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Self-Determination The Case of Taiwan

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Abbreviations

CSCE	Conference for Security and Cooperation in Europe
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OSCE	Organisation for Security and Cooperation in Europe
UN	United Nations

1 Introduction

Self-determination is a popular thing to claim. In almost every conflict today we hear different claims for independence and self-government. Civil wars break out because groups are unsatisfied with conditions in which they are living which almost always concern political non-representation or repression in some form. But self-determination according to international law is a restricted and in many ways delicate right. States territorial integrity is threatened when fractions of the territory want to secede and no one knows what will follow. In many ways the right to self-determination is a struggle between the beneficiaries of the right and states, which makes it very difficult for groups claiming this right to enjoy it even if they legally should have the right to this.

Today peoples are the beneficiaries of the right to self-determination. But what constitutes a people? There exists no general and official definition of this term. Some characteristics can be seen as basic but this will be dealt with later. As we see already, the problems start here. Not knowing who the beneficiaries of a right are creates an uneasy uncertainty and a very big chance of groups and states using this uncertainty for their own benefits. This is the same looking at the right to self-determination of minorities. In some situations where a minority has been systematically discriminated and oppressed the right to self-determination applies. The question is what amounts to systematic discrimination and oppression? Here the same problem arises with uncertainty, and parties ready to use this uncertainty for their own benefits.

But it is not only problems with who should benefit from the right to self-determination, there are also questions relating to what can they determine. Self-determination consists of two types of determination, external and internal. External self-determination includes the right to secede, which means the right to break away from the mother state or integrate with the mother state or another state. Internal self-determination is short of secession and deals with internal affairs of a group or the whole population. A question that can arise is whether the right to self-determination includes the right to secede. The answer is not clear but on the other hand neither international law nor commentators deny the right to secede even if some commentators are very sceptical.

Thus self-determination is a vague and ambiguous right with a lot of risks of turbulence and disturbances but at the same time very important for preserving peoples and minorities and their ways of living.

In the case of Taiwan the matter is very complicated. The island has been colonised by the Dutch and the Japanese. Meanwhile the emigration from the mainland to the island has been sporadic since the thirteenth century,

which led to the ethnic and cultural community that is shared on the mainland and the island today. After the Second World War the Japanese colonisation ended and the Nationalist government of China was appointed government of the island too. The communists came to power in 1945 with the consequence that the Nationalist government fled to Taiwan. A political struggle between the Mainland China and the island of Taiwan has been fought for the rightful representation of “China”. The Nationalist were first granted the right to represent China but in the 1970ies the communists on the mainland were given this right after some political events.

As we will see there are many different solutions to the question depending on whom you ask. The main idea is the “one China” solution. This is built on the concept that Taiwan and China should constitute one China but with two different systems. This suggestion is made with the background of the solutions reached concerning Hong Kong and Macao. Hong Kong and Macao has been incorporated with China but has kept the old system that had evolved when still colonies. But even if the government of the two entities are speaking of one united China there have been movements in Taiwan striving for self-determination and independence from the mainland for quite some time. The question asked in this thesis is thus if the population of Taiwan has the right of independence based on international law concerning self-determination. What must be answered is if the population of Taiwan constitutes a people, and if it does not does it constitute a minority? And if they do what can they decide? The question of statehood is not elaborated or investigated. It might be that Taiwan fulfils the requirements for a state and it might not. This is a new question for another thesis. What we will concentrate on is the right to self-determination and how Taiwan’s situation could be seen from this point of view.

What cannot be denied is that the question of Taiwan, and every other conflict involving independence claims, is very political involving a lot of political super powers and their interests. First there is China with a veto in the Security Council, not to be forgotten, with similar problems with other “provinces” like Tibet. What would happen if the population of Taiwan was given their independence from China? How would Tibet react and how would the world community react? There is a risk of disturbances and security if one province and not another claiming independence, is granted self-rule. China’s territorial integrity might be seriously threatened. In other words it is much a question of holding the positions. But it is not only internal situations depending on China’s policy towards Taiwan. If Taiwan would get independence how would this affect China’s security given the fact that Taiwan and the US have close communications? The US has already shown its interest in the area by defending Taiwan with arms and troops when China threatens to attack Taiwan. What interests do the Americans have in the area and how does this affect China? As we see there are not only legal problems relating to this question but many political questions as well. In this thesis the politics will not be dealt with but it is important to have it in the background when reflecting on how international

law is interpreted. As Koskiniemi said at a lecture I attended, international politics and international law are two different parts of the same thing.

1.1 Disposition

To make the analysis easier to comprehend and follow, a division of the question is necessary. First of all the writer will elaborate the right to self-determination in international law. This will be done by presenting relevant international legal instruments and revising them and study how they have been used. The views in doctrine will be presented as well. Because of the fact that in recent years the right to self-determination has been actualised in different conflicts around the world a presentation of the cases of Chechnya, former Yugoslavia and Tibet will be given to see how the right to self-determination has been considered or applied in practice and also to see if the right to self-determination is changing.

When investigating a case where the right to self-determination is current there are two different parts to deal with. This is obvious just looking at the word *self-determination*. It constitutes of two parts: the self and the determination. The following parts of this thesis will thus be dedicated to elaborating first the self, which would mean analysing the legal concept of minorities, indigenous peoples and peoples, and then the concept of determination, which will consider what the right to self-determination entitles the self to.

When this legal analysis of the different concepts, that are important to the right to self-determination, has been dealt with, the author will focus on the case of Taiwan. First a presentation of the islands history relevant to the aims of this thesis will be presented to give the reader the full picture of the current situation. After this historical presentation the author will apply the legal criteria elaborated and investigated in the previous chapters on the case of Taiwan. First the concept of people will be compared to the population of Taiwan. The author will research if the people on the island constitute a minority within China, an indigenous people in China or a people with the right to self-determination and independence from China. Depending on the findings in this analysis the question of what shall be determined will be dealt with.

Every chapter will be followed by a summary conclusion of what has been found. Here the author will summarize the facts and present own conclusions of these facts. It is these conclusions that the final analysis of the case of Taiwan will be based.

1.2 Material

International documents, both hard law documents in the form of conventions and treaties as well as soft law documents in the form of resolutions and declarations concerning the right to self-determination, have been studied. This is of course to examine how international law expresses self-determination and the right to it. Also reports of Cristescu Aureliu and Francesco Capotorti, both Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities but during different periods, have been used for the chapters on peoples and minorities. These reports have been made under the auspices of the United Nations and because of this they are important for the interpretation of the concepts of peoples and minorities. In the case of Capotorti's report, his conclusion on the definition of minorities is the most quoted and used definition today. Obviously the reports have had a high value for this thesis.

Doctrine has also been used to analyse the international instruments and obtain opinions from prominent commentators of international law. The interpretation of different writers is interesting and important to the analysis of the right to self-determination and the concepts connected, and helps to support the conclusions of the author.

It should be observed that the conclusions made in this thesis are restricted to the material used. Other conclusions based on other material are of course possible.

2The right to Self-Determination

Self-determination is an important and basic rule of international law. It guarantees different groups the right to determine their internal affairs in different ways. The texts of international instruments are unclear and ambiguous, and the practice of states and international organizations not consistent. The same is often true for scholarly writing. This has led to the fact that the right to self-determination has helped settle many disputes around the world as well as being misused by groups taking advantage of it in a wrongful way, which has led to instability and in many cases war. In this opening chapter we will investigate international law concerning self-determination and try to find a pattern of consistency.

2.1 Legal Instruments

2.1.1 United Nations UN Charter

The UN Charter of the United Nations¹ was established as a consequence of the United Nations Conference on International Organizations in San Francisco and was brought into force on the 24 of October 1945. 185 states have signed the UN Charter, which indicates its importance and widespread application-possibility. It is clear that the relevant provisions of the UN Charter have been interpreted in an increasingly progressive way over the years. Today it is generally accepted that the right to self-determination, being one of the principles of the UN Charter, entails legal rights and obligations. It is a vital feature and is regarded as the basis on which friendly relations among nations should develop. The incorporation of the principle of equal rights and self-determination of peoples is the culmination of a fairly long development. It marks not only the legal recognition of the principle, but also the point of the departure of a new process, the increasing dynamic development of the principle and its legal content, its implementation and its application to the most varied situations of international life². Many other General Assembly Resolutions confirm and support the principle of self-determination as part of international law.³

¹ Charter of the United Nations (1945), 59 Stat. 1031, T.S. no. 993, 3 Bevans 1153, 1976 YBUN 1043 [henceforth UN Charter]

² Cristescu Aulerliu, *The right to Self-Determination, historical and current development on the basis of United Nations Instruments*, UN Document E/CN.4/Sub.2/404/Rev. 1, 18, para 95-98; see also Cassese Antonio, *Self-determination of Peoples*, 1995, 41ff; Hannum Hurst, *Autonomy, Sovereignty and Self-Determination*, 1990, 33

³ Example of these are General Assembly Resolutions 1654 (XVI), 1810 (XVII), 1956 (XVIII), 2105 (XX) and many more, see Cristescu Aureliu supra 2, 18, para. 100-119; see also Duurmsa Jorri, *Fragmentation and the International Relations of micro states*, 1996, 16f; but see Philpott Daniel, *Self-Determination in Practice*, in Moore Margaret (ed), *National Self-Determination and Secession*, 85f

It is in article 1 para. 2 and art. 55 of the UN Charter that we find the principle of equal rights and self-determination of peoples. The UN Charter is ambiguous about the meaning of the terms “peoples” and self-determination. Many jurists and governments were prepared to interpret these references as merely of hortatory effect, but the practice of the United Nations organs has established the principle as a part of the law of the United Nations⁴. The UN Charter, as a multinational treaty, confers on the aforementioned provisions concerning equal rights and self-determination of peoples the character of conventional rules of international law. In addition, article 103 of the UN Charter stipulates that in the event of a conflict between the obligations of the Members of the UN under the UN Charter and their obligations under any other international treaty their obligations under the present UN Charter shall prevail. This has the effect of strengthening the principle and giving it precedence over other obligations⁵. By having been reaffirmed by international law and entrenched by international practice, the principle of equal rights and self-determination of peoples emphasises the notion of co-operation and friendly relations among states. The characteristics of this principle as a conventional rule of international law have been strengthened by its inclusion, as a fundamental right, in the International Covenants on Human Rights. It is thus clear that self-determination is a legal concept, which finds expression both as a principle of international law and as a subjective right.⁶

The principle of self-determination in the UN Charter seems to be linked to and important to the upholding of peace. The link between these two concepts is stated in article 1 paragraph 2:

“friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take relevant measures to strengthen universal peace.”

This implies that if self-determination is neglected the risk of war and conflict will increase. Article 55 reconfirms this.⁷

As we have seen the principle as stated in the UN Charter has developed into a legal principle containing rights and obligations. What is not clear is exactly what the principle as stated in the UN Charter entails and who the beneficiaries are. In this sense the rights and obligations could easily be violated or abused. It seems that there is a need to develop and define these terms in a more strict and focused way to avoid conflicts concerning the meaning of them in the future. As we have seen the right to self-

⁴ Brownlie Ian, *Public International Law*, 1990, 596; see also Cassese Antonio, *Self-determination of Peoples*, 1995, 41ff

⁵ Cristescu Aureliu supra 2, 21 para. 124

⁶ Cristescu Aureliu, supra 2, 22 para. 136-140; see also Bring Ove, *FN-stadgan och världspolitik*, 2000, 35ff and 187ff

⁷ Detter Ingrid, *The International Legal Order*, 1994, 55f

determination has been linked to peace and security and if not defined in a better manner the risk of disturbances or even war increases.⁸

2.1.2 Common Article 1 of the International Covenant on Civil and political Rights and the International Covenant on Economic, Social and Cultural Rights

Common article 1 of the two Covenants⁹ confirms all peoples right to self-determination. The article, like the UN Charter, does not define either “peoples” or the content of self-determination, nor does it establish a procedure for its realization.¹⁰

The discussions before the adoption of the two Covenants focused mainly on one aspect concerning the right to self-determination. It was debated whether self-determination should be included in the Covenants at all. Those that opposed the inclusion of an article on self-determination affirmed, *inter alia*, that the UN Charter only referred to the principle, not the right to self-determination. As a principle it had a very strong moral force, but it was too complex to be translated into legal terms in a mandatory instrument. It added that the principle was interpreted differently in different places and that it raised sensitive issues, such as minority rights and the right to secession. Finally it was said that the right to self-determination was a collective right and therefore inappropriate to include in an instrument, which was aimed at laying down individual rights.¹¹

Those in favour of an inclusion of the right to self-determination insisted that the right was essential for the enjoyment of all other human rights. Although the right was a collective one, it nevertheless affected everyone. To be deprived of the right to self-determination entailed the loss of individual human rights. Since the UN Charter referred to the right to self-determination as a principle, any Member State, which had accepted that principle, was obligated to respect the right that derived from it.¹²

As the Covenants are read today the right to self-determination was included in the first article of both Covenants. The first paragraph of article 1 referred

⁸ Brownlie Ian, *Public International Law*, 1990, p596.; see also Cristescu Aureliu *supra* 10 para. 101; Chadwick Elizabeth, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, 1996, 25ff

⁹ United Nations, *International Covenant on Civil and Political Rights*, 6 ILM 368 (1967) and *International Covenant on Economic, Social and Cultural Rights*, 6 ILM 360 (1967)

¹⁰ Hamline *Law Review* page 20, see also Detter Ingrid, *The international Legal Order*, 1994, p.57f; Cassese Antonio, *Self-determination of Peoples*, 1995, 59

¹¹ Cristescu Aureliu *supra* 2, para. 46; see also Cassese Antonio, *Self-Determination of Peoples*, 1995, 48ff; Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 28ff

¹² Cristescu Aureliu, *supra* 2, para 46-47; see also Cassese Antonio, *Self-Determination of Peoples*, 1995, 48ff; Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 28ff

only to Trust and Non-Self-Governing Territories, because the achievement of independence by those peoples was the most urgent problem at the time of the adoption of the two Covenants. In any case the article asserted the right to self-determination as a universal right, thus belonging to all peoples, as stated in the UN Charter.¹³

Thus the first paragraph does not limit the right to self-determination but states that it is a right belonging to all peoples to freely determine their political status and their right to freely pursue economic, social and cultural development. The word “freely” in article 1 paragraph 1 of the two Covenants implies a two-folded meaning. First, the article requires the peoples to choose their political leaders freely and without manipulation or undue influence from the domestic authorities themselves. This dimension of the right to self-determination stated in article 1 expresses the right of peoples to internal self-determination. This will be dealt with more under the part on determination. The other meaning of freely is that a states domestic political institutions must be free from outside interference that would seriously infringe upon the right to freely determine its political status, its economic, social and cultural development. This reinforces the duty of every state under customary international law to respect the political independence and territorial integrity of every state. But it also prohibits contracting states to occupy territory and by that depriving the peoples living on that territory of their right to self-determination.¹⁴

Article 1 paragraph 3 gives peoples of dependent territories the option to form an own independent state or to associate with an existing state, in other words to choose freely their international status. At the time of writing this paragraph is almost completely obsolete due to the fact that almost all colonial peoples has achieved independence. But it not worthless in the sense that it is not useful any longer. Instead this gives teeth to the UN Charter and bridges the gap of chapters 11 and 12 that does not mention the right to self-determination but only cites independence as a basic objective. Since the paragraph is to be read in conjunction with chapters 11 and 12 of the UN Charter it implicitly writes self-determination into these chapters governing dependent territories. This both strengthens and widens the right to self-determination in the UN Charter even if it does not technically amend chapters 11 and 12.¹⁵

¹³ Cristescu Aureliu supra 2, 9, para. 47; see also T.M Franck in *Peoples and Minorities in International Law*, (ed) Bröلمان Catherine, 1993, 11; Bring Ove, *FN-stadgan och världspolitik*, 2000, 193

¹⁴ Cassese Antonio, *Self-determination of Peoples*, 1995, 55; for the right to self-determination and occupation see also Alfredsson Gudmundur, *Self-determination, international perspectives*, 1996, (ed) Clark and Williamson, 59f; Alfredsson Gudmundur, *The implementation of the Right to Self-Determination as a contribution to conflict prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 198f; Franck T. M., *Postmodern tribalism and the right to Secession*, in Brölmann Catherine (ed), *Peoples and Minorities in International Law*, 1993, 11

¹⁵ Cassese Antonio, *Self-Determination of Peoples*, 1995, 57f

In Cassese's view the spirit of common article 1 leads to the conclusion of three possible groups that are entitled to the right of self-determination.

