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The New Doctrine in the United Nations

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MICHLA POMERANCE

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To OLIVER J. LISSITZYN,

Hamilton Fish Professor Emeritus of International Law and Diplomacy, Columbia University.

Scholar, teacher, and humanitarian, who has ever abjured double standards.

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The usual disclaimer, of course, applies (and it is the more necessary in a book dealing with a topic as controversial as self-determination): I alone am

responsible for the views enunciated in the book and for all the errors of commission and omission.

Finally, and most importantly, my thanks to Shlomo for his unflagging support and encouragement, and to Avigail for her endurance.

The "right of self-determination" . . . has never been recognized as a genuine positive right of "peoples" of universal and impartial application, and it never will, nor can be so recognized in the future. It would indeed in its general implementation prove a constant source of disruption and subversion, and the international legal order of established States will never be prepared to acknowledge with sincerity its universal existence as a matter of law or right. "Peoples" may fight for it and win or lose; they may succeed in persuading their own State to grant it by peaceful argument, or fail, completely or in part, to do so. But it is one of those realities of international life which do not lend themselves to rigid regulation by law, that is, by a mandatory rule, impartially applying and applied to all identical cases and susceptible of a juristic definition. And for the sake of the law itself it is better that it should remain so, for, worse than leaving the issue at the mercy of the unceasing political game would be to create a rule of law which would from the outset be inevitably infected by an ineradicable taint of international hypocrisy, and therefore unworthy of the appellation of a rule of law . . . . It is inherently impossible for it [self-determination] to form a universal basis of concrete rights and obligations under international law and accordingly it invariably presents itself in practice as a scarcely veiled instance of measuring with two measures.

J. H. W. Verzijl, 1968[1]

Today no one can challenge the fact that, in the light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*.

Héctor Gros Espiell, 1977[2]

Go put your creed into your deed,
Nor speak with double tongue.

Ralph Waldo Emerson, 1857[3]

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I

THE PRINCIPLE OF SELF-DETERMINATION: WILSONIAN DILEMMAS AND THE DOUBLE STANDARD

Unlike so many war-borne slogans, confined by fate at war's end to the dusty pages of history books, the principle of self-determination, the famous catchword of World War I, appears to be thriving today as never before. Indeed, so far is it from being interred that it is seemingly still proceeding from strength to strength, the achievements of its old age outstripping those of its infancy, childhood and maturity. All this emerges clearly from even the most cursory review of the multitude of resolutions and reports churned out annually by the United Nations. Suffice it to note that no resolution in UN history has been cited more frequently than Resolution 1514 (XV), the Declaration on Colonialism, which, among other things, proclaims that "all peoples have the right to self-determination." For many representatives in the United Nations, "self-determination" has not only been transformed from a political or moral principle to a full legal "right"; it has become *the* peremptory norm of international law, capable of overriding all other international legal norms and even such other possible peremptory norms as the prohibition of the threat or use of force in international relations.

In its Wilsonian heyday, the principle of self-determination had clearly never attained this blessed state. Nor, perhaps, could it have, in view of the complexities of its genesis and the endless difficulties entailed in its application.[4]

"Self-determination," as conceived by Wilson, was an imprecise amalgam of several strands of thought, some long associated in his mind with the notion of "self-government," others newly hatched as a result of wartime developments, but all imbued with a general spirit of democracy ("consent of the governed").[5] Thus, Wilson had long held that every people had the right to select its own form of government – an idea that might be termed "internal" self-determination. Moreover, if "consent" was to be given continuously, rather than as a one-time exercise, the form of government chosen would probably have to be *democratic*. Later, in the context of the war, "consent of the governed" came to subsume "external" self-determination as well: the right of every people to "choose the sovereignty under which they shall live," to be free of alien masters, and not to be handed "about from sovereignty to sovereignty as if they were property."[6] Finally, the exigencies of the European war also led to the close linking of "self-determination" with the "principle of nationalities,"[7] so that the "self" which was to determine its own fate began, more and more, to assume an ethnographic character. This development was least in accord with Wilson's own thought, which strongly preferred the atomistic Anglo–American view of

the nation as "a community of organization, of life, and of tradition" to the German collectivist concept of the *Volk* as a community of blood and of origin.[8] Geographically, the applicability of the self-determination principle was not, in Wilson's mind, confined to Europe. Asian and African people too might, after proper tutelage, become fit for self-government.[9]

The first major testing ground for this package of ideas was at the Versailles Peace Conference, and it was there that the deceptively simple and just-sounding principle of self-determination was exposed in all its intricacy and intractability. The questions thrown into high relief on that occasion and in the general Peace settlement have since become familiar ones, but as Rupert Emerson notes, they "have acquired no easy answers in the decades during which they have been debated."[10] It is perhaps for this reason that, despite their familiarity, the questions bear recapitulation, for it is a small step from observing the absence of answers to deducing that the problems themselves have evaporated.

Inevitably, the first and pivotal question is: who is the "self" to whom the right of self-determination attaches? At Paris, Lansing queried privately whether the unit contemplated by Wilson was "a race, a territorial area or a community"[11] – but the question is, in fact, far more complex. Selection of any one of these units requires further decisions with respect to delimitation, exclusion and inclusion. What are the boundaries of the area? Who are its inhabitants? Who are the members of the "race" or the "community"? The territorial and ethnic criteria are *not* neatly separable; they are, rather, inextricably interwoven. It is necessary to determine which population belongs to which area, an exercise which is particularly delicate where significant population movements, of recent or more ancient origin, have occurred. Such movements tend to complicate the ethnographic map and to raise thorny questions regarding the identification and rights of "indigenous" and "settler" populations. The issue of the "critical date" or "critical period" inescapably enters into the calculus, thereby demonstrating that definition of the "self" is not only space-bound and group-bound; it is also time-bound. Thus, in Alsace–Lorraine, for example, the population of 1919 was not viewed as the "self" which could separately determine its fate. The historic rights of an earlier community were preferred over the desires of the existing inhabitants, and all the Allies agreed that conducting a plebiscite in this case would be "insultingly illegitimate."[12]

The necessity of defining the "self" which is to exercise "self-determination" lies at the heart of what is probably the most basic dilemma in the matter of self-determination: recognition of the rights of one "self" entails a denial of the rights of a competing "self." For, in essence, every demand for self-determination involves some countervailing claim or claims. The problem may be formulated in several alternative ways. It may be said that the demand for secession or separate determination by one "self" clashes with the claim to territorial integrity and political independence put forward by the unit of which the first "self" is felt to be a part. Or it may be said that "self-determination" by the

smaller unit conflicts with the "self-determination" to which the larger unit claims to be entitled. Or again, it may be contended that there is an opposition between two claims to territorial integrity – that of the larger as against that of the smaller unit.[13] There may also be competing claims by different ethnic groups to the same territorial area. On what objective basis are the claims of the rival "selves" to be weighed?

