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The right expression?

A study into the current legal system of self-determination and decolonization.

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Abbreviations

ICJ	International Court of Justice
UN	United Nations
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
WW1	World War One
WW2	World War Two
NSGT	Non-Self-Governing-Territory
DFR	Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

Summary

During the 20th century the world changed drastically. In the first half of the century, large areas of the world were under, usually, European rule and the people living there lacked the ability to govern themselves. This changed radically under the second half and with new organizations, such as the United Nations, the global campaign for decolonization started. This was done under the banner of the right to self-determination. This was successful and by the end of the century only a small number of colonies remained. The campaign was driven not only by political means but also with legal developments. With decolonization almost complete, investigating the legal system and how it is implemented is of both interest and importance.

The purpose of this essay is therefore to clarify the proper application of the right to self-determination and what expressions of said right are tolerated under international law. The focus will be on how the right has been applied in the context of decolonization. To do this the essay uses the legal dogmatic method with a focus on sources from the United Nations and the International Court of Justice. The essay will primarily use an international chartering perspective, but it will also offer critical perspectives on the actual implementation of international law.

The essay finds that international law allows the right to self-determination to be implemented with a certain margin of discretion. The discretion only applies however if the expression meets certain standards, which in this case means that people need to be informed and able to express their opinion in a free and democratic manner. If used to pursue independence however, there is no need for any democratic expressions. In addition, the essay also finds that international law does not, currently, allow expression of self-determination that has the goal to preserve colonial rule. This means that in certain cases, such as the Falkland Islands (Malvinas), territories get stuck in a situation where they are unable to create a permanent solution for their political status.

Sammanfattning

Vid 1900-talets början så såg världskartan mycket annorlunda ut jämfört med idag. Stora delar av världens befolkning stod under ett främmande, ofta europeiskt, styre och saknade inom ramen för detta system en möjlighet att påverka sin regim. Detta förändrades drastiskt under andra halvan av 1900-talet där nya organisationer, som Förenta nationerna, fick allt större inflytande och spelrum. Detta ledde till en stor avkoloniseringskampanj som med stor framgång förändrade världspolitiken och vid 2000-talets början så återstod endast ett fåtal kolonier. Ett av de stora ledorden för denna förändring var rätten till självbestämmande. Denna rätt användes inte bara som ett politiskt verktyg utan den fick även legala följder. Eftersom avkoloniseringen är så gott som avslutad så kan det vara både intressant och nyttigt att studera hur denna aspekt av folkrätten har utvecklats.

Syftet med den här uppsatsen är att klargöra den korrekta tillämpningen av självbestämmanderätten och vilka uttryck för den som är sanktionerad inom folkrätten. Detta endast inom ramen för avkolonisering. För att kunna uppnå detta syfte så använder sig uppsatsen av en rättsdogmatisk metod, med ett fokus på källor från Förenta nationerna samt avgöranden från Internationella Domstolen. Som utgångspunkt kommer denna uppsats använda sig av ett internationellt kartläggande perspektiv men den kommer också erbjuda kritiska perspektiv på den faktiska tillämpningen av folkrätten inom det berörda området.

Slutsatsen som uppsatsen når är att folkrätten ger självbestämmanderätten en relativt vid diskretion vid dess tillämpning. Inom ramen för avkolonisering måste dock uttrycket följa vissa krav, som att den berörda befolkningen måste vara informerad och få möjlighet att uttrycka sig med demokratiska medel. Ifall att målet med uttrycket är att uppnå självständighet så finns det dock inga krav på att använda demokratiska uttryck. Likaså innebär inte diskretionen att folkrätten tillåter att självbestämmanderätten uttrycks för att behålla kolonialt styre. Detta innebär att områden som exempelvis Falklandsöarna (Malvinerna) saknar möjlighet att hitta en permanent lösning på sin politiska status.

1 Introduction

1.1 Background

In the 19th century the western European powers began spreading their influence around the globe. Powered by the industrial revolution they began occupying vast areas of land and establishing colonies in different parts of the world. After their peak in the early 20th century the imperial powers slowly started to lose their supremacy, and by the 1960s organizations such as the United Nations (UN) started pursuing a targeted decolonization campaign with the aim of freeing people from alien rule. This was successful and by the 2000s virtually all former colonies had become independent, save certain, usually small, isolated islands. Since the process of global decolonization can in practice be considered virtually complete, it is of interest to study how the legal framework for its implementation has been constructed.

