**UNIVERSITY OF LONDON**

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THE CHALLENGES OF CONTEMPORARY

SELF-DETERMINATION

IN INTERNATIONAL LAW

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# Declaration

I Ahmet Mustafa SN1143689 hereby declare this be my own written work.

…………………………………………….

AHMET MUSTAFA

# Abstract

The history of diplomacy and theory of political state shows that the modern international legal principle of self-determination, in the current state-centric formal international political system, regulates inter and intrastate relations. Therefore the international legal principle of self-determination contributes to the national and international order.

The self-determination is highly contentious, irregular and lacks a degree of certitude. This causes a threat to international peace and security when overlooked, or implemented immoderately, and without goodwill. Such a jurisprudential disposition leads to doubts over the legal credentials of the political concept of self-determination, suggesting that it invokes moral imperatives. This view runs contrary to the findings of this research.

Political and legal moderation is shown to be essential in the administration of international law and therefore that of self-determination due to three distinctive elements: the humanity, the political state and the formal state-centric international political system. The components and determinants of society, political, and legal rules are distinctive thus rendering each system sui generis. Therefore no legal precept serving all three distinctive domains of order can achieve certitude and regular application, found in dissimilar legal systems, and be subject to fair criticism arising from comparative analysis.

Although international law is sui generis legal system, the current challenges of self-determination can be resolved by the deployment of administrative measures and values within formally empowered international political system.

The hypothesis is that the conditionality of legitimate components and determinants of international legal principle of self-determination, in the current formal state-centric international political system, does not deprive its jural imperatives

The hypothesis is proven by regressive historical tracing of the conceptual developments at national levels, and at international level, upon its transmutation, once the formal international political system was established.

Once the hypothesis is proven jural imperative of self-determination in all three domains of humanity, the political state and the formal international order will be self-evident. Secondly, if all three domains are unregulated by international jural imperatives, they would be pitted against each other’s interest, and compete to subjugate each other.

The proof of the hypothesis leds to several sustainable conclusions.

First the transcendental jural cohesion provided by the three principles; legitimacy, democratic accountability and rule of law, in the said three domains of humanity, the state and the formal international order, forms the theoretic fusion of their pursued ends, as well as being found in practice as state action in the current UN era.

Second, self-determination also provides stability in diversity, and conflict of interests, aggravated by the constancy of change in national and international political systems.

Third, self-determination when administered moderately and with goodwill, provides the ultimate solution to international peace and security by placing greater international responsibility on the individual, and collective of individuals, and the state and international community, within the formal international political system. Thus, international law may be gentle civilised after all.

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# CHAPTER 1 THE CONCEPT OF SELF-DETERMINATION IN INTERNATIONAL LAW

## 1.1 Introduction the Concept, its Challenges, Limitations

The modern[[2]](#footnote-2) international legal principle of self-determination, (hereinafter referred to as “self-determination”) creates international legal obligations regulating interstate and intrastate relations, thus contributes to the international order. Yet no other political concept has altered so many aspects of international political systems causing controversy or affected other international legal norms, the constitutions of the states or the international organs. No other norm touched the lives of people so profoundly or changed frequently, imprecisely and violently broadening its purview into international threatening international order. The statistical evidence shows that in 2007, 74% of the international community endured self-determination based discontentment, 25% engaged in a civil war and 24% lost territory and population[[3]](#footnote-3). Therefore United Nations Charter Article 1 (2) added a new contentious dimension as a political concept, as a legal norm and as a legal precept, to the current FSIPS.

The UN Charter reflects the paradox faced by national international order. On one hand, it requires the implementation of the contentious principle of self-determination that challenges the title to the territory; while on the other hand, the Charter endeavours[[4]](#footnote-4) to protect the political unity and territorial integrity of the states while expressing clear resolve to intervene in domestic jurisdictions of non-compliant states.

Departure from such a paradox, by the abandonment of the FSIPS[[5]](#footnote-5), will destroy the principle of sovereign equality of the state and leads to the formation of global and regional hegemonic states. The creation of *civitas maxima* (world government) will also end the principle of sovereign equality of the states. An alternative approach to the paradox lays within the current international political system, and in the maturing of the international administrative justice.

The inherent and administrative challenges of modern self-determination are due to its contentious imprecise nature- inherent challenges-, and irregular application –administrative challenges. Therefore challenges limit[[6]](#footnote-6) legitimate invocation of political and legal principle. Challenges, therefore, the said limitations can be met with greater awareness of the threats to international peace and security, with harmonised action and good-will and moderation and friendly relations, justice, fairness, and cooperation within the international community. However, the broadening scope of self-determination and invocation of its moral and legal obligations imprecise and irregularly invoked also increases the frequency of international intervention[[7]](#footnote-7). Increased volume of interventions increases the associated inherent and administrative challenges and their consequential limitation. For instance the consequences of limitations of untimely intervention in Rwanda and Kosovo meant the loss of thousands of lives. Consequences of ineffective intervention in Srebrenica–Bosnia are equally dramatic. Failure to intervene in Syria cost even more lives with more refugees.

Three limitations emerge with the mounting challenges due to enlarged scope of the self-determination, and consequential extensive intervention affecting the modality of governance. These limitations will adversely affect the hypothesis

 (i) If there is no urgent improvement in determination of processes of legitimacy of claimant, their claims and claim process of self-determination,

(ii) If there is no FSIPS predetermined action to arrest ipso facto violations of self-determination based obligations will not be possible,

(iii) If there is no effective restitution to identified grievances due to violations of international law then the hypothesis advanced by the thesis will not be safe.

### 1.1.1 The Components and the Determinants of the Modalities of Self-Determination

The four modalities of self-determination are: external and internal self-determination, state succession and secession. All modalities are assisted by the international legal obligation of Responsibility to Protect, (hereinafter referred to as “R2P”). One may even argue that succession and secession are brought about because the international community is under international obligation to act and stop threats to international peace, security and commissioning of crimes against humanity, and other international crimes, or breaches of international peace because of moral and legal imperative R2P. Therefore R2P has legal and political and administrative basis emanating from the purpose and principles of the Charter and on account of implementing and administering its “purpose and principles“. Never-the-less international political norm has not yet transformed into international legal obligation without the direction of Security Council. Even crimes against humanity may occur and actually established by independent international authorities report to UN yet nothing may be done unless directed by SC resolution. Finding parties to take implement SC resolutions or ICJ decisions without threatening international peace and security is another challenge. Therefore a party may be aware of its international right to be protected by the international authority under the UN Charter and by an SC Resolution and ICJ judgment. Furthermore, claim that one’s grievance has received the legal sanction of the ICJ and support of the SC Resolution directing the offending party to cease violations of international law and take recitative as in the case of Partition Walls in occupied territories in Palestine. The implementation of this right depends on the political reality. If there are not coalitions of willing state ready to compel Israel with threat and use of force as one seen in the bombing of Libya, the Ruling on Wall Case and the articulated self-determination rights of the Palestinians under international law will remain protectable right with no implementation or legal and remedial effect. Application of self-determination manifesting in a state may cause three consequences due to practice of controversial, ill-defined irregularly applied self-determination in FSIPS; - (i) legal rights emerge and upon implementation attain legal effect, (ii) legal rights awaiting legal implementation, (iii) moral rights awaiting political action thus legitimate effect yet no legal right in sight and remain subject to incertitude, ill definition and irregular application. These are the said limitations due to the challenges function with the said characteristics (contentious, imprecise and irregular) yet with jural imperative held by the hypothesis.

These modalities of self-determination evolved, in the distinctive eras of the United Nations, by interpreting the Charter and by complying with the ideals of its purposes and principles. By 1945 external self-determination, evolved to ensure decolonisation. In the 1970s, internal self-determination emerged and expanded the inherent aspects of self-determination; legitimacy, accountability and the rule of law, beyond decolonisation to independent states and oppose oppressive and corrupt regimes.

The R2P has been evoked in the 21st century in view of the gross violation of human rights laws, in Rwanda and Bosnia a decade earlier when the R2P was totally abrogated and thousands died within days. The emergence of this international obligation is causing some concern over its development and invocation by the international community while implementing modalities of self-determination, including intervention and use of force[[8]](#footnote-8). By doing so, self-determination legitimises the international legal personality of a state with objective normative qualities. These objective qualities determine what a failed state is, and what is a legitimate state succession, and secession in international law. This is a ground-breaking development in need of being invoked by UNGAR with overwhelming support and judicial declarations. This is the pattern that emerged during decolonisation whereby non-subjugation to alien rule became a peremptory international legal principle applicable to all people permitting no state to derogate from. Non-the-less, R2P is ill-defined, contentious and irregularly applied thus justifiably looks like an incomplete international law project and will receive attention throughout below.

Four modalities of self-determinations contain legal precepts, constituted by three substantive and four constitutive components. The legitimate components and determinants legitimise the said modalities of self-determination subject to three conditions:

(i) Inviolability of states jurisdiction within its territory,

(ii) Inviolability of territorial integrity of the states,

(iii) Inviolability of fundamental freedoms and prohibition of crimes against humanity being an international obligation of R2P.

The first substantive component of self-determination is the political principle of the peoples’ and citizens’ political and legal right to their future without being adverse to others. The second substantive legal norm propounds that everyone has a constitutional right to participate in collective power-sharing through constitutional processes. The third substantive legal right under self-determination is, not to be subjected to the arbitrary rule of law and denied personal protection by the state.

