The evolution of the right of self-determination : A study of United Nations practice

By A. Rigo Sureda.

THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION

A study of United Nations Practice

by

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A. W. SIJTHOFF – LEIDEN – 1973

ISBN 90 286 01031

Library of Congress Catatalog Card Number: 72-97282

Printed in the Netherlands.

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FOREWORD

A great deal has been written on self-determination but hardly anything from a legal point of view. International lawyers either consider the subject too political to warrant serious legal study, or adopt a broad and generalised approach which, in fact, substantiates the criticism of self-determination as too vague a concept to give it legal status. Furthermore, there is in the international legal tradition a strong bias in favour of assimilating transfers of territory between states to the transfers of land regulated by municipal law. The human side of the picture is entirely forgotten when not dismissed as irrelevant. This attitude represents a survival of feudal ideas, and a refusal to take into account the changes which have occurred since the French Revolution in the equation territory-people-government. It is the purpose of this work to show the obsolescence of such attitudes after twenty-five years of state and United Nations practice to the contrary, and to prove through this practice the consolidation, within certain limits, of a right of peoples to self-determination as a legal right.

As regards the contents of this study, two things may strike the reader as missing. One, a greater concern with political realities; the other, the exclusion of cases such as Kashmir, Katanga, Biafra and Bangladesh. Concerning the first omission, the political context is precisely what has been covered by existing studies on

self-determination: this study has concentrated on the legal aspects previously neglected. In relation to the cases omitted, for compelling reasons of space it was necessary to deal only with cases in which colonies were involved. It is true that the cases mentioned above are themselves a result of the decolonisation process, and they show the shortcomings of the role of the United Nations in furthering the application of self-determination outside the strictly "colonial" areas. It should also be noted that, in selecting cases, special emphasis has been placed on those where conflicting claims challenged the delimitation of the "people" entitled to self-determination. Indeed, the way in which such claims were handled offers invaluable evidence when it comes to ascertaining the criteria used to determine the subject of this right. Such a preference accounts for the lack of a separate study on Namibia, where the issue is mainly one of competence rather of delimiting who is entitled to self-determination.

Finally, it has been impossible -except for a few minor instances- to cover events happening after spring 1971.

February 1973 A.R.S.

ACKNOWLEDGMENTS

I wish to express my sincere gratitude to Dr. D.W. Bowett, President of Queens' College, Cambridge, for his invaluable criticism and detailed suggestions during the two years and a half he supervised my research for the Ph.D. dissertation on which the present work is based, and for patiently correcting the "infelicities" -as he used to say- of my English style. I am also indebted to Professor R.Y. Jennings, of Jesus College, Cambridge, Dr. G. White, of Manchester University, and Dr. Rosalyn Higgins, of the Royal Institute of International Affairs, who read the manuscript and made useful comments. The views maintained as well as the shortcomings are mine alone.

On the financial side, I would like to thank the British Institute of International and Comparative Law, of which I was an Overseas Research Fellow during the years 1970-71 and 1971-72, and Trinity College, of the University of Cambridge, which in October 1971 elected me to a Senior Rouse Ball Research Studentship thus making it possible for me to prepare the thesis manuscript for publication.

LIST OF ABBREVIATIONS

a.i.	agenda item
A.J.I.L.	American Journal of International Law
A.F.D.I.	Annuaire Français de Droit International
B.Y.I.L.	British Yearbook of International Law
C.L.J.	Cambridge Law Journal
Cmd. or Cmnd.	United Kingdom Command Papers
col.	column
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
cttee.	committee
E.C.O.S.O.C.	United Nations Economic and Social Council
G.A.	General Assembly of the United Nations
G.A.O.R.	General Assembly Official Records
gral.	general
H.C. Debates	Parliamentary Debates (Hansard), House of Commons Official Report
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
L.N.O.J.	League of Nations Official Journal
L.N.T.S.	League of Nations Treaty Series
mtg.	mtg.
N.Y.U.J. Int'l and Pol.	New York University Journal of International Law and Politics