1.2 Purpose, questions and limitations

The purpose of the essay is to clarify the proper application of the right to self-determination in the context of decolonization. It will more specifically inquire into which expressions of self-determination are sanctioned according to international case and treaty law. To fulfill its purpose, the essay will answer the following questions;

1. What limits are imposed when expressing the right to self-determination in the context of decolonization?
2. Can self-determination be expressed in order to preserve colonial rule?

This essay is subject to certain limitations for the sake of efficiency and conciseness. The essay will focus strictly on the right to self-determination in the context of decolonization. Questions regarding for example non-colonial situations will not be a part of the investigation. Furthermore, the inquiry will only study resolutions from the UN and judgements from the International Court of Justice (ICJ). This is because state-practice can vary a lot, particularly in the context of decolonization, and it will make the essay too large and unfit for its purpose. Since all documents used already represent international customary law, the essay will not need to discuss the contents of said source of international law.

1.3 Methods and materials

Both questions that will be addressed by this essay concern the current state of international law. The legal dogmatic method is therefore the most appropriate for the task at hand, because it is meant to be used when determining and systemizing current law with focus on *de lege lata*.[1] I have chosen this method instead of an analytical method because the goal of the essay is still to answer what current international law constitutes, and not anything else. A wider perspective, *de lege ferenda*, is therefore in this case unnecessary, which would have been the case if the analytical method was used.[2]

This essay consists of a systematic investigation of the relevant international law in order to determine the width and limits of applying the right to self-determination. Since international law, especially in the context of decolonization, is a contentious issue, there are many political and historical considerations behind perceived ambiguity in the documents of the inquiry. To assist in the interpretation, this essay will follow the rules presented in the Vienna Convention on the Law of Treaties (VCLT).[3] The essay will attempt to make interpretations of international documents in good faith as demanded by the VCLT and will, if needed, use supplementary interpretation methods. Since the essay will be written in English, for the sake of continuity, only the English versions of international documents will be studied.

The materials used in this essay will follow the source doctrine presented in the ICJ-statute.[4] The firsthand sources used will be the UN-charter and resolutions from the United Nations General Assembly (UNGA), complemented by judgements and advisory opinions from the ICJ. These are the principal sources of what constitutes current international law and will therefore provide the best basis for this essay. Further on, the essay will also employ secondary sources, which will primarily consist of the writings of various legal scholars. These will be used to clarify how different documents are meant to be interpreted and provide additional context, for instance, historical background.

[1] Sandgren (2021) p. 51-52.
[2] Ibid p. 54.
[3] See section three of the VCLT.
[4] See art. 38 of the ICJ-statute.

Since this essay will be conducted using the legal dogmatic method and the materials used will primarily be legal documents, this essay will be done from a chartering international perspective.[5] This means that the investigation will attempt to be impartially conducted based on the sources and the information they present. Being impartial however also requires that I as the writer employ a certain critical relationship with the sources and do not take all presented facts at face value. To assist the reader in understanding certain problems with the current legal system the analysis will also provide a critical perspective concerning its implementation. This will be done with an actual example to highlight said problems, but will not provide any solutions, since this would fall out of the essay's purpose and method.

1.4 Previous research

Self-determination is a subject that has been widely studied in previous legal research, but since the subject is a real powder keg the results have been fragmented. For example, Hurst Hannum has put forward the notion that there exists a right for a combined territorial and ethnic, cultural or religious self-determination.[6] This can be contrasted with Helen Quane whose position is that the right to self-determination is only given to the people. The people in this case, according to Quane, strictly refers to inhabitants of a territory and no consideration is given to ethnic or cultural discrepancies.[7] James Summers has also concluded that current international law does not currently give the ability for the right to self-determination to be used to preserve colonial rule.[8] This is also emphasized by Rosalynn Higgins in her work.[9]

There are thus different interpretations of what constitutes current international law. As can be noted, many of the works are from the 1990s. In recent years, there have been substantial developments in the area, particularly with cases from the ICJ. This study contributes by bringing these more recent rulings into the analysis.

[5] Hjertstedt (2019) p. 167–168.
[6] Hannum (1998) p. 3.
[7] Quane (1998) p. 36.
[8] Summers (2014) p. 87.
[9] Higgings (1994) p. 112-115.