The first constitutive component of self-determination is its claimant. The second is the respondent to the claim of self-determination. The third is the claim and process. The fourth constitutive component is the international community and its organs and their response to the consequent claim process.

The first determinant of self-determination is international peace and security. It is a legal concept serving social and political ends .The FSIPS, utilise the reality of political power by supervising it, thus legitimising it. Such a constitutional order is the moral justification for the existence of the political state and constitutional order and state international political system. In 1919 the preambles of the League of Nations[[9]](#footnote-9) and in 1945 the United Nations Charter, codified these moral and legal considerations[[10]](#footnote-10).

The second determinant of self-determination is goodwill. This many consequences. Self-determination in view of their normative and legal incertitude will not be effective without goodwill, co-operation and moderate approach, in the interpretation of the rules for their implementation of. These are the challenges of contemporary self-determination.

Without co-operation among the states, the incertitude of rules of modalities of self- determination will render the conceptual, normative, jural imperative aspects of self-determination meaningless. Lord McNair in South West Africa built his legal argument on this change brought about by the Covenant and the Charter. [[11]](#footnote-11)

Irregular application without reason and the legal excuse will remove every jural aspect and vestige of a claimable right. Concept without jural aspect will abandon inter and intrastate relations based on law and international authority will be based on power only.

The jural control of threat and use of force in intrastate and interstate relations prevent the international arbitrary rule of law. These prevent regression from current imperfect order and abandonment of endeavours to achieve international justice and international order.

Competition between the states for global and regional domination and the international order, will not create civitas maxima but may destroy FSIPS. The law cannot create order anymore then power can maintain it alone. Power presents the order to law, law maintains order justly and fairly with power. However, in a FSIPS international legal order constituted by sovereign states and self-autonomy rule, and collective defence and self-monitored compliance, regulation of threat and use of force are challenges which can be met by application of goodwill and moderation, administrative fairness, and cooperation among legal and morally-bound parties as demonstrated in 1920 and in 1945

There are several legitimising determinants:

(i) Maintenance of international peace and security,

(ii) Goodwill,

(iii) International justice and fairness,

(iv) Cooperation,

(v) Moderation,

(vi) Harmonisation,

Therefore, this research will demonstrate the importance of the conditions legitimising self-determination. These determinants are the normative aspects of the legal principles of self-determination, rendering it conditional rather than an absolute without negating their jural imperatives.

The legal principle of goodwill is found in the maxim *‘*pacta sunt servanda’, and it is identifiable in codified form in 1969 Vienna Convention on the Law of the Treaties. It is stated in its preamble, and in Article 26.[[12]](#footnote-12)

The four modalities of external, and internal self-determination, the process of state succession and secession, and post-secession order maintains their substantive and constitutive legitimising components, and determinants along with their jurisprudential integrity. The jurisprudential integrity of the components and determinants are their ethical, political and legal aspects, and are essential for many reasons:

(i) For consistent diversification and broadening of their applications,

(ii) The jurisprudential integrity of the modalities is maintained in institutionalisation of the impartial accountability of all authorities,

(iii) The jurisprudential integrity of the modalities is maintained in pursuance of international justice confined within the cardinal purpose of, formal FSIPS and the maintenance of international peace and security,

The political concepts, the legal norms, and the jural precepts of the international law constitute the common aspect of all modalities of self-determination, thus attaining jural homogeneity. Jural homogeneity refers to the legitimacy of the claimant, the legality of the claim, and to the legitimacy of the redress and the attainment process of self-determination. Jural homogeneity established in all modalities of self-determination allows diversity to self-determination to affect interstate and intrastate relations, with jural imperatives. Jural homogeneity and diversity of self-determination affect constitutions of the states and administration of the international organisations. Co-existence of jural homogeneity and diversity explains why and how self-determination affects FSIPS and extend the purview of the jurisdiction of international law. Without common jurisprudential, therefore an ethical, political and legal component of modalities self-determination could not be implemented. Without the common jurisprudential components, the international legal principle will not be justiciable. Without justiciability, the principle of self-determination will have limited use in state creation and in the attainment of international order. Without jural imperative, legal right or prohibition has no effect.

Therefore the legitimacy of self-determination depends on the process of democratic principles, the rule of law, power sharing and inherent rights. Without these administrative norms, self-determination fails to maintain, protect and serve international peace and security, and the political freedom of the citizens and territorial integrity, and political independence of states.

Three general criticisms are levelled against self-determination:

(I) Its Regularly diversifying nature,

(ii) Its Irregular application,

(iii) The unwillingness of states to implement,

Constant diversification is not same as the change in the legal principle of self-determination. History can verify that modalities of self-determination are frequently diversified in FSIPS. In 1919 Covenant banned new colonisation of the defeated states and introduced minority protection over their territories. In 1945 the Charter started decolonisation and internal application of self-determination for democratisation[[13]](#footnote-13). Since 2005 frequent invocation of the international legal principle of R2P is emerged paradigm changing norm akin to decolonisation.

Irregular application of the Mandate System and Minorities Protection Treaties during League of Nations 1919-49 is a historical fact. Decolonisation under UN is prominent in 1950-1980s. R2P is being irregularly invoked since 2005.

Unwillingness to implement self-determination was noted from the start in the 1950s. In 1971ICJ declared decolonisation under the principle of self-determination, erga omnes international legal principle.[[14]](#footnote-14) In 1988 UN has still urged finalisation of Namibian saga.[[15]](#footnote-15) Then there was the East Timor yet to be [[16]](#footnote-16)adjudged by ICJ in 1996.

Three legal controversies pose a credible challenge to the validity of the jural imperative, necessitating conditionality and moderation in the application of self-determination as hypothesised herewith in.

(i) The legitimacy of the claimants, and the legitimacy of the claims, and legitimacy of the claim process,

(ii) Legitimacy of the response of the state, from which the claim is made,

(iii) Inappropriate response of the international community to a pending claim of self-determination.

In conclusion to this introduction, self-determination is now an international legal principle despite its imprecise, irregular and reluctant application. It creates an international obligation on the international community and it’member states and the claimants of self-determination. Therefore, the legitimacy of self-determination and its usefulness to international peace and security and its moral justification of its jural imperatives, are conditional, and dependent on several legitimate components and determinants as hypothesised herein.

### 1.1.2 The Hypothesis and Corollaries and their Proof

The hypothesis is that the conditionality of legitimate components and determinants of the international legal principle of self-determination, in the current FSIPS does not deprive its jural imperatives.

The subject of the hypothesis is constituted by General and Specific International Law whereby the legal, and the moral norms[[17]](#footnote-17) forms the substantive aspects such as rights and prohibitions while the international due processes, forms the constitutive thus administrative procedural aspects. The principle of General International Law[[18]](#footnote-18) has substantive and constitutive aspects. These principles invoke international obligations to intervene, to arrest, and prevent violations and determine liability for grievances and ensure restitution. Both legal and political international norms affect intrastate and interstate relations.

The specific law of self-determination while subject to general principles of law[[19]](#footnote-19), is also constituted by substantive and constitutive aspects. Both aspects concern self-determinations inherent and administrative challenges and consequential limitations[[20]](#footnote-20)impose on other international legal norms such as title to the territory, the principle of uti possidetis.

Furthermore the controversial attempts to change modalities of governance leads to threat and use of force and breach of international peace and security and crimes against humanity and violation of humanitarian law, and invocation of R2P[[21]](#footnote-21).

Proof of hypothesis will rely on relevant evidence from Customary and International Treaty Law. In practice, this includes norms emerging from UN as FSIPS, inclusive of Regional Organisations[[22]](#footnote-22) and practices. Never-the-less the focus of this thesis is not on the aggregate of national (exclusivity), but on international organisations (inclusive universality) for several reasons.

First, the Chapter VIII of the UN Charter regulate and control, and give legitimacy to regional organisations with Articles 52. Second, the international order relies on regional organs for compliance to custom and consent based universal values[[23]](#footnote-23) along with the Purposes and Principles of the Charter, [[24]](#footnote-24) therefore duplication of functions with regional processes complicates[[25]](#footnote-25)already complicated controversial, imprecise and irregularly applied, supervised, and enforced legal principle. Third, FSIPS facilitates three global norms, democratic accountability, legitimacy, and application of the rule of law whereas regionalism by definition negates global application of the three norms. Fourth the proof of the hypothesis is determined by an international legal method which limits the source of evidence and scope of the thesis. Finally, the hypothesis is proven by the inclusion of relevant important evidence at the exclusion of equally important but irrelevant.

The first part of the hypothesis holds that self-determination is subject to conditions legitimising its components, and determinants. It will, therefore, follow that since conditionality does not reduce the international legal principle to a mere hortatory moral obligation and confine it to the political context, then the legal principle retains its jural imperatives, and therefore is justiciable. Therefore self-determination created by the international community, for the agreed purposes and principles, gives rise to a justiciable international legal obligation, combined international moral and jural obligation.

The second part of the hypothesis is that the concept of self-determination has four components:

(i) The claimant,

(ii) The state against whom the claim is made,

(iii) The claim and claim process,

(iv) The international authority.

It also has six determinants:

(i) International peace and security,

(ii) Justice and fairness,

(iii) Goodwill,

(iv) Cooperation,

(v.) Moderation,

(vi) Harmonisation,

The third part of the hypothesis is its qualifying precondition. The hypothesis holds true as long as there is a formal state-centric international order.