para.	paragraph
P.A.S.I.L.	Proceedings of the American Society of International Law
P.C.I.J.	Permanent Court of International Justice
plen.	plenary
P.M.C.	Permanent Mandates Commission
Rec. des Cours	Recueil des Cours de l'Academie de Droit International
res.	resolution
R.G.D.I.P.	Revue Générale de Droit International Public
S.C.	Security Council of the United Nations
S.C.O.R.	Security Council Official Records
sess.	session
State Papers	British and Foreign State Papers
Suppl.	Supplement
T.C.	Trusteeship Council of the United Nations
T.C.O.R.	Trusteeship Council Official Records
U.N.	United Nations
U.N.C.I.O.	United Nations Conference on International Organisation. Documents.
U.N.I.T.A.R.	United Nations Institute for Training and Research
U.N.T.S.	United Nations Treaty Series
U.N.Y.B.	United Nations Yearbook
vol.	volume
Y.B.W.A.	Yearbook of World Affairs
W.H.O.	World Health Organisation

INTRODUCTION

1. Self-determination in historical perspective.[1]

The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French revolution: government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish. This meant that the territorial element in a political unit lost its feudal predominance in favour of the personal element: people were not to be any more a mere appurtenance of the land.

Self-determination in the context of the French Revolution is a democratic ideal valid for all mankind. It is an assertion of the rights of man against the tyranny of the "ancien régime". Thus self-determination had since the very beginning the character of a threat to the legitimacy of the established order, trying to substitute for it one with more equality. On the other

1. A. Cobban, The nation state and national self-determination (1969); S. Wambaugh, A monograph on plebiscites (1920) pp.1-33, and Plebiscites since the World War (1933) pp.2-45; R. Redslob, Histoire des grands principes du droit des gens (1923) pp.285-287, 318-328, 415-424, and 518-522, and "Le principe des nationalités", 37 Rec. des Cours (1931) vol.III pp.5-80. See also C. Parry, "The function of law in the international community" in Max Sørensen's (editor) Manual of Public International Law (1968) pp.18-19.

hand self-determination was also related to the principle of peaceful change: the corollary to popular sovereignty, that territorial transfers between sovereigns should not be carried out unless the people affected agreed, offered a method of settling disputes whereby the arbiter was the people themselves.

At first, the French revolutionaries consistently with their ideals renounced all wars of conquest and agreed to annexations of territory to France only after a plebiscite.[2] However, when they considered that their democratic ideals were threatened, they tried to impose them by force upon other peoples:[3] how could men choose not to be free?

The Congress of Vienna ignored the consent of the people as a basis for re-shaping the map of Europe after the Napoleonic wars, and the next step in the historic evolution of self-determination does not occur until 1848. Then

> "the conception of individual self-determination as a corollary of democracy (the proposition that 'Ruritanians have a right to choose to what state they shall belong') [shifted] to the conception of nationality as an objective right of nations to independent statehood (the proposition that 'the Ruritanian nation has a right to constitute itself an independent state'). The rights of man envisaged by the French revolution were transferred to nations."[4]

The Polish, Italian, Magyar and German peoples claimed self-determination, but so also did other nationalities -the Danes, Czechs, Ruthenians, Slovaks, Croats, and Slovenes- who lived in their midst. It thus became evident that the line must be drawn somewhere, and for

2. As in the cases of Savoie, Nice and Mayence.
3. As in the case of Belgium.
4. E.H. Carr, The Bolshevik Revolution (1917-1923) (1969) vol.I p.417 n.1.

the European liberal thought of the mid-nineteenth century the criterion was support of those claims to self-determination which threatened the Austro-Hungarian and Russian empires, which represented the forces of reaction, while denying support to the lesser nationalities who were considered anachronistic survivals of the past. Thus the Polish, Italian, Magyar and German claims were upheld and the rest of the claims dismissed.[5]

The result of the 1848 national movements was the formation of two new states on the basis of national characteristics; these were the states of Germany and Italy.[6] In the unification of the latter plebiscites played a large part,[7] and between 1885 and 1866 the use of the plebiscite to deal with territorial disputes was gathering support. S. Wambaugh describes the situation as follows:

> "[The method of popular consultations] adopted as their own by Prussia and the Germanic Confederation as the solution for the Schleswig question; adopted by the Congress of Paris of 1856, it grew rapidly in prestige and by 1859 had enlisted the almost undeviating adherence of three of the four leading statesmen of the time -Cavour, Russell, and Napoleon- and the temporary support of Bismark...; endorsed, though unsuccessfully, by the chief Powers at the Conference of London as the only solution for the Schleswig question; followed by Great Britain in her cession of the Ionian Islands to Greece; inserted in the treaty of Prague between Austria and Prussia -by 1886 the method of appeal to a vote of the inhabitants, either by plebiscite or by representative assemblies, especially elected, bode fair to establish itself as a custom amounting to law."[8]

5. Ibid. pp.416-417.
6. The claims of the Magyars and the Poles did not succeed until World War I broke out.
7. S. Wambaugh, A monograph on plebiscites (1920)p.10.
8. Ibid. p.1.

This process was stopped by Prussia when it annexed by force Hanover and Hesse (1866), Schleswig (1867) and Alsace-Lorraine (1871). The effect of these conquests was such that, except for minor exceptions,[9] self-determination did not come to the fore again until World War I. Indeed, in a war fought between empires, self-determination became a factor of great strategic value. The Central Powers were the first to realise it, and the Germans thought that, since the British empire was more heterogeneous than the German, a ruthless application of the principle of self-determination would produce a far more scattering explosion in the British territories than it would do in theirs.[10]

The Allies were at first reluctant to appeal to the principle of self-determination because they feared the effect that this would produce on the nationalities forming part of the Russian empire. This obstacle disappeared with the Russian Revolution, which itself affirmed the principle of self-determination.[11] The other important factor in changing the Allies' policies in this respect was the fact that the United States entered the war, and by then (the summer of 1917) the standing of President Wilson on the issue of self-determination was already known.[12] From then onwards it

9. After 1870 only two plebiscites were held: one in the island of Saint Bartholomew in 1877 between Sweden and France, the other in Norway in 1905 regarding separation from Sweden.

10. G. Murray, "Self-determination of nationalities", 1 Journal of the British Institute of International Affairs (1922) p.8. As indeed it did post 1945.

11. See Carr op.cit. pp.292-383 for a thorough analysis of the application of self-determination by the Soviets.

12. In an address before the League to Enforce Peace (May 27, 1916) he had said: "We believe these fundamental things: First, that every people has a right to choose the sovereignty under which they shall live..." (U.S. Congressional Record, vol.53, Pt.9, p.8854). And

was the Allies who championed the principle of self-determination. The British chargé d'affaires in Washington transmitted on October 31, 1916 a memorandum to the American Department of State setting forth views on the advisability of the general policy of granting provisional recognition to the national councils and other representative bodies of the smaller nationalities formerly part of the Russian empire, intending thus to stimulate their passive resistance under German occupation and to encourage them in their aims of self-determination.[13] Similarly, when Czechoslovakia was promised self-government, whole regiments deserted the Austrian army to join the Russian forces, and so did the Rumanians in response to a similar guarantee.[14]

When the moment arrived at the peace negotiations to fulfil the pledges of self-determination given by the Allies to the nationalities integrated into the Central Empires, the difficulties of applying self-determination, and the limitations to which such a principle must be subject, became apparent. Historical claims, economic needs and military and strategic arguments prevailed.[15] The principle did not find a place in the Covenant supposed to constitute the framework within which international relations should be conducted after

on January 22, 1917 he declared before the Senate that "No peace can last, or ought to last, which does not recognise and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property." (U.S. Congressional Record, vol. 54 Pt.2 p.1742).

13. Hackworth, Digest of International Law vol.I p.199.

14. G.S. Windass, "Power politics and ideals. The principle of self-determination", 3 International Relations (1967) p.168.