1.5 Disposition

The essay will begin with a short introduction to what I as the writer will refer to as self-determination. This will be followed by a brief prelude covering the historical development of self-determination. I have done this to make it easier for the reader to understand how the term has been used historically which can explain why the system looks like it does today.

This will be followed by a description of the right to self-determination in the UN-charter and how this right has been interpreted in different resolutions made by the UNGA. This part will also include definitions of key concepts which will assist the reader in understanding the topic of discussion. After this, a summary of vital cases from the ICJ will be presented which will provide the reader with a description concerning how the court has interpreted current international law. This will be followed with an analysis where the presented information will be discussed and unraveled, with a short section on the problems of the current legal system. Finally, the essay will contain a chapter where the questions of the essay are answered.

2 Investigation

2.1 Definition of self-determination

Self-determination is a vague concept that can mean many different things depending on the situation. It is therefore important to stress which type of self-determination that is the focus of this essay.

Self-determination in international law can be divided into two main categories, external and internal.[10] Internal self-determination focuses on the right of states and people to govern themselves without outside interference. The other aspect is the external self-determination. External self-determination (henceforth just self-determination) focuses on the political status of an entity or a people, and their right to decide which kind of political status they prefer to have.[11] The latter can be viewed as the traditional definition of self-determination and will be the one used and focused on in this essay.

2.2 Origins of self-determination

The idea of self-determination is ancient, and it is almost impossible to find an exact time and place for its beginnings and there is also a significant scholarly debate on the topic.[12] In order to make this essay appropriate the starting point will be taken in a more modern context, since the bulk of the discussion will be contemporary.

2.2.1 Westphalian peace

The first concept of self-determination originates in the Westphalian peace in 1648. The treaties introduced a principle of a state's right to self-determination, which meant, at least on paper, that states were equal and that they had sovereignty in local policymaking.[13] This can

[10] Hannum (n.d), "Legal Aspects of Self-Determination", The Princeton Encyclopedia of Self-Determination, accessed on the 15th of May 2024, <https://pesd.princeton.edu/node/511>.
[11] Rose (2023) p. 51.
[12] Sparks (2023) p. 65-66.
[13] Prinsen & Blaise (2017) p. 58.

be seen as the beginning of a new era and a good starting point, since it for the first time places the right to rule solely in the hands of the state, which at that time usually meant that of a king.[14]

2.2.2 The rise of popular sovereignty

The idea that sovereignty only should lie with a crown was challenged during the 17th century. Thinkers such as John Locke and Thomas Hobbes presented the idea of a social contract, which made the point that the basis of power, in a way, lies with the people that have entered a contract with the sovereign ruler.[15] This way of thinking was compelling and gained traction in the late 18th century and was the basis of both the American and French revolutions in 1776 and 1789 respectively.[16] In particular the phrase used in the beginning of the American declaration of independence, 'we the people', emphasizes the fact that the governed have to, in some way, consent to the governance.[17] Popular sovereignty has the function that it creates a focus on the abstract *will of the people*. This will of the people ties into self-determination because it places the right into the hands of the people of the state.[18] The French revolution especially conceived the idea that the people living in a territory are the holders of the right to self-determination, not only the ruler.[19]

2.2.3 The effects of the first world war

By the 19th century vast empires had sprung up both on the European continent and all around the globe. This type of imperialism reached its end in Europe (not around the world) after World War 1 when the multiethnic German, Austro-Hungarian, Ottoman and Russian empires all collapsed or disintegrated.[20] Demands for self-determination came both from the then president in the United States, Woodrow Wilson, and the leader for the Bolshevik revolution in Russia, Vladimir Lenin.[21] Their reasoning behind why they strived for self-

[14] Franca Filho (2007) p. 3-4
[15] Herzog (2019) p. 162-163.
[16] Sparks (2023) p. 64-65.
[17] Ibid p. 66.
[18] Ibid p. 71-72.
[19] Ibid p. 72.
[20] Hobson (2015) p. 167.
[21] Griffiths & Pavković & Radan, Peter (2023) p. 22, 24.

determination was rooted in different interests but Wilson's view became particularly consequential.[22] Wilson managed to universalize self-determination and quickly the center of legitimacy became the will of the people.[23] Wilson presumed that this will would manifest itself in the form of democracy and even though this was not always the case, the Wilsonian influence on the term self-determination was massive and came to shape 20th century international law and politics.[24]

Though the Wilsonian order was not the final form it was still very influential on the later development of the UN-charter and became the basis of the modern definition of self-determination.[25]

2.3 The United Nations

The war to end all wars, WW1, did not in fact become the last. WW2 was the bloodiest conflict mankind had ever experienced. The created system inspired by Wilson, the League of Nations, proved to be completely ineffective in preventing war when challenged by belligerent powers.[26] Instead the UN was founded in 1945 and its charter provides the modern definition of self-determination.