Three corollaries follow from the hypothesis. First, the incertitude of legal definition, irregular and hesitant application to all modalities self-determination, within the FSIPS developed a sui generis legal system.

Second, an international law intervenes to achieve international social order in interstate and intrastate relations. Therefore: (a) the international community accepts intervention in domestic and in the international order, (b) intervention is legitimate in the absence of general law and order and lack of non-compliance with the international legal principles, (c) external and internal self-determination creates international obligations to intervene in the states and international authorities.

Subsequent international intervention has political and legal objectives and consequences. If internal and external self-determination fails to bring peace, then legitimate state succession and secession becomes an extreme ultimate form of self-determination.[[26]](#footnote-26) It is legitimised because it attempts to protect the citizens from persecution and genocide and crimes against humanity and from war crimes. However, secession under international supervision also seeks to prevent the breach of international peace and security.

The third corollary is that self-determination is the imposition of an international legal obligation on the state with R2P the citizens collectively from the crimes of genocide, crimes against humanity, war crimes, crimes of aggression[[27]](#footnote-27). Furthermore, ICCPR and ICESCR create legal and moral international obligation in the context of FSIPS. The subsequent civil, legal and moral and intentional criminal obligations contain jural imperatives to implement external and internal self-determination while protecting the political unity, and the territorial integrity of the state[[28]](#footnote-28). It, therefore, follows that since a failed state cannot protect its citizens, and implement international norms, within its domestic jurisdiction, then it also forgoes its attributes of sovereignty, and gives way to alternative state or states to emerge, subject to their implementation of international legal norms.

Self-determination creates an international obligation on the state, on the claimants of the self-determination, and on the international community. The legal basis of the hypothesis is found in the history of customary and international treaty laws and the United Nations Charter as a source of international law[[29]](#footnote-29). Furthermore in 21st Century international community comes under an international legal obligation to exercise its R2P human beings from, ethnic cleansing, and genocide, crimes against humanity and war crimes and breach of international peace.

International intervention under Charter based maxim R2P is also conditional. A state-centric ought to be intervened in if it is incapable or about to be incapable[[30]](#footnote-30) of maintaining its political unity, and its territorial integrity, and protect its citizens from the negation of their fundamental freedoms and alien subjugation.

Therefore political facts render international intervention and state-centric succession or secession legally objective acts rather political acts only. International intervention, ensuing succession or secession was conditional to the legitimacy of components and determinants of the self-determination as hypothesised herein.

### 1.1.3 Method of Science of International Law

The method of proving the hypothesis and its three corollaries is the task of the science of international law by the admission of important and relevant evidence at the exclusion of important but irrelevant evidence. This method can carry out four tasks with four steps namely,

 (i) Restate the current international law of self-determination,

(ii) Trace its historical development and reach several moral truths,

(ii) Consider the fairness of criticisms of the precepts of self-determination,

(iii) Identify the challenges of self-determination.

The method of science of international law relies heavily on three histories:

 (i) History of political ideas,

(ii) History of political states and their constitutional and administrative law,

(iii) The epochs of the diplomatic history of Europe, the new world, and recently of all state’s diplomatic history, within the UN political system.

Chapter 1 introduces the concept of self-determination, including its components, and determinants, its modalities, and a hypothesis and methodology. If these identify contemporary modalities of external, internal self-determination, and the relationship between the state succession and secession, international R2P and the link to the concept of deserved sovereignty.

Finally, academic view of the concept is cursorily covered, to justifying the research and the response to the criticism of general international law with a hypothesis. It concludes first by reflecting on the perceived characteristics of contemporary self-determination *lex lata* (law as it is). Second by purporting that fair criticism is essential to rectify administrative failings of the system, and to adapt to changes and evolve and administer self-determination *lex ferenda* (as it ought to be) within the existing system.[[31]](#footnote-31)

Chapter 2 supports the view that international justice necessitates fair and progressive change without causing injustice introducing new legitimate measures with moderation, selectively and appropriately. These transitions are historically traced, as the absolute rule of theocracy, gave way to the centralised monarchy and to the republics in the Eurocentric 17th-century system from 1648 onwards.

Chapter 2 focuses on the emergence of first Formal State-Centric International Political System (FSIPS) in 1919 with the signing of the Covenants of League of Nations. The legal basis of the concept self-determination is traced to Article 22 to “Sacred Trust” and the mandate and selective use of Minorities Treaties[[32]](#footnote-32). Examining the Aaland Island showed how the international community perceived self-determination as a grantable right initially as opposed to a claimable right. The era of decolonisation hanged on the balance of probability of progressing from grantable to the claimable inherent right.

Chapter 3 traces the legal formation and diversification of self-determination as an international legal principle, as well as a political concept, in the FSIPS. Diversifying evolution of self-determination continues under the care and conduct of the principal UN organs; Secretary-General, the General Assembly and Security Council, and The Judicial system.

Chapter 4 traces the judicial acknowledgement of the legal, moral, and political principles within the modality of external self-determination and the commencement of the UN era of decolonisation. A case study of South-West Africa 1949-1971, followed by the case of Western Sahara 1976, showed that the ICJ upheld the jural precepts of the international legal principle of self-determination, in mandate and colonial context. In the case of Burkina Faso vs. Republic of Mali, the ICJ in 1986 reiterated the principle in the context of independent states. These cases show how all organs of UN developed the concept, precept, and jural imperative. The case study shows that the hypothesis is based on legal principles with jural imperative, which stood the test of time without being diminished in legal effect in view of the irregular and selective application of the principle of self-determination. The hypothesis also discredits any attempt to import the domestic jurisdiction maxim, that irregular or non-application negates jural imperative of legal principle. The distinction is made between selective application of general legal principle –lex gernalisis -, and non-application of special laws -lex specialis in two identical situations and circumstances.

Chapter 5 defends the hypothesis and its corollaries, and analyses fairness of the criticism levelled against international law and self-determination on account of its imprecise general definition, and irregular application.

Chapter 6 deals with the judicial examination of the contemporary international legal principle in the 21st century. The hypothesis is built on presupposition, and case studies provide the evidence to support them. This chapter reiterates that this work and the hypothesis is about international law and how states believe it to function in compliance with international law, within the existing system and look for a solution there within.

Chapter 7 concludes by supporting the proven hypothesis that the conditionality of legitimising components and determinants of the international legal principle of self-determination, in the current FSIPS does not deprive its jural imperatives.

Chapter 7 findings are applied to three current international dispute of Easter Ukraine and Crimea, Palestine and Syria

It is concluded that the hypothesis is proven by evidence of acceptance of an idea, and its jural practice by the FSIPS. This work defends several propositions as it contributes to the discourse on contemporary international law of self-determination while relying on the proven hypothesis: namely,

(i) The current international legal system is sui generis,

(ii) Critics’ of international law compare it with domestic legal system with a false assumption that it has higher successes rate.

(iii) International law is developing because national laws fail to demonstrate a commitment to legal equality and friendly relations among states. Furthermore states fail to conduct their intrastate and interstate relations in compliance with the principles of democratic accountability to its citizens, legitimacy of the constitutional order and rule of law,

(iv) The fact that current international order is built on collective defence and security and principle of intervention under the Charter in 1945 forms the legal basis of necessity to intervene due to failure of some states to reform. The fact that the 21st century witnessed the arrival of a new UN era of national, and international R2P, demonstrates the inherent developmental process of self-determination under the Charter,

(v) Supports the current international political system functions which are capable of being more efficient if international peace and security, justice, good faith and friendly relations and moderate application of international principles to national political systems are pursued.

These are the prerequisites of international legal systems and may not be encountered in all domestic jurisdictions, but hypothesised and proven herein.

Can the proven hypothesis apply to ongoing current self-determination disputes?

This will be under taken in the final chapter

##

## 1.2. Modalities of Self-Determination

Contemporary modalities of self-determination in the 21st century are external, internal and, succession and secession. Presently all are compelled by jural R2P. The ultimate failure of internal self-determination invokes R2P to legitimise secession.

### 1.2.1 Internal, and External, Self-determination

The political concept of self-determination reliant on moral imperative for its implementation evolved, external and internal dimensions and decolonisation as a legal precept with a jural imperative.[[33]](#footnote-33) The external self-determination has two consequences. One terminates and the other prohibits alien subjugation and exploitation of natural resources of the states. Decolonisation under UNGAR 1541(XV) 1960[[34]](#footnote-34)could be achieved by one of three methods,

Principle VI. A Non-self-governing Territory can be said to have reached a full measure of self-government by:

(a) Emergence as a sovereign independent state,

(b) Free association with an impendent state or,

(c) Integration with an independent state[[35]](#footnote-35)

External self-determination prohibits the States from violating each other’s inalienable supremacy within their domestic jurisdiction, thus protecting their territorial integrity.

Internal self-determination provides constitutional and legal protection to all of the citizens of the states, including ethnonational groups in two ways:

1. Constitutional political power-sharing
2. By grant of regional autonomy within the existing territorial boundaries.

If both approaches of self-government subject to legitimate conditions and determinants fail, total independence by secession may be attained. State transformation can take place in several ways. First, the constitution may facilitate state succession from unitary to federal state, or to the dissolution of federations into several unitary states as in the case of USSR in 1989. Secondly, negotiation may lead to multilateral secession, as in the case of Czechoslovakia. The third method of state-centric creation may occur violently. This was the case in Yugoslavia where civil wars threaded international peace and security. Though the secession of Kosovo from Serbia was controversial and deemed unilateral by some, it was assisted by international multilateral intervention in 2008.

