion holds that, in bestowing the title of "peoples" no distinction can be made on the grounds that some peoples are under sovereignty of another country, or live on a particular continent, or possess independent territories, or live in the territory of a sovereign State.[111] This opinion is in concordance with the earlier mentioned view that the right to self-determination is universal in its application, including thus all peoples without any distinction whatsoever. For the Basques this could be of importance since they do exist within the territory of Spain, an independent and sovereign state. However, I believe that if one should adopt this very broad view, there is need for certain additional requirements to be fulfilled in order not to leave room for any abuse. Such requirements could be the need to show of continuos strives towards self-determination, a clear and certain manifestation of the group identity enough to be considered a “self”.

Another view holds that "people" should be understood to mean all those who are able to exercise their right to self-determination, who occupy a homogeneous territory, and whose members are related ethnically or in other ways, while yet another opinion has expressed that the word "peoples" should designate large, homogenous national groupings.[112] This in a way reminds us of the ethnic definition as it used to be employed during Wilson's time, before the formation of the United Nations. It was then thought that the right to self-determination should be conceived as the political independence of ethnic or national communities. This poses however some difficulties since in contemporary world there have been significant changes in the composition of the populations within certain regions (maybe an exception would be indigenous peoples). This is due to immigrations and other external factors, which of course makes it much more difficult than before to determine what is a "homogenous" territory and grouping. This is also the case in the Basque Country. In the event of making the right to self-determination dependent on the existence of a Basque homogenous people within a homogenous territory then it would be very difficult to assert this right to the Basques. The Basques are present both in Spain and

[111] Cristescu, p. 39

in France, and along the years there has been a lot of immigration to and emigration from the Spanish Basque settings, in particular. There are large Basque communities in US and Latin America, as well as there are many non-Basques in today's Basque Country who arrived there during the industrialization period but also after. Thus, in my view, it would be impossible to apply the "homogenous" definition of "people" for the purpose of the right to self-determination in the Basque case.

A further theory holds that, for the purpose of defining the word "peoples" the principle of self-determination should be considered in application only to two situations. First, that of peoples occupying a geographical area which, in the absence of foreign domination, would have formed an independent State (colonial territory, Trust Territory, etc), and second, that of peoples occupying a territory that has become independent, but who may be subjected to other forms of oppression, in particular, neo-colonialism.[113]

This view coincides with the idea, which has been the most accepted until now, namely, the idea that the sole beneficiaries of self-determination should be "peoples" under colonial or foreign domination. It has been argued that the difficulty of agreeing on a definition of this term ought in no case to prevent the application of the principle to colonial peoples and this has been the case since in the context of the elimination of colonialism, it has proved easier to resolve the uncertainty presented by the term "people". The solution has been found by adopting the principle of granting independence to "colonial countries and peoples" as laid down in the GA Declaration on that subject (1514 XV).

It seems therefore that the proper interpretation of the right to self-determination would be found if one is to see it in the total context. This means to take into account the limitations existing in the international instruments dealing with this right. If one pays attention to the "peoples" with the right to self-determination, there are some additional words attached such as "dependent", or "subjected to alien subjugation, domination and exploitation", or "colonial peoples", even "peoples under colonial and alien domination". This is also the common understanding among many scholars who recognize that the right to self-determination is, under the contemporary international law, awarded only to a narrow category of peoples, i.e. peoples under colonial domination or under racist regimes. This gives us more support for the view that peoples who do not fulfill these criteria should not be considered under the right to self-determination.

---

[112] ibid

It would be superfluous and out of the question to examine the Basque case in the light of this colonial definition, despite the view held by some commentators, namely that "when a claim to self-determination is put forward, present rule is presumably perceived by the claimant as colonial or alien".[114] I will come back to this later on.

It is obvious that it is difficult to arrive to a precise definition of the term "people", because the identification of a people to whom the principle would apply may present very complex problems. It has been argued that the various possibilities of interpretation and the consequent uncertainties could in many cases turn the right of peoples to self-determination into a weapon for use against the territorial integrity and political unity of States.

