1

Fixing Selves

Problems with the idea of self-determination are frustratingly many and varied. Is it recognized under international law, or is it merely a nebulous political slogan? Is it best understood as a strict 'right' or broader 'principle'? What is the 'self' that is to be 'determined' in self-determination? If self-determination presupposes a distinct and cohesive 'people', as seems logically necessary, can it also be true that the act of asserting self-determination constitutes a 'people' in the first place, as many have suggested? Most importantly, what is one to make of the fact that self-determination has been invoked to reinforce state structures as well as in support of secessionist and revolutionary struggles? Does self-determination sanction or subvert the international state system?

These and other questions have long plagued efforts to develop coherent and persuasive models of self-determination.[1] The debates they have engendered occupied treatise-writers and nation-builders alike for centuries before mid-twentieth-century decolonization, running parallel in some cases to analogous philosophical debates about the self-determinative authorities and capacities of individual persons.[2] But they came to be accorded political and economic significance with increased urgency after 1945, as part of the push to forge the legal architecture of a formally decolonized world. Surfacing in popular and scholarly discourse in

[1] Toynbee complained that, 'in the political domain, the formula of "Self-Determination" is merely the statement of a problem and not the solution of it'. Arnold J. Toynbee, 'Self-Determination', *Quarterly Review* 243 (1925), 317, at 319. On the centrality of imperial dissolution and inter-nationalist conflict in the Balkans and Anatolia to Toynbee's thinking on self-determination, see Georgios Giannakopoulos, 'A World Safe for Empires? A. J. Toynbee and the Internationalization of Self-Determination in the East (1912–1922)', *Global Intellectual History* 6 (2021), 484.

[2] For the argument that collective self-determination's modern philosophical origins lie to a significant degree in Kant's conception of the self-knowing subject, via Fichte and others, see Eric D. Weitz, 'Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right', *American Historical Review* 120 (2015), 462.

mid-nineteenth-century Europe in relation to nationalist projects, from the Risorgimento Italy of Pasquale Mancini and Giuseppe Mazzini to Lajos Kossuth's Hungary, Yannis Makriyannis' Greece, and beyond, the post-1945 wave of decolonization promised to secure the legality of the 'right of self-determination' once and for all.[3] But even as self-determination won acclaim, the limits of its application and effectiveness remained in doubt, as did its very coherence and intelligibility.

This chapter takes up self-determination in the 1970 Friendly Relations Declaration, focusing on the concept's core antinomy, its ability to relay both support for and suspicion of state power.[4] The declaration revisited the UN Charter's references to 'we the peoples' and 'self-determination of peoples', both of which appeared in its text largely because of Moscow's official commitment to self-determination after London and Washington proved unenthusiastic in the wake of the 1941 Atlantic Charter.[5] It also engaged a range of different concepts and aspirations, from nonintervention and sovereign equality through peaceful dispute-settlement and the prohibition on force to interstate cooperation and good faith fulfillment of legal obligations. Even when they did not discuss self-determination directly, those involved in the negotiations often found themselves circling around questions involving its meaning, scope, and actual force. These negotiations took place largely within a special committee that was established by the General Assembly in late 1963.[6]

[3] That the right of peoples to form nation-states was always limited is illustrated by the fact that even so passionate a devotee of these rights as Mazzini did not envisage the emancipation of Ireland (on grounds of size). E. J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality*, 2nd ed. (Cambridge: Cambridge University Press, 1992), 31.

[4] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (24 October 1970) ('Friendly Relations Declaration').

[5] UN Charter, Arts. 1(2), 55; Declaration of Principles Known as the Atlantic Charter, 14 August 1941, 204 LNTS 384. Churchill had been clear that the Atlantic Charter – which referred to the right of peoples to choose their form of government and repudiated territorial changes without the consent of the concerned peoples – did not apply to the colonies but only to 'the restoration of the sovereignty, self-government and national life of the States and nations of Europe now under the Nazi yoke'. *Parliamentary Debates*, House of Commons, 5th Series, vol. 374, 69 (9 September 1941). For contemporaneous discussion see Erich Hula, 'National Self-Determination Reconsidered', *Social Research* 10 (1943), 1, at 1.

[6] For the instrument establishing the committee, see Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 1966 (XVIII) (16 December 1963). See also Future Work in the Field of the Codification and Progressive

Convening for six sets of meetings through the remainder of that decade,[7] the committee's deliberations were laced with discussions of ongoing developments, from the 1967 Arab–Israeli War and Biafran War to intensified US involvement in Vietnam and the revolt against British colonial authorities in Aden, not to mention 'the collapse of the colonial system, the emergence of the newly independent States, the development and progress of the socialist countries, and the great advances in science and technology'.[8] They were also affected by the General Assembly's adoption of a number of key resolutions, particularly the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,[9] the 1962 Declaration on Permanent Sovereignty over Natural Resources,[10] the 1963 Declaration on the Elimination of All

Development of International Law, GA Res. 1686 (XVI) (18 December 1961); Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 1815 (XVII) (18 December 1962).

[7] Extensive details on negotiations at these meetings are collected in its official reports: Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/5746 (1964) ('Report I'); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/6230 (1966) ('Report II'); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/6799 (1967) ('Report III'); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/7326 (1968) ('Report IV'); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/7619 (1969) ('Report V'); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/8018 (1970) ('Report VI').

[8] Report I, para. 35. US delegates objected to the inclusion in the official record of 'contentious material' relating to developments such as the Vietnam War – a move that elicited a bemused response from the Soviets. See Report III, paras. 476, 478; G. W. Wattles to C. A. Stavropoulos, 'Difficulties over the Report of the 1967 Special Committee on Friendly Relations' (6 September 1967), UN Archives, Folder Ref. No. 989. Controversies broke out even before the committee's formation, with proposals from the GDR (regarding nonaggression and normalization of relations with the FRG) being countered by a joint Anglo–French–American letter contending that the GDR had no legal existence as a state or government, being 'merely an occupied portion of German territory'. Jiri Hájek to Carlos Sosa-Rodriguez (10 October 1963), enclosing Lothar Bolz to Carlos Sosa-Rodriguez (23 September 1963), UN Archives, Folder Ref. No. 987; Roger Seydoux de Clausonne, Patrick Dean, and Adlai Stevenson to U Thant (6 December 1963), UN Archives, Folder Ref. No. 987.

[9] GA Res. 1514 (XV) (14 December 1960).

[10] GA Res. 1803 (XVII) (14 December 1962).

Forms of Racial Discrimination,[11] and the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.[12] Self-determination was central to all of this, and proved to be one of the two issues that occupied the special committee until its sixth and final meeting in May 1970,[13] a couple of months before the Security Council, having already condemned South Africa's presence in South West Africa, requested from the ICJ an advisory opinion on the legal consequences of its continued occupation.[14]

International lawyers have long grappled with the fact that the support extended to self-determination in the declaration's fifth principle, intended not only to 'promote friendly relations and co-operation among States' but to 'bring a speedy end to colonialism',[15] was undercut to a significant extent by what has been dubbed its 'safeguard clause' or 'saving clause'. Drafted to ensure that secessionist movements could invoke the right to self-determination only under exceptional circumstances, this clause prohibited all attempts to 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign

[11] GA Res. 1904 (XVIII) (20 November 1963).

[12] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res. 2131 (XX) (21 December 1965). See also Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination, GA Res. 2160 (XXI) (30 November 1966). In addition to such resolutions, the committee engaged with a litany of treaties and other instruments – among others the 1945 Pact of the League of Arab States, the 1947 Inter-American Treaty of Reciprocal Assistance, the 1948 OAS Charter, the 1948 Universal Declaration of Human Rights, the final communiqué of the 1955 Bandung Conference, the 1955 Treaty of Friendship, Cooperation, and Mutual Assistance establishing the Warsaw Pact, the 1956 Statute of the International Atomic Energy Agency, the 1961 Vienna Convention on Diplomatic Relations, the 1963 OAU Charter, the 1963 Vienna Convention on Consular Relations, and the 1963 Partial Test Ban Treaty. Even earlier treaties included the 1885 Treaty of Berlin, the 1899 and 1907 Hague Conventions, the 1928 Kellogg–Briand Pact, and the 1933 London Conventions for the Definition of Aggression.

[13] The other principle was the prohibition against the threat or use of force. See, for example, Report VI, paras. 22, 35.

[14] For the resulting advisory opinion, which underscored the right to self-determination and called for South Africa's withdrawal, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16. On the relevance of the UN Charter's rhetoric of 'friendly relations' to the case, see U. O. Umozurike, 'International Law and Self-Determination in Namibia', *Journal of Modern African Studies* 8 (1970), 585, at 602.

[15] This and subsequent references are to the Friendly Relations Declaration, princ. 5.

and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. All states were obligated to refrain from actions directed toward 'the partial or total disruption of the national unity and territorial integrity of any other State or country'.

In itself, structural ambivalence of this sort was not new. It had left its mark on the 1960 resolution, the 'Magna Carta of decolonization',[16] which qualified its affirmation that '[a]ll peoples have the right to self-determination' with the warning that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[17] By contrast, the two 1966 covenants were more straightforward on the question of self-determination; their first articles enshrined a general entitlement to self-determination that recognized every people's right to dispose of its natural wealth and resources.[18] The ambiguity was also reflected in diplomatic practice. The first meeting of the All-African Peoples' Conference, held in Accra in December 1958, condemned 'artificial barriers and frontiers drawn by imperialists to divide African peoples'.[19] But the OAU Charter, adopted in 1963 as the constitution of an organization formed through the integration of several regional groups,[20] left no doubt that its member states were committed to 'defend[ing] their sovereignty, their

[16] Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.l (1980), 8, para. 48.

[17] GA Res. 1514 (XV), paras. 2, 6. On the relation between the two 'safeguard clauses', and the view that the 1970 resolution affords greater scope to self-determination by limiting its proviso language to 'states' (as opposed to 'peoples'), see Robin C. A. White, 'Self-Determination: Time for a Re-assessment?', *NILR* 28 (1981), 147, at 159ff.

[18] International Covenant on Economic, Social and Cultural Rights, Art. 1, adopted 16 December 1966, 993 UNTS 3, at 5; International Covenant on Civil and Political Rights, Art. 1, adopted 16 December 1966, 999 UNTS 171, at 173.

[19] 'Resolutions of the All African People's Conference', *Current History* 37 (1959), 41, at 46.