Moreover, what happens when new demands for secession arise? Is a limit to be set to a process which, theoretically at least, may be continuing and endless – and if so, why and how? May the Croatians within Yugoslavia, for example, determine their own fate? Are the minorities within Czechoslovakia entitled to secede even as Czechoslovakia seceded from Austria–Hungary? Given a messy ethnographic map in which "the eggs were scrambled"[14] and given the dangers of creating numerous non-viable entities, would some worthy "selves" have to be denied an absolutely free determination of their fates in the sense of full "external" self-determination? To avoid forcible assimilation of minorities by the new ruling majorities, might other solutions – e.g., autonomy, minority rights, the right of option, forced transfer of populations, and guarantees of non-discrimination – need to be resorted to in certain instances?[15] Could some of these devices be deemed an implementation, rather than a denial, of self-determination? For example, autonomy and minority rights might be considered forms of "internal" self-determination; and the right of option may be viewed as a way of permitting individuals to "vote with their feet," indicating thereby whether they feel a subjective need to align their political with their ethnic allegiance.

The issue of minority rights points to a further question raised by Wilsonian self-determination: what is the proper relationship between "external" self-determination, "internal" self-determination, and democracy? In Wilson's mind, the three were intimately connected. Freedom from alien sovereignty was less than meaningful if there was no continuing process of "self-government" internally; from the standpoint of the individual, the rule to which he was subject would continue to be alien. On the other hand, in the presence of real democracy and a genuine régime of non-discrimination, the matter of "external" self-determination was not really so pertinent. For that matter, even the creation of special minority régimes became necessary, Wilson thought, only in the absence of true self-government. Where, as in Britain and the United States, the highest form of self-government had happily already been attained, no special dispensations were required for any group.[16] Democratic forms of government were held to have the additional virtue of providing an essential guarantee of future peace. The pacific nature of democracies, as opposed to the warmongering character of autocratic régimes, was an integral part of the Wilsonian credo.[17]

Other questions plagued Wilson and his fellow peacemakers at Versailles and beyond. How, for example, were the wishes of the "self" to be determined? Must plebiscites be conducted in all cases, or were other methods sometimes

permissible or even preferable? Could reliance be placed on expert commissions or on the views of a body claiming to represent the people concerned? It may be recalled that Wilson recognized the Masaryk–Benes committee as the representative of the people of Czechoslovakia. Moreover, none of the succession States were established by plebiscite. That tool was reserved for certain disputed border areas only, and it was not applied to some of the most controversial areas, such as the Sudetenland or Southern Tyrol. Is a minimal degree of political consciousness a prerequisite for any meaningful election results? Can powerful local elements, although in the minority, vitiate the results of the plebiscite by exerting improper influence, thus distorting the true wishes of the population?[18] Must the plebiscite be conducted under neutral auspices and in the absence of any military presence on the part of the would-be annexing States?[19] Who is to participate in a plebiscite? Is it to be only the "indigenous" population, and if so, which individuals and groups qualify for the appellation "indigenous"? That enigmatic and complex interplay between territorial boundaries, group affiliation, and time, which, as noted earlier, is involved in any definition of the "self", becomes particularly central when the criteria for participation in a referendum fall to be decided. What, for instance, is the status of those formerly domiciled and those newly arrived, and what are the critical dates in both cases?[20] Must the territory within which the plebiscite is held be viewed as a unit, or may the results in the sub-units (districts, communes, etc.) be taken into account?[21] This question, too, leads back, once again, to the cardinal issue of how to define the "self." Who determines the options which are to be placed before the electorate for their decision? Must these options themselves be "self-determined," or may the "choice of the choices" be determined by others, so that only those options deemed by others to be reasonable or practicable in the circumstances are offered?[22] Are the results of a plebiscite to be seen as permanent, or should provision be made for future revision to allow an expression of will to new constellations of political forces which may arise? The issue raised here, of course, is whether self-determination is to be seen as a continuing right or not.

Clearly, had self-determination been acknowledged as the sole guiding principle of the peace, the difficulties of applying the formula universally would have been insuperable – if only because, as noted, self-determination for one "self" means the denial of a rival claim. However, additionally – as Wilson quickly discovered at Versailles – other principles needed to be considered in the peacemaking, and these sometimes seemed to clash with the requirements of self-determination. Some of these principles were equally part of the peace program consecrated in Wilson's wartime speeches including the Fourteen Points. Access to the seas for Poland might not readily be reconciled with the claims of Danzig to determine its own fate. Sovereign equality is violated when part of the territory of the parent State is seen as a separate "self" and accorded "self-determination." Furthermore, principles which formed part of traditional international law could not be dismissed out of hand – such as the sanctity of

treaties, which Wilson later invoked to justify the concessions to Japan in Shantung, granted at the expense of Chinese self-determination.[23] Still other considerations, of an economic, strategic and historic nature, could be ignored, it was felt, only at great peril. Thus, if Austria was denied true "external" self-determination – her desire to accede to Germany barred – this was done for the sake of European peace and security. It should be noted, however, that not every apparent conflict between self-determination and another principle, is to be viewed as such upon second thought. In order to define the "self" and to determine what it is that it may determine, it is necessary to have recourse to historic, economic and strategic considerations. Only thus is the abstract "self-determination" formula concretized. The formula itself offers no guidance in this respect; as Toynbee remarked, it "is merely the statement of a problem and not the solution of it."[24] Moreover, the same instance may be viewed as an affirmation or negation of "self-determination" depending on the angle of the viewer and the "self" upon which he is focussing. Thus, inclusion of the Sudetenland in Czechoslovakia may be deemed a violation of the self-determination of the *Sudetens*, or, alternatively, a way of securing *Czechoslovakia's* self-determination by making the State economically viable and strategically defensible.[25]