The international legal principle of self-determination evolved beyond decolonisation by 1985 when the ICJ considered the principle in the interstate border dispute between Burkina Faso and the Republic of Mali, (ICJ 1985).

 Judge S.O. Luchairi paid specific attention to self-determination, to the decolonisation process and to the post-decolonisation scenarios:

In legal discourse, the term "decolonization" should be used only with great caution and must above all not be confused with accession to independence. On the one hand, it would be wrong to ignore a certain opinion - which like all opinions, whether one shares them or not, is deserving of some respect - to the effect that independence is not the opposite of colonization but rather its crowning achievement, especially in cases where it has been obtained, without fighting, from an administering authority which has facilitated the cultural, economic, social and political progress of the inhabitants, such progress being fundamental to any genuine independence What the Declaration made by the General Assembly of the United Nations on 14 December 1960 R;1514 (XV) specifies, in recognizing the right of self-determination possessed by all peoples, is that they ’freely determine their political status’; but the exercise of that right does not necessarily lead to the independence of a State with the same frontiers as a former colony. It may lead (see the list of factors annexed to General Assembly resolution 648 (VII) of 10 December 1952) either to independence within the aforesaid geographical framework or integration into the territory of the administering power with strict equality of rights as between individuals, irrespective of whether their origins lie in the former colony or the former metropolitan state, or merger with a neighbouring State on the same conditions of equality ,or the voluntary association of the ex-colony with the former metropolis on terms including unqualified respect for the former’s personality. [[36]](#footnote-36)

Modern[[37]](#footnote-37) self-determination in non-colonial context was notable in 1989, dissolution of the former Union of Soviet Socialist Republics into independent unitary states.[[38]](#footnote-38) These new states chose to remain loosely united within a regional inter-state forum as the Commonwealth of Independent States (CIS).[[39]](#footnote-39) The British Commonwealth is another example of how assimilation of indigenous Commonwealth countries took place when the former British Colonies attained their independence and chose to retain the British monarch as their head though some became Republics with presidents as their head of state.

The concept of self-determination is enmeshed in academic controversy, mainly, whether it is a legal, or a political, or a politico-legal concept. [[40]](#footnote-40) If it is treated solely as a legal concept, then it may relate to the political and the constitutional rights of the people which form the foundation of the concept.[[41]](#footnote-41) In other words, an aspiration of self-determination is propelled by a sense of freedom and political rights. Without legitimacy, the entitlement to internal and external self-determination does not arise in the post-colonial era. A claim is legitimised if the claimants are systematically discriminated against by their own states. For instance, the Quebecoise of the Quebec province of Canada maintained their national identity for 500 years in a shared-state with other cohesive groups, with an equal entitlement as pronounced in 1996 by the Supreme Court Canada.[[42]](#footnote-42) Their legitimate claim to self-rule by way of internal self-determination has long been recognised by the Canadian constitutional order both in fact and in law. However their claim for secession is neither legally, nor legitimately supported by the political facts. Legally they are autonomous and enjoy total fundamental freedoms and legal rights within all modalities of governance of a federation, without being subjected to the arbitrary rule of the majority. From this standpoint, it will be inappropriate to identify self-determination, as a legal or an exclusively political concept, as they are intertwined.

From a pragmatic standpoint, a meaningful self-determination entails socio-economic and legal rights,[[43]](#footnote-43) the principle of the inalienable right to life, property and liberty which, as a concept, entails both philosophical[[44]](#footnote-44) principles and pragmatic issues. It requires the beneficiaries to deal with their aspirations responsibly, and international organisation equally to provide the framework for self-determination. Incidentally, the UNGA Resolution “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,” was adopted in 1970, extendedself-determination beyond its decolonisation parameters. [[45]](#footnote-45)

### 1.2.2 R2P, State Succession and Secession

The 2000 UN Millennium Declaration introduced the concept of R2P. In 2002 the UN General Assembly[[46]](#footnote-46)further articulated the Responsibilities of States for international-wrongful acts. In 2005 the World Summit Resolution of the General Assembly added legitimacy to the doctrine of R2P and expressly linked it with three principles: democracy, the legitimacy of authority, and the rule of law. Thus paragraph 16 of the World Summit Outcome of 2005 reads as follows:

(16) We therefore resolve to create a more peaceful, prosperous and democratic world and to undertake concrete measures to continue finding ways to implement the outcome of the Millennium Summit and the other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas: Development, Peace and collective security, Human Rights and the rule of law, Strengthening of the United Nations.[[47]](#footnote-47)

The International concern expressed in Paragraph 16 was statistically justified since decolonisation increased the numbers of new autocratic, dictatorial and one party states. For instance, the democratic states did not makeup half of the community of states until 2007[[48]](#footnote-48). Furthermore, 74% of the global community in 2007[[49]](#footnote-49)were engaged in self-determination based discontentment, 24% of them were engaged in a civil war and lost territory and population to the claimants of self-determination by the force of arms.

In 1992-2010 the political crisis and violent events in the Balkans, especially in Bosnia and Kosovo, furthered and broadened the meaning of internal self-determination. In 2010 Judge Yusuf of the ICJ stated that self-determination was not an anachronistic concept but a developing one and took a remedial dimension to legitimise the political act of secession.[[50]](#footnote-50)

In 2005 The UN General Assembly mandate of R2P came after mass killings in Cambodia, Rwanda, and in Srebrenica. The latter two occurred when the Security Council empowered UN Peacekeepers[[51]](#footnote-51) were providing security. This manifested ‘[P]rofound failure of individual States (…).’ to meet their’ [M]ost basic and compelling responsibilities, as well as the collective inadequacies of international institutions.’[[52]](#footnote-52)

In 2005 UN Secretary-General, in his follow-up report to the General Assembly urged three strategies to implement R2P,

(i) The protection is the responsibilities of states,

(ii) International assistance and capacity-building,

(iii) Timely and decisive responses.[[53]](#footnote-53)

The principle of Self-determination has many challenges because it is dynamic and constantly evolving as particularly in the area of supervision of implementation and enforcement under the concept of R2P notable from the developments below.

The 2005 UNGAR suggests that the concept of self-determination is moving towards remedial succession. [[54]](#footnote-54)

In 2006 and 1999 Security Council Resolutions[[55]](#footnote-55) also suggested this view.

In 2008 The ICJ Judges in their Advisory ICJ about Kosovo supported the assertion that secession under the supervision of the United Nations is legitimate.

The 1996 Quebec case in the Supreme Court of Canada (hereinafter ‘SCC’) provided a comprehensive look at the legal basis of state succession and secession. The SCC expressed the view that constitutions cannot bar the free will of the People.

The first challenge of the contemporary approach to self-determination in international law is the appreciation of the importance of moderation. This is necessary when approaching international challenges. For instance, moderation and fair and just negotiation, between the international and domestic orders, in their discharge of their powers is essential to prevent the development of hegemony among them.

The second challenge is constitutively, and substantively misconceived incertitude of the international legal norm, by those who ignore the distinctions between international and national legal systems and their jurisdictions. As a result, the normative aspects of the *lex generalis* (general international law) are often overlooked due to lex specialis rule (law covering special subject). For instance title to the territory in Montevideo Convention declares it a prerequisite to the formation of State. So is the effective governance of settled population. The importance attached to the inherent rights of the individual as *lex specialis* (law of specific subject) may overlook title to the territory and the concept territorial integrity of the state. Strict application of the rule, special law overrides the general law, adds to incertitude renders Conditionality of external and internal self-determination also adds to the sense-of-incertitude. This case-by-case application of the norms has long been the recognised method of the UN Charter [[56]](#footnote-56) and cause for misunderstanding of the international law.

The third challenge is the legitimacy of the claim, and response of the state and the international context of the claim process subject to consequential facts;

(a) The occasion of the claim and the method of its application,

(b) The legitimate needs, of legitimate groups and peoples,

(c) Minimal constitutive and substantive disruption, to the domestic and international order,

(d) Awareness of the instances of administrative difficulties.

These difficulties were noted when the Security Council and General Assembly focused on the same *s*ituation in Kosovo matter despite their defined scope and power by the UN Charter. This is a constitutive and an administrative challenge.

Substantive challenges were also present because self-determination affects other issues such as title to the territory or state succession and secession and inherent rights of citizens.

It is hypothesised and will be proven that if the moral principle of moderation, identifiable within the UN Charter is not applied, then self-determination may seem to resolve one problem, at the risk of creating another. It is reiterated moral moderation is an administrative imperative providing flexibility in the effective application of normative international rules and processes. Nonetheless, self-determination raises three challenges:

(i) The reserved domain of a sovereign state diminished,

(ii) Reasonableness of expectation of high degree of certitude of consequences, from the general principle of international law (Fuller’s test),

(iii) Challenge of monitoring and administering an international political order, without undermining national sovereignty, while seeking implementation of self-determination (Roscoe Pound’s test).