[20] On the Casablanca, Monrovia, and Brazzaville groups' roles in international organizations law, see Derek W. Bowett, *The Law of International Institutions*, 2nd ed. (London: Stevens & Sons, 1970), 217, 220–21.

territorial integrity and independence'.[21] The result was that while members did much to support anticolonialist struggles, often to the point of running afoul of the UN Charter,[22] the OAU itself offered little support in the 1960s to secessionist struggles such as those carried out in Biafra, Eritrea, Katanga, South Sudan, and Western Sahara.[23] Similarly, in response to growing recognition of self-determination after the United Nations' establishment,[24] Belgium had argued that self-determination should apply not only to the overseas territories of colonial powers, as claimed by many advocates of the 'salt water' thesis,[25] but also to all non-self-governing peoples, including minority and Indigenous peoples beyond the colonial context.[26] This argument had been rejected,

[21] OAU, Charter of the Organization of African Unity, Art. 2, done 25 May 1963, 479 UNTS 69, at 72. See S. Kwaw Nyameke Blay, 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights', *Journal of African Law* 29 (1985), 147, at 149–51, also 157–59 (on self-determination in the Banjul Charter). For Bedjaoui, the OAU institutionalized 'a fairly risk-averse form of pan-Africanism'; see Mohammed Bedjaoui, 'Brief Historical Overview of Steps to African Unity', in *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization*, ed. Abdulqawi A. Yusuf and Fatsah Ouguergouz (Leiden: Brill, 2012), 9, at 17.

[22] C. J. R. Dugard, 'The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism', *ICLQ* 16 (1967), 157.

[23] This would change to some degree in the 1970s, with the organization supporting liberation movements in the Portuguese colonies of Angola, Guinea, and Mozambique. Onyeonoro S. Kamanu, 'Secession and the Right of Self-Determination: An O.A.U. Dilemma', *Journal of Modern African Studies* 12 (1974), 355; also U. O. Umozurike, 'The African Charter on Human and Peoples' Rights', *AJIL* 77 (1983), 902, at 902–3ff. Still, as late as the mid-1980s, Marxist revolutionary Thomas Sankara, leader of Upper Volta (which he renamed Burkina Faso), was forced to reject the idea of an OAU meeting that did not involve Saharawi representatives; see Thomas Sankara, 'There Is Only One Color – That of African Unity' [1984], in *Thomas Sankara Speaks: The Burkina Faso Revolution, 1983–1987*, 2nd ed., ed. Michel Prairie (New York: Pathfinder, 2007), 120, at 125.

[24] See, for example, The Right of Peoples and Nations to Self-Determination, GA Res. 637 (VII) (16 December 1952).

[25] The 'salt water' (or 'blue water') theory found support in language about geographic separation and ethno-cultural distinctiveness in 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, Annex, princ. 4, 5, GA Res. 1541 (XV) (15 December 1960). Cf. Quincy Wright, 'Recognition and Self-Determination', *ASIL Pd.* 48 (1953), 23, at 28.

[26] See the documents collected in Belgian Government Information Center, *The Sacred Mission of Civilization: To Which Peoples Should the Benefits Be Extended? – The Belgian Thesis* (New York: Belgian Government Information Center, 1953). See also Fernand van

in the General Assembly as well as other bodies.[27] The commitment to preserving borders laid down at the moment of independence had deep roots in nineteenth-century Latin American claims about *uti possidetis juris*, and had famously been upheld by an interwar committee of jurists' finding that 'Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish'.[28] It was this same commitment – one made to forestall what the ICJ has since called 'fratricidal struggles'[29] – that led Cambridge University jurist Derek Bowett to quip that 'while the last vestiges of colonialism in the political, economic and cultural spheres are ruthlessly and sometimes possibly unwisely removed, this one particular remnant of colonialism, the frontier, is zealously safeguarded'.[30]

The Friendly Relations Declaration built upon these precedents, affording self-determination's contradictory relationship with state power an unrivalled degree of legal authority at the height of decolonization. Twenty-five years after the UN Charter was first adopted, it crystallized the tension between self-determination as a people's right,

Langenhove, 'Le problème de la protection des populations aborigènes aux Nations Unies', *RCADI* 89 (1956–I), 321.

[27] On debates about the 'Belgian thesis' and 'salt water thesis', see Yassin El-Ayouty, *The United Nations and Decolonization: The Role of Afro–Asia* (The Hague: Nijhoff, 1971), 49–53; W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen, 1977), 108–9, 119, 127–28, 134; Patrick Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments', *ICLQ* 38 (1989), 867, at 873–75; Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (The Hague: Nijhoff, 2000), 65; S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford: Oxford University Press, 2004), 75–76; Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989)* (Oxford: Oxford University Press, 2005), 140–43; Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge: Cambridge University Press, 2018), 17, 21–38, 66–69, 71–72.

[28] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, *League of Nations Official Journal*, Special Supplement No. 3 (1920), 3, at 5.

[29] *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, [1986] ICJ Rep. 554, at 565, para. 20.

[30] D. W. Bowett, 'Self-Determination and Political Rights in the Developing Countries', *ASIL Pd.* 60 (1966), 129, at 130.

ultimately a conduit for secession, and self-determination as a sovereign right, a foundation for state sovereignty as such.[31] Inasmuch as its receptivity to national liberation struggles was conditional upon containment of secessionist conflict, the declaration showcased the degree to which the law of self-determination constrained decolonization's promise. Decolonization reached its apogee in a world of sovereign states constructed on largely European models and nominally responsive to the aspirations and grievances of recently decolonized peoples. Crucially, though, not all peoples were to be accorded such authority.

* * *

In 1958, having returned to Cambridge after an extended period at the University of Ceylon, Ivor Jennings famously argued that the 'doctrine of self-determination' – what he called the 'let the people decide' imperative – is 'ridiculous because the people cannot decide until somebody decides who are the people'.[32] A constitutional law scholar and adviser who had just helped to draft the Federation of Malaya's new constitution,[33] Jennings excoriated appeals to self-determination as disconnected from concrete struggles for independence or greater autonomy. 'Problems of this kind cannot be solved by the application of academic principles,' he declared, arguing that decisions needed to be made as between different 'wishes or emotions' and that it was never possible 'to satisfy everybody'.[34] By 1973, on the verge of the NIEO's formal inauguration, international lawyers like Sinha were already asking whether self-determination had become 'passé', given the frequency with which it was 'invoked to attain the result in a desirable fashion' only after 'the basic

[31] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', *ICLQ* 43 (1994), 241, at 249–51; Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age', *Stanford Journal of International Law* 32 (1996), 255, at 262, 264–65, 270–71.

[32] Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1958), 56.

[33] H. Kumarasingham, 'Sir Ivor Jennings' "The Conversion of History into Law"', *American Journal of Legal History* 56 (2016), 113; H. Kumarasingham (ed), *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (Abingdon: Routledge, 2016).

[34] Jennings, *Approach to Self-Government*, 57. On the social imaginaries that make it possible for self-determination to be conceived as a specific act or entitlement, thereby giving rise to such quandaries, see Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford: Oxford University Press, 2018).

decision for political reorganization or redistribution of power has been made'.[35]

The work of crafting a declaration of 'principles' of 'friendly relations' was undertaken amidst these and other anxieties about the meaning and usefulness of legal claims to collective self-determination. The special committee established for the purpose of preparing the Friendly Relations Declaration was given an exceptionally broad mandate: clarifying Article 1(2) of the UN Charter, which specified as a core 'purpose' of the United Nations the commitment to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.[36] This wording permitted decolonization's critics to argue that self-determination had been 'crowded into Article 1 of the Charter without relevance and without explanation', encouraging 'extravagant, impractical and irresponsible claims' even though '[t]he textbooks of international law do not recognize any legal right of self-determination'.[37] The committee was supposed to respond to such accusations by lending a measure of concreteness to self-determination. Compounding the difficulties of an enterprise of such breadth was the fact that a large number of states representing each of the world's major blocs and alliances, including the North Atlantic Treaty Organization (NATO) and the Warsaw Pact, were appointed to this committee at various points. Australia, Canada, France, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States represented the 'First World'. Czechoslovakia, Poland, Romania, the Soviet Union, and Yugoslavia represented the 'Second World'. Afghanistan, Algeria,

[35] S. Prakash Sinha, 'Is Self-Determination Passé?', *CJTL* 12 (1973), 260, at 271.

[36] The expression 'self-determination of peoples' appears twice in the text of the Charter: Arts. 1(2) and 55 both stress 'respect for the principle of equal rights and self-determination of peoples'. The French versions of these provisions render this as 'le respect du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes', explicitly presenting self-determination as a right. The expression 'friendly relations' appears in both provisions, and also in Art. 14. See further Peaceful and Neighbourly Relations among States, GA Res. 1236 (XII) (14 December 1957); Measures Aimed at the Implementation and Promotion of Peaceful and Neighbourly Relations among States, GA Res. 1301 (XIII) (10 December 1958).

[37] Clyde Eagleton, 'Excesses of Self-Determination', *Foreign Affairs* 31 (1953), 592, at 592–93, 603. An international law professor at New York University, Eagleton also derided self-determination claims as 'noble utterances on behalf of high-sounding principles' that 'take no account of reason, or justice, or practicality'. Clyde Eagleton, 'Self-Determination in the United Nations', *AJIL* 47 (1953), 88, at 88–89.

Argentina, Burma, Cameroon, Chile, Dahomey, Ghana, Guatemala, India, Kenya, Lebanon, Madagascar, Mexico, Nigeria, Syria, the United Arab Republic, and Venezuela represented the 'Third World'. With the exception of Canada (itself a settler colony forged and sustained through the dispossession and displacement of Indigenous peoples) and Sweden (a state which had been active in the transatlantic slave trade but had pursued overseas colonialism only sparingly and whose neutrality during the Cold War brought it close to the NAM), all members of the first bloc had considerable experience managing empires, formal and informal. Mainland China was the largest power to be excluded.

The United Nations had admitted large numbers of newly independent states in the years preceding the committee's formal constitution in 1964, with seventeen in 1960 alone and another thirteen in 1961 through 1963. Exercising its power to propel the 'progressive development of international law and its codification',[38] also vested in the International Law Commission (ILC),[39] the General Assembly had begun to grow into what many regarded as a quasi-legislative assembly of recognized states,[40] with Third World states 'trying to use international organizations as a battlefield and as a means of radically transforming the international system'.[41] Some were mistrustful of this body's reliance upon legally nonbinding resolutions, and keen to preclude what they regarded as illegitimate efforts to revise or simply distort the UN Charter. But many others believed that a resolution reinforcing self-determination alongside related commitments to principles of nonintervention and sovereign equality would accelerate the development of a new international law, one both reflective and facilitative of a formally decolonized

[38] UN Charter, Art. 13(1)(a).

[39] Establishment of an International Law Commission, GA Res. 174(II) (21 November 1947), Annex, Statute of the International Law Commission, Art. 1(1).