Within the international community there is a certain fear that improperly understood, this right could lead to the encouragement of secessionist movements in the territory of independent States, where any group whatsoever might believe that it has an immediate and absolute right to create a State of its own. As a consequence when the question of defining the concept "people" has come up for consideration is has very often been noted that the task is difficult as we could conclude from the above. Moreover, doubts have been expressed as to whether it is possible or even desirable to draft a definition that would be both universally applicable and generally accepted.

A synthesis of the different opinions with regard to a definition of the word "people" for the purpose of the right to self-determination, give rise to some elements which cannot and should not be ignored. These elements could and probably should be taken into consideration in specific situations in which it is necessary to decide whether or not an entity constitutes a "people" fit to enjoy and exercise the right to self-determination:

- the term "people" denotes a social entity possessing a clear identity and its own characteristics (it seems clear that the Basques do posses a clear identity and their own characteristics, especially in the language, which as it has been mentioned does not have any affinity to any other known language in current use)
- it implies a relation with a territory, even if the people in question has been wrongfully expelled from it and artificially been replaced by another population (in some way also this element can be applied to the Basques, although they have not been expelled from their settings in the right meaning of the word; however they do have a special relation

---

[113] ibid
[114] Carter, p. 61

to the territory which they currently inhabit because they seem to have always existed in that part of the Iberian Peninsula, as it results from many historical studies)

If we would to stop here, than the obvious conclusion would be that the Basques do constitute a "people" in the wording of the UN Charter and the two human rights Covenants, but would not fall under "colonial peoples" if one would limit the right to self-determination to this situation only.

It should be possible to conclude that the United Nations and its Member States have tried to keep apart, when dealing with the right to self-determination, "people" and "minorities". This has a great importance for the analysis of the Basque case, since, as it has already been mentioned, the Basques have been characterized as a typical ethnic minority group. At this point, there is no sense in continuing the idea that the Basques could, based on the above-mentioned elements, fit the non-official matrix of a "people" under the right to self-determination.

Although not explicitly excluded, minorities were not supposed to be included in a definition of a "people". This view has been upheld ever since the decision was taken as to include the right to self-determination in the UN Charter and the two human rights Covenants. As one writer states, "Self-determination is usually described as the right of peoples not minorities. But self-determination and minority rights are locked in a relationship which is part of the architecture of the nation State, since whenever a State is forged, the result is the creation of minorities (...) self-determination is now an accepted principle of international law, possibly of *jus cogens*, but a restricted principle for minorities"[115]

This position has been constantly shared within the United Nations. It can even be considered another important element in the determination of the "peoples" with a right to self-determination:

- a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the ICCPR

That the right to self-determination does not apply to minorities within the territory of a sovereign State is further supported by the opinion that despite uncertainty in the real meaning of "people" the application of the principle to all people should not be interpreted

[115] Thornberry, Patrick, "International Law and the Rights of Minorities", Clarendon Press, 1991, p. 14

as an encouragement to secession movements.[116] But doesn't the interpretation of the principle in its widest sense lead to an inevitable recognition of the right of all peoples to determine freely and on terms of equality their own political, economic and social regime and international status? I believe it does so. I believe that the ambiguity surrounding the concept "people" creates inevitably a state of confusion, which in some cases, the most extreme ones, is used against the common sense and creates thus enough space for extreme nationalist views.

This is the example of the Basque Country. Although it has never been shown that the Basques have been in possession of a political unity as an independent state, the extreme nationalists are fighting with terrorist means what they, wrongfully, believe to be a just cause. As I have stated before, this thesis is however not meant to take any political (correct) position in this question. Nevertheless, I do believe that if those demanding an independent Basque Country would take notice of the contemporary international law, they would probably understand that their claim is not justified under any international instrument relevant to the issue of self-determination.

With reference to one of the most detailed international instruments that exists with regard to the principle to self-determination, the Friendly Declaration, one can take this analysis further and examine its relevance for the Basque Case. It is stated in the principle of equal rights and self-determination of peoples that *"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples (...) and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of human rights, and is contrary to the Charter"*.