2.3.1 Self-determination in the UN-charter

When developing the UN-charter, different interests needed to be appeased. For example, France and Great Britain were represented in the creation of the charter but they also held vast colonial holdings all around the globe, which they were at risk of losing depending on its formulation.[27] At the same time the Soviet Union strived for national self-determination for its own purposes.[28] Both these sides needed to agree to a wording that at least placated their different interests.

[22] Griffiths & Pavković & Radan, Peter (2023) p. 24-25.
[23] Ibid p. 25.
[24] Ibid p. 25-26, Sparks (2023) p. 94-95.
[25] Whelan (1992) p. 2-3.
[26] Hobson (2015) p. 179-180.
[27] Getachew (2019) p. 71.
[28] Simma & Khan & Nolte & Paulus & Wessendorf (2012) p. 318-319.

The first chapter of the UN-charter gives the organization its purpose and which principles it should base its work on. Art. 1(2) states that one of the purposes of the UN is to 'develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples'. This viewpoint is also repeated in art. 55 in the charter. The dispute that existed between the signatory parties created a necessity for compromise, and the compromise became that self-determination was indeed one of the basis of the charter. Its implication and implementation were however left deliberately unanswered.[29]

2.3.2 Non-self-governing territory

After the conclusion of WW2 there remained large empires with inhabitants that lacked the possibility to govern themselves. These were described as Non-Self Governing Territories, NSGT:s, and their administration is regulated in the 11th Chapter of the UN-charter. Art. 73 gives an obligation to the administrative state, the state that governs the territory, to guarantee certain rights to the people living in said territory.[30] The main provision to focus on in this essay is art. 73(d) which states that the administrative state must promote 'to develop self-government, to take due account of the political aspirations of the peoples..'. What this means in practice is not specified in the regulation, but the wording of art. 73(d) suggests a certain progression. The administrative state has an obligation to progress the NSGT to a level of at least self-government which can be understood as that the current form of governance is unsuitable and needs to be replaced or upgraded.[31]

This was further emphasized by a 1952 resolution from the UNGA that recommended that the administrative states prepare the populations of NSGT:s for full self-government or independence.[32]

[29] Simma & Khan & Nolte & Paulus & Wessendorf (2012) p. 319.
[30] See art. 73 UN-charter.
[31] Turner (2013) p. 5.
[32] UNGA *The right of peoples and nations to self-determination* 1952 A/RES/647(VII)[A]

2.3.3 Decolonization and the UN

One of the most important developments regarding the rules for both decolonization and NSGT:s was the UNGA declaration 1514 in 1960.[33] The resolution 'affirms' that all people have a right to self-determination. It should be noted that the term 'peoples' used in the resolution only refers to populations in NSGT:s.[34]

The declaration has several different starting points which are important to focus on. Firstly it 'recognizes' the passionate yearning for freedom of all dependent peoples, which in this case would mean the people living in the NSGT:s.[35] It also is 'considering' the important role that the UN fills in assisting the movement for independence in NSGT:s.[36] The resolution also makes certain declarations. It declares that 'all peoples have a right to self-determination, and that they are free to themselves determine their political status'.[37] Furthermore it also declares that 'immediate steps shall be taken in … NSGT:s … to transfer all powers to the peoples in this territory … in order to enable them to enjoy complete independence and freedom'.[38]

The resolution is not completely clear what it means when it refers to the populations that should receive their self-determination. The resolution can however be interpreted so that the peoples referred are the inhabitants of a certain territory.[39]

The decolonization declaration was also followed up by another important UNGA resolution. Resolution 1541 gives countries guiding principles to when a NSGT has become self-governing and certain obligations for the administrative state are absolved and how the process should be conducted.[40] The resolution gives three possible solutions for a territory to stop being non-self-governing. Either the territory becomes independent, or it enters free association with an independent state or finally it integrates with an independent state.[41] The