[40] See, for example, Report I, paras. 20, 25. For the debate about that body's 'legislative' powers and functions in the context of the Friendly Relations Declaration, see Gaetano Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979). Not everyone was persuaded that numerical strength in international institutions translated into real power; see, for example, T. S. Rama Rao, 'Need for a Universal Law of Nations and the Means to Achieve It', in *Asian States and the Development of Universal International Law*, ed. R. P. Anand (Delhi: Vikas, 1972), 179, at 185.

[41] Georges Abi-Saab, 'The Concept and Evolution of International Organization: A Synthesis', in *The United Nations System at Geneva: Scope and Practices of Multilateral Diplomacy and Co-operation*, ed. Marcel A. Boisard and Evgeny M. Chossudovsky (New York: UNITAR, 1991), 27, at 35.

world. The UN Charter, on this account, was a constitution that should be interpreted in light of changing needs and circumstances,[42] and the General Assembly's authority as an embodiment of the collective will of UN member states could not be discounted.[43]

The committee's composition reflected the decolonization moment's international legal vanguard. In addition to Ian Sinclair and Michel Virally, key members of leading international legal circles in Britain and France at the time, international lawyers representing these states included Elias, a future president of the ICJ, and Stephen Schwebel, the American international lawyer who would join him on that court in addition to serving on a host of other arbitral and adjudicative bodies, including the Permanent Court of Arbitration and the administrative tribunals of both the World Bank and the International Monetary Fund (IMF). Other delegations also counted noted international lawyers as members: Gaetano Arangio-Ruiz, who would later roll his experience representing Italy and serving as rapporteur for the committee's final session into a monograph on the declaration;[44] Milan Šahović, the Yugoslavian delegate who would do the same with writings of his own;[45] Swedish lawyer and diplomat Hans Blix, often remembered today for his role in the UN inspections team dispatched to Iraq prior to the Second Gulf War; Egyptian jurist and diplomat Mohammed el-Baradei, Blix's successor as director-general of the International Atomic Energy Agency and rapporteur for the committee's first session; and Jorge Castañeda, the Mexican jurist and diplomat whose name would soon become linked to the NIEO. The result was a series of wide-ranging discussions, marked by shifting positions, overlapping interests, acrimonious exchanges, and counterintuitive alliances. In 1970, Grigory Tunkin, the leading Soviet international lawyer, observed that '[i]n the domain of

[42] Report I, para. 57.

[43] Report III, para. 184. This debate unfolded regularly in the committee; see, for example, Report I, paras. 20–25; Report III, paras. 183–85.

[44] Arangio-Ruiz, *UN Declaration*; Gaetano Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Friendly Relations with an Appendix on the Concept of International Law and the Theory of International Organisation', *RCADI* 137 (1972–III), 419.

[45] Milan Šahović, 'Codification des principes du droit international des relations amicales et de la coopération entre les États', *RCADI* 137 (1972–III), 243; Milan Šahović (ed), *Principles of International Law concerning Friendly Relations and Cooperation* (Dobbs Ferry: Oceana, 1972). See also Milan Šahović, 'Influence des États nouveaux sur la conception du droit international: Inventaire des positions et des problèmes', *AFDI* 12 (1966), 30.

subjects of international law, new entities have emerged which are different from states, the traditional subjects of international law'.[46] 'These', he noted, 'are international organizations, as well as nations fighting for their independence'.[47] The special committee engaged both of these new 'subjects', tasked with bringing the United Nations' authority to bear upon the question of how peoples aspiring toward self-determination ought to be integrated into a new world order.

At the heart of the difficult negotiations that brought the declaration to life was the question of whether and how existing international law could be adapted to – and could help to shape – the realities of a rapidly decolonizing world. Specifically, questions about the experiences of peoples subject to formal colonial rule or administered under international trusteeship regimes – the latter were often deemed to be just as 'colonial' as the former[48] – proved central to the negotiations, informing debates about each of the seven principles around which discussion was organized.

One issue of importance was whether territories under colonial domination should be understood as integral to the territory of the state that exercised such domination, no different in legal status from any of its other territories. This had far-reaching implications, for territories held directly under 'classic' colonialism, such as France's *départements* or Portugal's overseas provinces, but also for those administered under looser relations of protection or oversight, such as British arrangements in Aden or Bhutan.[49] For one thing, repudiating attempts to fold colonial holdings into the territories of colonial powers had the effect of extending rights of equality to peoples seeking independence ('nations') rather than limiting them to entities whose independence had already secured

[46] G. I. Tunkin, *Theory of International Law*, trans. William E. Butler (Cambridge, MA: Harvard University Press, 1974 [1970]), 244.

[47] Tunkin, *Theory*, 244, 315–19.

[48] See, for example, Report I, para. 89; Report II, paras. 459 (US), 465; Report III, paras. 174 (US), 176 (UK), 186; Report IV, paras. 137 (US), 139 (UK); Report V, paras. 123 (USSR), 140 (US), 142 (UK), 153, 180; Report VI, paras. 61, 68. The matter is posed in the form of a question at Report II, paras. 147–49. For the view that 'nothing in the Charter outlawed colonialism or made it illegal', see Report IV, para. 171.

[49] For a stylized treatment of the distinction between France's tendency to pursue greater integration of colonies into the metropolitan order and Britain's tendency toward decentralization and devolution of power, see Jan C. Jansen and Jürgen Osterhammel, *Decolonization: A Short History*, trans. Jeremiah Riemer (Princeton: Princeton University Press, 2017 [2013]), 58–59.

widespread recognition ('states').[50] For another, the question of the legal status of such territories spoke directly to the persuasiveness of claims that they 'recovered' their sovereignty, fully and without encumbrance, at the moment of formal independence. Socialist and nonaligned delegates consistently affirmed the distinct legal status of territories under alien administration,[51] harkening back to the NAM's meetings in 1961 and 1964 as well as earlier precedents like the first International Conference of American States in 1889–90.[52] By contrast, First World delegates generally maintained silence on the issue or else argued that integration into another state, including the metropolitan state, constituted an acceptable means of enjoying self-government and exercising self-determination.[53]

Another issue of significance was whether peoples under colonial or foreign administration had a right to wage armed struggles in pursuit of independence, and whether such force could be supported on grounds of self-defence pursuant to the UN Charter or customary international law.[54] Although it was often denounced as having been generated without the interests of extra-European peoples in mind, customary

[50] Report I, para. 326; cf. Report III, para. 86.

[51] See, for example, Report I, para. 294 (Czechoslovakia); Report II, paras. 26 (Algeria, . . .), 116–17, 401, 457 (Czechoslovakia), 458 (Algeria, . . .); Report III, paras. 26 (Algeria, . . .), 27 (Argentina, . . .), 85–86, 102, 172 (Czechoslovakia), 177 (Algeria, . . .), 215; Report IV, paras. 86, 136 (Algeria, . . .), 140 (Algeria, . . .), 184; Report V, paras. 139 (Algeria, . . .), 143 (Algeria, . . .), 145 (Czechoslovakia, Poland, Romania, USSR), 174.

[52] Report III, para. 76. For contemporaneous reportage from José Martí, the Cuban revolutionary, see José Martí, 'The Washington Pan-American Congress' [1889], in *Inside the Monster: Writings on the United States and American Imperialism*, ed. Philip S. Foner, trans. Elinor Randall (New York: Monthly Review Press, 1975), 339. For records see *Minutes of the International American Conference* (Washington: Government Printing Office, 1890).

[53] See, for example, Report II, para. 459 (US); Report III, para. 176 (UK); Report IV, paras. 137 (US), 139 (UK); Report V, paras. 140 (US), 142 (UK).

[54] This overlapped with the question of the threat or use of force in international relations. For support of self-defensive force on the part of peoples seeking self-determination, see esp. Report I, paras. 27 (Czechoslovakia), 28 (Yugoslavia), 31 (Ghana, India, Yugoslavia); Report II, paras. 25 (Czechoslovakia), 26 (Algeria, . . .), 136–42, 457 (Czechoslovakia), 458 (Algeria, . . .), 497; Report III, paras. 101–3, 206–7; Report IV, paras. 22 (Czechoslovakia), 26 (Algeria, . . .), 103, 106–7, 115 (Cameroon), 121 (USSR), 123 (Syria), 136 (Algeria, . . .), 140 (Algeria, . . .), 175; Report V, paras. 29 (Czechoslovakia), 34 (Algeria, . . .), 109–13, 120 (Czechoslovakia), 121 (Kenya), 123 (USSR), 130 (Romania), 138 (Czechoslovakia), 139 (Algeria, . . .), 143 (Algeria, . . .), 145 (Czechoslovakia, Poland, Romania, USSR), 167. For analysis on the basis of the relation between what became the declaration's first and fifth principles, see Report II, para. 141. For questions concerning nonintervention in this context, see Report II, paras. 321–28.

international law had arguably been amplified by instruments like the 1960 decolonization resolution, which lent support to armed struggle.[55] Pointing to Angola, Mozambique, Palestine, Rhodesia, South Africa, and elsewhere,[56] socialist and nonaligned delegates pressed to legalize armed liberation struggles against colonial rule,[57] viewing colonialism itself as the key source of ongoing coercion and aggression throughout much of the world. In the view of the Ghanaian delegation, for instance, self-determination was the essence of 'peaceful coexistence', and this, in turn, meant that peoples subject to colonial rule were justified in using whatever means were necessary to secure their emancipation.[58] Those representing the First World denied any such right of resistance, arguing that while they too supported self-determination and the gradual disappearance of colonialism, 'revolution was a political, not a legal, concept' – 'the leaven of law', perhaps, but not an idea possessed of any 'intrinsic legality'.[59] Generalizations about national liberation movements ought to be avoided, some observed, as they tended more often than not to degenerate into mere propaganda.[60] Above all, they felt, was the need to suppress terrorism, avoid insurrections, uphold law and order, refrain from fostering 'civil strife' and spirals of escalating violence, and maintain distance from efforts to juridify revolutionary violence.[61]

Still another issue involved the thorny relation between human rights and self-determination, with the very terms of the committee's mandate ('equal rights and self-determination of peoples') allowing the British delegation to tether self-determination to 'universal respect for and

[55] On the implications for the debate on force, see, for example, Report I, paras. 83–89; Report II, paras. 112, 138; Report IV, para. 104; Report VI, para. 92. See also GA Res. 1514 (XV), paras. 2, 4–5.

[56] For a list see Report VI, para. 209 (Syria). Rhodesia was the target of the Security Council's first mandatory sanctions, imposed in 1966; see Southern Rhodesia, SC Res. 232 (16 December 1966).

[57] On its 'legalization', see esp. Report V, para. 123 (USSR).

[58] Report I, para. 111.

[59] Report I, para. 86. See further Report I, para. 145; Report II, paras. 35, 114–15; Report III, para. 39. For countervailing suggestions that 'law' and 'politics' are intertwined, see, for example, Report II, para. 215; Report III, para. 40; Report VI, paras. 109 (Venezuela), 213 (India). For the relation between 'legal' and 'economic' principles, see Report III, para. 133.