This reminds of the colonial definition that I have mentioned above. If it has been easy to define "people" for the purpose of determining "colonial peoples" or "people under racial regimes", when it comes to define what constitutes "alien domination" there is no explicit definition and the subjective conviction makes it even more difficult to define such a situation. There are without any doubt situations where such a situation is easy to detect. However, it is still difficult to find a general definition applicable to all those claiming such treatment and therefore it should be a case-by-case examination.

[116] Cristescu, p. 39

"Alien subjugation, domination and exploitation" is this the case in the Basque Country? Certainly not and it would be absurd to state otherwise! It is obvious that the Basques are far from being subject to, what in this case, would be Spanish domination.

Further, with regard to minorities, and thus of significance to the Basques as well, there is one more principle of special importance. This is the principle contained in the saving clause incorporated in the principle of equal rights and self-determination of peoples in the Friendly Relations Declaration. Earlier in this thesis I have already considered it in connection with the territorial integrity of a State and in connection with the "representative government" definition. Accordingly, we have been able to see that some commentators aim to a close examination of this clause since it is believed that at the same time as it ensures the territorial integrity of a State, it also indirectly, opens a door for the claim to self-determination for those people not represented by the government. Thus, if peoples within existing States are treated in a grossly discriminated manner by an unrepresentative government, their claim to self-determination should not be crushed by arguments about territorial integrity. The guarantee of territorial integrity is here made conditional upon existence of a representative government. There are, however, reasons to caution against this kind of claim, and Cassese doubts if this saving clause can be pressed too far. In his view, the paragraph would apply to peoples living under racist regimes while ethnic groups are not supposed to be included.[117]

Thus, according to this text the principle of self-determination cannot be regarded as authorizing a claim to self-determination such as the one presented by the Basques. This is true not only with regard to the interpretation given to it by Cassese, but also due to the fact that the Spanish government is in fact representative of all its ethnic minority groups, Basques, Catalans, Galicians. Furthermore, one should not ignore the high degree of autonomy they enjoy in accordance with the Basque Statute of Autonomy recognized by the central government.

Further support for the recognition of the Spanish government as a representative government, is found in article 27 of the International Covenant of Civil and Political Rights, which reads as follows, *"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities (...) in community with the other members of their group (...) shall not be denied the right (...) to enjoy their own culture, to*

[117] Cassese, p. 114

profess and practice their own religion, or to use their own language". Although the right accorded to minorities through this article is a protection to the members of the minority group and not to the group as such, and despite the fact that it does not secure the group's expansion and development, I believe that it still is of importance for the Basque case. Moreover, as a parenthesis, it should be mentioned that Spain has also adhered to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in 1992. Despite the fact that it is "only" a declaration, it should be taken into account since it stresses more the collective dimension to the enjoyment of the rights there mentioned in comparison with article 27 in ICCPR.

In contemporary Spain all the ethnic minorities are granted due protection in accordance with this article, both in the Spanish Constitution from 1978 and through the Statute of Autonomy where such protection has been provided for. As earlier mentioned, the Basques enjoy currently a high degree of autonomy. In accordance with the wording of the Spanish Constitution they enjoy all competencies not expressly attributed to the state by the Constitution, but also such competence expressly contained in its particular Statute, (article 149.3 CE). As an example of the recognition and respect by the Spanish State of the Basque language, culture and other rights, I suggest to take a closer look to the relevant articles of the Basque Statute.

Thus, article 6.1 establishes that *"Euskera, the Basque People's own language, is to share with Spanish the status of official language in the Basque Country. And all its inhabitants have the right to know and use both languages"*. Accordingly, the Basque language, besides being official along with Spanish, is recognized as the Basque People's own language. It has been stated that the use of the word "own" is evidence of the uniqueness of Euskera as the official language of the Basque Country. However, the most important aspect of this statement is the admission of Euskera by the public powers as a normal means of communication with full legal validity and effects.[118] This is a huge achievement compared to the Franco's time when as we could see the use of Euskera was forbidden not only to the public agencies but also among private subjects.