These are:

- a. entire populations living within independent and sovereign states
- b. entire populations of territories that have not yet attained independence
- c. populations living under foreign military occupation

This leads to the conclusion that the right to self-determination is not necessarily determined by reference to a territory's international political status.¹⁶

The article has caused peoples living within independent and sovereign states, and groups, not defined as peoples according to international law, for instance indigenous peoples and minorities, to claim their right to self-determination. Internal self-determination, as stated above, acknowledges the right to be free from an authoritarian regime. This right is a right of all peoples.¹⁷ Further common article 1 does not state that the right to self-determination should not lead to a partial or total disruption of the territorial integrity of a state. On the other hand article 4 of the ICCPR provides a derogation clause that in cases of disruption of the national unity and territorial integrity of the state could be applied and thus support derogations from the provisions in the Covenant. One could interpret this to mean that disruption of territorial integrity is not legal in the sense of the Covenants. No clear answer is offered by the Covenants though.¹⁸

But does article 1 support the right of minorities to exercise the right to self-determination meaning the right to be free from majority rule? To decide this a look at article 27 of the ICCPR is needed. Article 27 grants persons belonging to ethnic, religious or linguistic minorities the right to enjoy their own culture, to profess and practice their own religion and to use their own language. The provisions of article 27 are addressed to individuals, not the group, and the article does not consider political, economical or cultural autonomy. The rights listed only refer to political, economical and cultural freedoms, which assures the minority the right to maintain an identity.¹⁹

An examination of the text of the ICCPR could lead to the conclusion that minorities are entitled to more than the rights contained in article 27. The provisions could be cumulative and thus lead to minorities having the rights

¹⁶ Cassese Antonio, *Self-Determination of Peoples*, 1995, 59; in relations to occupied territories see also Alfredsson Gudmundur, *Self-determination, international perspectives*, 1996, (ed) Clark and Williamson, 59f; Alfredsson Gudmundur, *The implementation of the Right to Self-Determination as a contribution to conflict prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 198f

¹⁷ Cassese Antonio, *Self-Determination of Peoples*, 1995, 60

¹⁸ Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 34; see also T.M Franck *Peoples and Minorities in International Law*, (ed) Brölman Catherine, *Peoples and Minorities in International Law*, 1993, 12

¹⁹ Cassese Antonio, *Self-Determination of Peoples*, 1995, 61

provided in article 1 and the rights in article 27. But according to Cassese the preparatory work induces an opposite conclusion. In the discussion before the adoption of the Covenants it was made clear that states did not want to encompass minorities in the term “peoples”. States feared the possible consequences of giving minorities the right to self-determination as in article 1. Thus the limitations of article 27 should be read into article 1.²⁰

The HRC²¹ has tended to be restrictive in their view of self-determination. First of all they have tended to emphasise external self-determination. But the Committee is slowly turning towards internal self-determination as well. In fact the weight has been shifted to internal self-determination because of its importance for a democratic decision-making offering the population a real and true choice between various political options.²²

2.1.3 Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of The United Nations

Declarations are of special importance according to a memorandum by the Office of Legal Affairs of the United Nations Secretariat²³. It is stated in this document that there is a strong expectation, on behalf of the organ adopting a resolution that members of the international community will abide by it. In so far as the expectation is gradually met by state practice, a declaration may by custom, become recognized as laying down rules binding upon states²⁴. This has been true in some cases for declarations concerning the right to self-determination. They have supplied to the formation of law concerning decolonization, as well as the interpretation and practical application of the rules of law relating to self-determination.²⁵

The legal significance of the Friendly Relations Declaration²⁶ lies in the fact that it provides evidence of the consensus among member states of the United Nations on the meaning and the elaboration of the principles of the UN Charter. As we have seen in the memorandum of the Office of Legal Affairs of the United Nations Secretariat, the fact that a declaration is justified by state practice may by customs be recognized as lying down

²⁰ Cassese Antonio, *Self-determination of Peoples*, 1995, 61f; see also T.M Franck in *Peoples and Minorities in International Law*, (ed) Brölman Catherine, 1993, 11

²¹ Human Rights Committee

²² Cassese Antonio, *Self-determination of Peoples*, 1995, 63f

²³ Memorandum by the Office of Legal Affairs of the United Nations Secretariat, E/CN.4/L.610 (2 April 1962), para.4

²⁴ *Ibidem*

²⁵ Cristescu Aureliu, *supra* 2, 23 para 148, 151

²⁶ United Nations, General Assembly Resolution, Approving the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among states in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 25 UN GAOR Suppl. (no. 28) UN Doc. A/8028 (1971) [henceforth Friendly Relations Declaration]

binding rules upon states. It is important to observe though that the document is not an amendment or construed as prejudicing the UN Charter.²⁷

In paragraph 14 of the preamble of the Declaration the principle of self-determination is mentioned for the first time. The same words as in the UN Charter are repeated adding the responsibility of states to promote the realisation of the principle of self-determination²⁸. The recognition by the General Assembly of the principle of equal rights and self-determination as a principle of the UN Charter and a basic principle of international law is a very important step to put an end to the various disputes concerning the legal nature of the principle. Because of the close link between the right to self-determination and international peace and security, it can no longer be regarded as a purely domestic matter. Article 1 paragraph 2 of the UN Charter makes the principle of equal rights and self-determination of peoples the basis of friendly relations among nations. Furthermore, paragraph 3 of the same article places Member States under obligation to respect and promote human rights and fundamental freedoms for all.²⁹

As to the nature of the of the principle, the view was expressed that it was a binding rule of international law, as had been recognized in the UN Charter and various decisions of the General Assembly, for example resolution 1514 (XV) containing the Declaration on Granting of Independence to Colonial Countries and Peoples. Reference was made to the elimination of colonialism, the right of colonial peoples to independence and to decide freely on their political status and institutions, their right to choose their own economic, social and cultural systems and their right to dispose freely their natural resources. It was pointed out that it would probably present difficulties in trying to define “peoples” enjoying the right to self-determination. States were clearly peoples in the international sense, but further study was needed to determine if other social groups, such as minorities, should be included. Some representatives did not think that the right entailed a right to secession.³⁰

With regard to the beneficiaries of the principle, that is the meaning of the word “peoples” several of the representatives emphasized that the term

²⁷ Brownlie Ian, *Principles of International law*, 596; see also Cistescu Aureliu supra 2, 10, para. 54-56; Bring Ove, *FN-stadgan och världspolitiken*, 2000, 37ff

²⁸ Cistescu Aureliu, supra 2, 22, para.134-135; see also Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 20f

²⁹ Cistescu Aureliu, supra 2, 22, para.134-135

³⁰ Cistescu Aureliu, supra 2, 11 para.58; see also Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 20f; Bring Ove, *FN-stadgan och världspolitiken*, 2000, 37ff and 193ff; but see Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 92f on the legal support for secession drawn from the Declaration

should be given a broadest possible interpretation. All peoples should be included but no final definition was reached.³¹

One passage in the Friendly Relations Declaration has in later years caused some confusion or in other word has opened the possibility for groups not defined as peoples according to international law to enjoy the right of self-determination. In the part dealing with the principle of self-determination the creators of the Declaration included a passage where it is clearly stated that the principle of self-determination is not to be understood by the authorisation or encouragement to any action which would threaten the territorial integrity or political unity of sovereign and independent states. This is if the states in question complies with the principle of equal right and self-determination of peoples as described in the Declaration and thus possesses a government representing the whole people belonging to the territory without distinction to race, creed or colour.³² If the state in question should not represent the whole population, thus discriminating groups because of creed, race or colour self-determination of that group will be an aspirant to the right to self-determination. The question is whether it is limited to internal self-determination or reaches to external self-determination with the right to secede. It seems that the Declaration does not explicitly deny the right to secede. This would lead to the conclusion that external self-determination is possible when a group is discriminated. But it is important to notice that serious violations of human rights, and systematic discrimination and the central governments refusal to reach a peaceful settlement within the framework of the state, are required for this ultimate right to apply. In other words the Friendly Relations declaration links external self-determination to internal self-determination in exceptional circumstances. A religious or ethnic group is allowed to secede, that is to enjoy the most far-reaching form of self-determination, if internal self-determination is beyond reach.³³

The question of systematic non-representation was again brought up in the Vienna Declaration adopted by the World Conference on Human Rights³⁴. The language used in the Friendly Relations Declaration is similar. A claim to the right to self-determination on this ground can be backed up by a

³¹ Cristescu Aureliu, *supra* 2, 12 para. 63; ; see also Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 21ff

³² Fourth Principle of the Declaration

³³ Cassese Antonio, *Self-Determination of Peoples*, 118f; see also Detter Ingrid, *the International Legal order*, 1994, 57; Duursma Jorri, *Fragmentation and International Relations of Micro State*, 1996, 25; Alfredsson Gudmundur *Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination International Perspectives*, 1996, 65f; Wippman David, *Introduction: Ethnic Claims and International Law in Wippman David (ed), International Law and Ethnic Conflict*, 1998, 15; Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 92f

³⁴ United Nation, *World Conference on Human Rights, Vienna Declaration and Programme of Action*, 32 ILM 1661 (1993); see also Alfredsson Gudmundur, *Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination international perspectives*, 1996, 65

reference to the third preambular paragraph of the Universal Declaration³⁵, where the passage “recourse, as a last resort, to rebellion against tyranny and oppression” is to be found.³⁶

But what amounts to non-representation or exclusion? Do massive and systematic violations of human rights of the group and the members of the group qualify? Does genocide qualify a claim? Who determines when these violations justifies secession? Despite the answers to these questions, as a result of non-representation it could be argued that groups, both minorities and indigenous peoples, are entitled to exercise the right to self-determination as a last resort.³⁷

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

The declaration was adopted by the United Nations General Assembly in Resolution 1514 (XV) on 14 December 1960³⁸. The resolution is in the form of an authoritative interpretation of the UN Charter rather than a recommendation.³⁹ In conjunction with the United Nations UN Charter the Declaration supports the view that self-determination is a legal principle.

³⁵ United Nations, Universal Declaration on Human Rights, UNGA Res. 217 A(III) UN Doc. A/810 (1948)

³⁶ Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 198ff; see also Alfredsson Gudmundur, Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination International Perspectives, 1996, 66; Hadden Tom, The Rights of Minorities and Peoples in International Law in Schulze K. E, Stokes M. and Campbell C. (ed), nationalism, Minorities and Diasporas: Identities and Rights in the Middle East, 1996, 15

³⁷ Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 201, see also Gudmundur Alfredsson, Different forms of and claims to the right of self-determination in Clark and Williamson (ed), Self-determination, international perspectives, 65f; Cassese Antonio, Self-Determination of Peoples, 118f; Wippman David, Introduction: Ethnic Claims and International Law in Wippman David (ed) International Law and Ethnic Conflict, 1998, 99ff

³⁸ United Nations, Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV), 15 UN GAOR, Suppl. (no. 16) UN Doc. A/4648 (1960)

³⁹ Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 201; see also Brownlie Ian, Principles of Public International Law, 1990 p.596f; Duursma Jorri, Fragmentation and the International Relations of Micro States, 1996, 18

Although its precise ramifications are not yet determined, the principle has great significance as a root of particular legal developments.⁴⁰

The resolutions concerning the implementation of the declaration recognizes the legitimacy of the struggle of the colonial peoples and peoples under alien domination to exercise their right to self-determination and independence by all the necessary means at their disposal. Furthermore, in a number of resolutions concerning the activities of foreign economic and other interests which were impeding the implementation of the declarations concerning the granting of independence to colonial counties, the General Assembly reaffirmed the inalienable right of peoples of dependent territories to self-determination and independence and to the enjoyment of the natural resources of their territories as well as their right to dispose of those resources in their best interests.⁴¹

The declaration also set forth the important principle of territorial integrity. In relation to this the question raised by the declaration whether self-determination is applicable to situations other than colonial situations and how to define the term “peoples” was not answered at this time. Groups within the colonial boundaries sometimes expressed signs of wanting to secede from the majority within these boundaries. The problem was not solved in a consistent manner but an emphasis on territorial boundaries can be discerned.⁴² But one can say that the Declaration is primarily a vehicle for decolonisation and not an authorization of secession.⁴³ The issues were once again addressed in the Friendly Relations Declaration as we have seen above.⁴⁴

⁴⁰ Ibidem, see also Kly N. Yussuf, Discussion Paper, African Americans and the right to self-determination in *Hamline Law Review*, Vol. 17, 1993 NO.1, 18f; Brownlie Ian, *Principles of Public International Law*, 1990, p. 597; Detter Ingrid, *The International Legal Order*, 1994, 56

⁴¹ Cristescu Aureliu supra 2, 10, para. 52; see also Hannum Hurst, *Autonomy, Sovereignty and Self-Determination*, 34; but see Duursma Jorri, *Fragmentation and the International Relations of Micro States*, 1996, 18

⁴² Cristescu Aureliu supra 2, 40f, para. 279; see also Hannum Hurst, *Autonomy, Sovereignty and Self-Determination*, 1990, 36; Detter Ingrid, *The International legal Order*, 1994, 57; Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 198ff; Alfredsson Gudmundur, *Different forms of and claims to the Right of Self-Determination* in Clark and Williamson (ed), *Self-Determination International Perspectives*, 1996, 59f; Moore Margaret, *National Self-determination and Secession*, 1998, 3; Bring Ove, *FN-stadgan och världspolitik*, 2000, 192

⁴³ Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 87

⁴⁴ Hannum Hurst, *Autonomy, Sovereignty and Self-Determination*, 34; but see T.M. Franck, *Peoples and Minorities in International Law* in Brölman Catherine (ed), *Peoples and Minorities in International Law*, 1993, 11

2.1.5 General Assembly Resolution 1541

Resolution 1541⁴⁵, adopted the day after the Declaration on the Granting of Independence to Colonial Territories and Countries, reflects an attempt to uphold the principle of territorial integrity and to limit the “self” to whom the principle of self-determination could apply. The Resolution specifies that a territory would be considered “non-self-governing” under Chapter XI of the UN Charter only if it were both geographically separate and distinct ethnically and/or culturally from the country administering it.⁴⁶ So strictly read the Resolution rules out the possibility of classifying an ethnic group on a state's territory as a “non-self-governing” entity entitled to self-determination if this should mean the right to secede, but not necessarily if it meant granting the minority a right to autonomous status or in other words internal self-determination.⁴⁷ Moreover the resolution clarifies that a non-self-governing territory can achieve full measure of self-government by emerging as a sovereign and independent state, by associating with another independent state, or integrating with another independent state.⁴⁸

2.2 Is the Right to Self-Determination Changing?

2.2.1 The case of former Yugoslavia briefly

After the First World War the peace settlements incorporated in the Versailles Treaty never initiated a rational process of rearrangement of territorial frontiers within the Balkans so as to reduce the risk of future conflicts by respecting more determinedly the principle of self-determination of peoples along ethno-cultural lines. Instead the larger and multi-cultural Kingdom of the Serbs, Croats and Slovenes was chosen by the victorious powers after the war. The Serbs had opted for a different solution where a territorially more limited and homogeneous Greater Serbia was created. This was seen as a threat to the European balance-of-powers and instead a multi-national state with the continuing inner tensions would be an effective political check-and-balance against any Serbian ambitions to overweening power in the Balkans. History is a witness to the accuracy of advance predictions of the problems in uniting within one state different cultures stemming from radically different exposures to foreign governments. Recurrent breakaway and terrorist activity culminating in the murder of the King of Yugoslavia, led to the breakout of First World War. After the war

⁴⁵ General Assembly Resolution on Principles which should guide Members in Determining whether or not an Obligation Exists to Transmit Information called for under 73e of the Charter, UNGA Res. 1541 (XV), 15 UN GAOR, Suppl. (no. 16) UN Doc. A/4684 (1960)

⁴⁶ Hamline Law Review page 34; see also T.M Franck Peoples and Minorities in International Law, (ed) Brölman Catherine, Peoples and Minorities in International Law, 1993, 11

⁴⁷ Ibidem

⁴⁸ Hannum Hurst, Autonomy, sovereignty, and self-determination, the accommodation of conflicting rights, 1990, 39f

Yugoslavia was restored to meet the pre-1941 frontiers. The state was constituted of the republics of Slovenia, Croatia, Serbia, Bosnia and Macedonia. The republics had their own constitution, legislative power and financial autonomy.⁴⁹ Yugoslavia under the rule of Tito turned into a territorial devolution of powers within the framework of the Communist Party. At the end of the Cold War in 1989 Tito's Yugoslavia disintegrated and fell apart.⁵⁰

Croatia and Slovenia were the first two republics to brake away in 1991, followed by Bosnia-Herzegovina and Macedonia and lastly Serbia. The world's reaction of these secessions was surprisingly not negative. Many countries did not hesitate to recognize the new created states of Croatia and Slovenia, even too soon to be legal according to international law concerning recognition of states.⁵¹ In any case the newly created states Croatia, Slovenia, Macedonia, Serbia and later Bosnia-Herzegovina was recognized and accepted into the world community in spite of the lack of direct support of these secessions in international law.⁵²

The territorial integrity of states was in the case of former Yugoslavia not respected in favour of the right to self-determination. Does this imply that the right to self-determination is changing and that a new approach is taking its place in the international legal arena? It could be concluded when looking back on the Yugoslavian case. Interesting is the fact that Yugoslavia is not a great power in the world despite of their close relation to the Russians. Yugoslavia did not enjoy a veto power in the Security Council.

2.2.2 The case of Chechnya briefly

As in the case of former Yugoslavia, 1991 the Soviet Union was dissolved and was replaced with a confederation consisting of sovereign republics. Many former Soviet republics gained their independence but not all. Chechnya, as a former republic, even though wishing and struggling for

⁴⁹ Magnusson Kjell, *Kosovos Albaner*, 1993, at 14ff; see also Marko Joseph supra 16; Helgesen Vidar supra 30; Malcolm Noel, supra 30, 239ff; Judah Tim, supra 30, 4ff; Vickers Miranda, supra 30, 103ff

⁵⁰ McWhinney Edward, *The united Nations and a New World Order for a New Millennium*, 2000, 57ff; see also Rogel Carole, *The Breakup of Yugoslavia and the War in Bosnia*, 1998, 7ff; Meier Victor, *Yugoslavia, a history of its demise*, 1999, passum; Tim Judah, *The Serbs*, 1997, passum

⁵¹ The purpose of this thesis does not allow for a thorough account for the law on recognition. For a thorough presentation of the law on recognition see McWhinney Edward, *The united Nations and a New World Order for a New Millennium*, 2000, 62ff

⁵² McWhinney Edward, *The United Nations and a New World Order for a New Millennium*, 2000, 57ff; see also Agrell Vilhelm, *Den rättsliga interventionen*, 1997, 137ff; Judah Tim, *The Serbs*, 1997, 170ff; Rogel Carole, *The Break up of Yugoslavia and the War in Bosnia*, 1998, 17ff; Meier Victor, *Yugoslavia, a history of its demise*, 1999, 215ff, Tim Judah, *The Serbs*, 1997, 168ff

independence, never gained it. The former republic was incorporated with the newly created Russian Federation.⁵³

In 1994 the Russian authorities made the first attempt to stop the Chechen separatism by force. After two years fighting and many thousands of lives later, they had to retreat. The experience of those two years had taught the federal authorities that colonial methods could not be used to solve ethnic conflicts. Force could not be used to impose the federal will on a small ethnic community if a significant part of it was prepared to resist. But in 1999 it was time again to take up the “anti-terrorist-operation”. The aim was to defend Russia’s integrity and keep Chechnya within Russia.⁵⁴

The Russian argument to restore a centralized state in Russia and to introduce federal rule in Chechnya, states that the former republic’s competence, as a subject of the federation, was doubtful.⁵⁵ However the main reason is probably the fear of commencing a domino-reaction and the disintegration of the Russian Federation if Chechnya should be granted self-determination. This is despite the fact that the Chechen assertion is based on historical, cultural, ethno-political and geopolitical grounds.⁵⁶

Moreover, the Russian Federation argues that they cannot stand aside from the process of restoring the Chechen statehood. It does not violate the sovereignty of the republic since the sovereignty has never been recognized. By ignoring the legacy of Russo-Chechen relations, including the deportation and ethnic cleansing of 1944 and by claiming to target and attempt to eliminate terrorism, the Russian try to disguise the real goal that is to bring Chechnya under Russian rule. To deal with the situation the

⁵³ Khalmukhamedov Aleksandr, How to return to normality in Chechnya in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 11ff; see also Svenska FN Förbundet, Folkkrätt eller nävrätt vid etniska konflikter? Konflikten Tjetjenien-Ryssland, 1996, 7; The war in Chechnya, Knezys Stasys and Sedlickas Romanas, 1999, 15ff; Dunlop John B., Russia confronts Chechnya, roots of a separatist conflict, 1998, 90ff; Goldenberg Suzanne, Pride of small nations, the Caucasus and post-soviet disorder, 1994, 183ff

⁵⁴ Pain Emil, The Second Chechen war in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 21f; see also Lapidus Gail w., Russia’s second Chechen war, ten assumptions in search of a policy in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 30ff; Svenska FN Förbundet, Folkkrätt eller nävrätt vid etniska konflikter? Konflikten Tjetjenien-Ryssland, 1996, 5f, The war in Chechnya, Knezys Stasys and Sedlickas Romanas, 1999, 23ff; Dunlop John B., Russia confronts Chechnya, roots of a separatist conflict, 1998, 124ff

⁵⁵ Khalmukhamedov Aleksandr, How to return to normality in Chechnya in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 11ff

⁵⁶ Lapidus Gail w., Russia’s second Chechen war, ten assumptions in search of a policy in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 30ff; see also MacFarlane S. Neil, What the international community can do to settle the conflict in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 99f

Russians have used harsh methods, including violence, which has led to many serious violations of human rights. This has led to fear of the Russian army among the population and a situation where there is no confidence in the federal centre.⁵⁷

In spite of the brutal nature of the conflict and the more or less obvious reasons for it, the Chechen population is still not supported internationally in their claim for self-determination. The interesting aspect of the situation of the Chechens is that Russia as an important power in the world's political arena and, not to be underestimated, Russia has a veto in the Security Council. Could this perhaps influence other states' reactions?