[60] Report III, para. 187.

[61] See, for example, Report I, para. 29 (UK); Report II, paras. 27 (Australia, Canada, UK, US), 29 (Italy, Netherlands), 114, cf. 144–51; Report III, paras. 104, 208; Report IV, paras. 28, 85, 105, 119 (UK), 131 (Australia); Report V, para. 165; Report VI, paras. 234–35 (UK).

observance of human rights and freedoms', the Universal Declaration of Human Rights being summoned as evidence of their foundational status.[62] In the final round of negotiations, held in 1970, the Italians submitted a working paper contending that '[t]he very existence and functioning of structures and machineries through which Self-Determination is to be expressed depends upon the possession and effective exercise of individual rights and freedoms'.[63] At root, this position grew out of the long-standing First World effort to undercut the moral superiority claimed by the Soviet Union and its allies in regard to inequalities of class, race, and gender. Yet it also played into the hands of socialist and nonaligned states, whose representatives could flip the argument on its head without difficulty, contending that self-determination was essential to 'human freedom' and that alien rule and 'inhuman practices such as apartheid' denied self-determination and human rights alike.[64] This was a widely shared view at the time, and found expression not only in common Article 1 of the two 1966 human rights covenants but also in less influential instruments like the resolutions adopted at the 1968 International Conference on Human Rights in Tehran.[65] Further, socialist and nonaligned states contended that if the principle of nonintervention were closely related to human rights, it could not be invoked in the case of 'apartheid in the Republic of South Africa, the oppression of Africans in Central Africa, the denial of the right of self-determination, and other colonialist and neo-colonialist practices'.[66] Nonintervention might well be a 'general rule', whatever that meant in a world riven with interventions both military and nonmilitary, but it admitted of certain exceptions, as sovereignty should be set aside when the 'purpose was to defend a higher right'.[67] The debate about the relation between self-determination and human rights even spilled over

[62] Report III, para. 176 (UK); Report IV, para. 139 (UK); Report V, para. 142 (UK).
[63] Report VI, para. 82.
[64] Report II, paras. 489, 495.
[65] The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, 11 May 1968, in Final Act of the International Conference on Human Rights, Teheran, 22 April–13 May 1968, UN Doc. A/CONF. 32/41 (1968), 9.
[66] Report I, para. 247.
[67] Report I, para. 248. See also Report II, para. 487.

into a dispute over the sequence in which they appeared in the declaration's text.[68]

One issue on which there initially appeared to be significant agreement was that self-determination, however construed, entailed rights of sovereignty over natural resources, at least when no compensatory formula was specified. Many delegates fought hard to garner support for it,[69] though they too differed in their understanding of the conditions under which expropriation and nationalization might be undertaken, the degree to which such ventures were required to comply with 'international law', and the status of unequal treaties and concession agreements concluded (often fraudulently, by coercion, or under duress) by foreign or colonial-era authorities.[70] The feeling that nonintervention had taken on added importance with the principle of self-determination's consolidation was shared widely,[71] as was a desire to curb formal and informal pressure on newly independent states.[72] That coercive means had been used to deprive peoples under formal or informal colonial rule of their wealth, or to control key sectors of their national economies, could not be forgotten.[73] Even so, the principle of permanent sovereignty over natural resources was not to find its way into the Friendly Relations Declaration.

Decolonization provided the context within which these debates were conducted. At the end of the fourth round of negotiations in 1968, the Soviets lambasted 'the reluctance of certain Governments to recognize the necessity of completing decolonization as soon as possible'.[74] 'Those States which were impeding the process of decolonization did not want their formulations of the principles to contribute in any way towards the elimination of colonial slavery', since, in essence, '[t]heir position was

[68] Report VI, para. 66.

[69] See, for example, Report I, paras. 294 (Czechoslovakia), 295 (Yugoslavia), 297 (Ghana, India, Mexico, Yugoslavia); Report II, paras. 358 (Czechoslovakia), 359 (Cameroon), 362 (UAR), 363 (Kenya), 364 (Ghana), 376, 379, 457 (Czechoslovakia); Report III, paras. 448 (Czechoslovakia), 451 (Kenya).

[70] See, for instance, the debates in Report I, paras. 329–31; Report II, paras. 376–79. On 'unequal treaties', see also Report II, paras. 555–58; Report III, paras. 270–73, also 286–300. On the related question of whether certain treaties could be voided on grounds of noncompliance with *jus cogens* norms, see further Report III, paras. 275–78.

[71] Report II, para. 289.

[72] Compare, for instance, Report II, paras. 278 (India, . . .) and 279 (Australia, . . .). On the 1965 Declaration on the Inadmissibility of Intervention, see Report III, paras. 321–31.

[73] See, for example, Report III, para. 352.

[74] Report IV, para. 121.

based on the strategic, political and economic interests of certain classes'.[75] What the Soviet delegation neglected to mention, of course, was that Moscow suppressed the circulation of secessionist ideas among the Soviet Union's constituent nations.[76] Still, the accusation was justified, particularly as capitalist states were not shy about referring certain matters, like some expressly economic in character, to other international organizations in which their power was even greater.[77] And its implications were far-reaching. In response to a nonaligned proposal that situations brought about through force should not be recognized legally, some delegates pointed out that its retroactive application, to 1945 or another date, would cause serious problems.[78] From top to bottom, the rather 'unfriendly' struggle to work up a declaration of 'friendly relations' turned on the general question of how – and whether – international law should be reconfigured in light of decolonization. This was a vital concern, of direct and ongoing relevance to hundreds of millions. After all, 'colonialism was still a living reality for many peoples and not merely an academic question'.[79]

Self-determination crystallized these debates. The legal recognition it had come to attract invested the concept of 'peoplehood' with considerable importance, ensuring that the right to plot a future vested in 'peoples' and not simply in states.[80] It was obvious that self-determination, however unruly, would need to be respected if international peace were to prove possible.[81] While First World states feared revolutionary upheaval, and the disorder it would bring in its train, socialist and nonaligned states thought that bloodshed in the colonies followed from the suppression of peoples' inherent right to emancipate themselves from foreign rule.[82] To which 'peoples' did self-determination apply? Were the boundaries

[75] Report IV, para. 121.
[76] From an enormous and complicated literature, see esp. Ronald Grigor Suny, *The Baku Commune, 1917–1918: Class and Nationality in the Russian Revolution* (Princeton: Princeton University Press, 1972); Terry Martin, *The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923–1939* (Ithaca: Cornell University Press, 2001); Francine Hirsch, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union* (Ithaca: Cornell University Press, 2005).
[77] See, for example, Report II, para. 573 (UK).
[78] Report II, para. 101.
[79] Report II, para. 482.
[80] Report II, para. 313. On 'peoples' and 'nations' as wielders and beneficiaries of self-determination, see also Report II, paras. 477–79.
[81] See, for example, Report II, para. 112.
[82] See esp. Report II, para. 152.

of 'peoplehood' coterminous with the frontiers of 'national' statehood? Was self-determination a promise advanced only once, and then only under exceptional circumstances involving 'classic' colonialism, so that states founded on the basis of imperial disintegration or successful armed struggle would be considered to have 'determined' themselves once and for all? If, as many delegations insisted, self-determination was a universal ground of legal claim-making, as either a right or a broader principle, then how could it apply to some but not all 'peoples', bringing the process of decolonization to a halt the moment a people already identified as a distinct subject of colonialism succeeded in reconstituting itself? Why, after all, should self-determination be withheld from peoples categorized or identifying as 'minorities' or 'sub-state groups' in the new, postcolonial environment? Surely it was unacceptable to defend self-determination when it was expedient but reject it when it proved inconvenient. This is what Pakistan did when supporting self-determination in Kashmir but opposing it for Pashtuns and Bengalis, and what the Soviets did when attacking Western colonialism while crushing irredentist movements within their own borders.[83] As if the task of defining and breathing life into 'self-determination' were not hard enough, it was further complicated by the difficulty of determining what was meant by the term 'state'.[84]

At root, two positions were articulated on the question of self-determination's content and scope.[85] On the one hand, British and American delegates characterized the equal rights and self-determination of peoples as a principle that ought to be 'respected' by administering authorities rather than a right to be wielded by those they administered.[86] Self-determination could be 'respect[ed]', the British proposal suggested, only if every state permitted the peoples within its jurisdiction to determine their own destiny, 'without discrimination as to race, creed or colour'.[87]

[83] Rupert Emerson, *From Empire to Nation: The Rise to Self-Assertion of Asian and African Peoples* (Boston: Beacon Press, 1962), 306.

[84] Report I, para. 39.

[85] For brief overviews of the bargaining positions, see Report IV, paras. 155–60; Report V, paras. 150–54.

[86] Report II, para. 459 (US); Report III, para. 176 (UK); Report IV, paras. 137 (US), 139 (UK); Report V, paras. 140 (US), 142 (UK). See further Report III, paras. 190, 192.

[87] Report III, para. 176 (UK); Report IV, para. 139 (UK); Report V, para. 142 (UK). The American proposal extended self-determination to 'the exercise of sovereignty by a State over a territory geographically distinct and ethnically or culturally diverse from the remainder of that State's territory, even though not as a colony or other Non-Self-

Underpinning this view was British insistence that self-determination was intrinsically connected to human rights and fundamental freedoms, as well as the reluctance of both British and American delegates to condemn colonialism unequivocally as a basic violation of international law.[88] On the other hand, most socialist and nonaligned states argued that self-determination had to be understood as a right of peoples – a right to form an independent sovereign state, choose their own political, economic, and social systems, and exercise full sovereignty over the natural resources of their territories.[89] Central to this argument was the claim that observance of self-determination was legally and conceptually prior to conformity with international human rights. To the extent the two were brought together, self-determination, the argument went, was the basis of human rights and freedoms, 'since individuals could only benefit from those rights within the framework of broad national communities formed through self-determination'.[90]

* * *

In advancing arguments about self-determination, many Third World and socialist states leaned heavily upon the tradition of socialist internationalism. As with Austro-Marxists like Max Adler, Otto Bauer, and Karl Renner, national self-determination had been an abiding concern for Lenin, Rosa Luxemburg, and others in the Second International, all of whom spent significant time writing on the 'national question' during the 1910s. In contrast to Luxemburg, who dismissed '[a] "right of nations" which is valid for all countries and all times [a]s nothing more than a metaphysical cliché of the type of "rights of man" and "rights of the

Governing Territory'. See Report II, para. 459 (US); Report IV, para. 137 (US); Report V, para. 140 (US).