According to article 6.2 the official regulation of the linguistic education falls within the competence of the Basque institutions and according to article 6.3 no one can be discriminated against on the grounds of language.

With regard to the enjoyment of culture, article 6.5 foresees that with Euskera being the heritage of other Basque territories and communities, the Basque Country may ask the Spanish Government to draw up treaties or conventions establishing cultural relationships with these other countries where these territories or communities are located, in order to safeguard and foment Euskera.

The fact that the Basque language has been going through a period of, if could I call it slow-death, is witnessed by many surveys undertaken in the Basque Country. In 1987 the President of the Basque Nationalist Party (PNV) Xavier Arzalluz commented that Euskera "is living in a state not precisely of retreat but one of mortal agony"[119]. However, this cannot be blamed on the central government. If some official body could be given the blame, it is the actual Basque Autonomous Community that has not supported many programs that had been started within the Basque Country in order to ensure the survival and development of Euskera.[120]

With this said, there should not remain any doubt on the wide recognition and protection offered by the Spanish State to the Basque peoples with regard to enjoyment of their own language and culture.

Last but not least, I propose to consider the Basque case in the light of the current standing of the right to secession in international law but not as much as a following right of secession after having been granted the right to self-determination, but as a primary right. It is obvious that such a right is totally outlawed by the Spanish Constitution, which upholds the unity of Spain as its main goal.

In international law there has been no right of secession granted to nations, ethnic groups or minorities for that matter. In the words of Boutros Boutros-Gali, "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace and security and economic well-being for all would become ever more difficult to achieve. The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other (...)"[121].

---

[118] Castells, Jose Manuel and Jauregui, Gurutz, "Political Autonomy and Conflict resolution: the Basque case", available at www.unu.edu
[119] Astrain, Luis Nunez, "The Basque, their struggle for independence", Welsh Academic Press, 1995, p. 16
[120] ibid
[121] Boutros Boutros-Gali, "An Agenda for Peace", paras. 17 and 19

For the Basques there cannot be any question mark behind the reason for their claim to self-determination. As explained above they are by no means subjected either to colonial or to alien domination.

Thus, their wish of self-determination could not be granted, reminding the words of the Commission of Rapporteurs from 1921, "to concede to minorities (...) the right to withdraw from the community to which they belong, because it is their wish or their good pleasure (...) would be to uphold a theory incompatible with the very idea of State (...)"[122]. In this particular, given the background, the claim to self-determination must be seen to be "their good pleasure".

Moreover, even if there had been a right of secession contingent upon some element, such as the demonstration of a historical right to independence, the Basque Country would fall short of its historical examples of independence. It has never constituted a unified state with a political unity comprising all the seven Basque communities, since, as it has been mentioned earlier in this thesis, Navarra was before a kingdom, while Vizcaya was once a seigniory and Guipuzcoa was an old "Country of Communes". Besides, the three provinces in France have always followed their own different political paths. The common tie among them, besides the language, was the oath sworn beneath the tree of Guernika to unite against foreign invasion in order to defend the Basque race, culture, language, customs and *fueros*.[123] This, however, does not amount to the evidence of a Basque State.

Maybe we are heading for new times and new developments in international law as we could see from the adoption of the Helsinki Final Act and the Algiers Declaration. However, it would be too bold and presumptuous to even try to provide for a forecast with of the future situation in the Basque Country based on such developments. I doubt though that what has been the constant view throughout the years can change over night and an acceptance of the dismemberment of Spain could ever be a fact.

Having now arrived at the end of this analysis the answer to the questions posed throughout this thesis must be that the Basques do not constitute a "people" for the purpose of the right to self-determination. Neither could they claim to be under "alien domination" and therefore have a right to self-determination, nor could they be granted a right of

[122] see footnote 67
[123] Carr, see footnote 81

secession since, according to international law, they constitute an ethnic minority group within the territory of a sovereign state, whose territorial integrity must be uphold.