15. C.A. Macartney, National states and national minorities (1934) pp.192-208.

the war,[16] and it was only reflected in the plebiscites carried out by the Allies in the aftermath of the war, the minority treaties, and the mandates regime of Article 22 of the Covenant.

The Allies did not hold plebiscites in all controversial regions, and without recourse to such a procedure millions of Germans went to Poland and Czechoslovakia, Alsace-Lorraine to France, the Austrian Tyrol to Italy, and the port of Kiao-Chau to Japan. This failure to apply the plebiscite method in all the disputed areas made it impossible to consider as unlawful a title to territory acquired by the use of force. Indeed,

> "while the term conquest has been persistently avoided in the cases of enforced cession without recourse to the principle of self-determination, those annexations by the respective Allied Powers differ neither in the method of nor in the motive for acquisition from the territorial aggrandisements of the past."17

However, Wambaugh sounds a more hopeful note when assessing the plebiscites organised as a result of the Peace Treaties; she writes that

> "It is true that the Allies avoided a plebiscite in every region of first importance save that of Upper Silesia, and that when they resorted to a plebiscite it was as a method of compromise, to escape from a dilemma rather than as a deliberate choice. Nevertheless, the treaties made at Paris gave the principle [of self-determination] far more attention than it had ever before enlisted; they provided for by far the most important plebiscites ever held concerning changes of sovereignty; and they laid down much more precise and scientific rules to govern the freedom of the vote than had any previous treaty in the history of the world."18

16. See below pp.95-97.
17. J. Mattern, The employment of the plebiscite in the determination of sovereignty (1920) p.194.
18. Plebiscites since the World War (1933) p.42.

As regards the minorities regime,[19] this was applied in those states embodying nations with no possibility of becoming independent states, and in those regions where the drawing of a boundary left groups belonging to one nation recognised as a state.[20] It is interesting to note how self-determination as an individual right came up again in the context of the minority treaties, and at a moment when self-determination was thought of as a collective right. Indeed, individuals belonging to a particular nationality were especially protected -individually[21]- vis-à-vis the national state -different from their own nationality- in which they were living, while their fellow nationals had been accorded as a group the right to form a state.[22] In fact, the minorities regime, in the context in which it was applied, represents an attempt to combine two different concepts of a nation and of the relationship of the individual with the nation to which he belongs. On the one hand there is the political concept of nation, basically Western European, and that was perfectly reflected by the definition of a nation given by the Dictionary of the Académie Française as late as 1878:[23] a nation is "the totality of persons born or naturalised in a country and living under a single government".[24] On the

19. There is an extensive literature on the minorities regime: see especially Macartney op.cit., and also P. Azcárate, The League of Nations and National Minorities (1945); E. Dugdale, "The working of the minorities treaties" 5 Journal of the British Institute of International Affairs (1926) pp.79-95; I.L. Evans, "The protection of minorities" 4 B.Y.I.L. (1923-24) pp.95-123; A. Mandelstam, "La protection des minorités" 1 Rec. des Cours (1923) pp.367-517; and J. Stone, International guarantees of minority rights (1932).
20. The minorities regime was not applied consistently, the most obvious examples of inconsistency being the cases of South Tyrol and Alsace-Lorraine given to Italy and France respectively with no minorities obligations attached to the cession.

other hand there is the nation as a cultural concept based on "objective" characteristics such as religion, race or language.[25] The combination of these two different concepts in the minorities regime by giving individuals of a cultural nation certain rights in a state, the majority of which also belonged to a cultural nation, constituted an initial flaw from which the regime never recovered:

> "So long as the majority nations which have assumed command of the different states persist in their theoretically absurd and practically unattainable endeavour to make of those states the exclusive instruments of their own national ideals and aspirations, so long will the minorities be placed in a position which no system of international protection can render tolerable."26