### 1.2.3 Challenging the Peremptory International Legal Norms

The UNGAR 2625(XXV) 1970 paragraph 5(7) declares that:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would diminish or impair, totally or in part, the territorial integrity or political unity of the sovereign and independent State conducting themselves in compliance with the principles of equal rights and self-determination of the peoples as described above and thus possessed government representing the whole people belonging to the territory without distinction as to race, creed or colour. [[57]](#footnote-57)

This resolution refers to the conditionality of modern state sovereignty to the implementation of internal self-determination. Yet the inviolability of supremacy of a state within its domestic jurisdiction and its territorial integrity has been deemed a peremptory international legal principle, supporting the UN Charter Article 2(4) while also rendering it conditional to the terms of Article 2(7). Article 5(7) reproduced above, refers to the conditionality of state’s sovereignty to the state’s compliance with the principle of equal rights and legal principle of self-determination. This conditionality makes multilateral intervention justifiable.

There are two other aspects of self-determination, one that concerns title to the territory and the other concerns the people’s fundamental rights and freedoms. The former is often determined under the policy of uti possidetis juris, meaning that a new state is to be created within their colonial boundaries. The latter is concerned with institutional and individual democracies, the constitutional principles of fairness and accountability, legitimacy and the rule of law. The theoretical basis of these two aspects of self-determination emanated from self-determination oriented disputes. Franck complained that independence movements by way of self-determination were arrested by the 19th-century Latin American principle of uti possidetis[[58]](#footnote-58). In the same context, Judge Dillard in the Western Sahara Case ICJ (1985) said that it is not the land which creates law for man, but man creates the law of the land.[[59]](#footnote-59) This issue receives attention throughout the thesis.

The said three concerns and challenges about the right to self-determination also render three conditional questions:

(i) What is the legal nature of the claim self-determination?

(ii) Who can claim it self-determination?

(iii) How to claim?

These claims often lead to domestic and international controversies, discontentment, to political agitation, and to civil disobedience, terrorism, and civil wars, discussed in the thesis.

##

## 1.3 Informed Views on the Importance of Self-Determination

In 1911 Oppenheim noted the importance of learned publicists and advised caution. In 1945 Article 38 of Statute of ICJ acknowledged the importance of reputed publicists. Therefore, caution is necessary, while considering the informed views of the eminent jurists on self-determination, as a mid-point of references, between the primary and secondary source of international law.

### 1.3.1 The Continuing Importance of Self-Determination

Adoption of the international legal principle of self-determination[[60]](#footnote-60) is a continuous process, and interest to the international community. In 2010 Judge Yusuf in ICJ pointed out, self-determination is not synonymous with decolonisation, or an anachronism because the decolonisation era has ended[[61]](#footnote-61).

 As successive UN Secretary-Generals have reiterated, a state’s sovereignty is no longer a licence to abuse its citizens’ fundamental freedoms, their constitutional entitlements and their legal rights, or to resort to the unilateral threat or use of force.[[62]](#footnote-62)

Moreover UNGA Resolution 2625(1970) par. 1 (3),[[63]](#footnote-63) demands that the States do not to oppress their citizens, as directed by Article 1(3)[[64]](#footnote-64) of the Charter. This obligation is also found in UNGAR 2625 (1970) para. 5 [[65]](#footnote-65) and in 1966 International on Civil and Political Rights, Article 1 and in the compliance provisions of Articles 40 and 41[[66]](#footnote-66). Therefore, the UN Secretary-Generals were not referring to *’*hortatory’ international political sentiments,[[67]](#footnote-67)but to normative legal precept pronounced by ICJ in 1971[[68]](#footnote-68) and in 1975nternational legal norms applicable to all people, erga omnes reiterated in 1996 East Timor case[[69]](#footnote-69). Therefore, the concept of self-determination is an epoch-making political concept to achieve intentional jural since the American Declaration of Independence in 1776.

### 1.3.2 Informed Views Concerning the Development of Self-determination

Doehring’s views support the hypothesis advanced herein. First, self-determination has a history, so regressive tracing is useful.

Second, history demonstrates the broadening scope of self-determination during decolonisation era.[[70]](#footnote-70) Therefore the narrow definition of self-determination is unhelpful in the post-decolonisation era. [[71]](#footnote-71)

Third, the Island of Palmas case[[72]](#footnote-72) demonstrated that the doctrine of inter-temporal law[[73]](#footnote-73) demands diligent analysis, since self-determination is perceived as a legal method of doing justice, by altering the title to the territory established in compliance with the contemporary international law. Palma’s dispute showed the necessity of non-dogmatic, moderate application of self-determination thus its conditionality. This supports the hypothesis.

The informed view on the subject ought to be valued with great care.[[74]](#footnote-74)Even more so, in view of the importance attached to the ’teachings of the most highly qualified publicists of the various nations, as subsidiary determination of the rules of law.’[[75]](#footnote-75) References to Higgins, Verzijl, Watts, Grewe, Kennedy, Doehring, and Emerson, Hannum and Cassese, are made because they expressed interest in the historical development of international law, and that of self-determination. References to Brownlie, Franck, Crawford, herein are made due to their specific contribution to the debate on the subject matter.

Grewe’s examines eight specific aspects of governance in distinctive historical epochs of international law. He demonstrates that history of international law is evolutionary and non-revolutionary.[[76]](#footnote-76) Kennedy suggests a displacement of one school of thought, with its effect on international relations, by another, akin to policy change supplemented with moral justification.[[77]](#footnote-77)

Emerson suggested that decolonisation started, after the Paris Peace Conference, of 1919, when the defeated central powers lost their European territories, and the newly formed states receiving their independence, from the Council of Principal Allied and Associated Powers, while sitting in their capacity as the Council of League of Nations. In 1945 decolonisation commenced with the formation of Untied Nation, spreading to Asia in the 1950s and to Africa by the 1960s.[[78]](#footnote-78) Emerson said that ‘paradoxically’[[79]](#footnote-79) this was not due to colonial nationalism of the oppressed people, but to due to the’ [W]idened horizons opened by the progressive colonial government.’[[80]](#footnote-80) He is clear that the ’[S]tarting point in eighteenth-century proposition that government must rest upon the consent of the governed (…).’ Thus, by implication links the starting point to the American Declaration of Independence. Emerson quotes Woodrow Wilson’s statement ’[The] Central Empires had been forced into political bankruptcy because they dominated alien peoples over whom they had no natural right to rule’[[81]](#footnote-81)attesting to the violent historical development, instigating self-determination as will be argued in the latter parts of this work.

Doehring traced origins of self-determination to opposing state oppression in the “American Declaration of Independence of 1776” and non-intervention to the legal concept advocated by the “[F]rench constitution of September 3rd, 1791, declared the renunciation of wars of conquest (…).”[[82]](#footnote-82)

Doehring addressed the paradox and dichotomy, created by the incidents of sovereignty, and the defensibility of intervention against tyrannies,[[83]](#footnote-83) on behalf of the oppressed people.

In 2008 Bowering lamented the degradation of international legal order and considered the significance of self-determination by calling his first chapter, ’Self-determination revolution as kernel of international law.’[[84]](#footnote-84)

Carty in his work *The Decay of International Law*[[85]](#footnote-85) considers self-determination as a case study, to prove his hypothesis that the principal cause of the crisis in international law is due to its methodology.

In time, the conceptual and juristic application of self-determination altered and received distinctive attention. This attests to the fact that international society is dynamic and order can be maintained, allowing change justly and equitably apportioning international burden.

### 1.3.3 Generally Perceived Characteristics

In 1994 Higgins, remained [C]ommitted to the analysis of international law, as a process rather than rules, and that the legal processes and the decision reached by the appropriate bodies leading to legal decision-making, renders the law a continuing process of automotive decisions.[[86]](#footnote-86) On self-determination, Higgins wrote, “[I]s because it is difficult, extraordinarily intertwined with other norms of international law, controversial topic(...)[T]his chapter address one particular human right that of self-determination.”[[87]](#footnote-87)

Verzijl was critical of the concept of self-determination as being ‘indefinable.’[[88]](#footnote-88)

[A]dvanced as a legal right a claim so a political nature and such a slogan like quality as the so-called right to self-determination. And seldom has a would-be right been exercised or negated with such evident arbitrariness and with such flagrant international hypocrisy as this.[[89]](#footnote-89)

Verzijl notes the intrusion of law into politics and vice versa, thus attributing to the lack of certitude, arbitrary rule of law, and injustice in the international order.

Watts, considered self-determination as’ [O]ne of the most important principles of contemporary international law and international relations (...)’[[90]](#footnote-90) that it was a fundamental challenge to other international norms, ’[W]ithout it, human rights and fundamental freedoms suffer. Equally important is respect for territorial integrity and political unity of states*.*’[[91]](#footnote-91) After all people and territory are fundamental to interstate and intrastate relations, and global order’…without it, a cornerstone of international order is destroyedd and state fragment. A balance has to be struck between them. *‘[[92]](#footnote-92)*

Watts’ caution is justified, because self-determination poses a challenge to the global peace, and security, in the post-decolonisation era as it did during selective decolonisation era to the international territorial borders.[[93]](#footnote-93)

The *’*doctrinal synthesis*’*[[94]](#footnote-94) of uti possidetis suggests the retention of colonial boundaries, as new international borders of decolonized territories, were kept in preference to the Wilsonian theory of people’s rights based self-determination was paradoxical rejected in the UN General Assembly, of the newly formed states. Wilsonian concept was abandoned in the hope that uti possidetis would minimise the disturbance of the existing territorial boundaries, during the decolonisation process. Instead, the doctrine of uti possidetis confined the juristic right of peoples’ to self-determination,[[95]](#footnote-95) and led to the verifiable doctrinal clash, referred to by Franck and Higgins and Watts. When contentious decolonization claims declined in the 1980s, contrary to rational expectations, the statistics[[96]](#footnote-96) in 2008 revealed an increase in self-determination-based disputes with varying degrees of violence. Furthermore 24%of these states were locked in civil war, giving rise to secondary human tragedies increasing the number of refugees. [[97]](#footnote-97)

In 1996, Cassese considered self-determination as’ [O]ne of the most important driving force in the new international community with such an effect that changed the world community’s basic rules of game.’[[98]](#footnote-98)

In 1998 Brownlie, considered self-determination as an’ [I]nternational legal principle.’[[99]](#footnote-99) He also points out that they constitute the third generation of human rights for people.