5. Conclusion

The subject of self-determination is a contentious and complex subject, with various dimensions. It made its appearance on the international arena as a political principle evolved at first as a by-product of the doctrine of nationalism, to which early expression was given by the French and American revolutions. In World War I the Allies accepted self-determination as a peace aim. In his Fourteen Points, the essential terms for peace, U.S. president Woodrow Wilson listed self-determination as an important objective for the postwar world.

At one level it is a moral question with a clear answer. Self-determination is a right linked to the fundamental right of human beings to dispose of themselves and their future. Further, it is a legal issue with important political ramifications. Within the framework of international law the issue of self-determination has developed through time from a mere principle to a right *per se*. The implications of this development are many and they arise when the beneficiaries of this right must be defined. Thus, the application of this legal right is not at all free from complications. The wording of the legal international instruments containing this right, is vague and leaves room for many interpretations.

In the process of making peoples' right to self-determination a constituent part of contemporary international law, the fundamental international instruments which have marked a turning point, are the Charter of the United Nations together with the GA Resolutions and of course the two human rights Covenants. As a consequence the principle of self-determination is no longer just a moral or political postulate. Due to the very close link, which exists between self-determination and the maintenance of international peace and security, it is no longer regarded as a purely domestic matter. If a "people" is frustrated in its self-determination, that situation is considered to constitute a threat to world peace and security. Article 1(2) of the Charter makes the principle of equal rights and self-determination of peoples the basis of friendly relations among states. Consequently, this principle is to be regarded as an established principle, a universally recognized right under contemporary international law, and a legally binding principle enjoying universality and constituting a general rule of international law.

In the introduction I offered some food for thought in the direction of viewing the right to self-determination in a broader sense than it has been done since its appearance. I believe that the international community has allowed it to develop slowly and carefully and

it has undeniably gained more status under international law and its application range has been widened at least in theory. Although the international community has officially recognized the right to self-determination only with regard to colonial peoples, I believe that we are heading towards new horizons. One has only to remember the new wording in the declarations and resolutions adopted under the auspices of the UN concerning this particular subject matter. I am confident that eventually claims of self-determination will be assessed based on the special situation at hand.[124]

One of the questions that I proposed to answer in this thesis was the question of who is the “self” entitled to self-determine. We have seen that a definition of the term "people" is of great importance for it affects the measures to be taken with regard to particular aspects of the matter, for example the political aspect of the exercise of the right to self-determination, i.e. the external aspect of the self-determination. Since no definition has been formulated either by the different organs within the UN nor in the international legal doctrine, the practice has been to proceed with caution in cases of external self-determination, although both UN and state practice witness of firm actions in the matter of elimination of colonialism.

Nowadays, the principle of self-determination is part and parcel of the group of human rights and fundamental freedoms. Its recognition is the ineluctable logical consequence of the recognition of human rights. Recognition of the right of peoples to self-determination as one of the fundamental human rights is bound up with the recognition of the human dignity of peoples, on the one hand, and for fundamental human rights and justice on the other. The principle of self-determination is the natural corollary of the principle of individual freedom, and the subjection of peoples to foreign domination constitutes a denial of fundamental human rights. This internalization of human rights and the high respect that it has been awarded to them still cannot however, pave the way to a universal right to self-determination as any other collective human right. The international community is still reserved concerning the right to self-determination of ethnic groups and minorities. This is however compensated by the recognition of other rights to ensure the continuance of the groups as such.

[124] One recent example towards such a solution that could be seen is the case of Yugoslavia 1992-1993 when the Yugoslavian Federation dismembered. The first reaction of both the European Union and US was to urge for the maintenance of the Federation’s unity. However, when they were faced with the situation at hand, they reassessed each their point of view allowing for the proclamation of independent states seceding thus from the Federation.