Finally, the mandates system was devised as a compromise solution between the "non-annexation" policy to which the Allies subscribed and the interests of those powers which occupied the Ottoman and German empires. The system reflected the idea of self-determination in that, at an unspecified future date, Article 22 of the Covenant expected the territories concerned to have developed sufficiently to face "the strenous conditions of the modern world". In the meantime the Mandated Territories were to be guided towards such status by "advanced nations", the kind of guidance varying from one territory to another according to its degree of development.[27] In fact the mandates system meant to

21. The Allies did not intend to create a "State within the State". Macartney, op.cit. p.283.
22. This was for instance the case with the Poles left in Germany after the re-birth of the Polish state.
23. When, especially since the German unification, the idea of a cultural nation was predominant.
24. A. Cobban, op.cit. p.30.
25. See below p.130 n.96.
26. Macartney op.cit.p.421.

accord to the so-called "backward peoples" a certain standing in international law. It presupposed a break away from the positivist theories of some writers according to which international law only operated between European states or states of European culture. It started a process of international supervision of colonial administration, the swift development of which in the last two decades nobody could then have predicted.

Thus, by a curious paradox, it was in those cases where full recognition of self-determination was not granted, i.e. where statehood was not achieved, that a form of partial recognition of self-determination developed. This partial recognition involved the use of techniques, such as the plebiscites, minorities regimes, mandates, all of which served to give a clearer conception of the "self" (the unit constituting a people) and the rights pertaining to that people than did the somewhat arbitrary and highly political decisions by the Allies on full self-determination. One began to see the emergence of positive duties correlative to a true right of self-determination.

2. The juridical status of self-determination.

We have seen how self-determination with its revolutionary character poses a threat to the established order and, since it can be considered as a form of self-assertion against any kind of domination, its content is as varied as ways of domination are varied. Due to these circumstances, self-determination has been considered a concept of political rather than legal

27. For the development of the idea of the mandates see Q.Wright, Mandates under the League of Nations (1930) pp.3-23.

character. Indeed, its challenge to the established order is said to provoke anarchy, especially when the subjects of a right such as self-determination are as difficult to define as "peoples" and "nations". On the other hand the variety of its content has been said to make it too vague and imprecise to be considered a legal right.

Considering the first objection, the argument can be reversed, and it can be said instead that "the presupposition of strife between nations is not of itself a consequence of the principle of self-determination but the reflection of a desire to resist it: in other words, if the states involved are prepared to accept a result based on self-determination, then there is no reason to presuppose violence will ensue."[28] As regards the second objection -vagueness of the term self-determination- it may have been a valid objection before the practice of the political organs of the U.N. gave it a definite and limited meaning but, as it will be seen in the chapters that follow, the concept has now achieved as much clarity as many other principles of international law.

Thus, although there seems to be no reason to dismiss self-determination as a concept inappropriate for legal analysis, it is admitted that self-determination had no legal standing until fairly recent times. Up to World War II its application by states lacked sufficient consistency to provide a body of practice on which its status as a legal right under international law could be based. However, state attitudes, especially as evidenced in U.N. practice, have undeniably changed over the past twenty-five years and it is today difficult to deny the right of self-determination a true legal status consistently with a realistic interpretation of the practice of the political oragans of the U.N.[29] This change of attitude is in part due to the gradual clarification of the content of the right, but in large part it is due to the sheer political pressure stemming from the decolonisation process. It is with this process, and with the way that it has helped to clarify the legal status of self-determination that we shall be concerned here.

28. D.W. Bowett, "Self-determination and political rights in the developing countries" P.A.S.I.L. (1966) p.130.

29. On the value of U.N. practice in the development of international law see R. Higgins, The development of international law through the political organs of the United Nations (1969) pp.1-10, and "The United Nations and lawmaking: the political organs" P.A.S.I.L. (1970) pp.37-48, and the abundant bibliography there listed. See also the dissenting opinions of judges Tanaka, Jessup and Padilla Nervo in I.C.J. Reports (1966) pp. 292, 441 and 456 respectively. In assessing the practice of the U.N. regarding self-determination the fact should be born in mind that the U.N. organs have been the channel through which most of the state practice has become evident.