Higgins refers to self-determination in terms of developmental phases, the first being independence from colonial rule, and the second being human rights, concluding that self-determination, having for years being denied as a legal right by vested interest in the West, Eastern Europe and third world alike, now faces a new danger: that of being all things to all men.[[100]](#footnote-100)

UNGA Resolution 1514(XV) affirmed aspects of self-determination. First, it affirmed that advent of decolonisation developed the capacity of the people to lay claim title to the territory through legitimate, democratic processes, as an expression of free choice of the people of the territory. Higgins agreed that people cannot express their free will in autocracies and dictatorships ’[T]hat this is virtually impossible to achieve in one party state’,[[101]](#footnote-101) Therefore democracy is interminably linked to all phases of self-determination.

Second, self-determination was no longer a subjective grant, but an objective recognition of the legitimacy of the claim, by the international community.

Third, international community affirmed the fundamental freedoms of the people and rejection of oppressive regimes.

 Fourth, territory under occupation and those ruled by a racist totalitarian minority regimes were rejected as a concept.

Fifth, when federations such as Yugoslavia’s and USSR, split into unitary states in the 1990s, in theory, their ethnic and religious distinctive minorities, were to enjoy constitutional power-sharing, a high degree of autonomy

Sixth, modalities of self-determination are self-procreating, subject to the influence of modern concepts of rights and freedoms.[[102]](#footnote-102) This accounts why various authors as in the case of Higgins, Cassese, Crawford, Carty and Bowering looked at it from different perspectives.

 Nonetheless, the above assertions attest to the conditionality of the legal right by the legitimacy of the components and normative adequacy of the determinants of the contemporary self-determination as proposed by the hypothesis above.

# **CHAPTER** **2 THE GROWTH OF THE CONCEPT OF SELF-DETERMINATION** **IN THE LEAGUE OF NATIONS ERA 1919-1946**

## 2.1 Historiography of Growth of Self-Determination from 1776 to 1919

### 2.1.1 Allocated Task to History

The developmental history of self-determination is allocated several tasks. These will be carried out by diplomatic history and normatively analytic methodologies. The object of the tasks is the legitimising components and determinants of self-determination by historical tracing within with found three epochs of history. The components of self-determination are the legitimate claimants, claim, and the respondents, and the determinants are the international political system and claim process,

First epoch starts in 1648, with the Westphalian state system. Second, epoch starts with League of Nations in 1919 marking the start of the Modern era of FSIPS and emergence of the principle of self-determination. Third epoch is the legal evolution and development of modalities of self-determination as a right in the current UN since 1945 marking the Contemporary era. Therefore modern era starts in 1919 with the emergence of international principle of self-determination and included contemporary era. Contemporary era starts with UN and development of the legal right to self-determination as part of modern era.

The 1646 Informal Westphalian European Order marks the emergence of the political state, relatively independent from Rome. Independence of princedoms and monarchies and Republics were, guaranteed by alliances, acknowledging freedom of conscience for the Catholics citizens in the Protestant realms and the Protestant citizens in the Catholic ones.

This era is worthy of several observations. First, the foundations of the principle of inviolability of state within the domestic jurisdiction and territorial integrity are notable in interstate relations. International order depended on the balance of power and threat and use of force. Jews and Muslim were not protected and the treaties were not signed by Russian Tsar and King Charles II and Ottoman Sultan. The Westphalian system evolved until its total transformation by 1815 and Post-Napoleonic era and the emergence of European Congress System and Council of Europe. One can refer to emancipation of some European states from some theocratic system in preference of another and development of constitutional monarchy.

Second, the historical era is a formal international state-centric political system known as League of Nations 1919-1946. The concept and principle of self-determination are notable in the constitutions of several western democratic states, but the world was still divided between the free states, dominions and dependencies, colonies and non-self-ruling territories and mandated territories. With FSIPS the International order acknowledged citizens of all states with distinctive modalities of governance. Some states gave some rights to their citizens but colonial rule varied and non-self-ruling varied even more

Third historical era started in 1945 with the commencement of UN political system whereby legal precept of self-determination developed into several modalities such as externally during the era of decolonization, and internal leading to expansion of human rights and secession and succession by way of intervention under the R2P.

Allocated task to history will be considered in due course tracing the arrival development and diversification of legal concept of self-determination.

### 2.1.2 The French and American Revolutions

The origins of the modern principle of self-determination[[103]](#footnote-103) can be traced in the 1776 American Declaration of Independence[[104]](#footnote-104) and to the 1798 French Revolution.[[105]](#footnote-105) Both advocated constitutional order in which the government would be accountable to the governed. The American Declaration of Independence may be considered as the first modern[[106]](#footnote-106) instrument for the attainment of independence from a colonial power.[[107]](#footnote-107) On 4th July 1776 the thirteen states of America unanimously signed the declaration of Independence in the Congress and read:

 [W]e hold these truths to be a self-evident truth, that all men are created equal, that they are endowed by their Creators with certain inalienable rights ,that among these are life liberty and the pursuit of happiness. That to secure these rights, Governments reinstituted among men deriving their just powers from the consent of the governed (…).[[108]](#footnote-108)

This Declaration represents the contemporary view of the Founding Fathers[[109]](#footnote-109). They intended to create a political cohesion among the states, by adopting the liberal democratic principles embodied in the Constitution of 1787, in keeping with their contemporary view of international law. [[110]](#footnote-110)

The French Revolutionary ideology included values[[111]](#footnote-111) such as peoples’ rights, freedoms and welfare, and was deemed to be central concerns of the government. On 26 August 1789 the French National Assembly approved the Declaration of Rights of Man stating inter alia:

1. Men are born and remain free and equal in rights, social distinctions may be founded only upon the general good.

2. The aim of all political associations is the preservation of natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression.[[112]](#footnote-112)

Therefore, self-determination in the context of the French Revolution belongs to a political philosophy advocating political individualism. It concerned citizens’ capacity to participate in a modality of governance, based on principles of democracy, legitimacy of government and the rule of law. The informal expressions of these values were supported only by natural laws and state practice, which were to last until 1919.[[113]](#footnote-113) One could argue that the French Revolution was inevitable since Pre-revolutionary France, was historically ruled by a centralised monarchy in alliance with the Church, without the engagement of the people or an active parliament. One could argue that American colonies, which evolved from the settlements created under Royal Chartered Companies, conquests and purchases, were no longer prepared to be governed like a chattel. [[114]](#footnote-114) Doehring’s postulate is historically verifiable.

In this regard, one of the first signs of legal relevance may be seen in the American Declaration of Independence of 1776. In this declaration, it is said that men are entitled to have the ’right’ to freedom and the ’right to participate’ in the exercise of state power. The people, therefore, have the ’right’ to alter or to abolish a form of government which fails to guarantee or discharge that freedom.[[115]](#footnote-115)

Doehring did not consider this to be secession along ethnonational divides but in ’the installation of free and democratic government.’[[116]](#footnote-116) He also noted that a sense of protection of the new states from external intervention, which led to the development of the doctrine of non-intervention in their domestic jurisdiction. Doehring relied on the French constitution of 3rd September 1791, akin to Article 22 of the, which also formed the peremptory principle of modern international law and Article 2(4) of the Charter. [[117]](#footnote-117)

The basic difference between the American War of Independence and the French Revolution is that one was a war of independence (thus identifiable as external self-determination) while the other one was a revolution (thus internal self-determination). [[118]](#footnote-118) The former was a state creation, while the latter state succession. Furthermore, whereas the former wanted territorial government without alien domination, the latter formed a new constitutional order and a process, whereby the individual identity must be allowed to be established and enjoyed in a territorial government (where appropriate).

Drawing parallels between 19th and the 20th century are not helpful. When Napoleon promised to help any nation to overthrow Ancient Regimes and did so until the Battle of Waterloo in 1815, he was perusing common policy of external intervention. Among the nations. He did not constitute formal international order creating an international obligation to intervene.

The French concept of self-determination soon accepted territorial arrangements, thus rejecting the principle of uti posidetis. The principle of uti posidetis advocated self-determination without adjusting international borders. Thus the Revolutionary regime soon began to support annexation as part of self-determination. Merlin de’ Douai,[[119]](#footnote-119) an active revolutionary aristocrat, advocated annexation of the territory for France. Indeed, based on the French concept of self-determination, the annexation of Savoy was achieved in 1791. The annexation of Nice, Belgium and Palatine and of Avignon was completed in 1793.[[120]](#footnote-120) The French concept also recognised a plebiscite for self-determination. In other words, the French concept was based on what people aspired to and that self-determination process meant that their voice must be heard.