With regard to the Basque case, it is an undeniable truth that they posses common customs, a common distinct language and a common history. To this can be attached the important subjective element, that of being conscious of pertaining to this distinct group of people. But is this enough for the enjoyment of self-determination, external self-determination? Well, it does not seem so. There are many such groups sharing some kind of unique features, but this does not entail them, at least not under current international law, to be recognized the right to external self-determination. Is it because States fear the "domino effect" that might be put in motion, thus leading to their dismemberment into small "ethnic" states? Yes, there is a great deal of concern about such a development, but the main concern is more likely where to draw the limits. European states are by now, whether they recognize it or not, multinational states, where nationalistic feelings are fostered and nurtured more and more when faced with the risk of disappearance.

Neither does it help the fact that the Basques enjoy a high degree of autonomy through the Basque Autonomous Statute. Although the competence included in this Statute is very vast and broad, which includes many other areas than other Autonomous Communities in Spain, it cannot be interpreted to the extent that it based on this they could exercise the right to external self-determination since they do not fulfill the other criteria set up by state and UN practice.

The right to self-determination is as already mentioned, not an absolute right. In general there is a hierarchy of principles and rights and when one of these, in the manner in which it is claimed clashes with any other international recognized right or principle then they all have to be weighted and balanced, keeping in mind the overall international law objective of maintenance of peace and security. The territorial integrity of a state is, as we have seen, closely linked to claims of right to self-determination. It has been stated that a state that invokes the principle of territorial integrity must have a legitimate ground based on the equal treatment of those claiming self-determination and the rest of the population. That is, a state that neglects to take into account other peoples than the majority within that state, oppressing and destroying them, violating their human rights and fundamental freedoms will have no legitimacy invoking the principle of territorial integrity against a claim from the oppressed peoples of self-determination.

This might easily be the case in many parts of the world, but it is not the case in Spain with regard to the Basque Country. If compared to the rest of the autonomous

communities within Spain it will be possible to see that the Basques enjoy probably the most extensive form of autonomy. If during General Franco's regime they were exploited and oppressed, denied their rights as a community, by now they have regained their rights and freedoms to a higher degree than ever before.

The situation in Spain with regard to the Basques cannot be thought in terms of external self-determination for the obvious reasons presented in this thesis. There should be other ways to stop the terrorism fought in the name of an independent Basque State.

It is doubtful that we are ever going to witness a further development of the scope and application of the right to self-determination to the extent of the Unrepresented Nations and Peoples Organization's statement reading as it follows, *"All peoples have the right to self-determination. According to this right they freely determine their political status and freely determine their economic, social and cultural development. States shall respect this right and the principle of territorial integrity shall not unilaterally form an obstacle to its implementation"*. [125]

Until such a development takes place any ethnic minority, including the Basques, who after a thorough examination of their claim to self-determination, have been found not in possession of this right, will have to moderate and finally put an end to any militant actions, in order to achieve an acceptable solution by common accord with the central government. Only in this way they may achieve some acceptance within the international community.

[125] Unrepresented Nations and Peoples Organization, Universal Declaration of the Rights of Peoples, article 1, available at www.unpo.org

6. BIBLIOGRAPHY

BOOKS

- **Alfredsson, Gudmundur and McAlister-Smith**

Living law of nations – essays on minorities, refugees, indigenous peoples and human rights of vulnerable people

N.P. Engel Publisher, 1996

- **Astrain, Luis Nunez**

The Basques, their struggle for independence

Welsh Academic Press, 1995

- **Buchheit, Lee**

Secession: The Legitimacy of Self-determination

Yale University Press, 1978

- **Carr, Raymond**

Modern Spain 1875-1980

Oxford University Press, 1980

- **Cassese, Antonio**

Self-determination of Peoples – a legal reappraisal

Cambridge University Press, 1995

- **Clark, Donald and Williamson, Robert (eds)**

Self-determination international perspectives

Macmillan Press Ltd., 1996

- **Crawford, James (ed)**

The Rights of Peoples

Clarendon Press, 1988

- **Crenshaw, Martha (ed)**

Terrorism in context

The Pennsylvania State University Press, 1995

- **Danspeckgruber, Wolfgang (ed)**

The self-determination of peoples - Community, Nation, and State in Global Interdependence