2.2.3 The case of Tibet briefly

The history of Tibet shifts between autonomy and dependence. In the mid-nineteenth century Tibet managed to liberate itself from a protectorate-relationship with Beijing. In the beginning of the twentieth century the European colonialism reached Tibet with the British troupes reaching Lhasa with the consequence of the Dalai Lama fleeing from the country. A convention was signed, the Lhasa Convention, between the British and the Tibetans which implicitly implied the Tibetan's full capacity to enter into treaty relations without authorisation from Beijing. This was undermined when the British a few years later signed a treaty with Beijing and transferred the implementation of the Lhasa Convention to Beijing. The following years the Chinese established full control over Tibet through military occupation. But in 1914 the political independence of Tibet was once again obtained. The Chinese aim at seizing Tibet was never surrendered and in 1918 the Chinese again tried to invade Tibet. This did not succeed and a peace-treaty was signed between the parts that included a temporary delimitation. This treaty was never ratified by China. The British tried to mediate between the parts and recognized Tibet as an autonomous state under the sovereignty of China. In 1931 battles were fought along the borders to China again and the Tibetans managed to defend themselves. Up until 1949 Tibet established itself if not as a state, at least as a political unity with the power to enter into international treaties and maintain international relations. This confirms Tibet's international status as

⁵⁷ Khalmukhamedov Aleksandr, How to return to normality in Chechnya in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 11ff; see also Lapidus Gail w., Russia's second Chechen war, ten assumptions in search of a policy in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 30ff; MacFarlane S. Neil, What the international community can do to settle the conflict in Jonson Lena and Esenov Murad (ed), Chechnya; The international community and strategies for peace and stability, 2000, 97f; Svenska FN Förbundet, Folkrätt eller nävrätt vid etniska konflikter? Konflikten Tjetjenien-Ryssland, 1996, 6f; Dunlop John B., Russia confronts Chechnya, roots of a separatist conflict, 1998, passum; Goldenberg Suzanne, Pride of small nations, the Caucasus and post-soviet disorder, 1994, 183ff

a subject of international law. In 1950 invaded Tibet and the Chinese sovereignty has been solid and effective since then.⁵⁸

The people living in Tibet has expressed their will and right to self-determination through a referendum. China has claimed their right to territorial integrity. Two facts should be considered when determining and weighing these two principles in the case of Tibet. First Tibet did function as a separate subject of international law between the years 1912 and 1950, and practically as an independent state the decades after 1918. Further, the Tibetans have been victims of gross violations of human rights, including genocide. The Chinese have carried out a harsh and ruthless policy in Tibet, with the manifest purpose of eradicating the Tibetan political entity, cultural, religious and ethnic personality. The Tibetans are still treated as second-class citizens. These facts speak in favour for the self-determination of Tibet. Secondly Tibet lost this status through military occupation, which violates the right to self-determination. In addition the Chinese forced an agreement on the Tibetans that incorporated Tibet into the Peoples Republic of China. These violations of international law speak against the Chinese claims.⁵⁹

As to the question concerning the Tibetans as a distinct people with the right to self-determination the Tibetans themselves have always considered themselves as one people distinct from any of the neighbouring peoples. Moreover the Tibetans are a distinct ethnic group with their own language, culture, religion and historical heritage.⁶⁰

The conclusion will thus be that if the Tibetan people claims a right to self-determination expressed as extended and de facto autonomy the international community should support this. If a right to secede is claimed this can only be supported if the central government suppresses every peaceful settlement within the ramifications of the state according to the Friendly Relations Declaration.⁶¹

But Tibet has not enjoyed any form of self-determination. Even if many states support the Tibetan peoples claim nothing specific has been done. The Chinese are still controlling and in many ways suppressing the people in

⁵⁸ Bring Ove, *Fn-stadgan och världspolitik*, 2000, 207ff; see also van Walt van Praag Michael C., *The Status of Tibet, history, rights, and prospects in International Law*, 1987, 34ff; Cao and Seymore (ed), *Tibet through dissident Chinese eyes*, 1998, 3ff

⁵⁹ Bring Ove, *Fn-stadgan och världspolitik*, 2000, 207ff; see also van Walt van Praag Michael C., *The Status of Tibet, history, rights, and prospects in International Law*, 1987, passim; Cao and Seymore (ed), *Tibet thorough dissident Chinese eyes*, 1998, 5ff

⁶⁰ Bring Ove, *Fn-stadgan och världspolitik*, 2000, 207ff; Cao and Seymore (ed), *Tibet thorough dissident Chinese eyes*, 1998, 5ff

⁶¹ Bring Ove, *Fn-stadgan och världspolitik*, 2000, 207ff; see also van Walt van Praag Michael C., *The Status of Tibet, history, rights, and prospects in International Law*, 1987, 197ff

Tibet. In the authors view the one reason for this is the political impact of the problem. China is today a powerful state with a veto in the Security Council. If this would be a situation involving a less powerful state the problem would probably be solved a long time ago.

2.2.4 Conclusion

When considering if the right to self-determination has changed during the past half century one important factor must be observed, the fact of political power. As the author has pointed out when powerful states, such as Russia or China, have been involved, the struggle for self-determination has not been very much supported from other states, at least the support has not been explicit and open. The implication of this might be taken as to imply that the self-determination is dependent on the political situation and on the political power involved. In the cases of Tibet and Chechnya, the right to self-determination has not been granted even though support of this could be found in international law.

In the Tibetan case the historical and the ethnic dimension clearly could be interpreted in favour of a right to self-determination independent from China. The same could be said in the Chechen case in relation to Russia. Although international law could be interpreted in this way this has not shown to be the case. In the Yugoslavian case the world was supportive or at least not so negative towards the break up. Is it because the Yugoslavian republics and its different populations could find better support in international law? Could they constitute peoples in a more convincing manner in relation to the Tibetans and the Chechens, and thus be accorded the right to self-determination? According to the author this is not the case. The Yugoslav populations could not in any way be seen more as peoples than the Tibetans or the Chechens.

Neither was the situation of the different populations in Yugoslavia worse than the situation of the Chechen or the Tibetans. Quite the opposite, the Chechens and the Tibetans have suffered more repression and discrimination than the different Yugoslavian populations⁶². So neither in this case can the Yugoslavian case be supported in a stronger way than the other cases mentioned. International law was interpreted in a way that seemed to have widened the scope of application of the right to self-determination. This was not because the world sought to alter or even widen the scope of application of the right to self-determination. Political power and political interests, in the view of the author, are, if not the only, one important reason.

⁶² An exception is the Albanian population in Kosovo that suffered oppression and discrimination for many years. Today after the massive violations of human rights and humanitarian law the Kosovo Albanians are under an international administration for the time being.

Of course this is a very pessimistic view of international law and probably not the entire truth. Most of the conflicts arising today are internal conflicts that in one way or the other include an ethnical or minority dimension. To deny groups the right to self-determination, even if not always with the right to secede, is not realistic. It is time to acknowledge the rights of groups in a wider way and widen the scope of beneficiaries of the right to self-determination to avoid violent and repressive situations.

2.3 Summary/conclusion

As we have seen it is generally accepted today that the right to self-determination, being one of the principles of the UN Charter, entails legal rights and obligations. It is regarded as the basis on which friendly relations among nations should develop. The incorporation of the principle of equal rights and self-determination of peoples is the culmination of a fairly long development. It marks not only the legal recognition of the principle, but also the point of the departure of a new process, the increasing dynamic development of the principle and its legal content, its implementation and its application to the most varied situations of international life.

As we saw it is not undoubted what is entailed in the right to self-determination. The question, of which the beneficiaries are, a very important question, has not been answered. Moreover the application-range of the right has not been clearly answered and this also is unsatisfactory. There are many loose ends that need to be dealt with. This is important to international peace and security since the right to self-determination is seen as a basis on which friendly relations are supposed to rest.

When it comes to the beneficiaries, according to some writers the right to self-determination was a right of colonial or otherwise non-independent peoples. Other peoples were excluded according to this theory. This view is mainly based on chapters 11 and 12 in the UN Charter that elaborates on colonies and trust territories and the Declaration on the Granting of Independence. Supporters of this view means that the right to self-determination is to be read in connection with the mentioned chapters and the Declaration on the Granting Independence and only in relation to these peoples can the right to self-determination be current. But as we saw in all instruments there was never a mentioning of any limitations of the concept of peoples. In every legal instrument it is stated that "all peoples" have the right to self-determination. Many critics state just this that the right was never meant to be limited to a special kind of peoples. In the authors view it would be very discriminating if some peoples would be granted a right but others denied it. The usage of the term "all peoples" has been interpreted in the way mentioned and the right has been granted to all peoples and not only to colonial or other dependent people. The fact that the third paragraph of the common article 1 of the two Covenants mentions colonial or other non-self-governing peoples as a special case proves this.

The territorial emphasis given to the right to self-determination has also worked as a limitation to the application of the right. As we saw the definition of the beneficiaries of the right was given a territorial emphasis rather than a national emphasis. This has led to the fact that the right to self-determination was to be applied within the territorial boundaries of states. This leads to the conclusion that groups defined as peoples living within states do not enjoy the right to self-determination at least not with the right to secede. Territorial integrity has, and still is, a very important and dominating principle in international law. This is very logical since the creators of international law are states and it would be strange if they would not be concerned of their own best. So to admit and accept a right to self-determination without any limitation to how this should be expressed would be to good to be true. Of course it is not only due to the egoistic thoughts and reasons of states but also in connection to security and peace that this principle has been stressed. Self-determination was seen as a basis on which friendly relations among states should rest. If every group would have the possibility to claim a right to self-determination the consequence could be that borders as they look today would probably not last for a very long time. So, a too wide application of the right to self-determination could be a threat to other rights and principles in international law.

But a too narrow application could have the same effect. As we have seen many conflicts in the world today often involve independence claims from groups that for on reason or the other feel unfairly treated. And in many cases this is sadly the case. To deny the right to some form of self-determination, even if not the ultimate form, which would include a right to secede, could and has in many cases shown to be a threat to international peace and security. But we have seen a development towards a different application of the right to self-determination. Groups not defined as peoples who have been victims of systematic discrimination and violations of fundamental human rights have been granted self-determination even with the right to secede. Could this imply that the right to self-determination has been altered? Is the right to self-determination changing? As we have seen in the case of former Yugoslavia there are some tendencies that indicate a changing attitude towards the right to self-determination. The world community met minorities such as the Croatian minority and the Slovenian minority that claimed their right to self-determination including the right to secede in a positive way. This was despite the territorial integrity of former Yugoslavia, which normally is seen as a very strong and important principle.

But as we have seen in the cases of Chechnya and Tibet, the trend is not as convincing and certain. These cases have not been successful in their strife for self-determination. And above all the world is not supportive as it was in the case of Yugoslavia. The author's observation on this fact was the importance of the political power and influence of the states involved. Yugoslavia was in no way as important as are China and Russia. To find any

answer to the question why Yugoslavia and not Tibet or Chechnya, you probably have to look in this direction. It will be hard to find determinative differences when it comes to the differences in populations or the attitude of the central government towards these populations. In this case the Tibetan and the Chechen cases would probably find more support in international law than Croatia and Slovenia. The Chechen and the Tibetan have been subjects of discrimination and oppression and suffers violations of human rights as we speak, which would, according to the Friendly Relations Declaration, legitimise the right to self-determination including the right to secede. Croatia and Slovenia did not in any way experience this treatment.

So, the only possible explanation to the difference in treatment of these different situations is politics. If you have a strong political role and political influence your chances at convincing the world of your right to territorial integrity will increase.

But it is hard to deny the changing nature of the right to self-determination. Today we are at least speaking of the possibility of self-determination to other groups than peoples if the right circumstances exist. The scope is widening even if the exact ramifications are not yet fixed. And perhaps this is not such a bad thing. The lack of definitions probably facilitates the evolution of the right to self-determination.

3 The Legal Concept of Peoples

A fundamental question when it comes to the right to self-determination, and any other right for that matter, is the identification of the beneficiaries of the right and the nature of the corresponding duties. This is very important in relations to the sphere of application of the principle and the its legal content. Attempts have been made to distinguish between the principle of self-determination of peoples, which is referred to in article 1 and 55 of the UN Charter and self-government or independence as referred to in article 73 subparagraph b and article 76 subparagraph b. Despite the differences in wording and context the principle of self-determination and right of peoples to self-government or independence is essentially the same. The United Nations cannot uphold the view that the UN Charter gives peoples of non-self-governing and trust territories the right to self-government or independence but refuse them the right to self-determination. The right to self-determination is universal and should be applied to all peoples and nations.⁶³

Distinction has not only been made between non-self-governing peoples and independent peoples. Other groups have been created to narrow the concept of peoples. Examples of such groups are minorities and indigenous peoples. Rights directed towards these groups have been included in several international declarations and conventions to strengthen their position and role in the international arena. But probably also to limit their rights and possibilities of demanding rights like the right to self-determination which would threaten states territorial integrity. If minorities and indigenous peoples would be included in the definition of peoples many groups would probably claim the right to self-determination. Of course this meaning of the concept of peoples could have absurd consequences. Instead, giving these groups special rights and protection, these claims can maybe be calmed and the threat of territorial disruption resolved.

3.1 Peoples

The policy pursued by the United Nations with regard to the application of the right to self-determination of peoples has tended towards recognizing a wider entitlement of enjoyment of the right in order to avoid any discrimination between peoples. The right to self-determination is a right of all peoples since the UN Charter, and other legal instruments of the United Nations uses the term “peoples” without any demarcation. It should be understood in its widest sense as a universal right and a right of all peoples whether or not they have attained independence and the status of a state. Consequently “peoples” should not be interpreted as meaning a particular category of “peoples” but all “peoples”. At the same time this should not be

⁶³ Cristescu Aureliu supra 2, 38 para. 260-266

interpreted as an encouragement to secession or as justifying activities aimed at changing a country's system or government. Interpretation of the principle in its widest sense leads to the recognition of all peoples to determine freely in terms of equality their own political, economical and social regime and their international status.⁶⁴

When defining the terms “peoples” many different views have been expressed. One point of view is that no distinction can be made on the grounds that some peoples are under the sovereignty of another country or live on a particular continent or possess independent territories or live in the territory of a sovereign state.⁶⁵ Another view is, that the word peoples should be understood to mean all those who are able to exercise their right of self-determination, who occupy a homogenous territory and whose members are related ethnically or in other ways.⁶⁶ A third opinion holds that the right to self-determination should be applied in two situations only, that is, peoples occupying a geographical area which in the absence of foreign domination would have formed an independent state, and the commoner situation of peoples occupying a territory that becomes independent but who may be subjected to new forms of oppression.⁶⁷

No general definition exists though and as we see the views expressed by different states differs in many ways. One common thing that is found in all of the proposed definitions is the territorial emphasis. The people should have a connection to the territory.

3.1.1 The Decolonization Definition

The advocates of this opinion hold that self-determination should only be applied to peoples under colonial rule or foreign domination. Representatives of this point of view interests article 1 paragraph 2 of the UN Charter by reference to chapters XI, XII and XIII in the UN Charter so that the word “peoples” in article 1 paragraph 2 of the UN Charter is understood to refer only to peoples in non-self-governing or trust territories within the territorial boundaries of the existing colonies or non-self-government territories. Common article 1 of the Covenants is interpreted in the same manner. The difficulty of defining the term people should not prevent the application of the right of self-determination to colonial peoples.⁶⁸

⁶⁴ Cristescu Aureliu supra 2, 39, para. 267-268; see also Duursma Jorri, Fragmentation and International Relations of Micro States, 1996, 78; Musgrave Thomas D., Self-Determination and National Minorities, 1997, 150

⁶⁵ Cristescu Aureliu, supra 2, 39, para. 270

⁶⁶ Cristescu Aureliu, supra 2, 39, para. 271-272

⁶⁷ Cristescu Aureliu, supra 2, 40, para. 273

⁶⁸ Cristescu Aureliu, supra 2, 40, para. 274; see also Musgrave Thomas D., Self-Determination and National Minorities, 1997, 149f; Dinstein Yoram, The Protection of Minorities and Human Rights, 1991, 5

The colonial argument implying that only colonial peoples have the right to self-determination is hard to support. Article 1 paragraph 2 of the UN Charter, and the travaux préparatoires, do not restrict its application only to colonial situations but states a right to self-determination to “all” peoples. Further the provisions of the Friendly Relations Declaration indicates that the right set out in article 1 paragraph 2 of the UN Charter is a universal one to which all peoples have the right. The fact that the purposes of self-determination set out in resolution 2625 (XXV) extend beyond decolonisation and the reference to a government representing the whole people belonging to the territory, which would not be necessary if the right to self-determination only applied to colonial territories, supports this. Also common article 1 of the Human Rights Covenants makes it difficult to apply the decolonisation definition. The right set out here is not limited to a specific situation, but a right of all peoples. The fact that the third paragraph of article 1 specifically and inclusive refers to colonial territories, reinforces the line of argument forwarded.⁶⁹

3.1.2 The Representative Government Definition

The representative government theory holds the opinion that self-determination is an ongoing and universal right whereby a population of a territorial unit exercises popular sovereignty in the choice of its government.