In the face of the innumerable theoretical and practical difficulties surrounding universal implementation of the principle of self-determination, it is hardly surprising that the peacemakers at Versailles, and especially Wilson, were subsequently charged with the betrayal of the principle and the application of a double standard. It could not have been otherwise. As Lansing had warned, the phrase "self-determination" was bound to "raise hopes which can never be realized."[26] Sitting with the "pieces of the Austro–Hungarian Empire" and the "various dispersed assets" of the German and Ottoman Empires in their hands,[27] the peacemakers arbitrated, as best they could, between the various claims which fell to be decided. But, in giving specific answers to the multitude of questions raised, they did not and could not satisfy the desires of every claimant waving the flag of "self-determination." In some cases, of course – Ireland and the Allies' own dependencies, for example – the claims were not really before the forum, because, as Wilson later explained, "we did not have our own dispersed assets in our hands."[28] Moreover, the *geographical* area within which the principle of self-determination was held to be operative was limited. Apart from Europe, it embraced, after a period of tutelage, the Middle East (Class A mandates), but did not encompass Germany's Asian and African colonies except, perhaps, in the very remote future. Although Wilson was able to forestall the annexation of any German colonies, the mandates system adopted for them at Versailles failed to reflect clearly Wilson's personal view that, with proper guidance, *all* peoples were capable of self-government. Rather, the dominant motifs were the British concepts of non-exploitation and the prevention of German-type abuses.[29] Within the acknowledged field of the principle's application, it was inevitable that certain groups would be favored

at the expense of others. The less favored could be excused if they saw arbitrariness and opportunism, rather than impartial justice and fairness, behind the decisions taken at Versailles or shortly thereafter. The Armenians, Azerbaijanis, Kurds, and Montenegrins, as well as the German, Magyar, and other minorities in the succession States (to take a small sample) did not deem their causes any less worthy of espousal than those of the Poles, the Czechs, or the Serbs. And those expedients adopted to mitigate the plight and grievances of the minorities who could not be accorded full "external" self-determination – primarily, minority rights and voluntary or compulsory transfer – met with resentment on the part of both the States and the minorities concerned.[30] Disillusioned idealists within the Allied States joined the chorus of denunciation of the peacemakers. They could see no inherent difficulty in applying the principle of self-determination "universally, integrally, forcefully, [and] scientifically."[31] If, instead, there emerged only "patchwork Wilsonism,"[32] this was attributable primarily to Wilson's weak-kneed submission to the wiles of his cynical and more forceful cohorts at the conference table and to the pressures of powerful domestic lobbies in the United States, such as the Polish lobby.[33]

The idealist critique was grossly unfair to Wilson and failed to grasp the gist of the problem. While it was legitimate to criticize one or another application of the principle or the process by which the decisions to favor one "self" over another was arrived at, it was totally unreasonable and even absurd to expect "universal" application of the principle. "Self-determination" could not be applied to all unless the "self" were reduced to the individual "self" of the term's metaphysical origin! Wilson himself may have been no more aware than were his idealist critics of the inherent non-universalizability of the principle of self-determination. But he was perhaps more painfully aware than they were that many deserving groups had not had their just demands for self-determination recognized at Versailles, whether because these groups had not formed one of the "pieces" to be disposed of or because their claims had been denied or only partially fulfilled. These groups could be expected to continue to press their causes in the future, along with new groups whose claims would arise out of future demographic, social and political changes. How would these demands be met after the post-war peacemaking process was concluded? Would "self-determination" revert to what it had always been in the pre-Versailles days – a right of revolution to be "self-determined" by the "self" concerned, with or without outside assistance?[34] Or would it be lifted from the realm of self-help and made subject to authoritative international decisions to be accepted unquestioningly by the rival claimants? At the root of the League scheme of things lay the principle of respect for and preservation of the territorial integrity and political independence of all the members of the League (Article 10 of the Covenant). How could this principle be reconciled with the recognition of self-determination as a continuing right, involving the disruption of existing States? On the other hand, would failure to recognize certain self-determination claims not jeopardize international peace? Wilson's proposed

solution to these questions was incorporated in an early version of Article 10, which read:

> 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 racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments 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.[35]

In one of the subsequent revisions of the article, the projected territorial adjustments would have required the consent of "the States from which the territory is separated or to which it is added."[36] Ultimately, however, the entire provision was dropped; self-determination was not mentioned in the League Covenant; and the "heart of the Covenant," Article 10, referred only to the necessity of respecting and preserving "as against external aggression the territorial integrity and existing political independence of all Members of the League."[37]

Thus, after conclusion of the Peace Settlement, "self-determination" remained in law essentially what it had been before then – a right of revolution, a matter of self-help. For third States, this meant that claims to self-determination were fundamentally within the domestic jurisdiction of the States concerned; that if the claims engendered civil strife, no intervention on the side of the rebels was permissible; and that assistance might be extended to the established government unless the civil strife reached the proportions of belligerency, in which event neutrality was required.[38] For the League, it meant minimal involvement with respect to future demands for self-determination.[39] There was a measure of self-delusion in Wilson's subsequent pronouncements on the subject. On the one hand, Wilson correctly observed that Article 10 of the Covenant protected League members only against *external* aggression and interfered in no way with the "right of revolution," which he termed "sacred."[40] On the other hand, Wilson continued to speak as if the *League*, and not the parties concerned, would be the final arbiter of claims to self-determination. "There is not an oppressed people in the world," he said during his Western tour, "which cannot henceforth get a hearing at that forum, and you know, my fellow citizens, what a hearing will mean if the cause of those peoples is just."[41] Yet, the domestic jurisdiction clause of the Covenant (Article 15, paragraph 8) implied that even the *hearing* of an oppressed people by the League would be questionable in most cases.[42] And the requirement of unanimity signified that no *settlement*

of new self-determination claims could be effected against the wishes of the State or States directly concerned.