Lynne Rienner Publishers, 2001

- **Halperin, Morton; Scheffer, David J and Small, Patricia L**

Self-determination in the New World

Carnegie Endowment for International Peace, Washington D.C. 1992

- **Hurst, Hannum**

Autonomy, Sovereignty and Self-determination – the accommodation of conflicting rights

University of Pennsylvania Press, 1990

- **John, McGarry (ed)**

Northern Ireland and the divided world

Oxford University Press, 2001

- **Joshua, Castellano**

International law and self-determination – the interplay of the politics of territorial possession with formulation of post-colonial national identity

Martinus Nijhoff Publishers, 2000

- **Landa, Kepa and Goirizelaia, Jone**

The Spanish Constitution and the right to Self-determination of the Basque Country

Pais Vasco

- **Markku, Suksi (ed)**

Autonomy: applications and implications

Kluwer Law International, 1998

- **Medrano, Juan Diez**

Divided Nations: class, politics and nationalism in the Basque Country and Catalonia

Cornell University Press, 1995

- **Michla. Pomerance**

Self-determination in law and practice – the new doctrine in the UN

Martinus Nijhoff Publishers, 1982

- **Moore, Margaret**

National self-determination and secession

Oxford University Press, 1998

- **Musgrave, Thomas**

Self-determination and national minorities

Clarendon Press Oxford, 1997

- **Philip, Alston**

Peoples' Rights

Oxford University Press, 2001

- **Thornberry, Patrick**

International law and the right of minorities

Clarendon Press, Oxford 1991

- **Tomuchat, Christian**

Modern law of self-determination

Martinus Nijhoff Publishers, 1993

- **Rodrigo, Ruiz Segundo**

La Teoria del Derecho de autodeterminacíon de los pueblos

Centro de Estudios Politicos y Constitucionales, 1998

- **Rokkan, Stein and Urwin, Dereck (eds)**

The Politics of territorial identity – studies in European regionalism

Sage Publications, 1982

- **William, Colin H (ed)**

National Separatism

University of British Columbia Press, 1982

UN DOCUMENTS

- **Aureliu, Cristescu**

The Right to Self-determination – historical and current development on the basis of United Nations instruments; study prepared by the Special Rapporteur of the Sub-Commission on Prevention of discrimination and protection of minorities, UN 1981

- **UN GA Resolution 1514 (XV) on the granting of independence to Colonial Territories and Countries, 1960**
- **UN GA Resolution 1541 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960**

- **UN GA Resolution 2200A (XXI), International Covenant on Civil and Political Rights, 1966**
- **UN GA Resolution 2200 (XXII), International Covenant on Economic, Social and Cultural Rights, 1966**
- **UN GA Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 1970**
- **UN GA Resolution 2396 (XXII)**
- **UN GA Resolution 2672 (XXV) On the legal status of the Palestinian people**
- **Vienna Convention on the Law of Treaties. UNTS 331**

ARTICLES

- **Carter, Michael**

Ethnic Minority Groups and self-determination: the case of the Basques

Columbia Journal of Law and Social Problems, vol. 20, no.55. 1986

- **Nayar, Kaldharan**

Self-determination beyond the colonial context: Biafra in retrospect

Texas International Law Journal, vol. 10, 1975

- **Rosenstock, Robert**

The Declaration of International Law concerning Friendly Relations: a survey

American Journal of International Law, vol. 65, 1971

OTHER DOCUMENTS

- **Boutros Boutros-Gali**

An Agenda for Peace, A/47/277 - S/24111 17, 1992

- **Eide, Asbjorn**

Protection of Minorities, Report for the Commission on Human Rights,

E/CN.4/Sub.2/1993/94

- **UNESCO International Meeting of Experts on further study of the concept of the Rights of Peoples, final report and recommendations**

UNESCO doc. SHS-89/CONF.602/7. 1998

- Unrepresented Nations and Peoples Organization, **Universal Declaration of the Rights of Peoples, article 1,** available at www.unpo.org