The term people is defined as the entire population of a territorial unit and includes both non-self-governing territories and independent states. Resolution 2625 (XXV) supports this view. Paragraph 1 indicates that self-determination is a right of all peoples and a duty incumbent on every state. Paragraph 7 refers to representative government, which again would be superfluous if only non-self-governing territories were addressed. Further the two Covenants confirm this opinion by stating in common article 1 that “all peoples” have the right to self-determination, it is not limited to populations of non-self-governing territories.⁷⁰

The representative government theory flanks the decolonisation theory by defining a people in terms of prior existing territorial boundaries. Looking at the travaux préparatoires, this view seems to be in line with what the creators of Resolution 2625 (XXV) had in mind. With regard to the beneficiaries of the principle, that is the meaning of the word “peoples” several of the representatives emphasized that the term should be given a broadest possible interpretation. All peoples should be included. One of the views expressed was that peoples living in a region geographically distinct and ethnically and culturally different from the rest of the state should be allowed to enjoy self-determination. An opposing view meant that this

⁶⁹ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 150f; see also Chadwick Elizabeth, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, 1996, 32f

⁷⁰ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 151ff

would interfere with the domestic affairs of that state and it would encourage secession. It would be absurd to widen the scope of application to any group different from the state as a whole. Another view proclaimed that the terms “peoples” meant peoples who did not have equality of rights with the people of the administering authority, that is peoples who had been unable to exercise their right to self-determination.⁷¹ What can be read in the travaux préparatoires is that “peoples” in article 1 paragraph 2 should be interpreted to mean groups within the context of prior existing state boundaries, comprising the whole population of that state. The principle of self-determination conformed with the UN Charter only insofar it implied the right to self-determination of peoples and not the right to secession. In other words peoples are defined as populations within already existing territorial boundaries.⁷²

The representative government definition, as we have seen, consists of two features; a universal scope applying both to independent and non-independent territories, and people defined by the territorial limits of the state or territory. The Helsinki Declaration⁷³ is a good example of the representative government theory. The reference to peoples in the declaration must apply to populations of independent and sovereign states, because it was independent and sovereign states that signed the declaration, and territorial integrity of states was stressed in connection with the right to self-determination. This implies that self-determination must take place within the territorial limits of the state.⁷⁴ This theory however, fails to take account of the enormous impact of linguistic, cultural and religious factors when populations identify themselves. The implementation of sovereignty within multi-ethnic states often creates representation that is ethnically adjusted. Ethnic groups do not consider the will of the majority to be that of the whole population, but the will of their group. If the group is a minority within the population as a whole, the will of the group could constantly be let down because of the unevenness in the population picture. Ethnic disputes within a given territory could not be solved by an appeal to the will of the majority because the will of the majority will simply reflect the will of the most numerous group within the territory.⁷⁵

But as we saw earlier a passage in the Friendly Relations Declaration has in later years been interpreted as granting groups not defined as peoples, within the territorial boundaries of states and not represented in government the right to self-determination. Systematic discrimination, serious violations of human rights and the central governments unwillingness to resolve the

⁷¹ Cristescu Aureliu, *supra* 2, 12 para. 63; ; see also Duursma Jorri, *Fragmentation and International Relations of Micro States*, 1996, 21ff

⁷² Musgrave, Thomas D., *Self-Determination and National Minorities*, 1997, 151ff; see also Dinstein Yoram, *Protection of Minorities and Human Rights*, 1991, 5f

⁷³ 1975 CSCE Declaration on Principles Guiding Relations Between Participating States, 14 ILM 1975

⁷⁴ Musgrave, Thomas D., *Self-Determination and National Minorities*, 1997, 151ff

⁷⁵ Musgrave, Thomas D., *Self-Determination and National Minorities*, 1997, 151ff

situation with peaceful means within the boundaries of the state are all elements required for the right to self-determination to be granted in these situations. Even the right to secede in these situations has been accepted as a last resort. So even for groups within the territorial boundaries of the state have the possibility and the right to enjoy the right of self-determination with the ultimate right to secede if certain circumstances exist according to one of the interpretations of the Friendly Relations Declaration.⁷⁶

Non-representation was again brought up in the Vienna Declaration adopted by the World Conference on Human Rights.⁷⁷ Similar language as used in the Friendly Relations Declaration is found in this Declaration. A claim to the right to self-determination on this ground can be backed up by a reference to the third preambular paragraph of the Universal Declaration, where we find the passage “recourse, as a last resort, to rebellion against tyranny and oppression”.⁷⁸ The problem with this theory is to recognize what should amount to systematic non-representation and who should determine this. But despite these questions groups that are victims of non-representation should be entitled to exercise the right to self-determination as a last resort.⁷⁹

3.1.3 Ethnic Definition

Many definitions of ethnicity or nationhood have been put forward but no one has ever gained general acceptance. The only features that almost every

⁷⁶ Cassese Antonio, *Self-Determination of Peoples*, 118f; see also Detter Ingrid, *The International Legal Order*, 1994, 57; Duursma Jorri, *Fragmentation and International Relations of Micro State*, 1996, 25; Alfredsson Gudmundur, *Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination International Perspectives*, 1996, 65f; Wippman David, *Introduction: Ethnic Claims and International Law in Wippman David (ed), International Law and Ethnic Conflict*, 1998, 15

⁷⁷ United Nations, *World Conference on Human Rights, Vienna Declaration and Programme of Action*, 32 ILM 1661 (1993); see also Alfredsson Gudmundur, *Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination International Perspectives*, , 1996, 65

⁷⁸ Alfredsson Gudmundur, *The implementation of the right to self-determination as a contribution to conflict prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*, 200f; see also Alfredsson Gudmundur, *Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination International Perspectives*, 1996, 66; Hadden Tom, *The Rights of Minorities and Peoples in International Law in Schulze K. E, Stokes M. and Campbell C. (ed), Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East*, 1996, 15

⁷⁹ Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*, 201; see also Alfredsson Gudmundur, *Different forms of and claims to the right of self-determination in Donaldson and Clark (ed), Self-Determination International Perspectives*, , 1996, 65f; Cassese Antonio, *Self-Determination of Peoples*, 118f; Wippman David, *Introduction: Ethnic Claims and International Law in Wippman David (ed) International Law and Ethnic Conflict*, 1998, 99ff

definition of nationhood has had in common are objective criteria and subjective criteria. Both objective and subjective criteria's are needed to create an ethnic group. They are interrelated. The terms nation and peoples were both used in the final draft of the UN Charter of the United Nations. The travaux préparatoires of the UN Charter reveals no definitive definition of the term peoples. That an ethnic interpretation was not ruled out at this time can be seen from the fact that members of the United Nations regularly put such an interpretation forward. Even the General Assembly referred to an ethnic group as a people at this time.⁸⁰

When it comes to territorial integrity the General Assembly seemed not to be of particular concern with the question when using the ethnic definition to define a people⁸¹. The reason for this was that the General Assembly initially adopted a pragmatic approach to territorial integrity when dealing with non-self-governing territories. After the adoption of resolution 1514 (XV) 1960 the pragmatic approach was abandoned. Paragraph 6 of the mentioned resolution stated that any attempt to disrupt the national and territorial integrity of a country is incompatible with the principles and purposes of the UN Charter. Further paragraph 2 declared that peoples had the right to self-determination and thus the right to freely determine their political status. This meant that ethnic groups within non-self-governing territories could not be seen as peoples because paragraph 6 prohibited them from creating an own nation state and by virtue of that hindered them from freely determine their political status, dedicated to peoples only. The United Nations became increasingly unwilling to permit division of non-self-governing territories even if ethnic groups within the territory were different and incompatible in every way.⁸²

The General assembly has not generally recognized ethnic groups as peoples but there have been situations when ethnic groups have been recognized, implicitly and explicitly, as peoples⁸³. Furthermore both resolution 1514 (XV) and resolution 2625 (XXV) declare that peoples not only have the right to determine their political status but also to pursue their economic, social and cultural development. Many prominent legal writers defines peoples in terms of ethnic criteria and with almost universal elimination of colonialism many commentators claims a general recognition of ethnic groups as peoples saying that the recognition of these groups would provide for a new and suitable role of self-determination in a world of independent states, especially in cases of political oppression.⁸⁴

⁸⁰ Resolution 441 (V) of 2 December 1950; 1353 (XIV) of 21 October 1959; 1723 (XVI) of 20 December 1961; 2079 (XX) of 18 December 1965 Musgrave, Thomas D., *Self - Determination and National Minorities*, 1997, 154ff; see also Bring Ove, *FN-stadgan och världspolitik*, 2000, 195

⁸¹ Resolution 181 (II) 29 November 1947; 2079 (XX) of 18 December 1965

⁸² Musgrave, Thomas D., *Self-Determination and National Minorities*, 1997, 154ff; see also Bring Ove, *FN-stadgan och världspolitik*, 2000, 195f

⁸³ Resolution 2672C (XXV) of 8 December 1970; Resolution 3203 (XXIX) of 17 September 1974

⁸⁴ Musgrave, Thomas D., *Self-Determination and National Minorities*, 1997, 154ff

The ethnic definition is not trouble less. No precise definition is offered by the theory. Defining an ethnic group demands that both objective and subjective criteria's are identified, fixing appropriate objective criteria's has proven impossible. Also the subjective criterion is hard to define since a subjective phenomenon and what constitutes the important element in the subjective consciousness varies between different nations. As the subjective element of self-consciousness amongst a particular ethnic group determines the content of the objective criteria by which the group identifies itself, it is impossible to formulate a single, universal definition of the nation. Defining peoples as an ethnic group means that those that do not belong to the group will be excluded from the process of determining the political status of the state. But according to the Covenants on Human rights the right to self-determination and to determine the political status of the state is a human right. Even though the HRC has denied individuals the right to claim the right to self-determination and stated that this is a collective right to be enjoyed within a group⁸⁵, individuals not belonging to the specific ethnic group enjoying the right to self-determination would thus be denied the right to self-determination.⁸⁶

3.1.4 Summary

As we have seen no mandatory legal definition of “peoples” exists today that could be used in all parts of the world covering all situation. The practice of the United Nations has been cautious in cases of political self-determination, but firm in cases of decolonisation. There are some elements of the term “peoples” that has emerged from the discussions held in the United Nations that should not be ignored, and could be used in cases where it is necessary to decide if a group constitutes a “people” or not. These elements are:

- a. the term peoples indicates a social entity possessing a clear identity and its own characteristics
- b. the term implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population
- c. a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the ICCPR.

The territorial rather than the popular emphasis is clear in this way of defining “peoples”. The population of fixed territorial entities rather than the composition and cultural characteristics of the people living within the

⁸⁵ See the case of Chief Bernard Ominayak and the Lubicon Band v. Canada, Communication NO. 167/1984, communications submitted to the Human Rights Committee

⁸⁶ Musgrave, Thomas D., Self-Determination and National Minorities, 1997, 154ff

territory has been defined as “peoples” and thus been granted the right to self-determination.⁸⁷

The territorial emphasis is reinforced by resolution 1541 of 1960 and the decolonisation process itself.⁸⁸ This can be seen for example in the Western Sahara case⁸⁹ where the territorial emphasis was given priority. Self-determination should be exercised within colonial boundaries. This was very important and unless the people as a whole chose to integrate with another independent state, this remained almost a holy fact. In the cases of the African state’s decolonisation this aspect was adopted rather than empowering minorities within the colonial boundaries to alter the same boundaries.⁹⁰

Also in paragraph 6 of resolution 1514 (XV) territorial boundaries are protected, which again strengthens the territorial importance when defining the beneficiaries of the right to self-determination.⁹¹

⁸⁷ Cristescu Aureliu supra 2, 40f, para. 279; see also Hannum Hurst, *Autonomy, Sovereignty and Self-Determination*, 1990, 36; Detter Ingrid, *The International legal Order*, 1994, 57; Moore Margaret, *National Self-Determination and Secession*, 1998, 3; Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1991, 7; Hadden Tom, *The Rights of Minorities and Peoples in International Law* in Schulze K. E, Stokes M. and Campbell C. (ed), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East*, 1996, 16f; see also Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention in the Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*, 198; Alfredsson Gudmundur, *Different Forms of and Claims to the Right of Self-Determination* in Clark and Williamson (ed), *Self-Determination: International Perspectives*, 1996, 59f; Kly N.Yussuf, *Discussion Paper, African Americans and the Right to Self-Determination* in *Hamline Law Review*, 1993 vol.17 number 1, 21; Moore Margaret, *The Self-Determination Principle and the Ethics of Secession* in Moore Margaret (ed.) *National Self-Determination and Secession*, 1998, 3; Franck T.M., *Post-modern tribalism and the right to Secession* in Brölmann Catherine (ed), *Peoples and Minorities in International Law*, 1993, 10f; Alfredsson Gudmundur, *Report on Equality and non-discrimination: minority rights*, 1990, 16; Bring Ove, *FN-stadgan och världspolitiken*, 2000, 195; but see Duursma Jorri, *Self-Determination, Statehood and International Relations of Micro-States*, 1994, 28; Crawford James in Bayefsky Anne, 58

⁸⁸ Cristescu Aureliu supra 2, 40f, para. 279; see also Hannum Hurst, *Autonomy, Sovereignty and Self-Determination*, 1990, 36; Detter Ingrid, *The International legal Order*, 1994, 57; Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*, 198ff; Alfredsson Gudmundur, *Different Forms of and Claims to the Right of Self-Determination* in Clark Donald and Williamson Robert (ed), *Self-Determination: International Perspectives*, 1996, 59f; Moore Margaret, *National Self-Determination and Secession*, 1998, 3; Alfredsson Gudmundur, *Report on Equality and non-discrimination: minority rights*, 1990, 16

⁸⁹ *Western Sahara Case*, ICJ Advisory Opinion, ICJ Report, 1975, 12

⁹⁰ T.M. Franck, *Post-modern tribalism and the right to Secession* in Brölmann Catherine (ed) *Peoples and Minorities in International Law*, 1993, 9f

⁹¹ Musgrave Thomas D., *Self-determination and National Minorities*, 1997, 160

On the other hand, as we saw earlier, the requirement of a government representing the whole people without discrimination as to creed, race or colour has been interpreted in later years to indicate that when a group within the state is systematically discriminated and systematically not represented in office, that group has a right to self-determination and ultimately a right to secede on that ground. In these cases the territorial integrity has had to give precedence to the right to self-determination.⁹²

3.2 Minorities

Since the end of the First World War peoples and minorities have been defined as two different and separated concepts. The reason to this is that, as we have seen, only peoples have the right to self-determination. To create a minority-concept was probably an attempt to prevent ethnic groups that had been separated from their nation-states as a result of the Paris Peace Conference after the war. The separation of peoples and minorities has continued and today we find separate provisions in the Covenants on Human Rights⁹³ and the Helsinki Declaration⁹⁴ for peoples and minorities. Many declarations and other soft-law instruments have been created to protect the identity of minorities in a more efficient way. But a definition of a minority of general usage has not been reached. Capotorti formulated the definition that has obtained the widest currency in his study on the rights of persons belonging to ethnic, religious and linguistic minorities in 1979.

3.2.1 Minority Definition

The first attempt to define a minority was provided by the Permanent Court of Justice in the Greco-Bulgarian Communities case⁹⁵. The Court defined minorities as groups possessing attributes of race, religion, language and tradition and possessed a sentiment of solidarity and a will to preserve the characteristics of the group. The court went on to say that “the existence of a minority is a question of fact; it is not a question of law”. In 1954 the Sub-Commission on the Prevention of Discrimination and Protection of

⁹² Alfredsson Gudmundur, Different Forms of and Claims to the Right of Self-Determination in Clark and Williamson (ed), *Self-Determination: International Perspectives*, 1996, passum; see also Kly N. Yussuf, Discussion paper, African Americans and the right to self-determination in *Hamline Law Review*, 1993 Vol. 17 No. 1, passum; Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention in the Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*, 198ff.; see also T.M. Franck, Post-modern tribalism and the right to Secession in Peoples and Minorities in International Law, (ed) Brölmann Catherine, 1993, 9f

⁹³ see supra 9

⁹⁴ 1975 CSCE Declaration on Principles Guiding Relations Between Participating States, 14 ILM 1975 [henceforth the Helsinki Declaration]

⁹⁵ (1930) PCIJ Reports, Series B, No. 17, 4

Minorities defined a minority as non-dominant groups in the population, which possessed and wished to preserve ethnic, religious or linguistic traditions or attributes markedly different from those of the rest of the population.⁹⁶

The definition mostly quoted is the one Capotorti formulated in 1979 in his role as Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The definition proposed was limited in its objective. It was formulated solely within the framework of article 27 of the ICCPR.⁹⁷ Capotorti described a minority as:

“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, possess 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”.

As we see in these definitions, objective criteria as well as a subjective criteria is required to constitute a minority. Capotorti further regarded the subjective element and the non-dominant position as more contentious than the objective element that was not discussable.⁹⁸

This definition was reached after summarizing and concluding what United Nations states and committees within the United Nations had put forward. As the definition stands, there are two major elements required if a group claims to constitute a minority. These are the objective element and the subjective element. The following parts will explain in more detail what these two elements contain.

3.2.1.1 Objective Criteria

Objective criteria are required if a group should be defined as a minority. In order to constitute a minority it is crucial that the group is objectively distinct with features distinguishing it from other groups within the state. All the relevant definitions as we have seen above, list qualities such as ethnicity, religion and language differing from the rest of the majority of the

⁹⁶ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 168f; see also Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1991, 8f; Thornberry Patrick, *International Law and the Right of Minorities*, 1991, 164f

⁹⁷ Capotorti Antonio, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979), 95 para.568

⁹⁸ Capotorti Antonio, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979), 95 para.568; see also Thornberry Patrick, *International Law and the Rights of Minorities*, 1991, 165ff.; see also Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and human Rights*, 1991, 9ff

population. Other merits may be significant as well such as historical and traditional characteristics in the case of indigenous peoples.⁹⁹

The numerical factor is important as well. A group has to be numerically inferior in relation to the rest of the population, to constitute a minority. When the numerical structure of the state is such that it is impossible to tell which of a number of groups of roughly numerical size is the majority and which are the minority, Capotorti suggests that article 27 would be applicable to all of them. There have been views expressing the need of identifying a minimum number of individuals to constitute a minority. In relation to this question Capotorti suggested that state should not require adopting special measures of protection beyond a reasonable proportionality between the effort and the benefit to be derived from it. It should be noted that this could open for states avoiding responsibility by claiming resource arguments with regard to a numerically small community. In these cases a question of facts arises that can only be solved upon consideration of each particular case.¹⁰⁰

In the definition of Capotorti a nationality requirement was included. The protection of minorities in international law was seen as separate from protection of aliens. The view is that it is a crucial difference between protecting nationals and foreigners, who already benefit from customary international law and in certain situations specific treaties. To what extent this distinction is included in article 27 of the ICCPR is not clear by the text of the article. The covenant does use language like “all persons”, “everyone” and “every human being”, but differences between national and non-nationals do exist as well¹⁰¹. The travaux préparatoires confirms the exclusion of aliens from the application of article 27. Aliens do have the right to enjoy all human rights under the Covenant based on non-discrimination in the enjoyment of those rights but they do not enjoy the protection offered by article 27.¹⁰²

Added by the Sub-Commissions definition and the Capotorti definition is the element of a non-dominant position in relation the rest of the population, thus excluding cases like South Africa. Minorities in a dominant position

⁹⁹Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1991, 23f

¹⁰⁰ Capotorti Antonio, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979), 95 para.566

Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1991, 24f

¹⁰¹ Article 25 of the ICCPR requires that “every citizen shall have the right and opportunity to take part in public affairs, to vote and to have equal access to public service in his country”. Articles 12 and 13 also make differences between national and non-nationals.