Of course, the League was not precluded from dealing with future questions of self-determination where, as in the case of Manchukuo, a problem of external aggression arose. Moreover, as a kind of general overseer of the Peace Settlement, the League Council was charged with supervising the workings of the minorities and mandates régimes, and it sometimes became, de facto, a court of last resort with respect to related problems, such as the exchange of populations.[43] In these capacities, the League was often called upon to deal with delicate questions of interpretation regarding group affiliations and group rights. But the League was never required to develop the "law of self-determination" in any significant way, for the simple reason that there was no such acknowledged law.[44] Once the "International Legislators"[45] had completed their tasks at Versailles and its aftermath by allocating territorial sovereignty and jurisdiction within the areas whose fate was then to be decided, the functions of the League were strictly circumscribed. Respect for the territorial integrity and political independence of the existing sovereign units was the primary norm and desideratum, unchallenged in law by any fledgling "right" of self-determination. Only in the period of the United Nations, when the existence of a new "law" of self-determination comes to be widely asserted, does the necessity of facing the old Wilsonian dilemmas arise afresh – and with even greater urgency. Has the United Nations been able to resolve these dilemmas, and if so, how? Have the answers furnished by the United Nations revealed the consistency and clarity which elevation of the principle of self-determination to a legal rule would require? Or have the problems of the double standard, of inconsistent application based on *ad hoc* political and expediential considerations, been sharpened rather than alleviated during self-determination's new dawn?

II

FROM THE UN CHARTER TO THE "NEW UN LAW OF SELF-DETERMINATION"

At its inception, the UN scheme clearly did not include any general "right" of self-determination whose perimeters and field of application needed to be carefully delimited. There was no tilt away from the cardinal principle of the League Covenant, respect for the sovereignty and territorial integrity of the member States. The "principle of equal rights and self-determination of peoples," with all its ambiguity,[46] is referred to only twice in the UN Charter – and then, one is tempted to say, almost in passing. The development of friendly relations among nations based on respect for the principle is listed as one of the "purposes" of the Organization (Article 1, paragraph 2); and Article 55 makes a preambular mention of the principle before enumerating several goals which the Organization "shall promote" (in the spheres of economics, education, culture, human rights, etc.). In contrast, the principle of sovereign equality, the obligation to refrain from "the threat or use of force against the territorial integrity or political independence of any state," and the proscription of intervention by the United Nations in "matters which are essentially within the domestic jurisdiction of any state," are all included among the "principles" in accordance with which the United Nations was to *act*. On the basis of any reasonable textual construction, the conclusion is inescapable that "self-determination, in contrast to sovereignty and all that flows from it, was not originally perceived as an *operative* principle of the Charter; . . . it was one of the *desiderata* of the Charter rather than a legal right that could be invoked as such."[47]

Paradoxically, perhaps, the principal difference between the League and Charter systems in relation to "self-determination" manifested itself in two chapters of the Charter in which the term does not appear at all, Chapters XI and XII. One of the basic objectives of the trusteeship system was, according to Article 76, to promote "progressive development *towards self-government or independence as may be appropriate to the particular circumstances of each territory* and its peoples and the freely expressed wishes of the peoples concerned . . . "[48] And in Chapter XI, UN Members administering "territories whose peoples have not yet attained a full measure of self-government" undertook, inter alia, "*to develop self-government*, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, *according to the particular circumstances of each territory and its peoples and their varying stages of advancement*."[49] As has been frequently noted, there was no commitment on the part of States administering

trust or non-trust dependent territories to offer full "external" self-determination to the inhabitants of those territories; even with respect to trust territories, independence was only one alternative, to be granted when and where "appropriate"; in the case of non-trust dependencies, the maximal political goal mentioned was "self-government" (which, it was understood, might, but need not, include independence);[50] and the Organization was endowed with no supervisory powers regarding attainment of that goal.

Upon these meager and tentative foundations the United Nations proceeded to construct an edifice of practice in which, increasingly, full "external" self-determination – preferably to result in independence – was viewed as an imperative and immediate goal for all peoples "under colonial or alien domination." The manner in which the United Nations mirrored and reinforced the movement to decolonization has been well documented and need not be repeated here.[51] By all accounts, the end of 1960 marked a clear turning point in this regard. Two resolutions adopted in December 1960 within a day of each other, and in many ways mutually contradictory, bear witness to this fact.

The second, less famous resolution – General Assembly Resolution 1541 (XV) – represented the culmination of an *evolutionary* process within the United Nations, designed to spell out the factors which should guide the United Nations and Member States in determining whether or not a territory had attained full "self-government" so as to fall outside the scope of Chapter XI of the Charter.[52] A full measure of self-government, it was stated, could be reached by any of the following three means:

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.

While no conditions were proposed for limiting the grant and receipt of the first alternative – independence – the other two alternatives were thought to require stricter regulation. "Free association" (according to Principle VII) "should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." The "individuality and the cultural characteristics of the territory and its peoples" should be respected; and furthermore, the people should retain "the freedom to modify the status" of the territory "through the expression of their will by democratic means and through constitutional processes." Thus, the decision for "free association" should, according to this resolution, be viewed as a temporary one, always open to revision. The decision for integration, on the other hand, is not considered reversible. For this reason, perhaps, "integration" (which "should be on the basis of complete equality") should come about only after the attainment of "an advanced stage of self-government with free political institutions"; and it should be based on "the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed

through informed and democratic processes, impartially conducted and based on universal adult suffrage." UN supervision was not, apparently, deemed essential; but the United Nations "could, when it deems it necessary, supervise these processes." (Principles VIII and IX).

If Resolution 1541 was evolutionary in origin and could reasonably be considered an attempt to *interpret* the Charter[53] (and then, by suggestion rather than fiat), the more famous resolution adopted a day earlier – General Assembly Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples – was clearly the beginning of a *revolutionary* process within the United Nations and represented, by its terms, an attempt to *revise* the Charter in a binding manner. It would be difficult to find a sound Charter basis for any of the following propositions contained in the Declaration: that it was necessary to bring "to a speedy and unconditional end colonialism in all its forms and manifestations"; that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" (paragraph 1); that "all peoples have the *right* to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (paragraph 2); that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence" (paragraph 3); that the General Assembly could call for the cessation of "all armed action or repressive measures of all kinds directed against dependent peoples . . . in order to enable them to exercise peacefully and freely their right *to complete independence*" (paragraph 4); that the Assembly could require respect for the integrity of the dependent peoples' national territory (paragraph 4); and that the Assembly could demand that "immediate steps . . . be taken, in Trust and Non-Self-Governing Territories *or all other territories which have not yet attained independence*, to transfer all powers to the peoples of those territories . . . *in order to enable them to enjoy complete independence* and freedom" (paragraph 5).[54]