The self-determination identifiable within the French Revolution was limited in scope. The colonial people were not deemed to have the right to self-determination nor did the minorities, ethnic or religious groups.[[121]](#footnote-121) Therefore, the French revolutionary ideology with normative values was selectively applied, with limited universality. The French concept of self-determination emphasised the rights and freedoms of the individual, rather than separate statehood which ironically spread in Europe very rapidly.[[122]](#footnote-122) American Revolutionaries also overlooked the matter of slavery in their haste for independence. The concept of self-determination, and nationalism and the unification of Germany and Italy that was to diplomatically and militarily engaged Europe in the 1850s should not be overlooked.

The unification movement of Italy, initially under Giuseppe Mazzini, and others, has a time-span of one and a half, marking the political transition from empire to nation-state through the union of mini-kingdoms which had to reject French and Austro-Hungarian domination with the blessing of the Pope. The Unification of Italy, even though the Italian people had common culture religion and language, meant achieving political unity among autonomous rulers, with external supporters fielding armies (when needed). Therefore, the Unification of Italy was not unlike American independence, since it was external self-determination. It was not unlike the French Revolution either, since it was internal self-determination. In effect it was a combination of the two, with added challenges in three notable eras of unification, leading to the Kingdom of Italy.

In the first phase was the Prussian-Danish war of 1864, the Prussia-Franco and Franco-Austrian wars and the drawing of international borders with Italy took place. The second phase was Regiment (an Italian term meaning rising to ancient glory). The third was Irredentism (reclaiming the land on which Italians lived). Therefore, external self-determination gathered pace during the interwar years and in the 1950s.

The history of Italian reunification is a fine sample of European ethnonational oriented self-determination in the 1860s. It has been part of European history since 1830, which led to the secession of Balkan territories of the Ottoman Empire due to Austro-Hungarian and Russian aggression.

### 2.1.3 Woodrow Wilson and Lenin: the Evolutionary and Revolutionary Process

The self-determination as an international policy emerged during the last phases of WW1, giving the President Woodrow Wilson the opportunity and the platform, to transform the concept into the international arena. Lenin and Stalin soon after 1917 became engaged with the practical challenges of implementing the theory of self-determination, within the communist system. The Bolsheviks faced a paradox. The choice of uniting all the working class of the Russian Empire with distinctive ethnonationalism through ideology or through national states divided along ethnonational basis while adopting the ideology of communism as a state policy. A compromise was reached by decolonising the Russian Empire and by granting national independence to Ukraine, Finland Belorussia Azerbaijan, Kazakhstan, Turkmenistan, while also forming a socialist block made up by the Soviet system with totalitarian one party system (anocracy).

President Wilson was engaged with the challenges of self-determination on a larger plane, as an interstate matter, leading to the formation of international obligation, while Lenin was engaged with the concept, within internal Russian context, with a propensity to become an international matter thus an external self-determination.

President Wilson’s contribution to the international dimension of self-determination became apparent on 8th January 1918 after he delivered his shorthand scripted 14 Points during the Joint Session of Congress. He explained the reasons for going into the WW1 and concluding peace by rectifying 14 issues that damaged international peace and security. Lansing, the Secretary of State of the day, alluded that the speech and therefore the proposals were the result of work compiled earlier by a Commission of inquiry, as it was called[[123]](#footnote-123)which’ [W]as set up in the spring of 1917 under the Department of State, a body of experts to collect data’[[124]](#footnote-124) under the control of Colonel Edward House who was the President’s special envoy in Europe. Miller also sat on that committee and actually drafted the final version with Hurst. The introductory section of President Wilson’s address claimed that America entered the War ’[B]ecause of violation of right (…) [T]hat be made safe for reason common to all peace loving nations (…)’[[125]](#footnote-125) who were entitled to the freedom, to pursue their well-being with their choice of modality of governance, peacefully and justly conducted international relations with each other. This was his moral justification for a declaration of war. It was in compliance with an international value of global peace and security and justice for all nations without being attacked and subjugated. There were two legal grounds for President Wilson’s arguments. First, the state had a responsibility to protect its citizens if it was to enjoy the consent of the people. Second, the wrongs committed by the aggressors were in breach of international law. The President was using a well-established tradition since 1776. The American Declaration of Independence, as shown below, also opens with a statement claiming that, what they are about to acquire, was in pursuance of international values and will of the people:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the [Laws of Nature](http://en.wikipedia.org/wiki/Natural_law) and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation (…).[[126]](#footnote-126)

The term decent opinion of mankind is equivalent to the contemporary expression of international consciousness and was referring to the fore-runner of the consent-based international political system. The concluding paragraph of the declaration reads as follows:

We, therefore, the Representatives of the United States of America, in General, Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare(…).[[127]](#footnote-127)

President Wilsons’ 14 points were intended to put right that was wrong, and which led to the war.[[128]](#footnote-128) Peace would be achieved with a 14 point rectification programme in the international political system and practices in international relations. First to be rectified was the peace-making processes. Peace and international order was a concern to all the peoples and ought not to be conducted in secret. The diplomatic engagement had to be in the public domain and accountable. Second, a practice that had to be ended was the assumed right of powerful states to police the high seas. Freedom of the high seas should only be restricted by the collective decision of the international community. The third practice that had to be ended was a division of the world into exclusive economic zones of influence. Free trade would remove undue competition and protectionism. The fourth danger to world peace and security was arms race beyond self-defence. The fifth issue to be addressed concerned the interests of the people in non-self-ruling territories especially in view of the changes that would follow after the war. Borders should be determined by taking the interest of the parties into account as well as that of the inhabitants of the colonies. The sixth issue was intervention in internal affairs of the Russian civil war. All foreign armies had to be withdrawn and Russia ought to be left to choose her own modality of governance, and her former constituting nations should pursue national interests without damaging Russia’s recovery. The seventh was the restatement of the national sovereignty political independence and territorial integrity of Belgium. After all, the Imperial German army marched through Belgium to attack France in 1914. The restitution of Belgian sovereignty would restore faith in international law. The eighth, the cause of war has been the annexation of territory contested over by France and Germany since Franco- Prussia war of 1871. This had to stop from being a threat to international peace. The ninth was the settlement of Italian borders. It should be determined by the ethnonationalism of the population. The tenth was the settlement of new borders which did not follow the Italian model because Italy was a victorious power. The Austro-Hungarian Empire lost the war and they lost territory and people. Former Austro-Hungarian nationals were now under the alien rule and were offered autonomy and minority rights.

The eleventh concerned the contentious affairs of Romania and Montenegro. Territories should be evacuated, and occupied ones restored along former historical ties, relations, alliances and nationalities. Once more many ethnic-nationals would come under alien. They were thus to be offered international protection.

The twelfth concerned the Turkish part of the Ottoman Empire. Turks were allowed to enjoy their sovereignty in a specified geography, free from any interference. The Turkish striates would be open to vassals of every nation and commerce.

The thirteenth dispute over many years was the future of Poland which had disappeared as a state after the fall of Napoleon. A new state would emerge with new borders’ where Polish people had traditionally lived’. The fourteenth point proposed a formal state-centric international association to ensure the peace, security, political independence and territorial integrity of nations small and large.

President Wilson’s perception of self-determination was also founded on the principle that the minorities must be offered particular protection, implying that the self-determination did not enjoy international confidence as point IV of his proposal was dropped from of the final draft of the . However, in the case of the Ottoman Empire, and Poland, Wilson took a different stand (Points XII and XIII), because the Turkish part of the Ottoman Empire, and the Polish people, were cohesive and culturally and linguistically distinctive. Furthermore Wilson’s ideas of self-determination were not disassociated from economic independence and world peace.[[129]](#footnote-129)

Lansing was critical and considered that self-determination as a phrase ’[M]ay set in motion a distorted conception of the truth, a false idea of rights or an impracticable theory faction leading to evil consequences.’[[130]](#footnote-130) In any event, Wilson was not suggesting that former colonies, of the defeated states with distinctive ethnonational, religious and linguistically cohesive groups would be allowed statehood, nor would they be annexed by the victors, but were to be mandated instead.

The fundamental difference between Lenin’s and Wilson’s principles of self-determination was that Lenin was a revolutionary, whereas Wilson aimed at a liberal reform that recognised the rights and freedoms of the colonial people.[[131]](#footnote-131) Lenin advocated an immediate liberation of those who were living under a colonial rule. Whereas Lenin advocated liberation of people, by all means, Wilson wanted to take into account the aspirations of the colonial people, so that they would have a right to determine their own political identities. Wilson’s self-determination would be non-violent and non-revolutionary in nature. During the decolonization era, most people aspiring self-determination wanted to implement Lenin’s ideas rather than Wilson’s. Wilson’s ideas were based on democratic development. Lenin chose revolution and did not see democracy as a pre-requisite to self-determination. Lenin’s thesis on social revolution and rights of the nations to self-determination was a clear exposition of the principle of self-determination.[[132]](#footnote-132) Earlier in 1913, Stalin also wrote in detail on the concept of self-determination.[[133]](#footnote-133) Consequently, many Soviet proclamations of self-determination followed, including the Decree of Peace of 26th October 1717. Mayer argued that self-determination was a political extension of Lenin’s economic analysis of imperialism.[[134]](#footnote-134) Pomerance[[135]](#footnote-135) also quotes Mayer arguing that:

The popularisation of the term even then owed to Bolshevik than to Wilson and in a small measure, Wilson’s espousal of the principle of self-determination as a central element of the peace was reactive to both Bolsheviks initiative and wartime exigencies.[[136]](#footnote-136)

Wilsonian self-determination was not in many cases achieved during the era of League of Nations, but interestingly enough, the UN Charter’s perception of self-determination, is very much based on Wilson’s idea, i.e. that it will be a right for each people to choose the government by which they would like to be governed, and this would contribute to world peace. Thus as Franck pointed out, decolonisation movements favoured the people’s aspect of Wilsonian self-determination. Yet even former colonies as part of the international community supported the doctrine of utis possitities, as the territorial aspect self-determination. Change from people’s principle to territorial aspect of self-determination, caused unfairness to the people who became minorities, while other former minorities became independent.