[88] For discussion see, for example, Report II, paras. 516–17; Report III, paras. 190–92, 218–23. On this tendency see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 46–47, 109. It barely needs mentioning that British and US officials had long harboured doubts about the viability of democratic institutions in decolonized territories; for an 'official' account, see D. J. Morgan, *The Official History of Colonial Development*, vol. 5 (London: Macmillan, 1980), 185–86.

[89] Report II, paras. 457 (Czechoslovakia), 458 (Algeria, . . .), 492–93; Report III, para. 177 (Algeria, . . .); Report IV, paras. 136 (Algeria, . . .), 140 (Algeria, . . .), 175; Report V, paras. 138 (Czechoslovakia), 139 (Algeria, . . .), 143 (Algeria, . . .), 145 (Czechoslovakia, Poland, Romania, USSR).

[90] Report III, para. 191.

citizen"',[91] Lenin expressed enthusiasm for self-determination as a weapon in the struggle against bourgeois rule and the inter-imperial rivalry it produced, mobilizing its rhetoric so explosively that Wilson and others were subsequently compelled to appropriate and resignify it in the lead-up to the 1919 Paris Peace Conference.[92] In November 1917, Lenin's Bolsheviks proclaimed a 'Declaration of the Rights of the Peoples of Russia' granting all peoples subject to Petrograd's power a right of secession, as well as a related 'Decree on Peace' advocating a universal right of outright independence.[93] Nearly three years later, in September 1920, thousands of delegates from states, political parties, and national liberation movements throughout Asia convened in Baku for the Congress of the Peoples of the East.[94] That the early Soviet state made

[91] Luxemburg extended this logic to federalist proposals in central and eastern Europe, suggesting that '[t]he idea of federation, by its nature and historical substance reactionary, is today a pseudo-revolutionary sign of petit bourgeois nationalism, which constitutes a reaction against the united revolutionary class struggle of the proletariat'. Rosa Luxemburg, 'The National Question and Autonomy' [1908–9], in Rosa Luxemburg, *The National Question: Selected Writings*, ed. Horace B. Davis (New York: Monthly Review Press, 1976), 101, at 110–11, 213.

[92] For Lenin, 'Social-Democrats would be deviating from proletarian policy and subordinating the workers to the policy of the bourgeoisie if they were to repudiate the right of nations to self-determination'. V. I. Lenin, 'The Right of Nations to Self-Determination' [1914], in Lenin, *Selected Works*, vol. 1 (Moscow: Progress Publishers, 1970), 595, at 621. On the legal implications see John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: Cambridge University Press, 2007), pt. 3; Bill Bowring, 'Positivism versus Self-Determination: The Contradictions of Soviet International Law', in *International Law on the Left: Re-examining Marxist Legacies*, ed. Susan Marks (Cambridge: Cambridge University Press, 2008), 133; Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Abingdon: Routledge, 2015), 216–40; Johannes Socher, *Russia and the Right to Self-Determination in the Post-Soviet Space* (Oxford: Oxford University Press, 2021), ch. 1. For the 'debate' between Lenin and Wilson, see Cassese, *Self-Determination of Peoples*, 14–23; Arno J. Mayer, *Wilson vs. Lenin: Political Origins of the New Diplomacy, 1917–1918* (Cleveland: World Publishing Co., 1964). For an account of the global resonance of Wilsonian rhetoric see Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (New York: Oxford University Press, 2007).

[93] V. I. Lenin, 'Report on Peace, October 26 (November 8), Decree on Peace' [1917], in V. I. Lenin, *Selected Works*, vol. 2 (Moscow: Progress Publishers, 1970), 467; V. I. Lenin and Josef Stalin, 'Declaration of the Rights of the Peoples of Russia' [2 (15) November 1917], in *A Documentary History of Communism in Russia: From Lenin to Gorbachev*, ed. Robert V. Daniels (Burlington: University of Vermont Press, 1993), 66. See further Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion*, trans. Anita Mage (Cambridge: Cambridge University Press, 2015 [2010]), 130–31.

[94] See John Riddell (ed), *To See the Dawn: Baku, 1920 – First Congress of the Peoples of the East* (New York: Pathfinder, 1993). For related developments and after-effects, see

a point of concluding friendship treaties on terms of legal equality with 'eastern' states like Afghanistan, Persia, and Turkey only reinforced its association with the idea of self-determination.[95] All this was typically understood in 'sovereigntist' terms, with self-determination framed as a means of anchoring a people's right to statehood. However, many socialist states also engaged in armed interventions in support of liberation movements and uprisings by workers and peasants. This was the case during Cuba's long-running intervention in Angola.[96] It was also one of the rationales used by Moscow when it entered Hungary in 1956, an event that split developing states,[97] and the Warsaw Pact when it rolled into Czechoslovakia in 1968, precipitating the 'Brezhnev Doctrine' of collective action on the part of socialist states in response to reactionary developments.[98] These interventions only complicated a tradition of

Alexandre A. Bennigsen and S. Enders Wimbush (eds), *Muslim National Communism in the Soviet Union: A Revolutionary Strategy for the Colonial World* (Chicago: University of Chicago Press, 1979).

[95] See Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic, signed 26 February 1921, 9 LNTS 383; Treaty between the R.S.F.S.R. and Afghanistan, signed 28 February 1921, excerpted in *The Soviet Union and Peace: The Most Important of the Documents Issued by the Government of the U.S.S.R. concerning Peace and Disarmament from 1917 to 1929*, ed. Henri Barbusse (New York: International Publishers, 1929), 273; Treaty of Friendship between Russia and Turkey, signed 16 March 1921, 118 BFSP 990. China followed suit in mid-1924; see Agreement on General Principles for the Settlement of the Questions between the Republic of China and the Union of Soviet Socialist Republics, with Six Declarations and Exchange of Notes Relating Thereto, signed 31 May 1924, 37 LNTS 175. The history of capitulations instruments and the Soviets' abrogation of such concessions figured prominently in Soviet international law curricula; see William E. Butler, 'Soviet International Legal Education: The Pashukanis Syllabus', *Review of Socialist Law* 2 (1976), 79, at 91, 94.

[96] See esp. Edward George, *The Cuban Intervention in Angola, 1965–1991: From Che Guevara to Cuito Cuanavale* (London: Frank Cass, 2005); Candace Sobers, 'Investigating Cuban Internationalism: The First Angolan Intervention, 1975', in *Cuba in the World, the World in Cuba: Essays on Cuban History, Politics and Culture*, ed. Alessandra Lorini and Duccio Basosi (Florence: Firenze University Press, 2009), 249. See also Piero Gleijeses, *Conflicting Missions: Havana, Washington, and Africa, 1959–1976* (Chapel Hill: University of North Carolina Press, 2003).

[97] See Samir N. Anabtawi, 'The Afro–Asian States and the Hungarian Question', *International Organisation* 17 (1963), 872. For broader assessment see Eliav Lieblich, 'The Soviet Intervention in Hungary – 1956', in *The Use of Force in International Law: A Case-Based Approach*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford: Oxford University Press, 2018), 48.

[98] For a leading Soviet account of the doctrine's international legal background, see Tunkin, *Theory*, chs. 19–20. For an American assessment, see John Norton Moore and Robert F. Turner, *International Law and the Brezhnev Doctrine* (Lanham: University Press of America, 1987).

commitment to self-determination whose contradictions US critics identified with little difficulty. The Soviets officially championed self-determination, including the right to secede, resist foreign administration, and establish an independent national state – so long as this did not apply within the borders of the Soviet Union and its allies. The limitations of their position were also evident beyond the North Atlantic geopolitical context: as early as the mid-1950s, Moscow supported Afghan claims to areas of US-allied Pakistan that were inhabited by Pashtuns while resisting calls for a plebiscite in Kashmir due to fears that India might thereby lose the territory.[99]

During the negotiations for the Friendly Relations Declaration, Asian, African, and Latin American states drew upon arguments worked out within this tradition of socialist internationalism. Among other things, they did so as part of their effort to ground individual rights in collective rights. As early as 1952, in discussions for what would eventually become the two human rights covenants of 1966, developing states rejected what Pakistani economist and stateswoman Ra'ana Liaquat Ali Khan described as 'the wrong notion that there was an inherent conflict between the right of self-determination and the exercise of individual rights', preferring the view that 'it was only when people were in enjoyment of the right of self-determination that unfettered exercise of fundamental rights and freedoms was at all possible'.[100] This position found favour among socialist and Third World delegates to the negotiations, as did the view that the right of self-determination did not expire with the moment of independence but was instead crucial to combatting ongoing intervention and 'neo-colonialism'.[101] Upholding self-determination beyond the moment of independence was to a significant degree about

[99] Elliot R. Goodman, 'The Cry of National Liberation: Recent Soviet Attitudes toward National Self-Determination', *International Organization* 14 (1960), 92, at 104–5. On Soviet development programs in central Asia as models for Moscow's engagement with Afghanistan and the subcontinent, see Artemy M. Kalinovsky, 'Not Some British Colony in Africa: The Politics of Decolonization and Modernization in Soviet Central Asia, 1955–1964', *Ab Imperio* 2013 (2013–II), 191, at 204; and also Artemy M. Kalinovsky, *Laboratory of Socialist Development: Cold War Politics and Decolonization in Soviet Tajikistan* (Ithaca: Cornell University Press, 2018).

[100] Begum Liaquat Ali Khan, 'United Nations and the Self-Determination of Peoples', *Pakistan Horizon* 6 (1953), 10, at 12.

[101] See, for example, Report II, paras. 480, 482. On 'neo-colonialism', see, for example, Report II, para. 483; Report III, para. 188; Report IV, paras. 105, 179; Report V, para. 161. The term's popularity derived largely from Kwame Nkrumah's *Neo-Colonialism: The Last Stage of Imperialism* (New York: International Publishers, 1965).

defending every people's sovereign right to adhere to developmental programs and legal, political, and economic systems of its own choosing.

Third World and socialist delegates maintained that self-determination vested in – and could therefore be asserted and exercised by – 'all peoples'.[102] Notably, though, the content of the important 'all' was not spelled out. It was therefore common to hear complaints that 'use of expressions like "all people have the right to self-determination" could raise almost insuperable practical difficulties'.[103] Soviet delegates, working with their Czechoslovak, Polish, and Romanian counterparts, attempted to lend slightly greater precision to the expression with expansionary adjectives: '[a]ll peoples, large and small'.[104] But this did not attract general approval. Many delegations were of the view that no generally accepted definition for 'people' was available.[105] A number sought to limit self-determination to conditions of 'alien domination or colonial rule'.[106]

When all was said and done, most participants in the negotiations were keen to adopt language derived from the 1960 decolonization resolution that prohibited actions threatening 'partial or total disruption of the national unity and territorial integrity' of other states (or, in an alternate formulation, the 'integrity of their national territory').[107] This went to the core of the question of secession, which most delegates were determined to restrict in order to preclude the kind of irredentism and internecine conflict that might otherwise lead to 'fragmentation, disintegration and dismemberment'.[108] The desire to limit the ambit of self-determination sometimes made itself felt in opaque distinctions between 'genuine self-determination and secession in the guise of self-determination',[109] as well as *uti possidetis*-style claims about the need to preserve

[102] Report II, paras. 457 (Czechoslovakia), 458 (Algeria, . . .), 492; 492; Report III, paras. 172 (Czechoslovakia), 177 (Algeria, . . .), 196; Report IV, paras. 135 (Czechoslovakia), 136 (Algeria, . . .), 140 (Algeria, . . .); Report V, paras. 138 (Czechoslovakia), 139 (Algeria, . . .), 143 (Algeria, . . .), 145 (Czechoslovakia, Poland, Romania, USSR), 156.