Many legal objections could be raised to these postulates, but a few of the more obvious ones will suffice. The Charter's emphasis, in respect of trust and non-trust territories alike, is on gradual and progressive development toward increased self-government, taking into account "the particular circumstances of each territory" (Articles 73 and 76). Independence is seen only as a possible, not a necessary (and certainly not an immediate) objective of colonial administration. Colonial rule is not deemed an impediment to the maintenance of peace; it is rather to be exercised in such a manner as to promote international peace and security (Articles 73 and 76).[55] There is no violation of the Charter nor of human rights in continued colonial rule per se – alien domination – although an abuse of that rule – i.e., exploitation – may entail such violation. While the term "national territory" in paragraph 4 of the Declaration is ambiguous, there is no Charter-derived necessity to preserve the integrity of a colonial unit,

especially if, in the "particular circumstances" of a territory, geographical division is a better means of promoting "self-government" (as, e.g., in the case of British India, it was felt to be). The obligation to promote the interests of the inhabitants of dependent territories is termed a "sacred trust" and the General Assembly has no legal right to require termination of the trust against the judgment of the administering power. "Armed action" and "repressive measures" may be necessary to maintain law and order in the administered territories, and the General Assembly can hardly expect, much less require, such actions to cease. Moreover, Article 2, paragraph 4, of the Charter prohibits the threat or use of force only in the *international* relations of Member States. By adding to the two categories "Trust and Non-Self-Governing Territories" a third category of "all *other* territories which have not yet attained independence" (paragraph 5), the Declaration goes well beyond Chapters XI and XII of the Charter and opens up the door to UN involvement in respect of territories which, although fully self-governing, are not independent and may not even wish to be. The Charter nowhere mentions any "right" of self-determination for "all peoples" and, in any event, "*all* peoples" can never have the right, especially if it is seen as synonymous with the right to full independence. Finally, and perhaps above all, the mandatory language used throughout the Declaration, as opposed to the suggestive and hortatory terms of Resolution 1541, fallaciously suggests an Assembly competence to bind Member States and even to amend the Charter without complying with the amendment process outlined in that document.[56]

Arguably, only paragraph 6 and parts of paragraph 7 are more firmly premised on Charter principles, but, to the extent that they are, they conflict – at least potentially, and at times inevitably – with the principles set out in the preceding paragraphs. Thus, paragraph 6 avers that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[57] Yet, as noted earlier, claims to self-determination are generally pitted against claims to territorial integrity. Similarly, those references in paragraph 7 to the faithful observance of the UN Charter provisions on the basis of equality and non-interference in the internal affairs of all States may not be congruent with the demand for immediate decolonization, and, beyond that, for universal self-determination.[58]

While from the legal standpoint, Resolution 1541 was and remained the more solidly grounded of the two leading resolutions on self-determination adopted in mid-December 1960, it is Resolution 1514 – an "essentially . . . political document"[59] with questionable legal credentials – which has formed the foundation stone of what may be called the "New UN Law of Self-Determination." That such a "law" exists is taken for granted by a majority of UN members, although the exact content of that law is frequently debated. Its general contours, it may be said, have been shaped primarily by the gloss placed on the 1960 Declaration by the dominant group within the United Nations in the post-colonial era (which, for the sake of convenience, will be referred to as the Third World) in alliance, usually, with the Soviet Union and the States of Eastern Europe. Similar in

content to Rupert Emerson's "New Higher Law of Anticolonialism,"[60] the "New UN Law of Self-Determination" consists of a series of explicit and implicit assumptions regarding the status, scope, and application of the "right" of self-determination and the competence of UN organs (especially the General Assembly) to implement the "right." These assumptions may be deduced from the attitudes adopted in connection with certain general pronouncements of the Organization (e.g., the 1970 Declaration on Friendly Relations and the 1974 Consensus Definition of Aggression) as well as from the positions assumed in specific cases in which the issue of self-determination was raised. A particularly illuminating distillation of the "New UN Law" may be found in recent studies by Mr. Héctor Gros Espiell on "Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination," prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights.[61]

Yet, the widespread assertion that a "law" of self-determination now exists – and, moreover, that it is even in the nature of *jus cogens*[62] – can hardly be accepted uncritically. Rather, it renders particularly imperative a close examination of the principal components of the alleged "law." How valid are the legal premises upon which the central theses are based, and how wide is the consensus supporting them? How much internal coherence is there between the various elements of the "law", and how consistent has their application been in specific cases? Furthermore, what solutions has the "new law" presumed to proffer to the dilemmas raised in the Wilsonian period? How, for example, has it defined the bearer of the "right", the methods by which best to ascertain a population's wishes, and the options which may, or must, be offered to the people concerned? How has it reconciled the conflicting claims to "self-determination" and "territorial integrity"; linked the questions of "external" self-determination, "internal" self-determination, and representative government; viewed new post-colonial demands for self-determination; and related self-determination to the principles of the non-use of force, sovereign equality, and non-intervention in the affairs of other States? As Kelsen remarked, in a different context: "That a right . . . has been transformed from a principle of political morality into a principle of law is not very significant if the ambiguities that marked the former principle continue to mark the latter principle as well."[63]

With respect to all the questions raised, a new lexicon has been developed in the United Nations, replete with terms of opprobrium ("colonial", "alien", "racist", "neo-colonial", "hegemonism") and approbation ("national liberation", "legitimate struggles", "freedom fighters"). It is all too easy to assume that the new terminology provides substantive answers when, in fact, it bedevils the discussion and shifts the questions from one semantic plane to another. Beyond that, the emotive overtones of the new language in which the debate on self-determination is increasingly conducted may tend to heighten the subjectivity and aggravate, rather than mitigate, the problem of the double standard – particularly since, as will be seen, the labelling of groups entails practical implications bearing especially on the legitimacy of the use of force.

III

SCOPE OF THE PRINCIPLE: DEFINITION OF THE "SELF"

Upon whom is the "right to self-determination" conferred, according to the "new law" regulating the subject? The answer, given in identical terms in the Declaration on Colonialism and in Article 1 of the International Covenants on Human Rights, is as simple in formulation as it is chimerical in fact. "All peoples," it is proclaimed, "have the right to self-determination." However, the total context in which the universal goal is declared demonstrates an intention to confine the right to the following peoples: those who are still "dependent" (because they inhabit trust territories, non-self-governing territories, or "all other territories which have not yet attained independence") and those subjected to "alien subjugation, domination and exploitation."[64] The "alien subjugation, etc." formula reappears as the modifier of the "all peoples" statement in many subsequent resolutions, including the Declaration on Friendly Relations.[65] Elsewhere, the bearers of the "right to self-determination" are defined, inter alia, as "colonial peoples,"[66] "peoples under colonial and alien domination,"[67] and "peoples subject to colonial exploitation."[68] It may well be doubted, however, whether any of these definitions can provide objective criteria by which to circumscribe significantly, or even in any manner at all, the universe of eligible claimants to the "right of self-determination."