¹⁰² Capotorti Antonio, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979), 95 para.566

Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1992, 24f; see also ,Thornberry Patrick, *International Law and the Rights of Minorities* 165ff

did not need the special protection offered by article 27 and other international instruments. One question in relation to this situation is whether the majority could be seen as a minority. This is not the case because these groups are protected by human rights generally including the Racial Discrimination Convention¹⁰³ of 1965.¹⁰⁴

3.2.1.2 Subjective Criteria

Also a subjective criterion is needed to distinguish the group. The element of awareness by the minority of their distinctiveness in relation to the rest of the population, and a will to preserve that identity is crucial for the group's existence. To what extent it is needed to proclaim the will to preserve the identity of the group is not so obvious. According to Capotorti the requirement could be implicit. Otherwise a risk of states wishing to evade the rule might justify its refusal by claiming that the groups themselves did not intend to preserve their individuality. Apart from this point however, one could deduce the subjective factor from the objective existence of the group. It seems logical that a group that has existed and survived historically as a community with a distinct identity could hardly have done this without wishing to remain as a group.¹⁰⁵

3.2.2 The Relationship between Minorities and Peoples

The Director of the Minorities Questions Section of the League of Nations, Azcarate, came to the conclusion that the terms "nationality" and "minority" were essentially the same, both definitions require an objective element to identify the group, and a subjective element of awareness of, and a will to maintain a separate identity, and that the primary distinguishing characteristics of both were language and culture. Brownlie came to the same conclusion, and acknowledged that the differing terminology that had been used, the reference to "peoples", "minorities", "nations" and "indigenous peoples", all involved essentially the same idea. If minorities are equivalent to nations, do they also have the right to self-determination on that basis? The answer is the question: do nations constitute peoples and by

¹⁰³ United Nations, International Convention on the Elimination of all Forms of Racial Discrimination, 5 ILM 352 (1966)

¹⁰⁴ Capotorti Antonio, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979), 95 para.566; see also Thornberry Patrick, International Law and the Rights of Minorities 165ff; Malcolm N. Shaw, The Definition of Minorities in International Law in Dinstein Yoram (ed), The Protection of Minorities and human Rights, 1992, 9ff and 25f

¹⁰⁵ Capotorti Antonio, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979), 95 para.566; see also Thornberry Patrick, International Law and the Rights of Minorities, 165ff; Malcolm N. Shaw, The Definition of Minorities in International Law in Dinstein Yoram (ed), The Protection of Minorities and human Rights, 1992, 9ff and 27ff

that have the right to self-determination? A single and common answer to this question does not exist today.¹⁰⁶

A common argument relating to the differences between peoples and minorities is the territorial emphasis. What seems to be clear is that the term is meant to stand for the population of a separate political unit, with delimited territory and with a background in mainly colonial history or recent occupation. This emphasis on the geographical entity rather than the popular entity is repeated in a long series of human rights and other international law texts and confirmed by inter-governmental practice. This was stressed in the report of Cristescu where he clearly stated that a relationship with a territory is implied when defining a people, even if the peoples in question have been wrongfully expelled from it and artificially replaced with another population. Even if this has been accepted as the primary criterion differentiating peoples and minorities, it is still very difficult to decide whether a particular group constitutes a people or a minority, especially if the minority in question has a territorial connection.¹⁰⁷

3.2.2.1 The ICCPR and the Helsinki Declaration

As we already stated above, article 1 of the ICCPR grants peoples the right to self-determination and tries to ensure the development of peoples in all spheres, for example political and cultural. Article 27 protects the rights of minorities, which would be the right to enjoy their own culture, practice their own religion and use their own language. Article 27 does not entitle minorities the right to self-determination, which expresses itself in the fact that they cannot determine their political status, unlike peoples, according to

¹⁰⁶ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 168f; see also Hadden Tom, *The Rights of Minorities and Peoples in International Law* in Schulze K. E, Stokes M. and Campbell C. (ed), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East*, 1996, 16f; Johnson Harold S., *Self-Determination within the Community of Nations*, 1967, 55ff

¹⁰⁷ Hadden Tom, *The Rights of Minorities and Peoples in International Law* in Schulze K. E, Stokes M. and Campbell C. (ed), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East*, 1996, 16f; see also Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention in the Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*, 198; Alfredsson Gudmundur, *Different Forms of and Claims to the Right of Self-Determination* in Clark Donald and Williamson Robert (ed), *Self-Determination International Perspectives*, 1996, 59f; Kly N.Yussuf, *Discussion Paper, African Americans and the Right to Self-Determination in Hamline Law Review*, 1993 vol.17 number 1, 16ff; Moore Margaret, *The Self-Determination Principle and the Ethics of Secession* in Moore Margaret (ed.) *National Self-Determination and Secession*, 1998, 3; Franck T.M., *Post-modern tribalism and the right to Secession* in Brölman Catherine (ed), *Peoples and Minorities in International Law*, 1993, 10f; Hannum Hurst, *Autonomy, Sovereignty and Self-Determination, the accommodation of conflicting rights*, 1990, 36; Cristescu Aureliu, *supra* 2, 37 para. 279; but see Duursma Jorri, *Self-Determination, Statehood and International Relations of Micro-States*, 1994, 28

the article mentioned. As to the definition of minorities the ICCPR and article 27 does not offer any help. No attempt at this can be found anywhere in the covenant.¹⁰⁸

The same relationship between peoples and minorities is found in the Helsinki Declaration¹⁰⁹. Paragraph 4 of principle VII provides protection for minorities. Principle VIII grants self-determination to peoples, which minorities cannot invoke. This conclusion is reached when reading principle VIII that states that the right to self-determination can only occur in conformity with the purposes and principles of the UN Charter including those relating to territorial integrity. In other words the right was created with limitations not allowing for any disruption and dissolution of states comprised of peoples with different nationalities or other minorities. The same problem in relation to the definition of minorities exists in the Helsinki Declaration.¹¹⁰

Despite the efforts in the ICCPR and the Helsinki Declaration to separate the concept of peoples and minorities to give the former the right to self-determination, minorities identify themselves as peoples and claim a right to self-determination and independence. And since peoples are sometimes defined as a nation, as we saw above, many ethnic groups may be able to claim to be peoples because the various definitions of minorities share the same elements as definitions of nations.¹¹¹ This is of course the case if nations can be defined as peoples in the meaning of the right to self-determination as stated in the various international instruments.

The Badinter Arbitration Commission, appointed to solve issues concerning the disruption of former Yugoslavia, which came to the conclusion that minorities constitute people, supports this view. Since both peoples and minorities occupy territory (in some cases) and possess cultural or linguistic characteristics, both groups should have the right to self-determination.¹¹²

3.2.2.2 The Theory of Reversion

The theory of reversion was first articulated in Aaland Island case¹¹³. Commission of Rapporteurs qualified its declaration that minorities were not entitled to self-determination. But they would as a last resort be

¹⁰⁸ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 167f

¹⁰⁹ see supra 92

¹¹⁰ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 167f; see also T.M Franck, *Post-modern tribalism and the right to Secession* in Brölman Catherine (ed) *Peoples and Minorities in International Law*, 1993, 15

¹¹¹ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 167f

¹¹² Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 168f; but see Wippman David, *Introduction: Ethnic Claims and International Law* in Wippman David (ed) *International Law and Ethnic Conflict*, 1998, 13

¹¹³ In the Aaland Island case the question concerned a Swedish minority within Finland but on the Island they constituted the majority. The question was how the Swedish population should be defined.

permitted to separate from one state and join with another in the event of oppression where the state lacked both the will and the possibility to guarantee religious, cultural and linguistic rights. One of the advocates of this theory is Buchheit, according to whom minorities are not ipso facto peoples, but possesses a right of reversion to self-determination and therefore constitutes potential peoples, with the right to self-determination in case of oppression. The right of reversion appears again in the Friendly Relations Declaration. It is here stated that any attempt to impair or disrupt the territorial integrity of a state concluding itself in compliance with the principle of equal rights and self-determination of peoples, and thus possesses a government representing the whole population of the territory without discrimination as to creed, race or colour. When a part of the population is not represented in government, this group is denied their right to self-determination. In these cases the group will constitute a people and thus be granted the right to self-determination.¹¹⁴

As to what really constitutes a minority there seem to be general agreement that there is no generally agreed definition. No international instrument offers a definition and only a core meaning can be distinguished from instruments and statements. Minority seems to refer mainly to a particular kind of community, especially a national or similar community, which differs from the predominant group in the state. Instead minority rights has been developed and used as an alternative for self-determination. Minority rights have been used to protect the group-identity and by that settle and calm group claims of self-determination and secession.¹¹⁵

3.3 Indigenous Peoples

Today indigenous peoples have been recognized as minorities in international law. The case of *Lovelace vs. Canada* exemplifies this. Lovelace was an Indian lady who lost her Indian status, and by that also her right to live on a reservation, when she married a non-Indian. The HCR did not explicitly discuss whether the Indian band she belonged to constituted a minority, but implicitly acknowledged this by applying article 27 of the ICCPR to the case. In the case of *Kitok vs. Sweden*¹¹⁶ and *Ominayak and the Lubicon Lake Band vs. Canada*¹¹⁷ the Human Rights Committee repeated the same pattern. Article 27 was applied, but not article 1 implying that the petitioners were members of minorities and not peoples. Despite the findings of the HRC, indigenous peoples continue to claim that they satisfy

¹¹⁴ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 168f; see also Wippman David, *Introduction: Ethnic Claims and International Law* in Wippman David (ed) *International Law and Ethnic Conflict*, 1998, 99

¹¹⁵ Wippman David, *Introduction: Ethnic Claims and International Law* in Wippman David (ed) *International Law and Ethnic Conflict*, 1998, 113ff; see also Alfredsson Gudmundur, *Report on Equality and non-discrimination: minority rights*, 1990, 13ff

¹¹⁶ Human Rights Committee, *Ivan Kitok v. Sweden*, Communication no. 197/1985

¹¹⁷ Human Rights Committee, *Chief Bernard Ominayak and the Lubicon Band v. Canada*, Communication no. 167/1984

the generally accepted definition of a people or they constitute a sui generis category, but they are not minorities. The argument that indigenous peoples meet the definition of peoples is based upon the notion of peoples being the same thing as nations. This of course is neither clear nor generally accepted.¹¹⁸

There have been steps taken on the international level towards recognizing indigenous peoples as peoples. The Matinez Cobo Report¹¹⁹ commissioned in 1971 by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to study the problems of discrimination against indigenous populations, represents this effort. The report stated that self-determination had to be recognised as the basic precondition for the enjoyment of the fundamental rights of indigenous peoples. The right to self-determination constitutes the exercise of free choice that should be created by the indigenous populations themselves, but did not include a right to secession. The International Labour Organisation has fought the same line. This can be seen in the Convention No. 169¹²⁰ where indigenous peoples has been given a wide range of rights and freedoms but the right to secession was denied. The most recent international instrument on indigenous peoples is the Draft Declaration on the Rights of Indigenous Peoples but it has not yet been adopted by the General Assembly. Indigenous Peoples are being recognised as peoples in the draft declaration and is accorded the right to self-determination¹²¹ among other rights. The Declaration extends the rights granted indigenous peoples in existing international instruments by stating the right to freely determine their political status and institutions. The right does not however, include the right to secede because of the inclusion of the reference to the right to autonomy.¹²²

Recent international instruments have created a situation in which indigenous peoples can be characterized neither as minorities nor as peoples. Although they speak in terms of peoples and use language that invokes the principle of self-determination, in the final analysis they do not grant the

¹¹⁸ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 172f; Pentasuglia Gaetano, Lecture at the Raoul Wallenberg Institution for Human Rights in Lund, On the course on Minority Rights, 9 March 2001; but see Nettheim Garth, *Peoples and Populations: indigenous peoples and the right of peoples* in Crawford James (ed) *The Right of Peoples*, 1988, 118

¹¹⁹ Study on the problem of Discrimination against Indigenous populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8

¹²⁰ International Labour Organisation, Convention (no.169) Concerning Indigenous and Tribal Peoples in Independent Countries, 28 ILM 1382 (1989), the preamble and article 1(3) of the Convention. Observe that this Convention is not in force at the time of writing.

¹²¹ Operative Paragraph 1

¹²² Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 172ff; see also Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1997, 14f; Pentassuglia Gaetano, Lecture at the Raoul Wallenberg Institute for Human Rights in Lund on the course of Minority Rights, 16 March 2001; but see Thornberry Patrick, *International Law and the Rights of Minorities*, 1991, 379

right which is accorded to peoples by article 1 of the International Covenants and by resolution 1514 (XV) and 2625 (XXV), that is the right to freely determine their own political status. They claim to recognize indigenous populations as peoples while refusing to allow them to determine their own political status.¹²³

Of course similarities exist between the two groups but one important and crucial difference between minorities and indigenous peoples is the historical continuity on the territory of indigenous peoples. Otherwise the same objective and subjective elements are present when trying to define both groups. It is also evident that the development of the law relation to indigenous peoples and to minorities is diverging, even if both groups still in many situations are treated as minorities.¹²⁴

3.4 Summary/Conclusion

As to whom the right to self-determination applies to, the previous chapter tried to clarify this question. And as we saw no definitive answer exists at present time. It is certain that peoples are the beneficiaries of the right, but as to what constitutes a people there is no generally accepted definition.

Many different theories and models of “peoples” exist but no single definition has been generally accepted. As we saw different theories accentuated different elements. The least complicated and most clear definition of peoples is the colonial definitions. As the name implies the colonial definition defines “peoples” as the populations of non-self-governing entities. The definition limits the definition to the whole population of the non-self-governing territories and thus excludes groups within the territorial boundaries from the beneficiaries of the right to self-determination.

In the view of the author the colonial definition is a very narrow interpretation of the concept of peoples. All international instruments mentioning the right dedicates it to “all” peoples and never mentions any kind of limitations of the beneficiaries more than that they shall constitute peoples. The only instrument expressly granting independence exclusively to colonial peoples is Resolution 1514. This could be seen as a special form of application to the more general right of self-determination otherwise granted to “all” peoples. As we have seen most commentators do not support this definition of peoples.

¹²³ Musgrave Thomas D., *Self-Determination and National Minorities*, 1997, 172ff

¹²⁴ Malcolm N. Shaw, *The Definition of Minorities in International Law* in Dinstein Yoram (ed), *The Protection of Minorities and Human Rights*, 1991, 14f; Alfredsson Gudmundur, *Lecture at the Raoul Wallenberg Institution for Human Rights in Lund on the course on Minority Rights*, 28 February 2001

The ethnic definition equated nation with people, an equation not simple to defend since no general definition of nation exists either. Elements shared by the two concepts are objective criteria and subjective criteria. This theory finds support in the work and language of the United Nations, which used “peoples” and “nations” interchangeably. The practice of the United Nations changed with the adoption of Resolution 1514 and 2526 and the territorial emphasis increased instead of the ethnic emphasis. On the other hand both above mentioned resolutions states not only the peoples right to determine the political status but also the right to determine the social and cultural development, which could be seen as implying an ethnic dimension of the concept of peoples. Commentators supporting this interpretation of the concept of peoples allege a wider application of the right to self-determination with the colonial era being almost completely historic. And in this sense they certainly have a point. What confuses the author is the territorial emphasis in relation to this argument. If “peoples” is interpreted as a group representing the whole population within fixed territorial boundaries what is the meaning with the right to self-determination today? There are of course cases of occupied territories that would fall under this definition, but otherwise situations required for this definition to apply seems very rare in the world today. But there are other situations *within* state’s territorial boundaries that are more current in today’s world. Conflicts today almost always include minorities, or what is defined as minorities, in one way or the other. States seem reluctant to accept minorities and see them as a threat to state sovereignty and existence. As a result systematic discrimination and violations of human rights occur. Should discriminated groups not enjoy protection just because they happen to reside within already existing territorial boundaries? Of course if existing minority rights would be respected and implemented this discussion, in many cases, would probably not be held. But sadly enough the reality is very negative and many minorities do not enjoy their minority or other human rights in a lot of situations today. The question remaining is how should the situations then be resolved.

Moreover the ethnic definition fails in the recognition of what objective and subjective criteria are relevant when defining a people. It has shown too hard to identify common objective and subjective criteria since these differ vastly depending on different groups. The only thing that is sure is that groups have to hold objective criteria and subjective criteria to constitute a people. It leaves much to be wished for, and to rely on a definition that in fact barely defines anything does not seem as a very safe solution.

The representative government definition defines peoples as the whole population, independent or dependent, of a defined territory. We see the same territorial emphasis in this definition as in the ethnic definition. The right to self-determination is seen as enjoyed by the whole population in their ability to choose their own government. As we saw, this definition lacks the ability to take account for the different groups within the population as a whole. Different minorities within populations and their

aspirations are completely forgotten. In later years an interpretation of Resolution 2526 has opened for the possibility to grant also groups within state boundaries the right to self-determination. This view claims that if groups were not represented in government, thus denied their right to self-determination. Advocates of this view rely on Resolution 2526, the Helsinki Declaration and the Vienna Declaration for legal support. It is argued that the right to self-determination of groups not defined as peoples, in cases of serious violations of human rights and systematic discrimination is legally correct by interpreting the above-mentioned instruments as implying that if the government of a state does not represent the whole people, and that includes different minorities, the groups not represented should be able to claim the right to self-determination.

It is hard to sieve any generally acceptable essentials required in a possible definition of “peoples”. It seems that different definitions take into account different things and stresses different rudiments. But as stated earlier, some elements could be seen as basic requirements for constituting a people.

These are:

- a. the term peoples indicates a social entity possessing a clear identity and its own characteristics
- b. the term implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population
- c. a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the ICCPR.

Again we see the territorial emphasis as a fundamental element in the concept of peoples. A people is a group with a special relationship to a territory in one way or the other. One other important thing is the explicit saying that a people should not be confused with a minority. The minority definition contained four different elements, the numerical factor, the nationality factor, the non-dominant factor and the subjective factor. In other words a group had to be numerically inferior to the rest of the population, be in a non-dominant position, the members have to be nationals of the state and the group have to possess a common awareness of their distinctiveness compared to the rest of the population and a wish to preserve these characteristics as a group. The only thing different from the notion of peoples is the lack of the territorial emphasis. A minority does not have to have a special connection to a territory to constitute a minority. Otherwise the definitions are fairly the same. The groups have to indicate a social entity possessing a clear identity and its own characteristics. The territorial emphasis could create confusion and uncertainty when minorities do have a special connection to a territory. An example of such a minority is the Kosovar Albanians in Serbia and Macedonia. This minority has lived on the west of Serbia for many, many years. How should the claims of such a group be dealt with if applying the existing definitions? In the authors view

according to the definitions above, the Kosovar Albanians constitutes a peoples and not a minority. They do indicate a social entity possessing a clear identity and its own characteristics and they do imply a special relationship with the territory on which they reside. But the Kosovar Albanians have always been seen as a minority within Serbia, even if they were given special rights to self-government. The reason to this is probably the special value given to territorial integrity mentioned before. After the Second World War the borders drawn were seen as absolute and forever valid. This was about the time the General Assembly abandoned the ethnical method of solving conflicts and adopted the territorial model. In many ways the hinder of the development of the applicability of right to self-determination has been the strong accent made by state on the principle of territorial integrity. And in many ways this is very logical. States are the members of the United Nations and the ones creating international law. It would be very strange (and maybe even unwise) if states would create threats against their own territorial boundaries or even existence. And as we saw the right to self-determination was not seen as a right but a general principle of hortatory effect. The strong resistance from states narrowed down the beneficiaries of the right to self-determination. In the authors view the group of beneficiaries should develop and widen, with some caution of course. The need is obvious when one looks upon the many internal conflicts in many countries today, many of whom started because of territorial disputes. And this should not be difficult if the elements existing today, that do indicate what constitutes a people, are applied. Not every group claiming the right to self-determination would be granted the right of self-determination but some probably would.

The same relationship between peoples and indigenous peoples can be seen. Indigenous peoples are seen as minorities in international law. Even if some steps are taken towards a separation of these two groups, they are both still treated as minorities. In the case of indigenous peoples the territorial factor needs not be stressed. The definition of indigenous peoples differs from the definition of minorities on this specific element because as the term indigenous peoples indicate, they are the original inhabitants of the specific territory on which they reside. But as in the case of minorities indigenous peoples had to surrender to the principle of territorial integrity. Examples of this group are the Indian tribes of both North and South America.

To extend the applicability of the right to self-determination to groups not defined as peoples can have negative consequences. World peace and stability would be threatened and the risk of groups all over the world claiming and applying the right to self-determination would be probable consequences. Instead, as Alfredsson has argued, respect and implementation of existing minority and other human rights should be the prime aim of states and the world community. Independence claims would probably be reduced if states would recognize and respect minorities instead of looking upon them as threats. On the other hand if states does not implement rights accorded to minorities and instead gross violations of

human rights and systematic discrimination would occur the author sees no other choice than to grant groups the right to self-determination with the right to secede as a last resort, even when they do not meet the elements of what constitutes a people. The legal support does exist as we saw in Resolution 2526.