[103] Report II, para. 494.

[104] Report V, para. 145 (Czechoslovakia, Poland, Romania, USSR).

[105] Report III, para. 194.

[106] Report III, paras. 195.

[107] Report II, paras. 458 (Algeria, . . .), 502; Report III, paras. 176 (UK), 177 (Algeria, . . .), 225; Report IV, paras. 136 (Algeria, . . .), 139 (UK), 140 (Algeria, . . .), 190; Report V, paras. 139 (Algeria, . . .), 142 (UK), 143 (Algeria, . . .), 145 (Czechoslovakia, Poland, Romania, USSR), 179.

[108] Report VI, para. 219 (India).

[109] Report II, paras. 486, 484–86 more generally.

national unity and forestall border conflicts.[110] While they underscored territorial integrity just as much as their socialist and nonaligned counterparts, the British and American proposals had a proviso: governmental authorities and institutions in the state had to be 'representative' of the entire population of the territory over which self-determination was exercised. In the event that some form of minimally satisfactory 'representative government' was in place, the principle of equal rights and self-determination would be regarded as having been protected. Both proposals noted that this government 'effectively function[s] as such to all distinct peoples within its territory', and both observed that 'self-government' could manifest in a number of political and institutional arrangements, from the creation of an independent state through 'free association' with an existing state to de jure integration into another state.[111]

The debate about how to define 'self-determination' assumed that it was possible to do so with some definitiveness – and that a catch-all definition was worth pursuing. Such concerns were not limited to the issue of self-determination. During discussions about what would become the declaration's third principle, some delegates suggested that it was preferable not to attempt a definition of 'intervention' at all. It was a fluid concept, and such efforts would only impede international cooperation. It was impossible, at any rate, to transform every piece of useful political rhetoric into legal doctrine.[112] Similarly, in the context of the sixth principle, which concerned sovereign equality, the committee split between those who held that sovereignty was a social fact that preceded

[110] See, for example, Report IV, para. 164. The *uti possidetis* idea played an important tole in nineteenth-century independence struggles and frontier disputes in Latin America. See Alexandre [Alejandro] Alvarez, *Le droit international américain: son fondement – sa nature: d'après l'histoire diplomatique des États du Nouveau Monde et leur vie politique et économique* (Paris: Pedone, 1910), 65–66; also Fisch, *Right of Self-Determination*, 77–81, 91–99, 104. The OAU formally affirmed *uti possidetis* in mid-1964, roughly a year after its own establishment; see Border Disputes among African States, OAU Doc. AHG/Res. 16(I) (21 July 1964).

[111] Report II, para. 459 (US); Report III, para. 176 (UK); Report IV, paras. 137 (US), 139 (UK); Report V, paras. 140 (US), 142 (UK). I give the US formulation here; the UK formulation is only slightly different.

[112] Report I, para. 231. For the argument that the declaration 'brought little to the elaboration of the normative content of the principle', though it did confirm its existence and acknowledge 'other means of interference – political, economic or otherwise', see Georges Abi-Saab, 'Some Thoughts on the Principle of Non-Intervention', in *International Law: Theory and Practice – Essays in Honour of Eric Suy*, ed. Karel Wellens (The Hague: Nijhoff, 1998), 225, at 227.

and preconditioned international law and those who followed the Permanent Court of International Justice's decision in the *Wimbledon* case, arguing that states may limit their freedom of action by incurring international legal obligations without thereby curtailing or weakening their sovereignty.[113] The result, rather predictably, was that no language dealing satisfactorily with the relationship between state sovereignty and international law found its way into the declaration.

The compromise that was eventually registered in the Friendly Relations Declaration's fifth principle canonized a vision of world order in which self-determination was useful mainly as a way of achieving and consolidating states that would be responsive to the claims of (some but not all) 'peoples'.[114] Providing 'the cornerstone of the United Nations approach to the concept',[115] the final text of the fifth principle underscored the need to 'promote friendly relations and co-operation among States' and 'bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned'. It also reminded its readers that 'alien subjugation, domination and exploitation' violated both self-determination and fundamental human rights, not to mention the Charter. These were the matters Abi-Saab had in mind when writing that 'the Third World scored some major points', with 'Western powers as a whole for the first time recogniz[ing] self-determination as a legal right and its denial as a violation of the Charter'.[116] Following British and American suggestions, the fifth principle's text also stressed that the right of self-determination could be operationalized through a number of different means: the establishment of an independent sovereign state; free association with or integration into an existing state; or the 'emergence into any other political status freely determined' by the people in question. Incorporating language from the British proposal, it anchored the generality of self-determination in the generality of human rights, proclaiming that '[e]very State has the duty to promote through joint and separate action universal respect for and observance of human rights and

[113] Report II, paras. 384–88. In the *Wimbledon* case, the World Court had stated that 'the right of entering into international engagements is an attribute of State sovereignty'. *Case of the S. S. 'Wimbledon' (Britain et al. v. Germany)*, PCIJ Rep. Series A No. 1 (1923), 25.

[114] References in this and the following paragraph are to the Friendly Relations Declaration, princ. 5.

[115] White, 'Self-Determination', 147.

[116] Georges Abi-Saab, 'The Third World and the Future of the International Legal Order', *REDI* 29 (1973), 27, at 43, 46, also 48.

fundamental freedoms in accordance with the Charter'. The declaration did not explicitly provide for a right to use force to resist colonialism or occupation – but it denounced forcible acts to deprive peoples of their right to self-determination, and upheld their right to seek and receive assistance in the face of such force. It also affirmed that territories held under formal or informal colonialism were possessed of a distinct status and therefore incapable of being absorbed legally into the territory of the administrating state.

Finally, and most importantly, the declaration rejected attempts to 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. All states were under a positive obligation to forbear from actions that would result in 'the partial or total disruption of the national unity and territorial integrity of any other State or country'. This 'safeguard clause', as committee delegates themselves termed it,[117] built upon the 1960 decolonization resolution. In 1960, the General Assembly had repudiated '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country'.[118] Now it did so for any state with a government that was representative of the territory's 'whole people', irrespective of 'race, creed or colour'.[119] Although premised upon a logical circularity,[120] the declaration's fifth principle has since been affirmed on a number of occasions,[121] and has typically been taken to mean secession or state

[117] See, for example, Report VI, paras. 78, 150 (France), 177 (Canada), 261 (US).

[118] GA Res. 1514 (XV), para. 6.

[119] On the difference, see Frederic L. Kirgis Jr, 'The Degrees of Self-Determination in the United Nations Era', *AJIL* 88 (1994), 304, at 305–6, 308.

[120] '[I]n order to determine whether a given collectivity escapes the interdiction on impairing political unity, one would first have to determine whether the government of the encompassing State, which is denying the dismemberment, is really "conducting itself in compliance with the principle of equal rights and self-determination" – which in turn requires prior determination of whether the collectivity does indeed hold a right to the action it seeks, in circular fashion'. David Makinson, 'Rights of Peoples: Point of View of a Logician', in *The Rights of Peoples*, ed. James Crawford (Oxford: Clarendon Press, 1988), 69, at 77.

[121] See esp. United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993, 32 ILM 1661, at 1665. Cf. James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden: Nijhoff, 2007), 332 ('[t]he normal response in

fragmentation, while permitted, is limited to exceptional circumstances. Related to it was the implication that the right to self-determination was capable of being exercised only once, at least inasmuch as 'representative government' was available. This implication found expression in language to the effect that colonial and non-self-governing territories enjoyed a 'separate and distinct' legal status until such time as their inhabitants exercised their right of self-determination.

In January 1970, roughly a half year before the declaration's formal adoption, UN Secretary-General U Thant warned of the dangers of secession when asked about the ongoing Biafran War, making explicit reference to UN efforts to prevent Katanga's attempt to break away from the newly established Republic of the Congo in the early 1960s.[122] 'As an international organization', he said, 'the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State'.[123] While the declaration did not go so far as to outlaw secession as such, it lent formal legitimacy to efforts to contain it. As the Americans stressed during the final round of negotiations, independent statehood was not always the singular and necessary outcome of self-determination.[124]

If the declaration showcased the extent to which self-determination is a product of far-reaching contestation, it also demonstrated the extent to

international instruments has been for an article on self-determination to be accompanied with provisions on the territorial integrity of states').

[122] For international legal analysis of the former, see T. O. Elias, 'The Nigerian Crisis in International Law', *Nigerian Law Journal* 5 (1971), 1; David A. Ijalaye, 'Was "Biafra" at Any Time a State in International Law?', *AJIL* 65 (1971), 551; J. N. Saxena, *Self Determination: From Biafra to Bangla Desh* (Delhi: University of Delhi, 1978), chs. 2, 4. For the latter, see esp. Thomas M. Franck and John Carey, *The Legal Aspects of the United Nations Action in the Congo* (Dobbs Ferry: Oceana for the Association of the Bar of the City of New York, 1963); Georges Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (Oxford: Oxford University Press, 1978). For recent discussions see Samuel Fury Childs Daly, *A History of the Republic of Biafra: Law, Crime, and the Nigerian Civil War* (Cambridge: Cambridge University Press, 2020); Alanna O'Malley, *The Diplomacy of Decolonisation: America, Britain and the United Nations during the Congo Crisis 1960–1964* (Manchester: Manchester University Press, 2018).

[123] 'Secretary-General's Press Conferences' [4 January 1970], *UN Monthly Chronicle* 7 (1970), 34, at 35–37 (quotation at 36). More than two decades later, another occupant of this office would remark that 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve'. Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc. A/47/277–S/24111 (1992), para. 17.