In the first place, every demand for self-determination is, presumably, based on a subjective conviction that present rule is "alien" or "colonial", and that its continuance cannot readily be tolerated. Little wonder, then, that all the valiant attempts to define the terms so as to include only what it is wished to include and to rule out that undesirable, but inescapable, by-product (or synonym) of "self-determination" – "secession" – have landed in hopeless tautological bogs. The efforts of Mr. Gros Espiell are illustrative, and almost disarmingly question-begging:

> "Colonial and alien domination" means any kind of domination, whatever form it may take, which the people concerned freely regards as such. It entails denial of the right to self-determination, to a people possessing that right, by an external, alien source. Conversely, colonial and alien domination does not exist where a people lives freely and voluntarily under the legal order of a State, whose territorial integrity must be respected, provided it is real and not merely a legal fiction, and in this case there is no right of secession.[69]

Or again:

> The United Nations has established the right of self-determination as a right of peoples under colonial and alien domination. The right does not apply to peoples already organized in the form of a State which are not under colonial and alien domination, since resolution 1514 (XV) and other United Nations instruments condemn any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country. If, however, beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated.[70]

The progress, if any, from the days of Wilson is not readily discernible. Then self-determination could be denied by telling an aspiring "self": "You are not really a 'people' but only a 'minority'" (e.g., within Czechoslovakia). Today, the potential claimants (Biafrans, Katangans, West New Guineans, Southern Sudanese, Eritreans, South Moluccans, Pathans, Nagas, Somali in Ethiopia and Kenya, Corsicans, and a host of other secessionists) are told, rather: "You are not really under 'colonial' or 'alien' rule at all; you are part of a non-colonial 'self' entitled to its territorial integrity."

Moreover, the broad construction placed by the General Assembly on the term "colonial" serves to obfuscate the issue still further. "Colonialism" in all its "manifestations" is said to subsume, e.g., "racism, *apartheid* and activities of foreign economic and other interests which exploit colonial peoples."[71] Thus, the expression "colonial" is often coupled with "racist" or "neo-colonial" in the halls of the United Nations.

The key problem, of course, is to whom and to which specific situations to attach these pejorative labels. Clearly, the terms must be interpreted in the light of additional – possibly ad hoc, expediential and subjective – criteria. This fact was perhaps somewhat obscured from view during the course of decolonization's main thrust, for several reasons. The "salt-water" test prevailed easily – some would say, too easily – over the challenges presented by both the "Belgian thesis"[72] and the Western contention that the Soviet overland empire was the largest and most oppressive "colonial" empire in the world (and, moreover, the only one which was expanding rather than liquidating itself).[73] True, Western colonial powers long smarted under the conviction that a double standard was operative in matters of self-determination. As Lord Home, addressing the General Assembly in 1961, queried: "Is there to be one principle for Asia and Africa and another for Europe? One rule for the British Commonwealth and another for the Russian Empire? I thought if a principle was anything it was universal."[74] But as the liquidation of Western imperialism proceeded apace, the charges became muted. Sooner or later, the Western colonial powers came to accept the illegitimacy of their claims to retain their empires. In other words, if a demand for self-determination normally vies with a counter-demand for self-determination or territorial integrity, this no longer held true in the case of

Western imperialism, because one of the claimants abdicated the claim (at times, voluntarily and peacefully, and at other times, after greater or lesser local and external pressures), and thereby cancelled itself out of the equation. In other situations, however, such voluntary abdication is not so readily forthcoming, the rival claims to legitimacy stubbornly persist, and concomitantly, the need to select between them. The conflicting claims of the Indonesians and Papuans to West Irian (West New Guinea); of Nigeria and the Ibos to Biafra; of the Sahrawi, on the one hand, and the Moroccans and (until mid-1979) the Mauritanians, on the other, to the Western Sahara; of Spain and the local population of Gibraltar to that territory; of Argentina and the inhabitants of the Falklands (Malvinas) to those islands; of Guatemala and the population of Belize (British Honduras) to that territory; and of Indonesia and Fretilin to East Timor – all are harbingers of what may well be the future generation of self-determination problems. Which "neutral principles" will be employed in the process of arbitrating between rival legitimacies and applying the "law" of self-determination? Significantly, many of the cases just mentioned brought to the fore serious cleavages in the Third World consensus on colonialism.

Self-determination, in its most likely new permutation, will also, presumably, be less amenable to another criterion found not far beneath the surface of most UN resolutions on decolonization, the test which Ali Mazrui has referred to as "pigmentational" or "racial" sovereignty.[75] With respect to UN practice to date, it may be agreed that "the definition of colonialism as subjugation to alien rule" has been "of a very relative character." It has depended "not on whether the ruler is alien, but on whether in being alien . . . [he] is also European."[76] *Prima facie*, any "white" or "Western" presence outside Europe, North America and Australasia has been suspect and generally considered "non-indigenous."[77] Yet, although this pigmentational/racial bias continues to characterize the debate on many of the central problems of self-determination now on the UN agenda,[78] there are indications of some willingness to acknowledge the possibility that intra-Third World "colonial" relationships may also exist. Demands for self-determination arising out of the latter relationships will not be solved by reference to the "pigmentational sovereignty" test, because the feeling that rule is "alien" is often based on non-racial considerations of a religious, tribal, ethnic, coastal/interior, and "relative-levels-of-development" nature.[79] In fact, as the British representative suggested in discussing Mayotte's wish to retain its links with France rather than integrate with the other Comoros in an independent State, certain people may be more suspicious of their immediate neighbors than of their more distant "colonial" rulers.[80] Their suspicions may be well grounded in pre-colonial history and in the post-independence experience, as in the case of southern Sudan, regarding which Emerson observed:

> The south was turned over to a Sudanese government of the north which was unfamiliar with its needs and problems and looked to a Sudanization which in fact was an Arabization. This consolidation of political and military authority in the hands of the Muslim northerners, with Khartoum as the capital, was regarded in the south as the imposition of an alien and hostile regime, all the more resented because of the still surviving memory of the Arab slavers who had hunted their victims in the south.[81]

That non-European rule could also be "colonial" was long asserted by the Somalis who, in pressing forward their irredentist demands for the unification of the entire Somali nation – in Ethiopia, Kenya, and Djibouti (formerly French Somaliland) – cited approvingly the Irish argument that people might well feel oppressed by, and seek independence from, those with whom they shared a common race, creed, or color.[82] While rejecting the specific claims of Somali irredentism, many Third World States have been willing to accept the argument in other instances. Thus, perceptions within the Third World were and remain divided on whether the annexation of Portuguese (East) Timor by Indonesia and of Western Sahara by Morocco (and until recently, Mauritania) were impermissible "colonial" expeditions. And even with respect to Biafra, several African States, by according recognition, implicitly acknowledged the "colonial" nature of Nigerian rule.