4. The What

The beneficiaries of the right to self-determination are only one of two halves of the concept, and that would be the who. The second half of the concept deals with what can be determined by the beneficiaries of the right. Two concepts are entailed in the right of self-determination. The first and most far reaching is external self-determination, which includes the right to secede from the “original” country and territory. The second concept is internal self-determination, short of secession, and concerns the internal affairs of a group. This chapter is disposed so that external self-determination will be accounted for first and internal self-determination secondly.

4.1 External Self-Determination

External right to self-determination is usually associated with the right of peoples to freely decide on its own international status, which entails direct access to independence, which means secession, association, union or any other alternative of international status.¹²⁵

4.1.1 Secession

External self-determination implies the right to secede. A secessionist effort does have as its goal the dismemberment of a previously unified independent state. Some authors justify secession when different conditions exist. The right to secession is only legitimate when it is necessary to remedy an injustice, such as violations of human rights including genocide and discriminatory injustices.¹²⁶ This is in line with what was argued when dealing with non-representation. Others argue that the right to secede is dependent on an expression of wanting to secede from the majority, without

¹²⁵ Cristescu Aureliu, *supra* 2, 43 para. 288; see also Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 198; Bring Ove, *FN-stadgan och världspolitik*, 2000, 202; Kly Yussuf N., *Discussion paper, African Americans and the Right to Self-Determination in Hamline Law Review*, volume 17, fall 1993 No. 1, 20; Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 12ff

¹²⁶ Buchanan Allen, *Secession, the morality of political divorce from Fort Sumter to Lithuania and Quebec*, 1991, 27ff; see also Buchanan Allen, *Democracy and Secession*, in Moore Margaret (ed), *National Self-Determination and Secession*, 1998, 14 passum; see also Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 134f; but see Moore Margaret, *Introduction, the self-determination principle and the ethics of secession* in Moore Margaret (ed), *National Self-Determination and Secession*, 1998, 6

having to prove any kind of injustice.¹²⁷ But most authors do not endorse a general principle of separation through national self-determination. The emphasis on the many factors that must be taken into consideration in the assessment of the right to self-determination as well as in particular cases.¹²⁸ Strengthening and implementing existing minority rights and human rights could resolve many secessionist claims from many groups. Secession should be the ultimate option, but nevertheless an option.¹²⁹

According to Buchheit when talking about self-determination, the right to secede is not an obvious consequence. Secessionist claims constitute a matter of concern for the world community on many levels. First of all the impact of widespread secession on the present structure of inter-state relations. An increase of political entities lacking the accepted requirements of statehood is a foreseeable result of an unqualified acceptance of a right of secession. Moreover the two entities created by the secession may lack the military and the economic strength of the unified state. This creates a risk of entities dependent upon international economic charity for their existence. Finally the world community, as Alfredsson argued, must recognize that a favourable international reaction, even if only to a single secessionist attempt, may constitute a dangerous precedent potentially applicable to any state containing racial, religious, linguistic or political minorities.¹³⁰

Thus the reluctance towards the claims of secessionist groups within the principle of self-determination seems to be motivated primarily by a fear on the part of most independent states that this would threaten the stability and harmony of the international system as it stands today. Further it is needed to shift the emphasis of the discussion to the standards of legitimacy rather than maintain an unconvincing denial of secessionist claims. Establishing guidelines that restrict the applicability of the principle would remove the anarchistic features of an unlimited endorsement of secession.¹³¹ It is

¹²⁷ Moore Margaret, Introduction, the self-determination principle and the ethics of secession in Moore Margaret (ed), *National Self-Determination and Secession*, 1998, 6; see also Duursma Jorri, *Fragmentation and the international relations of Micro-States*, 1996, 92

¹²⁸ Ibidem; see also Franck T.M., *Post-modern tribalism and the right to Secession* in Brölman Catherine (ed), *Peoples and Minorities in International Law*, 1993, passum; Higgins R., *Post-modern tribalism and the right to Secession*, Comments in Brölman Catherine (ed) *Peoples and Minorities in International Law*, 1993, 35

¹²⁹ Alfredsson Gudmundur, *Different Forms of and Claims to the Right of Self-Determination* in Clark and Williamson (ed), *Self-determination; international perspectives*, 1996, 66; see also Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The implementation of the right to self-determination as a contribution to conflict prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 201; Cristescu Aureliu supra 2, 41 para. 279; but see Kly N. Yussuf, Discussion Paper, *African Americans and the Right to Self-Determination in Hamline Law Review*, 1993 vol.17 No. 1, 36ff

¹³⁰ Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, passum; see also Alfredsson Gudmundur, 1996, supra 6, 66; see also Alfredsson Gudmundur, 1998, supra 6, 201

¹³¹ Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 19ff

probably too much to hope for that an international framework for discerning such legitimacy would prevent any future instances of contested secession attempts, but at least it could help to reduce the frequency.¹³²

The problem is that juristic opinion and other sources are neither uniformly in favour of the right to secession nor uniformly in opposition. There is probably no commentator that would deny the legitimacy of secession entirely but a significant number uphold its status as an international right subject to heavy limitations. Perhaps more importantly, other writers are prepared to accord it such a status if an international consensus on limiting conditions were impending.¹³³

The problem of secession and its legitimacy is based on the fact that no rule of international law forbids all secession under all circumstances. As we saw above, no international legal instrument expressly stated an absolute prohibition of secession even though the constant reference to the principle of territorial integrity of states is strong support for the argument that secession could be excluded. But as we have seen secession is legal under certain circumstances and almost all writers has problems with denying the right to secession completely, even if the limitations are many.

4.1.2 Decolonisation and Occupied Territories

External self-determination is almost always mentioned in connection to the decolonisation process and the liberation of occupied territories. As mentioned the options of peoples in these situations are independence, which implies the right to secede, free association or integration. If a people chooses to integrate with the colonial power or the occupying power, it should be observed that the peoples becomes a group within the state and is presumably reduced to beneficiaries of group rights rather than peoples rights. This means that the right to external self-determination is lost. The voice of the peoples should be sought through referendums or elections and not through the voice of liberation movements of other organisations claiming to represent the will of the people.¹³⁴

¹³² Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, passim

¹³³ Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, 127ff

¹³⁴ Alfredsson Gudmundur, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 198f; see also Alfredsson Gudmundur, *Different forms of and Claims to the Right of Self-Determination* in Clark and Williamson (ed), *Self-Determination; International Perspectives*, 1996, 60ff; but see Buchheit Lee c., *Secession, the legitimacy to Self-Determination*, 1978, 16ff

4.1.3 Non-Representation

The Friendly Relations Declaration and the Vienna Declaration both consider self-determination in relation to non-representation or exclusion from national government on discriminatory grounds. The third preambular paragraph of the Declaration on Human Rights, which states that “recourse as a last resort to rebellion against tyranny and oppression” backs up the statements found in the two previously mentioned Declarations. The question is of course, as mentioned earlier, what amounts to non-representation and who should decide this. Nevertheless non-representation can in some cases, based on what has been said above, entitle groups to exercise the right to external self-determination, thus legitimate secession as the ultimate option.¹³⁵

4.1.4 Territorial Integrity and Political Independence

Interference in the internal affairs of states amounts to a violation of that states sovereign right, that is territorial integrity and political independence. So in this sense territorial integrity should be observed with the utmost attention. This is the case when the threat to these concepts comes from outside the borders of the state in question.¹³⁶

But territorial integrity is current also when the threat of its disruption comes from within the states own borders. As we saw earlier the definition of the term peoples is based on the emphasis on a territorial connection rather than an ethnical emphasis. The beneficiaries of the right to self-determination have always been defined within the borders of already existing states. This was not always the case. Before the 1960's the territorial connection was rarely mentioned. It was not until after the 1960's that the General Assembly changed direction towards a territorial accent, and the right to self-determination, with the right to secede, was only allowed to territorial entities and was excluded for groups within these entities.¹³⁷

The problem with territorial integrity, as we have seen above, is its relation to the right to self-determination. There is a balance between these two concepts that is very hard to manage. In all the instruments where self-determination is mentioned territorial integrity of states is mentioned as well. And as a wholly principle states play the territorial integrity card as

¹³⁵ Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 200f; see also Alfredsson Gudmundur, Different forms of and Claims to the Right of Self-Determination in Clark and Williamson (ed), Self-Determination; International Perspectives, 1996, 65f

¹³⁶ Ibidem

¹³⁷ Ibidem

soon as claims of autonomy or independence arise within the country. As we have seen the territorial integrity card does not always prevail.¹³⁸

4.2 Internal Self-Determination

The second concept of self-determination consists of internal determination for example autonomy, which means that local matters are left in the hands of the group. It can be under self-management or through the delegation of expanded powers to municipal authority. This alternative can be important for protecting dignity identity and cultures and putting groups on equal footing with the rest of the national society. Internal self-determination, compared to external self-determination, is short of secession.¹³⁹

4.2.1 Democracy and other political rights

Political participation, free and fair elections, good governance and public accountability have been referred to as internal self-determination. It is a right of the whole population within a state. For minorities and indigenous peoples, democratic participation in decision-making processes and other political rights at the national and local levels constitutes important contributions to dignity and well being.¹⁴⁰

It should be observed that labelling political rights as self-determination could be confusing and misleading. According to Alfredsson political rights, such as articles 21 and 25 of the ICCPR, are more valuable on their own without mixing them with self-determination. Respect and implementation of political rights would indeed reduce claims for self-determination, so to mix these two concepts together seems rather confusing and unnecessary.¹⁴¹

¹³⁸ Ibidem

¹³⁹ Kly Yussuf N., Discussion paper, African Americans and the Right to Self-Determination in Hamline Law Review, volume 17, fall 1993 No. 1, 20f; see also Alfredsson Gudmundur, 1998, supra 6, 198; Cristescu Aureliu, supra 5, 43 para. 288

¹⁴⁰ Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Determination-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 206f; see also Alfredsson Gudmundur, Different forms of and Claims to the Right of Self-Determination in Clark and Williamson (ed), Self-Determination; International Perspectives, 1996, 76f; Pentassuglia Gaetano, Lecture at Raoul Wallenberg Institute on Human Rights in Lund on the course on Minority Rights, 22 march 2001; Buchheit Lee C., Secession, the legitimacy of Self-determination, 1978, 14

¹⁴¹ Alfredsson Gudmundur, Different forms of and Claims to the Right of Self-Determination in Clark and Williamson (ed), Self-Determination; International Perspectives, 1996, 76f

4.2.2 Autonomy

Autonomy differs from democracy and other political rights in that it is directed toward minorities only and not the whole population of the territory in question. It implies that the central government agrees to share power and leave local matters in group hands. It can be under self-management or through the delegation of expanded powers to a municipal authority. The institution of autonomy is important for the protection of dignity, identity and culture of the group in question, and for placing groups and individuals on equal footing with the rest of the population, which will foster harmony between minority and majority. Short of secession this may be the best guarantee groups can expect within states.¹⁴²

Autonomy can be both territorial and personal. If the groups live concentrated in one area, a minority administration would naturally be a territorial one. If the group-members are spread over a large area, and are intermixed with other population groups, membership and participation in the group's activities irrespective of residence, that would be personal autonomy, would be a legitimate solution. Autonomy is a collective right, which is enjoyed by the collective entity. Through membership forms and structures of the administration are determined.¹⁴³

The one human rights instrument mentioning autonomy is the Report from the 1990 Copenhagen Meeting of the OSCE. In the 35th paragraph states the state's undertakings to protect and create conditions for the promotion of ethnic, cultural, linguistic and religious identity by establishing autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the state concerned.¹⁴⁴

¹⁴² Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Determination-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 202f; see also Alfredsson Gudmundur, Different forms of and Claims to the Right of Self-Determination in Clark and Williamson (ed), Self-Determination; International Perspectives, 1996, 71ff; Alfredsson Gudmundur, Report on Equality and non-discrimination: minority rights, 1990, 10; ; Pentassuglia Gaetano, Lecture at Raoul Wallenberg Institute on Human Rights in Lund on the course on Minority Rights, 22 march 2001; Bring Ove, FN-stadgan och världspolitiken, 2000, 202

¹⁴³ Alfredsson Gudmundur, Report on Equality and non-discrimination: minority rights, 7th International Colloquy on the European Convention on Human Rights, 1990, 10f

¹⁴⁴ Ibidem, see also Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Determination-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 202

The ILO Convention No. 169 concerning Indigenous and Tribal Peoples¹⁴⁵ also mentions autonomous functions without using that exact word. In Alfredsson's view this is to be interpreted to mean that autonomy is not yet firmly established in international instruments, and as it stands today, it is not a right granted to minorities or other groups, only a possible solution for minorities and the states concerned in the aims at respecting and protecting the identities of minorities.¹⁴⁶

It should be noticed that if autonomy is presented under a self-determination label, while deliberately avoiding the external form, it is misleading and may create false expectations because many groups would not get what they originally aimed for. To use the term self-determination does not improve chances of obtaining autonomy, rather alienate concerned states and disappoint the intended beneficiaries. The rights offered should be called by their correct names and their image not advanced by convenient labelling.¹⁴⁷

4.2.3 Cultural Self-Determination

According to common article 1 paragraph 1 of the ICCPR, all peoples have the right to self-determination and by virtue of that right they freely pursue their cultural development. In this context cultural development is available to peoples and not groups. One of the objections to this argument is the question what is its worth if the peoples affected have not first exercised the right to external self-determination. It would seem that respect for political status and political rights are prerequisites for making policy and taking decisions which are necessary for upholding and developing culture. Furthermore, assuming that cultural development is about the maintenance and development of cultures, languages, religions, customs and other traditions, it would seem that these issues can be dealt with more effectively under the cultural, educational, linguistic and religious rights and freedoms of individuals and groups, as spelled out in a series of international instruments.¹⁴⁸

Cultural self-determination could have a role in those instances when a people is improperly denied the right to self-determination, which would be

¹⁴⁵ International Labour Organisation, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 28 ILM 1382 (1989)

¹⁴⁶ Alfredsson Gudmundur, Report on Equality and non-discrimination: minority rights, 1990, 10f; Pentassuglia Gaetano, Lecture at the Raoul Wallenberg Institute on Human Rights in Lund on the course on Minority Rights, 22 March 2001

¹⁴⁷ Ibidem

¹⁴⁸ Alfredsson Gudmundur, Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups in The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, 202f; see also Alfredsson Gudmundur, Different forms of and Claims to the Right of Self-Determination in Clark and Williamson (ed), Self-Determination; International Perspectives, 1996, 73ff

a colony or an occupied territory. Peoples in these areas could demand cultural self-determination while still under foreign or alien domination. Independent peoples have the capability of taking care of their own culture and do not need further protection. In cases of integration with another state the people transforms into a group within that state and is left with group rights, including protection of cultural rights.¹⁴⁹

4.3 Summary/Conclusion

Self-determination entails two concepts of the determination part. The first is external self-determination, which includes the right to break away, the right to secede. External self-determination means in practice to determine one's own political status, which means the right to determine once independence from or integration with other states. This form of self-determination has been granted to peoples and in some cases to minorities. External self-determination is the ultimate form of self-determination.

The right to secede is very debated. This of course because of its threat to the territorial integrity of states. In the name of fairness it should be said that secession can also be a serious threat to world peace and security, and to apply the right to secession too positively and progressive could cause more damage than good. The right to secede is very limited today. Only peoples of colonial rule and peoples under foreign occupation and domination have been granted the right to secede. In later years also other groups that has been victims of systematic discrimination and violations of human rights has also been granted the right to secede. One example is Bosnia-Herzegovina. But this has not been accepted as a rule, it is more the exception that proves the rule. But it is a proof of the evolution of the right to secede and we saw that most writers do not deny the right to secede completely, although many limitations do exist. Another conclusion made by Buchheit¹⁵⁰ is that secession would probably be more accepted if clear rules and limitations of the application of the right to secede would exist. This also supports the view that secession is not a totally forbidden action.

Internal self-determination on the other hand stands for the population of a territory/state and its right to choose their government and to be represented in government. It also stands for different forms autonomies. Autonomy gives a group the right to determine and decide in questions related to that specific group. In other words, just as the term implies, internal self-determination deals with the internal questions of a territory or a group.

When one considers internal self-determination the connection to minorities and indigenous peoples seems natural. Minorities sometimes enjoy

¹⁴⁹ Ibidem

¹⁵⁰ Buchheit Lee C., *Secession, the legitimacy of Self-Determination*, 1978, passum

autonomy related to questions concerning the group, within a state. This means that the state has delegated powers to the group and thus shared powers in relation the questions of the group. Autonomy is short of the right to secede, thus external matters is still left to the state to handle.

5 The case of Taiwan

Up to the present point the right to self-determination and its different parts have been presented. Now for the following part the case of Taiwan will be analysed in relation to what has been brought forward in the first part. As is probably already known Taiwan is not represented as a state in the world community today but is represented by the Peoples Republic of China, which in practice is constituted of mainland China and the island of Taiwan. In later years claims of self-determination and secession have been raised in Taiwan with the strong opposition and threat from mainland China. The question resulting from these happenings is of course if Taiwan has legal support for its claims based on international law concerning the right to self-determination. With the help of the previous chapters the question will be sought to answer based on international law concerning self-determination.

First the history of Taiwan will be presented as thorough as possible to give the reader a full and complete picture of the islands relation to mainland China. After that an analysis will follow, which will seek the answers to the questions whether the Taiwanese constitute a people or not, and whether independence can be claimed based on the right to self-determination.

5.1 The history of the Island

The history of Taiwan is filled with different happenings that date back to early years. It is not possible to account for every event. This is why the author has chosen to begin accounting for the history of Taiwan from the year of the first Sino-Japanese war 1894.