[124] Report VI, para. 268 (US).

which its crystallization in international law channelled transnational solidarity into the prism of national sovereignty, limiting the more innovative modes of political mobilization engendered by the postwar project of decolonization. Absolutist theories of sovereignty may have lost much of their appeal, but it was delusional, many delegates stressed, to subscribe to theories of 'world law' and 'world government', just as it was hard to believe that self-determination knew no limits.[125] Radical cosmopolitanism was impractical. No state could survive in total isolation,[126] but most agreed that state sovereignty remained international law's foundation and *raison d'être*.[127]

The special committee aspired to achieve unanimity, or at least common ground, rather than relying on majority votes, which would have permitted the nonaligned states (with or without socialist states) to control the proceedings.[128] Its decisions on self-determination were therefore marked by considerable imprecision, with elastic wording encouraging a high degree of interpretational flexibility. Delegates did not simply object to specific terms and phrases in proposals they opposed. They also emphasized the essentially contested character of even the most basic concepts, such as 'justice' and 'negotiation'.[129] But this invited the tactical move known to some UN diplomats at the time as the 'defusing' of the text: precluding the inclusion of terms inimical to the interest of particular states, or pitching those terms at such a high level of abstraction that they turn into vague platitudes affirming the existing order.[130] Ultimately, this made it easier for the General Assembly to adopt the resolution without a vote, the first major resolution concerning self-determination to be adopted by consensus and therefore without abstentions.[131]

[125] Report I, para. 337.
[126] Report II, para. 422.
[127] Report I, para. 337.
[128] Speaking on behalf of nonaligned states as a whole, the Lebanese delegation explained that they had refrained from using the full procedural powers at their disposal but that they reserved the right to do so. See Report II, para. 571. On these procedural questions see further Report II, paras. 37, 350 (Sweden), 352 (US).
[129] See, for example, Report II, paras. 182–83, 200.
[130] Arangio-Ruiz, *UN Declaration*, 28.
[131] GA Res. 1514 (XV), by comparison, attracted nine abstentions, all but one from advanced capitalist states (Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, UK, US). The point is examined in Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988), 71, also 96–99.

In 1950, Alf Ross, the Danish jurist associated with the Scandinavian school of legal realism who would go on to be a judge of the European Court of Human Rights,[132] had underscored the indeterminacy of the rhetoric of 'peoplehood' in the UN Charter, writing that it is 'quite impossible to define by any precise or rational criterion the group to which this right should belong'.[133] Rather than resolving that ambiguity, the 1970 declaration gave further life to it. What was decidedly *not* ambiguous about its vision of self-determination, however, was its commitment to state-centrism. Bangladeshi international lawyer Subrata Chowdhury would merely echo the views of many others when he argued a few years later that according a right of self-determination to every 'people' on the basis of racial identity, confessional affiliation, or another criterion like linguistic practice would provoke unending fragmentation, a problem that 'will become particularly acute in Asia and Africa where infinitesimally small dialectical groups would clamour for an independent State'.[134] '[W]here', he asked, 'will one stop?'[135] Notwithstanding Bedjaoui's claim in the 1975 *Western Sahara* proceedings that '[i]t is the people [*la population*] which decides the fate [*décide du sort*] of the territory and not the territory which decides the fate [*tranche le destin*] of the people [*la population*]', self-determination being 'the cardinal principle of contemporary international law' and even a 'superior norm' that qualified as *jus cogens*, the territorial configuration of a formally decolonized world marked the outer limit of self-determination's reach.[136]

* * *

[132] Alejandro Lorite Escorihuela, 'Alf Ross: Towards a Realist Critique and Reconstruction of International Law', *EJIL* 14 (2003), 703, as well as the other Ross-related articles in the same issue.

[133] Alf Ross, *Constitution of the United Nations: Analysis of Structure and Function* (New York: Rinehart & Co., 1950), 135.

[134] Subrata Roy Chowdhury, 'The Status and Norms of Self-Determination in Contemporary International Law', *NILR* 24 (1977), 72, at 76.

[135] Chowdhury, 'Status and Norms', 76.

[136] 'Exposé oral de M. Bedjaoui, représentant du Gouvernement algérien', ICJ Pleadings, *Western Sahara*, vol. 5, at 303, 309, 320. This language was repeated, with only minor modifications, in Judge Dillard's separate opinion in the case. *Western Sahara*, Advisory Opinion, [1975] ICJ Rep. 122 (separate opinion of Judge Dillard): 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people.' Rosalyn Higgins suggested that the dictum, while attractive and oft-quoted, is hampered by a crucial ambiguity: it is unclear whether the statement grants such weight to self-determination that no pre-colonial 'legal ties', even those rising to the level of sovereignty, would have been enough for Morocco or Mauritania to make out its case.

In 1960, casting a sideways glance at the disintegration of European empires from the privilege of his enclave in Oxford, John Plamenatz, the political philosopher whose family had fled Montenegro during the First World War, offered something of a theory of decolonization. Among the various 'criteria of capacity for self-government' he discussed was one concerning international law: 'We may say that a country is capable of self-government', he wrote, 'when it can produce native rulers strong enough and responsible enough to respect international law'.[137] Plamenatz knew little international law and does not appear to have understood his criterion of responsibility to mean much aside from being a 'tolerable neighbour' that abides by 'certain rules in its dealings with other governments ... [and] foreigners within its own territory'.[138] But he was also keen to note that 'narrower loyalties to clan or community or religion or "race" have got in the way of broader loyalties to the nation newly emerging largely as a result of European intrusion', so that 'these narrow loyalties may get the better of nationalism or even may use it as a cloak'.[139] Whatever else it may have been, decolonization could not be allowed to devolve into internal struggle. This would jeopardize international order. Self-determination might be tolerated, even encouraged, but only so far and only inasmuch as it was conditioned upon prior commitment to the state system.

Plamenatz belonged to a British establishment insecure about having been overtaken by its US counterpart but not entirely displeased to have freed itself from the increasingly costly business of maintaining far-flung colonies. Yet such ambivalence was not limited to elites in advanced capitalist countries such as Britain. If anything, they were often felt with greater intensity among international lawyers hailing from newly independent states or involved in national liberation movements. A mere three years after Plamenatz's observations about nationalism appeared in print, Doudou Thiam, a lawyer who was then serving as Senegal's foreign minister and who would later become a member of the ILC, argued that '[a]ll the African states are animated by two movements, forces and

Rosalyn Higgins, 'Judge Dillard and the Right to Self Determination', *VJIL* 23 (1983), 387, at 390ff.

[137] John Plamenatz, *On Alien Rule and Self-Government* (London: Longmans, Green & Co., 1960), 40 (de-emphasized from original).

[138] Plamenatz, *Alien Rule*, 40, 42.

[139] Plamenatz, *Alien Rule*, 86.

aspirations pulling simultaneously in opposite directions – micro-nationalism and pan-Africanism'.[140] Among other things, Thiam suggested, this was one of the reasons why federalist association with metropolitan states, a popular idea in the early stages of decolonization,[141] had largely proven unworkable in practice.[142]

The debate about self-determination during the negotiations for the 1970 declaration – an instrument Anand and others saw as the legal culmination of Nehru's *Panchsheel*[143] – gave expression to the overlapping commitments to statist nationalism and solidaristic internationalism that marked so much of the struggle to forge a new international law distinguished by universalism and inclusiveness.[144] For many delegates, securing the right to self-determination was a duty of solidarity owed to the international community as a whole, colonialism being fundamentally opposed to the letter and spirit of the Charter.[145] A solidaristic

[140] Doudou Thiam, *The Foreign Policy of African States: Ideological Bases, Present Realities, Future Prospects* (London: Phoenix House, 1965 [1963]), 19. See further Doudou Thiam, 'L'Afrique demande un droit international d'un nouveau', *Verfassung und Recht in Übersee* 1 (1968), 52.

[141] See, for example, Frederick Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945–1960* (Princeton: Princeton University Press, 2014); Gary Wilder, *Freedom Time: Negritude, Decolonization, and the Future of the World* (Durham: Duke University Press, 2015); Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton: Princeton University Press, 2019), ch. 4.

[142] Thiam, *Foreign Policy*, 5. French West Africa-style colonial-era federal structures encouraged many newly decolonized states to form regional federations, such as the Guinea–Ghana Union (promised by the unimplemented 1959 Conakry Declaration), the 1959 Sahel–Benin Union, and the 1959–60 Mali Federation. Some of these attempts bore fruit, in the long if not the short run. The Customs and Economic Union of Central Africa, formed in 1964, laid the foundations for today's Economic Community of Central African States. Efforts to craft an East African Federation stalled in the early 1960s, but have been revived in recent years.

[143] R. P. Anand, 'Editor's Introduction', in *Asian States and the Development of Universal International Law*, ed. R. P. Anand (Delhi: Vikas, 1972), xi, at xxi. See also John N. Hazard, 'The Sixth Committee and New Law', *AJIL* 57 (1963), 604, at 605ff; Edward McWhinney, 'The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Co-operation Among States', *AJIL* 60 (1966), 1, at 2; M. Mushkat, 'The African Approach to Some Basic Problems of Modern International Law', *IJIL* 7 (1967), 335, at 337–38; Stefan Friedländer, 'Die völkerrechtliche Stellung der Pancha Shila und der Bandung-Prinzipien im Ringen um Frieden und Sicherheit', *Asien, Afrika, Lateinamerika: Zeitschrift des Zentralen Rates für Asien-, Afrika- und Lateinamerikawissenschaften in der DDR* 7 (1979), 855, at 858.

[144] On the themes of inclusion and universalism, see, for example, Report I, para. 321.

[145] Report II, para. 505.

world was one organized around duties as well as rights, one in which defending self-determination was a matter not simply of hard-nosed egoism but of universal emancipation. Gone were the days when self-determination could plausibly be dismissed as a postulate of only moral or vaguely political significance.[146] Insofar as the Friendly Relations Declaration was regarded by many at the time as 'perhaps the most important item ever discussed by the Sixth Committee of the General Assembly',[147] this was because it affirmed an international order of states that was less about self-determination than it was about sovereignty. What the Soviet delegation presented as a universalizing tendency had won out.[148] But self-determination was anything but universal in reach, having been co-opted and resignified as an additional means of reinforcing states, many founded and still controlled by European settlers.[149]

Although the UN Charter referred to the 'self-determination of peoples', it did not define either term, 'self-determination' or 'peoples', and its drafting history offered little evidence that they were understood to entail robust rights of secession or independence.[150] Tasked with working up a definition of self-determination equipped to feed the growth of 'friendly relations' in light of the 1960 resolution and other instruments, the special committee quickly found itself confronted with the fact that the conceptual architecture of self-determination is a source of multiple and often mutually antagonistic modes of social mobilization. Those committed to 'revolutionary' conceptions of self-determination managed to have some language supportive of their views inserted into the declaration. Those determined to tether self-determination to a fundamentally statist logic also gained satisfaction from the final wording, especially since statehood was conjoined to respect for 'human rights and fundamental freedoms'. Crucially, though, nearly all delegates took comfort in the inclusion of language relating to the 'territorial integrity or political unity of sovereign and independent States'. Self-determination found its way into the declaration's final text, adopted

[146] Report III, para. 182.
[147] Report I, para. 16.
[148] Report II, para. 577 (USSR).
[149] Cf. Bradley R. Simpson, 'Self-Determination, Human Rights, and the End of Empire in the 1970s', *Humanity* 4 (2013), 239, at 243; Joseph Massad, 'Against Self-Determination', *Humanity* 9 (2018), 161, at 173–74.
[150] Cf. Cassese, *Self-Determination of Peoples*, 41 (characterizing the inclusion of 'we the peoples' in the text as 'rather hypocritical and misleading').

twenty-five years after the UN Charter,[151] but this was only because of the negotiators' acquiescence in a formula abstract and qualified enough to allow all sides to claim a measure of victory, knowing full well that none had actually done so and that no victory was truly to be had here. Self-determination was everywhere – and also nowhere at all. The resonance of what Canadian-American international lawyer Percy Corbett had once described as 'the inscrutable majesty of the State', upheld by 'a sort of *camaraderie* among governments', was more powerful than ever.[152] Whatever exactly 'self-determination' might mean, the concept's usefulness was both limited and amplified by its deep-seated ambiguity, its ability to act as a juridical conduit for both state power and those who would contest and seek to supplant it.