[33] UNGA *Declaration on the Granting of Independence to Colonial Countries and Peoples* 1960 A/RES/1514(XV), Quane (1998) p. 11.
[34] Ibid p. 12.
[35] UNGA *Declaration on the Granting of Independence to Colonial Countries and Peoples* 1960 A/RES/1514(XV).
[36] Ibid.
[37] Ibid para. 2.
[38] Ibid para. 5.
[39] See Quane (1998) p. 13.
[40] UNGA *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the* Charter 1961 A/RES/1541(XV).
[41] UNGA *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the* Charter 1961 A/RES/1541(XV) principle VI.

resolution also gives guidelines on how one of these solutions should be picked. When choosing either free association or integration it needs to be based on the 'free expressed wishes of the territories peoples' and it also must 'be expressed through informed and democratic process, impartially conducted and based on universal adult suffrage'.[42] This requirement does not however exist if a territory wants to become an independent state.

2.3.4 The UN definition of a colony

When talking about decolonization the first question that comes to mind is what constitutes a colony. The definition of a colony that the decolonization declaration is based on is the blue-water thesis.[43] The blue-water thesis was first referenced in the UNGA resolution 141 from 1961, and it has the effect that there needs to be saltwater between NSGT and the administrative state for it to be considered a colony.[44]

2.3.5 Uti possidetis iuris

One important principle when addressing boundaries and states in the context of international law, especially when concerning colonies, is the principle of *uti possidetis iuris*. According to this principle, when states are created by the decolonization process the former delimitations should be the basis of this new state.[45] This norm is not, however, absolute, and the right to self-determination can employed to derogate from this norm.[46]

The 1514 (XV) resolution refers to the possibility of the administrative powers changing the borders of colonies. The resolution states that any attempt to change the borders of a NSGT is a violation of the charter and principles of the UN.[47] There is, as can be seen, certain tension between different sources of international law, which will be discussed further on.

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[42] UNGA *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the* Charter 1961 A/RES/1541(XV) principle VII, IX.
[43] See Eureti (2020) p. 15.
[44] UNGA *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the* Charter 1961 A/RES/1541(XV) principle IV, Sparks (2023) p. 30 (see discussion in note 152).
[45] Nesi para. 20.
[46] Ibid para. 21-22.
[47] UNGA *Declaration on the Granting of Independence to Colonial Countries and Peoples* 1960 A/RES/1514(XV) para. 6.

2.3.6 Declaration on Friendly Relations

In 1971 the UNGA agreed to the Declaration on Friendly Relations (DFR), which makes certain references to the principle of self-determination.[48] From the outset the declaration makes it clear that 'all peoples have the right to freely determine, without outside interference, their political status..'.[49] It also makes it clear that colonial people have the right to self-determination, and that every state has the duty to promote a 'speedy end to colonialism, having due regard to the freely expressed will of the people concerned'.[50]

The relation makes it clear that this right is given to all peoples in a certain territory, in what could be said is a territorial definition. The declaration also puts emphasis on that a colony or NSGT should have a distinct status. This is until the people have been able to exercise their right to self-determination in accordance with the principle and purposes in the UN-charter.[51] The declaration widens the scope of the applicability of self-determination to other territories, but this essay will only focus on its impact on its definition of self-determination.[52]

2.3.7 ICCPR and ICESCR

During the 1960s and 70s two covenants on different rights were agreed upon by the UNGA, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). They both address different rights, but the initial article is the same in the two covenants.[53] Art. 1 of the covenants conveys the right to self-determination, and art. 1(1) gives all peoples the right to determine their political status themselves. This right is not reduced to just populations in colonies but is applicable to all peoples around the world.[54] Art. 1(3) however focuses on populations living in NSGT:s and it states that the administrative powers shall promote the realization of the

[48] UNGA *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* 1971 A/RES/2625(XXV).
[49] Ibid.
[50] Ibid, Sparks (2023) p. 124–125.
[51] UNGA *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* 1971 A/RES/2625(XXV).
[52] Rose (2023) p. 53.
[53] See ICCPR and ICESCR art. 1.
[54] See Quane (1998) p. 22.

right to self-determination (in NSGT:s). It also states that this realization should be promoted in accordance with the UN-charter.[55]

2.4 International precedents

The colonial system has long been a contentious issue in international law. Therefore, there are many precedents from the ICJ which clarify many things, among them the legality of colonies, and what constitutes the will of the people. This essay will focus on a few cases from the ICJ which have been influential on the development of this area of international law.