An early adumbration of the Third World dilemma in cases where white alien rule is not at issue occurred in relation to the Indonesian claims to West Irian.[83] The matter was not devoid of a racial-pigmentational element, for the Free Papuans had appealed with some success to pan-Negroid sentiment in Africa;[84] but the *white* European rulers, the Dutch, had bowed out, in effect, in 1962. For many Black African States, the 1962 New York Agreement between the Netherlands and Indonesia and the subsequent dubious "act of self-determination" in 1969[85] represented the substitution of one kind of colonial rule for another. "The same reasons which justified the Indonesians in demanding the departure of the Dutch, because the Dutch are not Indonesians," it was argued, "require that the Papuans should not be handed over to the Indonesians, since they too are not Indonesians."[86]

If the task of fastening the "colonial", "alien", and "racist" labels objectively to specific situations presents great, indeed insurmountable, problems, the difficulty is compounded by the broadening of the scope of self-determination to include freedom from "neo-colonial" exploitation. Which people, for example, are totally free of such exploitation? Moreover, how can the increasing insistence on full political independence even for the smallest units (recognized as entitled to it) be reconciled with the equally persistent demand that self-determination embrace the absolute freedom of a people to pursue "their economic, social and cultural development"?[87] Does not the creation of non-viable units invite either the perpetuation of the old dependent relationship or its supersession by a new dependent relationship – and, in either event, the substitution of a "neo-colonial" for a "colonial" situation?[88] Is the whole point of the exercise of decolonization, in fact, an attempt to keep up with the current fashion in international relations in which "colonies" are "out" while "mini-States"

are "in"? Moreover, it has been justly noted that "what is to be cast out as neocolonialism and what is praiseworthy collaboration between a state and its former colonies is not a matter on which agreement can easily be reached."[89] The General Assembly has sometimes lauded the willingness of the administering power to extend continued economic assistance to its former wards after independence.[90]

Beyond that, the specter of "neo-colonialism" has frequently been raised for the purpose of affirming or, more commonly, denying the right of self-determination to a particular population. Thus, the Soviet bloc, along with many Asian and North African (but not most Black African) members of the United Nations viewed a 1961 proposal by the Netherlands to grant self-determination to the Papuans of West New Guinea as a means of perpetuating Dutch neo-colonialism.[91] Indonesia's policy of "confrontation" with Malaysia was formally premised, in large measure, on the charge that the joining of Sabah (North Borneo) and Sarawak to Malaya was a British "neo-colonial" plot and that each of the former colonial units must exercise its right to self-determination independently.[92] The secession of Katanga was, of course, widely viewed as a means of continuing Belgian "neo-colonial" activity in the area. More recently, charges of "neo-colonialism" have been heard in relation to the French decision to accede to the wishes of the population of Mayotte to remain part of France rather than join the independent State of the Comoros,[93] and with regard to Britain's decision to respect the wishes of the population of Gibraltar.[94] Finally, almost all the principals in the tangled Western Sahara issue have levelled accusations of "neo-colonialism" against one another – sometimes in support of, and sometimes in opposition to, the right of an independent Western Sahara "self" to determine its own fate.[95]

Leaving to one side temporarily the ambiguities surrounding the concepts of "colonial", "alien", "racist", and "neo-colonial", there is one respect, at least, in which – so it is widely assumed – the Wilsonian problem of defining the "self" has been overcome by the United Nations. To Lansing's query whether the bearer of the right of self-determination was to be "a race, a territorial area or a community,"[96] the United Nations, it is said, has given an unequivocal response. It has opted for the *territorial* over the ethnic criterion, and this, in contradistinction to what obtained in the Wilsonian era. As Rosalyn Higgins, summarizing UN practice on the matter, stated: "Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power."[97] It is, of course, still necessary to delimit the boundaries of that "political unit" and this is where problems of subjectivity and the double standard may creep in, even inadvertently. Happily, however, it is contended, the United Nations has discovered and utilized an objective criterion, that of respect for the former colonial boundaries. By means of this standard with its firm insistence on maintaining the territorial integrity of the former colonial unit, two dangers, especially prominent in the African continent with its

arbitrary borders, were averted: the disintegration of the new heterogeneous units into competing "selves" – probably along tribal lines – and endless irredentism for the purpose of uniting groups artificially divided by the colonial process.[98]

Undoubtedly, the territorial criterion has loomed large in the process of decolonization and in UN deliberations on self-determination, and many examples can be cited in support.[99] The fact that certain units (most notably, Nigeria and the Congo) may have been too large, and others (such as Lesotho, Swaziland, Gambia, and the Maldive Islands) too small to be viable mattered little. Moreover, in some instances, even where the relevant colonial administrative decisions were of very recent vintage as in the case of Equatorial Guinea, which was formed only in 1963 by a Spanish decision to merge the island of Fernando Poo with the mainland territory of Rio Muni, the General Assembly (in 1966) sought to ensure that the territory receive independence " as a single political and territorial unit."[100] Refusal to admit any partition or "bantustan" solutions for South West Africa (Namibia) is (apart from the racial basis) explicable in this manner.[101]

Nevertheless, on closer inspection, it becomes evident that UN practice has been far less consistent than is assumed; that the ethnic issue has not disappeared; that, particularly in the "harder" cases, the complex interweaving of territory, group affiliation, and time, continues (sometimes even more acutely) to plague the discussion; and that the manner in which the United Nations has sought to disentangle these issues leaves room for some doubt as to whether a single, principled stand was adopted. In essence, subjective perceptions of what constitutes an unacceptable "colonial" relationship have lurked ominously in the background.