Scholars of decolonization have catalogued the textual markers that punctuate self-determination's transformation from a potent but nebulous form of political rhetoric, widely associated with the compromises and double standards of great-power politics, to a globally resonant if no less amorphous 'right' of positive international law, enshrined in a litany of instruments in the years after the 1945 San Francisco Conference. Few inventories of this type elide the Friendly Relations Declaration. Though generally regarded as nonbinding, and therefore of no more than hortatory value,[153] the declaration has proven unusually influential among international lawyers, with its language and basic terms finding a home in a number of countries' constitutions.[154] Yet for all the time and energy poured into producing this resolution, self-determination remains a right

[151] Report VI, paras. 96 (Chile), 158 (Yugoslavia), 238 (Japan). See further Report VI, para. 109 (Venezuela).

[152] P. E. Corbett, *Law and Society in the Relations of States* (New York: Harcourt, Brace & Co., 1951), 60 (original emphasis).

[153] This debate also unfolded during the process of negotiating the declaration; see, for example, Report IV, para. 147; Report V, para. 147; Report VI, para. 200 (Australia). For the view that the 1970 declaration should be understood as an authoritative interpretation of the UN Charter, and therefore as legally binding or at least quasi-binding, see Chowdhury, 'Status and Norms', 73; Tunkin, *Theory*, 175–76; Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *AJIL* 65 (1971), 713, at 714–15; T. O. Elias, *New Horizons in International Law* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1979), 13.

[154] Often in combination with *Panchsheel* principles or calls for a 'new' or more 'just' international economic order, as in the constitutions of many lusophone and Latin American countries. See, for example, Constitution of Angola, Art. 12; Constitution of Brazil, Art. 4; Constitution of Cape Verde, Art. 10; Constitution of Cuba, Art. 16; Constitution of Ecuador, Art. 416; Constitution of Guinea-Bissau, Art. 18; Constitution of Lao People's Democratic Republic, Art. 12; Constitution of Mexico, Art. 89; Constitution

(or 'principle') whose scope is murky, content imprecise, and application inconsistent. The declaration might have been 'successful' for the Eritreans, East Timorese, Kosovars, South Sudanese, and Bangladeshis, the last achieving independence from Pakistan after a multifront war shortly after it was adopted. But it has clearly 'failed' the Kurds, Palestinians, Uyghurs, and Western Saharans, not to speak of the Biafrans, Katanganese, and Somalis of northeastern Kenya, whose rebellions were suppressed and who were therefore unable to secure the kind of 'effective control' generally used to justify the extension of de jure recognition.[155] Similarly, to the extent that ancillary instruments like the 1976 Universal Declaration of the Rights of Peoples, which stressed self-determination's inalienability, have had any effect at all, their influence has been confined mainly to 'civil society' initiatives like the Permanent Peoples' Tribunal, which has considered Soviet involvement in Afghanistan, US intervention in central America, and many other matters.[156]

of Paraguay, Art. 143; Constitution of Portugal, Art. 7; Constitution of Timor-Leste, Art. 8.

[155] Deriding the 1966 covenants' assurances of self-determination for 'all peoples', one scholar invited his readers 'to consult the Germans, Koreans, and Vietnamese; the Biafrans or Ibos, the south Sudanese, the Baltic peoples, the Formosans, the Somalis, and the Kurds and Armenians'. Rupert Emerson, 'Self-Determination', *AJIL* 65 (1971), 459, at 463. Another wrote that '[d]ue to this stricture concerning territorial integrity, self-determination absurdly, but still logically enough, was a right which existed for the eighty odd inhabitants of Pitcairn Island, but not for the millions of Biafrans'. Michael M. Gunter, 'Self-Determination in the Recent Practice of the United Nations', *World Affairs* 137 (1974), 150, at 152. On the vagaries of recognition in cases of rebellion and revolution, see further A. C. Bundu, 'Recognition of Revolutionary Authorities: Law and Practice of States', *ICLQ* 27 (1978), 18.

[156] Universal Declaration of the Rights of Peoples, Art. 5, signed 4 July 1976, available at www.algerie-tpp.org/tpp/en/declaration_algiers.htm. On this and other initiatives see François Rigaux, 'The Algiers Declaration of the Rights of Peoples', in *UN Law/Fundamental Rights: Two Topics in International Law*, ed. Antonio Cassese (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979), 211, at 213; Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier, 1981), ch. 7 (a revised version of 'The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights', in *UN Law/Fundamental Rights: Two Topics in International Law*, ed. Antonio Cassese (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979), 225); Richard Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)', in *The Rights of Peoples*, ed. James Crawford (Oxford: Clarendon Press, 1988), 17, at 27–31; Cassese, *Self-Determination of Peoples*, 296–302; Gianni Tognoni, 'The History of the Permanent Peoples' Tribunal', in *Peoples' Tribunals and International Law*, ed. Andrew Byrnes and Gabrielle Simm (Cambridge: Cambridge University Press, 2018), 42.

Australian-British international lawyer James Crawford is often cited for his claim that '[t]he problem with self-determination, outside the colonial context, is [that] while authoritative sources speak to its existence, it is an intensely contested concept in relation to virtually every case where it is invoked'.[157] But his more important observation was that '[d]uring the period 1945–89 there was hardly a single case of the successful breakaway of a state outside the colonial context; the only example (and that, quasi-colonial) was Bangladesh'.[158] In many cases, as with Tibetans in China and Tamils in Sri Lanka, self-determination projects have largely failed even when limited to a right to recognition or representative government ('internal self-determination') rather than a fully fledged right of remedial secession ('external self-determination').[159] Ironically, where 'new states' have instituted mechanisms of subnational autonomy, they have often done so to augment the power and legitimacy of central state authorities,[160] as well as to deflect the kind of critical attention that sometimes marked the administration of territories as trusts.[161] Despite claims that self-determination, as articulated in the Friendly Relations Declaration and other instruments, did not end with the moment of

[157] James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in *Peoples' Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2001), 7, at 38.

[158] Crawford, 'Right of Self-Determination', 24. For an attempt to explain why Bangladesh succeeded, see M. Rafiqul Islam, 'Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh', *Journal of Peace Research* 22 (1985), 211.

[159] '[T]he right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.' *Reference re Secession of Quebec*, [1998] 2 SCR 217, at 282, para. 126 (with a lengthy accompanying quotation from the Friendly Relations Declaration). Such claims are sometimes related to the current (but not necessarily future) state of the law; see, for example, Simone F. van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (Antwerp: Intersentia, 2013), 310–11. Interestingly, Canada rehearsed a prototype of its apex court's position during the declaration's negotiations; see Report VI, paras. 176–77 (Canada).

[160] Yonatan Fessha and Coel Kirkby, 'A Critical Survey of Subnational Autonomy in African States', *Publius: The Journal of Federalism* 38 (2008), 248.

[161] For comparison of the cases of South West Africa and Nagaland, where India suppressed nationalist claims, see Lydia Walker, 'Decolonization in the 1960s: On Legitimate and Illegitimate Nationalist Claims-Making', *Past & Present* 242 (2019), 227.

independence,[162] the political results have been disappointingly meagre.

If the project of revolutionizing the international legal order through a bolstered 'norm' of self-determination ended in failure, this is not least because it was premised upon a desire to subordinate self-determination's messy unpredictability to the institutional and organizational machinery of the interstate system. It may generally have been situated at the peak of the tripartite typology of rights offered by Czech-French jurist Karel Vasak in 1977, a key 'right of solidarity' in what he conceived as a 'third generation' of human rights.[163] But the right of peoples to self-determination was ambiguous to a fault, save only for the clarity of its deference to state power – that is, its role in subordinating the interests of 'captive nations' to those of 'captive States'.[164] When its reference to self-determination is invoked today, the 1970 declaration is often remembered as signalling self-determination's subsumption to the international state system.[165] Over forty new states had come into being during the 1960s. A world marked by such rapid and thoroughgoing change needed to be stabilized, and this could be achieved only if the internationalization of nationalism was halted at the border of the decolonized state, at least so long as it satisfied the minimal standard of providing a 'representative government'. This was the world of the Friendly Relations Declaration.

[162] See, for example, Ved P. Nanda, 'Self-Determination under International Law: Validity of Claims to Secede', *Case Western Reserve Journal of International Law* 13 (1981), 257, at 268–71; Michael K. Addo, 'Political Self Determination within the Context of the African Charter on Human and Peoples' Rights', *Journal of African Law* 32 (1988), 182, at 187.

[163] The typology was rendered in French terms, with the 'first', 'second', and 'third' generations corresponding to *liberté*, *égalité*, and *fraternité* respectively. See Karel Vasak, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *UNESCO Courier* 30 (1977), 29; also Stephen P. Marks, 'Emerging Human Rights: A New Generation for the 1980s?', *Rutgers Law Review* 33 (1981), 435, at 440–41. It took on a chromatic tenor, with blue succeeded by red and finally green, in Johan Galtung, 'What Kind of Development and What Kind of Law', in International Commission of Jurists, *Development, Human Rights and the Rule of Law: Report of a Conference Held in The Hague on 27 April–1 May 1981* (Oxford: Pergamon, 1981), 121. For critical assessment see Roland Rich, 'The Right to Development: A Right of Peoples?', in *The Rights of Peoples*, ed. James Crawford (Oxford: Clarendon Press, 1988), 39, at 40–43; Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015), ch. 3.

[164] Falk, 'Rights of Peoples', 23–27.

[165] Cf. Philip Alston, 'Peoples' Rights: Their Rise and Fall', in *Peoples' Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2001), 259, at 273.