2.4.1 South West Africa advisory opinion

The South West Africa-case concerns the legality of the South African occupation of the area which today constitutes the country of Namibia.[56] This case is important because it brings clarification on the relation between the right to self-determination and colonial rule. The ICJ in the advisory opinion clarified that self-determination was an international norm and that colonial rule violated said norm.[57]

2.4.2 Western Sahara advisory opinion

What exactly constitutes the people's right to self-determination is partly clarified in the Western Sahara advisory opinion from 1975. Western Sahara was a former Spanish colony, but the decolonization of the area was troublesome since it was unclear who exactly had the right to the territory.[58] While the main questions of the opinion are not relevant to the essay, the ICJ gives a good clarification on how to determine the proper application of the right to self-determination. In its opinion, the court directly refers to the UNGA resolution 1514 (XV) and states that ‘the application of the right of self-determination requires a free and genuine

[55] See ICCPR and ICESCR art. 1.
[56] See ICJ advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*) para. 17.
[57] See Rose (2023) p. 52.
[58] See ICJ advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*) para 15.

expression of will of the people concerned'.[59] The right of self-determination, therefore, must be expressed by the people of a territory and it must be free. The court clarifies that for the expression to be free, the population must be able to 'participate actively in the organization and holding of a referendum'.[60] This requirement clearly ties into the ones presented in the UNGA resolution 1541 (XV) which dictates that the population should determine their political status through free democratic elections.[61]

2.4.3 East Timor-case and Palestine wall advisory opinion

The East Timor ruling concerned a dispute between the former colonial power in East Timor, Portugal, and Australia. The origins of the case was that Australia had entered an agreement with the now ruling power of East Timor, Indonesia.[62] The important take-away from this case is the fact that the ICJ ruled that the right to self-determination is one of the fundamental principles of international law, and that it is of *erga omnes* character.[63] This means that it is an obligation for all states to actively cease violating the right to self-determination.

This was further emphasized in the Palestine wall advisory opinion from 2004 where the ICJ rephrased the notion that the right to self-determination is of *erga omnes* nature.[64]

2.4.4 Kosovo Advisory opinion.

The Kosovo advisory opinion addresses the Kosovinian declaration of independence from Serbia.[65] The opinion focuses on remedial secession, however the ICJ also gives important clarification on the development of colonial self-determination. The court states that 'the international law of self-determination developed in such a way as to create a right to

[59] See ICJ advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*) para. 55.
[60] Ibid para. 62.
[61] UNGA *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the* Charter 1961 A/RES/1541(XV) principle VII, IX.
[62] See ICJ judgement *East Timor (Portugal v. Australia)* para 17.
[63] Ibid para. 29.
[64] See ICJ advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* para. 88.
[65] See ICJ advisory opinion *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* para. 1.

independence for the peoples of non-self-governing territories'.[66] The court further explains that the ability to invoke this right is, according to international law, only given to people either in NSGT:s or people who are subject to some form of alien rule.[67]

2.4.5 Chagos islands advisory opinion

The Chagos Islands is an archipelago in the Indian ocean which is currently under British rule and claimed by Mauritius. In preparation for Mauritius' independence the island was detached from Mauritian administration and instead placed in a new one to keep the island under British command.[68] The question for the ICJ was if this was legal according to international law, and one of the central aspects of the case becomes if this constitutes a valid expression of the peoples self-determination.[69]

In this case the ICJ makes important clarifications on how the right to self-determination can be employed. It discusses the principles laid out in the UNGA resolution 1541 (XV) but states that these are not obligatory but mere options for the proper achievement of self-determination.[70] This means that according to international law there is not a strict way to determine the exact correct implementation of self-determination.[71] This does not however mean complete freedom. The ICJ states that certain discretion is allowed with the implementation of the right to self-determination.[72] In the case of the Chagos islands this discretion did not mean that Great Britain was able to dismember the colony of Mauritius. It still needed an expression of the free genuine will of the people concerned, which the agreement did not fulfill.[73] If this had been achieved however, the detachment would have been possible according to the court.[74]

[66] [66] See ICJ advisory opinion *Accordance with international law of the unilateral declaration of independence in respect of* para. 79.
[67] Ibid para. 82.
[68] See ICJ advisory opinion *Legal Consequences of the Seperation of the Chagos Archipelago from Mauritius in 1965* para. 32.
[69] Ibid para. 1.
[70] Ibid para. 157.
[71] Ibid para. 158.
[72] Ibid para. 157.
[73] Ibid para. 172.
[74] Ibid para. 160.