As for the consistency of UN practice, it may be noted that the United Nations has, on several occasions, permitted parts of previous colonial units to determine their future separately – frequently on ethnic grounds. Thus, Ruanda-Urundi acceded to independence as two separate States, Rwanda and Burundi, dominated respectively by the Hutus and Tutsis (and accompanied by reciprocal massacres).[102] The United Nations acquiesced in the British decision to divide the British Cameroons, for the purpose of conducting referenda, into northern and southern regions and in the subsequent accession of the northern region to Nigeria and the southern region to the independent State of Cameroon.[103] With the blessing of the United Nations, the Gilbert and Ellice Islands (a single colony) split, and the latter islands (with a population of a bare 6,000 and an area of 36 square kilometers) acceded to independence as Tuvalu in 1978. Earlier, over 90% of the Ellice Islanders (mainly Polynesians) had voted to separate from their Gilbertese (primarily Micronesian) cousins.[104] (The attempt by the Banaban separatists to utilize the Tuvalu precedent in order to achieve independence for the Ocean Islands met with no similar success.)[105] In the case of the Pacific Trust Territory the United Nations did not voice strong objection when the United States divided the fate of the Northern

Marianas from that of Micronesia as a whole. Whether the further fragmentation of Micronesia will receive UN endorsement or acquiescence remains, at the time of writing, an open question.[106]

Violations of the territorial criterion of defining the "self" may also be seen in the willingness of the United Nations to allow the absorption within former colonial units of areas never embraced within the pre-independence boundaries of those units – and to do so without ascertaining in any meaningful way the wishes of the populations to be annexed. Thus, e.g., in the early period of the United Nations, Hyderabad, which had not been part of British India, was conquered by India; Kashmir was divided militarily between Pakistan and India; and some French enclaves in India were ceded by treaty to India.[107] In the post-1960 era, the following instances may be cited: the Indian seizure of Goa in 1961; Dahomey's incorporation of the Portuguese enclave of Sao Joao Batista de Ajudá;[108] Indonesia's absorption of West Irian;[109] the integration of Ifni with Morocco; and the annexation of the Western Sahara by Morocco (and initially, by Mauritania too). In all these cases, the wishes of the local population were deemed by the annexing State either irrelevant or strictly secondary to the territorial claim involved. With respect to Goa, for example, Nehru had earlier declared: "We are not prepared to tolerate the presence of the Portuguese in Goa even if the Goans want them to be there."[110] Adoption of a Security Council resolution condemnatory of India was blocked by a Soviet veto, but a majority of the General Assembly apparently accepted the *Indian* view of the matter.[111] The "act of self-determination" conducted in West Irian in 1969 with à measure of UN participation was a *pro forma* and spurious exercise,[112] and annexation was consummated in fact in 1962–63, with the sanction of a split General Assembly.[113] Ifni was transferred to Morocco by Spain, and this was deemed, by the General Assembly and apparently by the International Court of Justice too, to have constituted compliance with the Assembly's earlier requests that "the aspirations of the indigenous population" be borne in mind.[114] The case of the Western Sahara has been far more sticky. Views within Africa were so divided for a long time as to render both the Organization of African Unity and the United Nations indecisive and paralyzed for several years. While the international fora temporized, the parties concerned – Morocco, Mauritania, Algeria, and the Polisario Front – proceeded to "determine" the issue of "self-determination" on the battlefield, as had been the custom in days of yore.[115] Mention might also be made of the Indonesian annexation of Portuguese Timor which, notwithstanding some early condemnations by the Security Council[116] and several strongly worded resolutions adopted by very slim majorities in the General Assembly,[117] appears to be well on the way to being accepted by the United Nations as a fait accompli.

These cases point to several conclusions which do not readily cohere with the assumed postulates of the new "UN Law of Self-Determination." First, as the Bangladesh experiment also demonstrated, success is still relevant, at least in certain cases, to the question of who may and may not exercise the "right" of

self-determination. Furthermore, the issue of size is also pertinent to the exercise of self-determination, notwithstanding the contrary assertion contained in innumerable resolutions of the General Assembly and the Special Committee of Twenty-Four.[118] It is only for small colonial territories fortunate enough not to have covetous neighbors with claims (whether based on reversion to an earlier sovereignty, geographical contiguity, or other grounds) which the General Assembly is prepared to accept or live with, that the issue of size is irrelevant. Goa, Ifni, Gibraltar, and the Falklands, for example, are not counted among the more fortunate. In turn, the question whether the claim can be sanctioned and legitimized (sooner or later) is inseparable from the *identity* of the claimant State and the Assembly's perception of the resultant situation as "colonial" or "non-colonial." Thus, the so-called objective and definite territorial criterion leads back, in fact, to the essentially subjective exercise of defining the "colonial" relationship.

Nowhere, perhaps, is the inherent subjectivity of the exercise more manifest than in those controversial cases in which the ethnic composition of the territorial unit concerned has changed significantly over time. Which population is to constitute the "majority" entitled to self-determination? Forced and voluntary population movements have been and remain a constant feature of international relations, particularly prominent during and following wars and unrest. Which is the critical point in the seamless web of history for determining the population to be deemed "indigenous"? Are 250 years of settlement in Gibraltar sufficient to establish the "indigenous" status of the present population, as Britain claims,[119] or are the current inhabitants to be viewed as a settler, non-indigenous population, having no "roots in the Territory," as contended by Spain?[120] Is *peaceful* settlement and non-expulsion of a previous population by force to be the test, as suggested by Spain? On this basis, taking almost any critical date as the standard, large scale redrawing of the global demographic and political maps would be required,[121] and few populations would be permitted to remain in their present countries of residence. Is not the choice between rival ethnic claimants and alternative critical dates determined, in the last analysis, by some preconceived notions of who the "real" population of the territorial unit is, or should be?

In the case of Fiji, for example, the General Assembly was unwilling to view as in any way "alien" or "non-indigenous" the immigrant Indian community which, by the 1960s, had outnumbered the native Fijian population. Britain, in its attempt to protect the indigenous Fijians, had introduced an electoral system based on communal rolls, but the General Assembly insisted, in several resolutions, that independence should be attained only on the basis of the "one man, one vote" principle.[122] On the other hand, the "indigenous" credentials of the populations of Gibraltar and the Falklands are apparently eyed with some suspicion – a factor which (along with considerations of territorial extent and size of population) goes far towards explaining the Assembly's preference for the territorial claims of Spain and Argentina, respectively, over the right of the inhabitants concerned to separate self-determination. Contrariwise, the General