5.1.1 The Treaty of Shimonoseki

Mainland China and the island of Taiwan were linked by a land bridge in ancient times but today they are separated by the Taiwan Strait. Mainland Chinese began commercial activities on the island long before the first Chinese local government was established in the 14th century. In 1662 the Dutch occupiers were expelled from the island after 38 years, and Taiwan was claimed as Chinese territory. After this China began to pay more attention to Taiwan.¹⁵¹

¹⁵¹ Sheng Lijun, China's dilemma, the Taiwan issue, 2001, 9; see also Wachman Alan M., Taiwan: Parent, province or black-belled state?, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 187f; Chiu Hungdah, The International legal status of Taiwan, in Henckaerts Jean-Marie (ed), The international status of Taiwan in the new world order, 1996, 3; Copper John F., Taiwan, Nation-state or province, 1990, 17f ; Long Simon, Taiwan: Chinas last frontier, 1991, 9ff

At first Taiwan resisted the Chinese establishment but as they saw themselves defeated they tried to negotiate a vassal status for Taiwan as Vietnam and Korea. The Chinese side turned down this request insisting that Taiwan was Chinese territory.¹⁵²

In 1894 Japan went to attack on China. The reasons were to seize control over Korea, traditionally the most important tributary state of China but also over other parts of the country, including Taiwan. China was overwhelmed by the military might of Japan and was forced upon defeat to negotiate and sign the Shimonoseki Treaty in 1895. One of the main conditions of the treaty was that the Manchu government would cede the southern part of Fengtien Province along with Taiwan and the Pescadores to Japan.¹⁵³

The treaty caused protests in Taiwan as well as the rest of China. When the government on Taiwan realized that help was not to be expected independence was proclaimed and the Chinese governor was named President of the Democratic Republic of Taiwan. Mobilized forces for war of resistance against the Japanese invasion lasted until September 1895 when the government was forced to surrender. Taiwan had become a Japanese colony but armed resistance continued sporadically until 1915. Before that China's claim of sovereignty over Taiwan had never been challenged.¹⁵⁴

The long period of resistance raises important questions. How integrated had Taiwan become with the rest of China on the eve of Japanese colonization? Was the war of resistance a sign of genuine Chinese nationalism or a sign of affinity to Taiwan only? Different views exist on these questions. Some writers claim that Taiwan, that had been a province to China for ten years only, had not yet become an integral part of mainland China and that the resistance was not a product of loyalty to China but due to an ethnic consciousness limited to the island itself. Others mean that the resistance is proof of Chinese nationalism and loyalty by the people of Taiwan toward mainland China. It seems however that the resistance had been a protest of Japanese colonisation rather than any independence struggle reflecting distinct Taiwanese-ness. The founders of the republic were all Chinese intellectuals with deep-rooted emotional ties to their own culture and civilization. Further the document declaring the establishment of the republic made clear that it would have the status of tributary state under the Chinese Emperor. On the other hand it is more difficult to discern what the

¹⁵² Sheng Lijun China's dilemma, the Taiwan issue, 2001, 9

¹⁵³ A pictorial history of the Republic of China-its founding and development, volume 1, published by Modern China Press, 1981, 15ff ; see also Wennerlund Pelle, Taiwan , in search of the nation, 1997, 10f; Wachman Alan M., Taiwan: Parent, province, or blackballed state?, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 188; Chiu Hungdah, The International legal status of Taiwan, in Henckaerts Jean-Marie (ed), The international status of Taiwan in the new world order, 1996, 3; Copper John F., Taiwan, nation-state or province?, 1990, 22; Long Simon, Taiwan: Chinas last frontier, 1991, 23ff

¹⁵⁴ Wennerlund Pelle, Taiwan , in search of the nation, 1997, 10f; see also Sheng Liju China's dilemma, the Taiwan issue, 2001, 9

grass roots felt. However it seems that the population defended themselves and their homes rather than defenders of civilization on the mainland.¹⁵⁵

5.1.2 Taiwan as a Japanese Colony

The Taiwanese colonial experience has been a very important factor in the making of a Taiwanese consciousness. For half a century the contact with the political development on the mainland was snatched off. Up until 1945 the island and the mainland lived different historical realities and in different environments, which would have important consequences after the reunification in 1945. While the political life on the mainland evolved the Taiwanese experienced institutionalized fragmentation and inequality created by the colonial government. The Japanese secured control over both economy and the political life on the island. But at the end of the Second World War the frustration of people subjected to colonial rule gained intellectual support from the Wilsonian spirit that emphasised their right to self-determination. These currents influenced also the population of Taiwan, who now focused on greater political participation, which meant granting the island greater autonomy. In 1919 the first civilian government was established in Taiwan. During the 1920's and 1930's petitions were sent to Tokyo demanding self-rule. This was mainly met with imprisonment, intimidation and suppression from the Japanese.¹⁵⁶

As was mentioned above the Japanese era on Taiwan brought about fundamental structural changes throughout the society. Structural changes in the economy such, as increased industrialization and urbanisation were some changes. Education under Japanese rule, which subjected the locals to Japanese values and culture, was another change. Many intellectuals came to respect the Japanese way. But most Taiwanese never approved of the position as a colony and the experience did not turn them pro-Japanese. Japan had succeeded in creating a high standard which the new Chinese government failed to match. This was the main reason for the conflict between Taiwan and the mainland. It was a problem arising from different experience and outlooks. The Taiwanese had been suppressed for half a century and expected that the Chiang Kai-shek led government would bring democracy and freedom. Some people were dubious in the retrocession and feared that the backwardness and the chaos that existed on the mainland would be exported to the island.¹⁵⁷

¹⁵⁵ Wennerlund Pelle, *Taiwan , in search of the nation*, 1997, 10ff; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 22ff

¹⁵⁶ Wennerlund Pelle, *Taiwan , in search of the nation*, 1997, 13f; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 22ff; Long Simon, *Taiwan: Chinas last frontier*, 1991, 26ff

¹⁵⁷ Wennerlund Pelle, *Taiwan , in search of the nation*, 1997, 13f; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 22ff; Long Simon, *Taiwan: Chinas last frontier*, 1991, 26ff

5.1.3 The origin of a Taiwanese identity.

The Chinese civil war had weakened the Nationalist Party on the mainland. The Nationalist rule on the island the first decades aimed at sowing seeds of an internal political conflict. This can be seen until today. The authoritarian regime of Chiang Kai-shek ruled and suppressed political dissent and caused bitterness among Taiwanese who had looked to Chinese rule as liberation from oppression. In fact now under Chinese rule the Taiwanese were even worse treated than under Japanese rule. The Republic of China on Taiwan became a state where the identity of the state was defined by the ideology of the party.¹⁵⁸

Nationalist China under the leadership of Chiang Kai-shek was one of the Allied powers in the Second World War. This led to the fact that the government of Chiang Kai-shek received promises at the Cairo Conference in 1943 of eventual restoration of the territories Japan had taken from China, including Taiwan. The Potsdam Declaration confirmed this but the statement did not explicitly state to whom the island was to be returned. The Taiwanese view on the matter was never asked. In 1945 the Nationalist troops occupied Taiwan and the question of sovereignty of the island would be handled later after a formal peace treaty between Japan and China. However the San Francisco Peace Treaty of 1952 only made clear that Japan renounced its claim to Taiwan. The future sovereignty question was deliberately left undecided.¹⁵⁹

The period that followed did not help the Chinese to gain respect and authority, quite the opposite actually. The frequent misbehaviour among the Chinese troops, the obvious unfamiliarity with modern things and the criminal behaviour they represented, for example by stealing unattended things, was a seed to a growing resentment against the mainlanders. Many scholars have given the blame for the escalating conflict between the islanders and the mainlanders to the Nationalist governor Chen Yi. He was responsible for expanding the government's interference in the economy by implementing monopolies over key industries. Corruption increased, inflation rose and the average standard of living declined. Ethnic tension caused by linguistic and cultural barriers led to frequent misunderstandings and aggravated mutual hostility between the two parts.¹⁶⁰

¹⁵⁸ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 19f; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 25

¹⁵⁹ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 19f; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 25f; but see Lijun Sheng, *China's dilemma, the Taiwan issue*, 2001, 10; Wachman Alan M., *Taiwan: Parent, province, or blackballed state?*, in Lee Wei-Chin (ed), *Taiwan in Perspective*, 2000, 188; Chiu Hungdah, *The International legal status of Taiwan*, in Henckaerts Jean-Marie (ed), *The international status of Taiwan in the new world order*, 1996, 3f

¹⁶⁰ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 19ff; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 25ff

5.1.4 Entrenching disunity

The central government in Beijing considered Taiwan politically retarded and held the view that the new Constitution of 1947 that was being prepared at the time should not apply to Taiwan. The opinion was that they needed a two to three years period of tutelage. Thus the liberation from colonialism had given nothing positive to Taiwan.¹⁶¹

Mainland China had no intention to loosen the grip of Taiwan. The increasingly harsher methods on the island reflected its weakening political position on the mainland. This created an explosive situation in 1947, which led to an all-out rebellion. The situation in Taipei and other major cities turned violent and the government lacked the capacity to control the crisis.¹⁶²

Eventually Taiwanese leaders took control over the major part of the island through a Settlement Committee. No call for independence was heard, only demands for reforms of the government. The demands touched mainly on implementation of the democratic rights stipulated in the Constitution of 1947 and economic reforms. Most important, the Taiwanese demanded the right to participate in the political decision-making and to achieve a higher level of self-rule within the existing political system.¹⁶³

The reality became the opposite of the demands. The bulk of the Settlement Committee was hunted down and executed. Nationalist troops soon invaded the island and crushed the resistance by murder, rape and terror. The hostility between the Taiwanese and the mainlanders continued for decades.¹⁶⁴

The developments in Taiwan between 1945 and 1947 produced a serious cleavage and severe hostility between native-born islanders and the newcomers from the mainland. It is certain that whatever Taiwanese consciousness existed prior to 1945 had been reinforced by the bad quality of the early interactions between the two groups.¹⁶⁵

5.1.5 The Republic of China

As the Nationalist regime faced an increasingly desperate situation in the civil war, the government enacted the “Temporary Provisions Effective During

¹⁶¹ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 23ff

¹⁶² Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 23ff; see also Chun Allen, “Culture in Taiwanese national politics in Lee Wei-Chin (ed), *Taiwan in Perspective*, 2000, 21; Copper John F., *Taiwan, nation-state or province?*, 1990, 25ff; Long Simon, *Taiwan: China's last frontier*, 1991, 53f

¹⁶³ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 23ff

¹⁶⁴ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 23ff; but see Copper John F., *Taiwan, nation-state or province?*, 1990, 25ff

¹⁶⁵ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 23ff

the Period of Communist Rebellion” in 1948. These provisions gave Chiang Kai-Shek, as President, a wide range of powers including the power to impose Martial Law without approval from the legislature. When the Communists defeated the Nationalists Chiang Kai-Shek and his advocates fled to Taiwan. When the Nationalist government on Taiwan claimed to be Free China and retained diplomatic support from non-communist powers led by the USA the old system had to be kept intact. The seat in the UN Security Council was still held by the government in Taiwan and embassies were retained throughout the world. Thus the charade of representing the whole Chinese nation had to be kept. The mission of mainland recovery was official policy and the basis of the Nationalist’ claim to political legitimacy.¹⁶⁶

When the Nationalist government had been taken under the wing of US military protection, they had their hands free to concentrate on local issues assisted by economic aid. This led to land reforms that laid the ground for a favourable economic development. Also it had the effect of eliminating the earlier powerful landlord class that had a potential political challenge.¹⁶⁷

5.1.6 Taiwan Independent

To advocate Taiwanese independence was a criminal act on the island until 1992. Because of this the Taiwanese Independence Movement (TIM) was mainly active abroad after 1947 and it was abroad that the activities were concentrated. Thomas Liao can be said to be the father of TIM as he started the Re-liberation of Taiwan that was the start of the TIM. Liao founded the Taiwan Democratic Independence Party and through the years 1955 and 1956 he set up the Provisional Government of the Taiwanese Republic in Tokyo. In 1970 a world-wide organisation was set up through the establishment of the World United Formosans for Independence (WUFI). The WUFI tried to inform the world community of their claims using different methods.¹⁶⁸

Since the Nationalist declared an ideological war against the communists on the mainland and mobilized the people towards military and political counter-revolution no dissident opinions were accepted or tolerated on the island. This did not hinder the opposition completely. Opposition came from mainly the mainland and it suggested an opposition party to counterbalance the Nationalist party. This line of argument was met with imprisonment.¹⁶⁹

¹⁶⁶ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 27f; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 25ff; see also Copper John F., *Taiwan, nation-state or province?*, 1990, 25ff; Long Simon, *Taiwan: Chinas last frontier*, 1991, 58f

¹⁶⁷ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 29f

¹⁶⁸ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 31ff

¹⁶⁹ *Ibidem*

The economic growth on Taiwan changed the surface and economic powers largely in the hands of native Taiwanese evolved which the party had no control over. A period of economic forces in relative command had commenced. Also the UN seat in the Security Council was “lost” to the Peoples Republic of China in 1971 and the USA, which had supported the government of Taiwan, initiated negotiations with Beijing the same year. Internationally the Nationalist’ status declined and country after country disowned them. As a consequence of this development the image at home had to take a blow too.¹⁷⁰ The relationship between Taiwan and the US was later almost regained when the United States Congress in 1979 passed the Taiwan Relations Act. It was a security and defence agreement. China accepted the US policy, with protest though.¹⁷¹

In the 1980’s democracy was introduced and in 1986 the first two party election was held were the Democratic Progressive Party formally competed with the Nationalist Party. In 1988 Lee Teng-Hui assumed leadership of the Kuomintang.¹⁷²

To the surprise of many, in an interview with a German radio station on July 9 1999, Lee Teng-hui, President of Taiwan, for the first time openly defined the relations between mainland China and Taiwan as between two countries, or at least a special relation between two countries. He also noted that there was no need for Taiwan to declare independence again since it had been an independent country since 1912. This was later confirmed as the official government position. The “one China” policy was thus dropped. Lee Theng-Hui’s statement was later translated into English and got the meaning “two states of one nation”. The new official line of the Taiwanese provoked China who responded with demands for explanations and retraction of the statement. Threats of use of force were also made if Taiwan did not comply with the wishes of China.¹⁷³

After Teng-Hui’s statement the two major parties in Taiwan seems to have got closer in their view of the situation with China. The Kuomintang seems to agree with the opposition that Taiwan is a separate state or country and the one China policy is not current any longer. The change in attitude did not amuse China, as we saw, and the response they gave was firm. The battle over Taiwan is not yet over.

¹⁷⁰ Wennerlund Pelle, Taiwan, in search of the nation, 1997, 31ff; see also Copper John F., Taiwan, nation-state or province?, 1990, 25ff

¹⁷¹ Copper John F., Taiwan, nation-state or province?, 1990, 31

¹⁷² Copper John F., Taiwan, nation-state or province?, 1990, 31f

¹⁷³ Sheng Lijun, China’s dilemma, The Taiwan issue, 2001, 210ff; se also Wang T. Y., One China, one Taiwan, an analysis of the democratic progressive party’s China policy, in Lee Wei-Chin (ed), Taiwan in perspective, 2000, 159; Wachman Alan M., Taiwan: Parent, province or black-balled state?, in Lee Wei-Chin, Taiwan in perspective, 2000, 183f

5.2 Taiwanese or Chinese?

Taiwan, as we have seen, has witnessed turbulent times with military crises, internal political strife and suppression and loss of diplomatic recognition as well as triumphant moments of economic revival, political stability and democratization and improvement of its international image. In light of all this should Taiwan be seen as a renegade province of China or should it be considered a separated society that has taken a totally different route than the rest of China and developed there own cultural norms and values? How should the differences between national Chinese culture and Taiwanese local and indigenous culture be interpreted and what consequences should they have from a legal point of view?

In this chapter the differences and equalities between the two societies will be analysed and interpreted into legal terms and the question of whether the population of Taiwan are to be seen as a “people” or not will be sought.

5.2.1 Ethnicity

As to the ethnicity of the population on Taiwan, there are four ethnic groups living on the island. The non-Chinese inhabitants are indigenous people of Malay-Polynesian origin. The outnumbering Chinese call this indigenous people aborigines. There are seven major tribes with three of them accounting for 85 percent of the aboriginal population. The Chinese immigrants identified two groups, the sedentary group living in the lowland areas practicing agriculture, and one group living in the mountains surviving by fishing and hunting. Ruthlessly the sedentary group was pushed up into the mountain area, with the other group, by the Chinese, and today this people live a second-rate life on the island. The Chinese emigration began in the 17th century when famine drove the mainlanders to the island. In the 19th century the emigration to the island increased and the characteristics of the mainland could be seen on the island in every day life now.¹⁷⁴

The majority of the population on Taiwan are Chinese a minority of whom came from the mainland after being defeated in 1949 by the troops of Mao Zedong. The first Chinese to settle on the island came from the Kanton-area in China around the 11th century. During the Ming dynasty (1368 to 1644) Chinese from Fukien Province, directly across the Taiwan Strait, emigrated, pushing the Kanton settlers inland. When the Ming Dynasty fell in 1644 a major emigration wave from Fukien to the island began. However it was not

¹⁷⁴ Kuijper Hans, Is Taiwan a part of China?, in Henckaerts Jean-Marie (ed), The international status of Taiwan in the new world order, 1996, 9f; see also Copper John.F., Taiwan, nation-state or province?, 1990, 7

until the 19th century that the Chinese constituted a majority on the island and even then they did not even inhabit half of the island's land area.¹⁷⁵

After the communist victory in 1949 on the mainland another wave of nearly two million immigrants arrived in Taiwan. Because they arrived from different parts of the country they were called mainlanders. Today the population on Taiwan consists of 14 percent Chinese that came after 1949, 84 percent Chinese that emigrated before 1949 and 1.5 percent aborigines.¹⁷⁶

Chinese that emigrated before 1949 never expected to return to the mainland. The move was permanent. Chinese arriving after 1949 on the other hand, hoped to liberate China from the communists after which they would return. Today the attitude had changed and most of the mainlanders see Taiwan as their home and have no plans of returning, especially younger mainlanders. There is a history of ethnic hostility between the different immigration groups. But today ethnic differences are disappearing as various barriers and ethnic identification weaken particularly among the younger generation.¹⁷⁷

5.2.2 Culture

Taiwan's culture, for the most part of Chinese origins, was brought by the early immigrants and reflects to a considerable degree regional variations as well as the national culture in China. Western culture has influenced culture in Taiwan more than China because of the brief colonial period during which missionary activities were practised. The Japanese era did also affect the culture, mostly through the language and educational system imposed on Taiwan. During the Japanese era western influence continued but filtered through Japan.¹⁷⁸

Taiwan has in the post cold-war era flaunted itself as "free China" both as the defender of traditional culture and civilization as well as champion of scientific progress and human freedom. In the beginning the reality looked a bit different though for the people living on the island. After the Second world war the Nationalist' had decided to make Taiwan a model province of China, a China of which they still claimed to be the only legitimate government, and because of this the importance of nationalism was stressed. Propaganda, school curricula and other methods were used to make Taiwan more Chinese. The local Taiwanese dialect was gradually prohibited and

¹⁷⁵ Kuijper Hans, Is Taiwan a part of China?, in Henckaerts Jean-Marie (ed), The international status of Taiwan in the new world order, 1996, 9f; see also Copper John.F., Taiwan, nation-state or province?, 1990, 7f

¹⁷⁶ Kuijper Hans, Is Taiwan a part of China?, in Henckaerts Jean-Marie (ed), The international status of Taiwan in the new world order, 1996, 9f; see also Copper John.F., Taiwan, nation-state or province?, 1990, 7f

¹⁷⁷ Copper John.F., Taiwan, nation-state or province?, 1990, 7ff

¹⁷⁸ Copper John.F., Taiwan, nation-state or province?, 1990, 9

Mandarin Chinese strongly enforced. The entire body of local cultural expression, including language, religion etc. was seen as subversive.¹⁷⁹

The forced imposition of Mandarin as the standard tool for everyday communication was an important precondition for the eventual dissemination of Chinese culture. Further to promote traditional values and the mandate of a continuous history all of which had as its intended goal the subordination of local ethnic tradition to the political mainstream.¹⁸⁰

And as was planned, traditional Chinese culture in post war Taiwan suppressed the existence of local (Taiwanese) culture in order to subordinate it to an all-embracing vision of Chinese history and civilization. Moreover the Chinese culture invoked a sense of national identity that depended on the explicit promotion of patriotic sentiment through social movement and the implicit cultivation of social values and shared beliefs through knowledge such as Confucianism, sense of continuous history and preservation of language.¹⁸¹