3 Results

This part will be divided into three sections. The bulk of text will be in the analysis where the information gathered from the investigation will be analyzed and straightened out. This will be followed by a short highlighting and implementation of the rules found in the analysis. Finally, the essays questions will be answered in the final chapter.

3.1 Analysis

The historical development of self-determination shows a certain trend. Post 1648 it was clear that this right meant equality and respect between kings, the people living in the kingdoms were not of importance. This viewpoint changed gradually over the centuries and by the conclusion of the French revolution it was quite clear that, at least on paper, the right was given to the people meaning the inhabitants of a territory. Even more so, the people who were actually given the right were only the people usually living in Europe. The people that lived in the European colonies did not in fact have the same rights as the people in the metropolitan states.

The conclusion of WW2 led to a radical change in the way global politics and international law is conducted, and the UN stood at the forefront of this new way. The right to self-determination became an important part of this new system and was universalized. Even though its implementation was left relatively unclear, the designation of territories as non-self-governing was a first step towards a new way of understanding self-determination, primarily in a colonial context.

Self-determination is one of the main principles of the UN-charter and one of the basis of international law. Self-determination is a right that is given to the peoples, not just one ruler or one party. This is a cause for problems since it is hard to determine exactly what the will of the people is. In every country or territory there usually is not complete agreement on anything, there is always debate and differing opinions. Still, the right to self-determination is a right given to the people so they can determine their own political status, free from outside interference.

If self-determination is a right given to the people, how do the people express it? And what expressions are tolerated according to international law? In the context of colonies and NSGT:s international law gives many important indicators. The UN-charter suggests that colonial rule is something that needs to end. It does not give an indication for exactly when it is supposed to end, but the view is that colonial rule is something unsuitable and needs to be replaced to achieve the goal of self-governance. This viewpoint is repeated in several other UNGA resolutions where statements are made which both give agency to ending colonial rule and which form of governance is to replace the old one. The decolonization declaration is the most important source of guidance in these instances, and it gives a clear indication of how colonial rule should be handled. From the outset the resolution taps into the 'yearning for independence' from dependent peoples and also that administrative powers should prepare the populations of NSGT:s for independence.

This can be viewed as a presumption for independence, meaning that the resolution presumes that colonized people want independence. This view is strengthened when looking at the 1541 (XV) UNGA resolution which does not require any popular expression when a territory is seeking independence from an administrative state, contrary to when it is seeking other forms of governance. When a NSGT wants, for example, to integrate into another state it requires, according to 1541 (XV), a clear and democratic expression with a deep popular connection. The resolution, in essence, limits the possible choices for the people of a NSGT when expressing their right to self-determination. It gives three different routes for decolonization but does not make the choices equal and, as mentioned, favors independence. The choice to remain as a colony is not possible either since resolution 1541 (XV) gives instructions concerning when a territory ceases being non-self-governing. If the methods that are given in the resolution are not fulfilled, no obligations for the administrative state are absolved and it still must continue acting as if nothing had happened.

The DFR also puts emphasis on the fact that colonial people have the right to self-determination. In its principle it declares that all peoples have a right to determine their own political status and that this right must be respected by outside forces. It also pushes for an end to colonialism but leaves more operational room since it expresses that the peoples opinion has to be taken in due regard. This seems to create an ability for more flexibility in the way of implementing the right to self-determination for peoples in NSGT:s. However the

declaration also states that the right has to be employed in accordance with the UN-charter. The charter suggests that the existence of a NSGT is unsuitable and needs to be progressed to something else. The DFR therefore implies a bit more flexibility in its implementation than the 1514 and 1541 (XV) resolutions, but still does not give colonized people the right to remain colonized.