Chapter I

CLAIMS TO SELF-DETERMINATION AND THE COMPETENCE OF THE ORGANS OF THE UNITED NATIONS

It is a common feature of criticisms about the workability of the right of peoples to self-determination to stress the lack of a competent organ in the international community to determine which peoples are entitled to such a right. Sir Ivor W. Jennings put the criticism in this way:

> "Nearly forty years ago a Professor of Political Science who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people."1

However, this "doctrine" of self-determination is less ridiculous if one takes into account the fact that when President Wilson launched his programme of self-determination he had in mind an organisation capable of deciding when and to whom self-determination would apply.[2]

1. The Approach to Self-Government (1956) pp.55-56.
2. Article III of Wilson's First Draft read as follows: "The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present social conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments

Wilson's ideas on self-determination were only partially and indirectly reflected in the Covenant through Article 22 on mandates. With such a start it is not strange that the League did not live up to Wilson's hopes regarding its role in implementing self-determination. The U.N., so far as self-determination is concerned, has had a more successful record and, to a certain extent, it can be said to have made effective a plan that in 1919 turned out to be too premature.

It is intended in this first chapter to analyse the grounds on which the political organs of the U.N. have based their competence to decide whether or not a certain people is entitled to self-determination, as well as the objections raised to such assertions of competence. Some precedents can be found in the League of Nations practice, and the chapter opens with the Aaland Islands question which was dealt with by the Council of the League at the very beginning of its existence.

1. The Aaland Islands question.

These islands, together with Finland, had been ceded by Sweden to Russia by the treaty of Fredrikshamn in 1809. When Finland proclaimed itself independent in 1917 the islanders -of whom 92.2% were of Swedish origin- expressed the wish to join Sweden and asked Sweden to back their claim. Sweden tried to persuade Finland to

as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary." D.H. Miller, The Drafting of the Covenant vol.II (1928) pp.12-13. See also p.30 n.4.

hold a plebiscite in the islands, but Finland refused to undertake such an action. The situation grew tense when Finland sent troops to the islands and arrested on charges of treason the leaders of the Aalanders. At this stage of the dispute[3] the United Kingdom, fearing that the situation could deteriorate so as to threaten peace in the Baltic, brought the Aaland Islands question before the Council of the League under the terms of Article 11 of the Covenant.[4]

Finland objected to the competence of the Council on domestic jurisdiction grounds.[5] The Council asked a

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3. July 1920.

4. President Wilson had declared in 1919 that : "If the desire for self-determination of any people in the world is likely to affect the peace of the world or the good understanding between nations, it becomes the business of the League; it becomes the right of any member of the League to call attention to it; it becomes the function of the League to bring the whole process of the opinion of the world to bear upon that very matter." R.S. Baker and W.E. Dodd, War and Peace (1927) vol.II p.244. Article 11 of the Covenant reads:

"1. Any war or threat of war, whether immediately affecting any of the members of the League or not*, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall on the request of any member of the League forthwith summon a meeting of the Council.

"2. It is also declared to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."

5. Article 15 para.8 reads: "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

* At that time Finland was not a member of the League.

Commission of Jurists[6] to report on this matter, which it did in the following terms:

> "The right of disposing of national territory is essentially an attribute of the sovereignty of every State...a dispute between two States concerning such a question, under normal conditions... bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned."7

But the Commission did not consider the existing circumstances to reflect "normal conditions" and decided that

> "The dispute between Sweden and Finland does not refer to a definite established political situation, depending exclusively upon the territorial sovereignty of a State."8

And it further stated that

> "...if the essential basis of...territorial sovereignty is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established."9

Thus, the Commission of Jurists appeared to base the Council's competence upon the uncertainty of the political situation, distinguishing between an established, settled situation -which fell entirely within the

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6. At that time the P.C.I.J. had not yet been established. The Commission was composed of: F. Larnoude, M. Huber and M.A.S. Struycken.

7. L.N.O.J. Suppl. n°3 October 1920 p.5.

8. Ibid. p.14. Emphasis added.

9. Ibid. p.6. Emphasis added.