5.2.3 Religion

There are many different religions in Taiwan. This is due to the various periods of different rulers on the island. The aborigines practice nature worship and various kinds of sacrifices. The Chinese brought Buddhism and Taoism as well as Confucianism. Protestant Christianity was introduced by the Dutch and Catholicism by the Spanish. Shintoism was brought by the Japanese. Today the main religions are Buddhism and Taoism, but some mean that Taiwan's religion is a mixture of many different beliefs. But religious faith does not emphasize ethnic identity or ethnic difference. Religious intolerance is very rare and religion is seldom the cause for argument.¹⁸²

Even though religious beliefs are partly shared with the mainland differences exist. Christianity has had a greater influence in Taiwan partly because the communist's persecution of Christians on the mainland. The aboriginal religions have also had a greater influence in Taiwan as well as Japanese Zen. Confucianism banned in China continues to be very important in Taiwan in every day life.¹⁸³

¹⁷⁹ Wennerlund Pelle, *Taiwan, in search of the nation*, 1997, 29f; see also Chun Allen, "Culture in Taiwanese national politics in Lee Wei-Chin (ed), *Taiwan in Perspective*, 2000, 11; Copper John.F., *Taiwan, nation-state or province?*, 1990, 9f

¹⁸⁰ Chun Allen, "Culture in Taiwanese national politics in Lee Wei-Chin (ed), *Taiwan in Perspective*, 2000, 112ff

¹⁸¹ Chun Allen, "Culture in Taiwanese national politics in Lee Wei-Chin (ed), *Taiwan in Perspective*, 2000, 11; see also Copper John.F., *Taiwan, nation-state or province?*, 1990, 9f

¹⁸² Copper John.F., *Taiwan, nation-state or province?*, 1990, 41f; see also Long Simon, *Taiwan: Chinas last frontier*, 1991, 9

¹⁸³ Copper John.F., *Taiwan, nation-state or province?*, 1990, 41f

5.3 Taiwan argues independence

What is challenged today, by the opposition party and freedom advocates for independence in contrast to the leading party Kuomintang, is the idea that Taiwan and China are one nation and that the same government must rule all Chinese. This argument builds on the fact that Taiwan has been separated from China for almost one century and this has created a distinct Taiwanese culture distinct from the mainland culture. Many go as far as opposing the assertion that Taiwan is a part of China and assert that the Taiwanese are not Chinese.¹⁸⁴

Although the culture shared by the mainlanders and the islanders have in many ways been forced upon the islanders, the political leaders in Taiwan do not deny their Chinese culture and ethnic roots although they espouse a separate Taiwanese nationalism. Here the same argument of a century long separation laid the ground for the view that political unity is not an option. In other words the ground for the separation from China is political and not ethnic or cultural. The view is that all Chinese do not have to live under the same government and this thus leads to the claim that Taiwan deserves separate statehood from China.¹⁸⁵

Citing the UN Charter and other international legal instruments the right to self-determination as a fundamental principle in modern international law is obvious as argued earlier. The Taiwanese thus argue that the population on the island should have the opportunity to, in a referendum, decide for themselves if they want to live as a separate state from China or not. Any interference with these political choices would be considered a violation of the right to self-determination.¹⁸⁶

Another argument held is that the “one country, two systems” model held by China has no legal support based on the fact that no legal document ever formalized the transfer of the island from Japan to China at the end of the Second World War. In addition the claim of sovereignty must be based on effective control of a territory and the people residing on it. China has, in the eyes of the opposition party, ignored the political reality that Taiwan has enjoyed de facto sovereignty for the past decades.¹⁸⁷ What is worth noting is that the opposition party does not enjoy very convincing support from the

¹⁸⁴ Wang T.Y., One China one Taiwan, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 161

¹⁸⁵ Wang T.Y., One China one Taiwan, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 161f; see also Wachman Alan M., Taiwan: Parent, province, or blackballed state?, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 190f

¹⁸⁶ Wang T.Y., One China one Taiwan, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 161f

¹⁸⁷ Wang T.Y., One China one Taiwan, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 161f

population on Taiwan. In 1998 they only won 30 percent of the votes at the national level.¹⁸⁸

5.4 Conclusion

The question asked in the beginning of this thesis was whether Taiwan had any legal support for their claim of self-determination according to international law concerning this right. As we saw, the writer came to certain conclusions regarding the right to self-determination and the different aspects of this right. At this point the question of Taiwan's case will be answered based on the conclusions reached in the earlier chapters, and on the facts presented in this last chapter concerning Taiwan.

5.4.1 Taiwanese, a people or not?

One important question when it comes to determining whether a claim of self-determination has any legal support is who is claiming this right. As was presented earlier the right to self-determination is a right of "peoples" and only in some very special cases other groups can be granted the same right if certain conditions exist. So the first question is, can the population of Taiwan be regarded as a people in legal terms?

The term "peoples" has no generally accepted definition in international law today. There seems to be some features though that are basic and required if a group should constitute a people. As we saw in chapter 3 these are a social entity possessing a clear identity and its own characteristics, a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population and a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the ICCPR¹⁸⁹.

As to the first criteria, a social entity possessing a clear identity and its own characteristics, the population of Taiwan fulfils the first part of this criteria. The population is a social entity, but the question is if it possesses a clear identity and its own characteristics. The identity perhaps is not the largest problem since Taiwan has been separated from China for many years and thus a Taiwanese identity must be said to exist today. A claim of independence could be said to be one of many evidence of this. On the other hand the part of possessing own characteristics is less clear. The customs, the language are the same, even if forced upon the Taiwanese population by the Chinese after 1949 for political aims. China and Taiwan does share the same culture and ethnic origin, and as we saw this is not contested by the Taiwanese. Religion could be said to be one of the characteristics that differ

¹⁸⁸ Wang T.Y., One China one Taiwan, in Lee Wei-Chin (ed), Taiwan in Perspective, 2000, 1167f

¹⁸⁹ See p 35

since many different religions are accepted in Taiwan, which is not the case in China. On the other hand, religion is not something very important and advocate in Taiwan's claim. It is not the reason for wanting independence from China. When reading and investigating the reasons for Taiwan's claim the strongest arguments, in the view of the author, are political and economical.

As we saw after the Second World War the aims and hopes of the Taiwanese government, then represented by Chiang Kai-shek who fled after the communist victory on the mainland, were to soon conquer the mainland again, and the reason for this was of course political. Two political preferences fought for the right to represent China from two different angles. Because of the political system that existed on Taiwan the economic development here was fast. In very little time the differences between the mainland and the island increased in a marked way.

So the main characteristics that could be said to be specific to Taiwan in relation to China are political and economical. But as we saw political or economical preference is not valid characteristics when it comes to defining a people. Culture, language and religion are the criteria that are determinative when defining a people. Based on these grounds, the first criterion, which would be a social entity in possession of its own characteristics, are not fulfilled in the view of the author.

As to the second criteria, a relationship to a territory, even if the people in question has been wrongfully expelled and artificially replaced by another population, the criterion seems fulfilled. The population of Taiwan has a relationship to the island and has had that for some time now. On the other hand when the Nationalists fled to the island after 1949 and the victory of the communists, the plan was to return to the mainland as soon as the communist were defeated. So the island was just a temporary solution for the Chiang Kai-shek government. When the communists showed to be more resistant than expected and the representation of China was handed to them in 1971 the Nationalists settled with the island and the aspire to some day conquer the mainland was dropped. The communists were there to stay.

Despite these facts to deny that the Taiwanese have a relationship to the territory would be wrong. We saw earlier that the Chinese emigrated to the island many years ago and have lived there for centuries. The only ones there before them as we saw were the aborigines, but it is not them that claim independence today.

The third and final criteria states that a people should not be confused with a linguistic, religious or ethnic minority whose existence and rights are recognized in article 27 of the ICCPR. Should the Taiwanese be considered a linguistic, religious or ethnic minority? The minority definition contains four elements, the numerical factor, the nationality factor, the non-dominant factor and the subjective factor. This means that a group have to be

numerically inferior to the rest of the population, be in a non-dominant position, the members have to be nationals of the state and the group had to possess a common awareness of their distinctiveness compared to the rest of the population and a wish to preserve these characteristics as a group. But first the group has to possess a language, a religion or an ethnic background different from the rest of the population, and after that possess the wish to preserve these differences. It would be a difficult task to prove this in the case of the Taiwanese since the language and ethnic origin is shared on the mainland and the island. The only possibility would be to try and argue a religious minority status but this would be hard too. As we saw there is no major or general religion on the island and religion is absolutely not a major argument for independence. Further, according to the existent definition one criterion was to possess a common distinctiveness and a wish to preserve this as a group. In the religion case there seems not to be this determinedness and will to preserve that is required, which as we saw earlier is not strange since there exists many different religions and the religion is not a dominant part of everyday life. In other words it is not because of religion the Taiwanese feel the urge to brake away from China. What can be argued is that the possibility of having a religion of once choice is quite impossible on the mainland. The Chinese authorities do not accept religion in the same way as they do in Taiwan. On the other hand the Chinese do not interfere with religion on the island. It is free to practice any religion on the island without any interference from the mainland.

Thus the Sino-Taiwanese relationship is hard to place even under the majority-minority model. The basic features that are supposed to differ between the two groups do not exist in this case; there are too many similarities. The features that do separate the two groups are political and economical systems, and these are not relevant characteristics when defining a people or a minority. And even if there would be relevant differences the relationship between the two parts is already a “two system under one roof” model so the different features of the two systems are not affected by the other system. The internal affairs of the Taiwanese are left to the Taiwanese to manage, in other words the situation resembles an autonomy solution, which means that the Taiwanese are de facto treated as a minority already. As we saw autonomy is not a legal right of minorities, it is mentioned in only two documents. The first document is the Report from the 1990 Copenhagen Meeting of the OSCE where the 35th paragraph states the state’s undertakings to protect and create conditions for the promotion of ethnic, cultural, linguistic and religious identity by establishing autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the state concerned¹⁹⁰. The other document is the ILO Convention No. 169 concerning Indigenous and Tribal Peoples also mentions autonomous functions without using that exact word. As already stated the autonomy is not a right but a solution possible to use to in the best way respect the rights

¹⁹⁰ See p 51

of minorities. So in the authors view the Taiwanese and the interest of the Taiwanese are protected and respected in the best way even though they legally do not constitute a minority. As has been stated before, autonomy could easily be confused with the external variant of self-determination, but once again this is wrong. Autonomy is a solution in which the respect and protection of minority rights is best looked after. In other words the population of Taiwan are being respected and protected in the best way a minority could be, even if they do not constitute a minority in the legal sense.

The question is very complicated since both populations share the same origin and the same culture. Not even religion is a clear and solid argument that would separate these two societies. In the authors view the main reason for the claim of independence has been the political and economical basis and these are not valid arguments when determining people status. In Taiwan's case the only applicable argument is the territorial relationship argument. This cannot be denied even if this relationship seems to be of a non-voluntary art. Unfortunately this is not enough when arguing for independence and the right to self-determination. The group in question also has to possess certain specific characteristics special for the group. Further the group should not be confused with a minority. Even if the Taiwanese legally do not constitute a minority their actual situation resembles one. The argument of the author is thus that Taiwan's situation is a de facto minority situation, looking at the actual separation of the systems, in which case the people status is annihilated.

Even if the Taiwanese could be regarded as minority the criteria for enjoying the right to secede are massive violations of human rights, systematic discrimination and oppression, which in this case does not exist. The population of Taiwan enjoys human rights in a much larger extent than the population on the mainland¹⁹¹, so it is easy to conclude that this option is ruled out.

5.4.2 Independence, autonomy or what?

As we earlier saw self-determination entails two forms of determination, external and internal. The external self-determination is the most far reaching and includes the right to brake away from a state and thus disrupt the territorial integrity of an existing state. External self-determination has been granted colonial peoples and occupied territories but also to minorities under certain circumstances. The conclusion the author reached in chapter 4 was that the right to secede is evolving even though it is very limited and restricted today.

¹⁹¹ One example of this is the religious rights mentioned before. On mainland China religious persecution is common, whilst on Taiwan there is religious tolerance in the widest way. And this is not interfered with by China.

In relation to the situation of Taiwan the right to secede seems difficult to support even though Taiwan has been under colonisation. Taiwan was colonised by Japan but after the Second World War Taiwan wanted and did represent China, including the mainland, which means that they were granted self-determination and the colonisation was ended. The government on Taiwan was later taken away this right after political happenings in the 1970ies but the situation created after this cannot be seen as a new colonisation. Nor is Taiwan under foreign occupation or domination. The situation that arised after 1949 was that two different governments claimed to represent the same state. First one government had the honour and after some years the other got the honour to represent the mentioned state. Thus the situation now is that they are not under colonial rule or occupied by a foreign force, they do have their own system on the island including a political and economical system, but a government that is not accepted in their eyes represents them internationally. Unfortunately international law has not accepted a right to secede in the case of political disagreement, and even if the right to secede is evolving it seems hard to argue for the right of Taiwan to secede in this case.

Even if one should argue that the Taiwanese represent a minority within China, based on the actual situation, the only possibility to legally claim secession is if the government in Beijing should refuse them political representation, systematically discriminate them and dispose them to gross violations of human rights. This is not the case. Taiwan has its own political system, the population is not systematically discriminated due to the fact that they exist in two different systems, and gross violations of human rights do not occur on the island. Thus, secession seems to be hard to argue for when international law stands as it does.

The second type of self-determination is internal self-determination. Internal self-determination includes the right to determine the internal affairs and questions of the group but is short of secession. Autonomy is one type of internal self-determination and applies to minorities only and not the entire population of a territory compared to political rights, which is granted the whole population of a territory. In many ways, as the author concluded earlier, the system existing between China and Taiwan resembles an autonomy solution. Of course the population of Taiwan, as the author argued before, cannot legally be said to represent a minority, but the situation could be said to be comparable to an autonomy situation.

When discussing political rights this fact is interesting. Political rights should be granted the whole population of a territory and not only some groups. If the case of Taiwan would have been such that the Taiwanese were left out of the decision making process the political rights of the Taiwanese would have been violated. But the situation is different. Taiwanese have their own political system with their own election in which Taiwanese politicians run for office. The government on Taiwan has the right to decide what ever they want as long as it relates to their internal affairs. So they

enjoy political freedom within the scope of internal affairs, which stretches from culture to business, which means that they are represented and they do enjoy political rights as long as everyone on the island has a right to make their political voice heard. In other words the political rights argument can only be applied on the island in the case of Taiwan because of the existing situation with different political systems. This means that political rights should be observed on the island as a separate political system, which in many cases is questionable, for example the aborigines political rights.

As Alfredsson argued, political rights should not be confused with the right to self-determination. If political rights were applied and respected independence claims would be reduced. In the case of Taiwan the political rights are being respected since they have their own individual political system even though legally speaking they do not even represent a minority.

In chapter two the author mentioned three cases briefly where the right to self-determination has been actualised in recent years. If we compare Taiwan with these three examples the case might get clearer. In the case of Tibet we see the line of argument from the Chinese side. Taiwan, as Tibet, is a renegade province and thus belongs to China. In the case of the population of Tibet, the arguments for self-determination are much stronger than the case of the population of Taiwan, in my view. First of all they possess different characteristics, such as a separate religion and their own customs, in relation to the Chinese and in a much clearer way than the Taiwanese population. This makes them if not a people, a minority within China, and as such beneficiaries of minority and of course other human rights. Secondly the Tibetans have been victims of gross violations of human rights and have suffered oppression for many years. As we saw in case of systematic discrimination and oppression minorities could become the beneficiaries of the right to self-determination including the right to secede. The world community has not supported the claims of the Tibetans in a very overwhelming way, maybe because of the political power of the Chinese with their veto in the Security Council. Anyway if the claims of the Tibetans are not met, the claim of the Taiwanese population could not be met either.

In the case of Chechnya we see the same pattern, a big important political power with a veto in the Security Council, and a small important population on the border claiming their independence. The same case as the population of Tibet exists for the Chechens. Oppressed and discriminated and by now victims of gross violations of human rights as well as humanitarian law. But the world watches and criticizes in an almost gentle way but no support is given to the claims of the population of Chechnya that at least fulfils the requirements for a minority if not a people. International law supports self-determination in these cases but nothing is done anyway.

The third example brought up was the case of former Yugoslavia. Here no political super power was involved, directly anyway, so the secessions of Slovenia, Croatia were accepted more easily. But if one examines the facts

and compares them to the legal requirements it does not sum up. The characteristics of these newly created states are very similar and it would probably be difficult to find differing features. No systematic discrimination or gross violations of human rights occurred except for the cases of Bosnia-Herzegovina and later Kosovo. But despite this states around the world recognized and accepted Slovenia and Croatia without grater problems, and comparing the reactions of one situation from another there seems not to be any logical explanation. In the case of former Yugoslavia, except for Bosnia-Herzegovina and later Kosovo, the situation resembles very much the same as between Taiwan and China. Political reasons, and perhaps even economical, seems to be the main features that differs between the two parts involved. In the case of Yugoslavia it got support, perhaps because there was no major political power directly involved, which in the case of Taiwan there is. In the author's point of view the case of former Yugoslavia has no more legal support than the population of Taiwan. But here we see the importance of politics when interpreting international law.

5.4.3 Concluding remarks

The case of Taiwan is a unique case that does not really fit into the legal models today. As we have seen the author has come to the conclusion that the population of Taiwan does not constitute a people or a minority according to international law as it stands at the present time. The history of Taiwan has been confusing and manipulated to create the situation that exists with the consequence that a complicated situation now reigns. In the last years political leaders after years of claiming the same as China, "one China", claimed independence. In my view this claim is purely political and economical and has no ground in any other aspect. This claim cannot be supported based on international law concerning self-determination. The author is very liberal when it comes to the right to self-determination and counts herself to those that see a need in the rights expansion and evolution. But in this case the author sees only political and economical motivations to the claim, not to mention the impact of world politics were superpowers like the USA are involved. In such cases I am very sceptical to support a claim of self-determination. If the risk of disturbances, turbulence and civil war is feared, these are the cases where I personally think the chances are very big for these consequences to follow. Of course politics are always the issue in international relations and also internal affairs, but the Taiwan-China situation is, in the authors view, a very political question and there seems not to be any other motivation for the claim for independence.

In the thesis the question of Taiwan's claim for independence has been to analyse the problem according to international law concerning the right to self-determination and the conclusion has been reached on this ground. It is possible for Taiwan's claim for independence to be analysed on other legal grounds, such as the law concerning statehood, and probably be more successful. Due to the fact that the situation is like it is, there are probably

many different approaches to the question. But the final conclusion of this thesis is that the population of Taiwan has no right to independence, meaning secession, based on the right to self-determination. The criteria existing today in international law are not met in this case. Thinking of the case of former Yugoslavia you might disagree, but as mentioned earlier the case of former Yugoslavia is probably the exception that proves the rule because the legal analysis shows very little support in this case, in the author's view of course. Looking at the other cases of Tibet and Chechnya on the other hand, we see that the population of Taiwan has not a very strong case. Here the populations both have stronger legal support for constituting, if not peoples, at least minorities, and their situation is much worse and oppressed than that of the Taiwanese. But as mentioned there are probably many different approaches to the problem. The author's approach was international law concerning self-determination and according to my view, the population in Taiwan has no right to self-determination on this ground.

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