The same can be seen in both the ICCPR and the ICESCR. Neither of them provides a complete modus operandi for self-determination, however they both state that all peoples have the right to themselves determine their political status. This is an indication for a more flexible application of the right to self-determination, however the covenants also state that the realization of the right should be promoted in accordance with the UN-charter. This would mean that the interpretation of the right to self-determination in the human rights covenants is similar to the one in the DFR, meaning a bit more flexible than the 1514 and 1541 (XV) resolutions but still bound by the progressive nature of the UN-charter.

International treaty law gives overall, some norms for the limits on the expression of the right to self-determination. The UN-charters focus on developing the forms of governance that NSGT:s employ indicates that the realization is limited to a few ‘developing’ expressions. This would mean that preserving colonial rule would not be a valid expression of self-determination, but the framework for other types appears blurry. The resolutions 1514 and 1541 (XV) give a more concrete path but their implementation seems to have been softened by other resolutions, in this case the DFR and the human rights covenants.

Case law from the ICJ also gives important clarifications on which types of expressions of self-determination that are tolerated within international law. From the outset, the South West Africa case explains that colonial rule is a violation of the international norm of self-determination. This ruling does not clarify any limits to the expressions of self-determination but the fact that colonial rule is declared as a violation indicates that it at least limits its use from preserving colonial rule. This viewpoint can be validated when looking at the East Timor and Palestine wall cases since they both declare that the right to self-determination is of *erga omnes* character. This would mean that since the administrative power has the responsibility to respect self-determination and since colonial rule is considered a violation, colonized peoples cannot consent to remaining colonized. This can be contrasted with the decisions that the ICJ makes in the Kosovo opinion where it declares that all colonized

people have the right to independence. The right to self-determination therefore will always allow expressions of independence and never expressions of preservation, according to international law. These two examples however are extremes and there still is a large gray area which needs more investigation.

Some clarification can be found in the Western Sahara-Case, since it declares that the proper application of the right to self-determination requires the free and democratic expression of the peoples concerned. This would mean that when seeking valid forms of expressions these should be made in a democratic way, therefore limiting expressions which are not democratically sanctioned. It is also relevant that the case mentions that the people who should express their opinions are the people concerned. Expressions of peoples who are not concerned therefore are not valid expressions of self-determination in the context of decolonization.

Important insights are also contained in the Chagos Islands-case since it concerns exactly what constitutes a valid expression of the right to self-determination. The ICJ discusses affirming the will of the people through applying certain discretion. This means that the right should not be applied so rigorously as is suggested in the 1541 (XV) resolution and that the people should be granted a wide margin of appreciation. The ICJ even suggests that the people of a territory should be able to give away parts of their territory, if the expression of self-determination has come about in a correct and democratic way. This could be done even though 1514 (XV) says that this would violate international law, which is a problem discussed in section 2.3.5. This indicates that the case-law from the ICJ gives few limitations on which expressions of self-determination are valid under international law if the expression has come about in a correct and democratic way.

3.2 The Falklands Islands (Malvinas) and application

Decolonization is understandably a contentious issue. The ability for a people to be able to rule themselves is something that most take for granted, but historically many have been denied that ability. When the big push for decolonization happened after 1945 it is therefore quite understandable that the aspiration for independence and self-governance was the most important and driving factor. The legal system was developed accordingly, with the focus of

decolonization following these lines. Today, however, the few NSGT:s or colonies that remain usually are small isolated islands where there in many cases exists a strong popular support for remaining as such. This is for example the case in the Falklands Islands (Malvinas), where almost the full population voted for remaining as a British NSGT in an election in 2013.[75] With decolonization virtually completed, is it perhaps time to reform the system of decolonization and to allow new forms of expressions of self-determination, or is the current order still suitable? This question is something that could form the basis for further research, which will not be provided in this essay.

3.3 Conclusions

Both the investigation and the analysis points into two directions regarding the essays research questions. Regarding what limitations are imposed when expressing the right to self-determination, this essay indicates that there is a wide margin of discretion in its application. This is the order if certain conditions are met. These conditions include that regarding decolonization as long as the people remain informed and can participate democratically in the decision, then usually the decision is valid according to international law. If however the goal of the expression is to achieve independence, there is no limits to which expressions are allowed. The possibility to employ the right to self-determination to preserve colonial rule however has no bearing, neither in case-law nor treaty-law.

[75] Turner (2013) p. 11–12.

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