## 2.2 The Covenant

The Covenant’s contribution to understandings of the challenges of the modern concept of self-determination, and to the proof of the hypothesis, is significant due to its constitutive and substantive historiography. Firstly, it created formal international organisations with its agreed purposes and principles, thus the prerequisite of the hypothesis; the formation and expression of legitimate international interest, in self-determination, and in the protection of minorities.

Secondly, the League of Nations brought about a paradigm change, from an informal to formal international system as well as codification and formal monitoring of inter and intra-state relations. Nonetheless, the less the policy of informal, power oriented defence of national interest, was to co-exist with formal cooperation while being guided by international law that rejected war as a formal state policy-instrument.

Third paradigm change occurred with the rejection of conquest, annexation and colonisation of the defeated empires, with a supervised grant of self-government under the mandate system. These were the three major contributions of the League of Nations to the evolution of modern self-determination, with their accompanying challenges.

### 2.2.1 The Covenant: purposes and principles

The League of Nations is the first formal international organisation, formed by 44 founding members with agreed purposes and principles in 1919. Other states who became members later agreed to non-annexation of territories, protection of minorities, and the introduction of the principle of self-governance to non-self-ruling territories. States also agreed to a peaceful resolution of international disputes, and reliance on international law for world peace and security.[[137]](#footnote-137) The Covenant intended to create a new world order, the prerequisite for formulation and implementation of a consent-based international policy of self-determination.

To suggest that the Covenant was the brainchild of President Woodrow Wilson does not do justice to Lord Phillimore, Lord Cecil or and General Smuts. Equally, to undermine the excitement, and stir President Wilson’s political proposals caused with his 14 points, and the first draft for Covenant in 1918 forcefully advocating the formation of a formal international authority to solve international issues, will be historically inaccurate. Nevertheless, several Wilsonian myths have to be laid to rest. Firstly, American foreign policy outlined in fourteen points necessitated the formation of the League of Nations to which America declined to enter, manifesting moral confusion. Secondly, President Wilson convinced himself and others that the mandate system was anything but annexation of territories of the defeated. Thirdly, President Wilson in three draft covenants (articles 3 and 4) wanted self-determination and protection of minorities expressly guaranteed by the League. Yet, between 20th January 1919 and 2nd February 1919, they were dropped, never to become part of the Covenant. Fourthly, historical facts cannot be overlooked; self-determination is a term synonymous with the modality of governance based on the consent of the people, which has been around for 300 years already. For instance, rejection of alien rule in preference to the consent of the people started in the Post-Napoleonic Balkans, spreading as revolts in Austrian-and-French dominated Italy, to the unification of Germany by the1860s. The principle of protection of minorities, and conduct of governors in non-self-ruling territories, and the conquered peoples goes back to Grotius, and the list of treaties. The Peace Treaties of Westphalia 1648, Utrecht 1714 and Paris Treaty of 1765 were multilateral treaties formalising new characteristics of political states, expanding the principle of the will of the people, protection of national minorities. Thus the covenant elevated these concepts from multilateral treaty obligation to a customary international law, as acknowledged by the eminent jurist in South West Africa ICJ Reports (1950). Therefore, the historiography of Wilsonian legal philosophy is regressively traceable.

A cursory look at the aspects of the League, affirms the importance of formal international organisation for the formation and implementation of the concept of self-determination. Constitutive aspects of the Covenant were dealt by Articles 1-6,[[138]](#footnote-138) creating its organs: the Assembly, the Council and the Secretariat, included provisions to establish Commissions, Bureaux and Permanent International Court of Justice. Disarmament and peaceful resolution of international disputes and outbreak of war were dealt with Articles 8 to 17[[139]](#footnote-139). Articles, 18 and 19 deals with the Treaty Registration and monitoring of interstate treaties.

Normative policy, thus the substantive aspects of the Covenant is noted in Articles 19 and 20, 21, 22, 23-discussed in the next chapter. [[140]](#footnote-140) Like the preamble to the Covenant, they dealt with the principles that also affect title to the territory, principles of recognition and modality of governance. Therefore these norms discreetly concerned subjective sovereignty, and objective international legal norms of self-determination will be discussed in the next section. The League of Nations supports the hypothesis advanced while relying on historical evidence and reasons.

First, it declared war a conditional to self-defence only, exhorting benefits of international law[[141]](#footnote-141).

Second, the Covenant was incorporated into the peace treaties, becoming part of the domestic constitutional order and thus their jural imperatives became enforceable within domestic jurisdiction.

Third, Articles 18, 19, 20, of the Covenant had the normative effect of regulating inter-state relations.

Fourth, the creation of international interests, and responsibilities for the inhabitants of the defeated empires formalised international obligation, whose implementation was monitored by the international community. These processes were extended to the Victors’ colonies, and eventually to everyone in the world without exception, during the decolonisation era. Nonetheless, the UN is now robustly advocating the legitimacy of the concept of national and international R2P.

Fifth, historical regressive tracing also shows that the covenant was the first formal state-centric international political order, thus proving the essential part of the hypothesis. The hypothesis is conditional on the existence of a state-centric international political system. The hypothesis is built on the political system as it is and not on as it to ought to be. The hypothesis is not built on the assumption that it holds true if there is a formal state-centric international political system, but on the premises that there one in place since 1919.

Sixth, since the Covenant is a historical fact, the hypothesis defeats the argument that, international law is supported by the idealist while the realist is right to argue that power is the only means of understanding chaotic international affairs. This work while defending the hypothesis suggests that this a philosophic issue as in the heart of Fuller and Hart debate reminiscent of as relevant echo of Hobbs’ and Hume’s argument that one cannot derive what ought to be from what it is. However, the formal legal international order is a reality now, and has been since 1919, therefore the hypothesis has diplomatic history to rely on its proof. Finally, the current legal principles of self-determination, as proven, are regressively traceable to the Covenant and to the customary international law before it.

### 2.2.2 The Covenant’s Article 21 and 22.

Article 21 of the Covenant[[142]](#footnote-142) is an indirect and confused international codification of the Monroe Doctrine.[[143]](#footnote-143)It was originally formulated as an American foreign policy, to prevent re-colonisation of the American continent by Europe, now perceived as a regional understanding to ensure peace. The principal purpose of the Article was to ensure the continuity of the pre-covenant multilateral treaties, arbitrations and regional understanding for the peaceful resolution of international disputes as well as placing them on par with the covenant if not above it. Article 22 of the Covenant prevented new colonisation, thus the acquisition of territory by conquest and interim decolonisation of defeated states through the mandate system.

Article (22). To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle, was to entrust the tutelage of such peoples, to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatory on behalf of the League.[[144]](#footnote-144)

Article 22 did not transfer sovereignty on to the Mandatory. First, it ensured the surrender of sovereignty over the territories. Second, it placed sovereignty over the said territories into a state of abeyance until the mandate system served their purposes. The section below will demonstrate that the mandate system was a conditional and circumstantial administrative process. It was not a simple grant, but a grant of administrative rights, subject to international monitoring. Mandates were conditional and set to a limited duration, to be determined by objective norms, rather than by the subjective will of the Mandatory power.

Nicholson, engaged in the 1919 Paris Peace Conference, considered the mandate system as Wilson’s frailty of character, for convincing himself and others that it was not a modern annexation process.[[145]](#footnote-145) Nevertheless, in theory, mandated territories were different from colonies and mandates differed from each other.[[146]](#footnote-146)

Frequently, the modern international law is developed upon reception of earlier customary international law and attains the preface of ’modernity’ with its first appearance in state practice due to multilateral international covenants. This applies to the moral and legal concept of the sacred trust of civilised nations referred to in Article 22, forming the international legal basis of the mandate system of the 1920s and referred to by Wheaton Wharton and Westlake decades earlier throughout the 19th century.

Wharton writing in 1887 with a degree of authority suggested that, although discovery provided a good title to conquered or subjugated, annexed or divided, territories, they retained their prior municipal institutions, and benefits and burdens fell upon the conquering or annexing sovereign, as well as the colonies retaining their administrative boundaries upon decolonization. [[147]](#footnote-147)

In 1894 Westlake reflecting on the 1878 Berlin Conference on Africa, and on the Articles 34 and 35 of the Berlin Final Act, is careful and starts from the assumption that normative definition of civilisation is a modality of governance which the inhabitants of Africa could not meet as required by the European settlers. The necessity to protect the ’Natives’[[148]](#footnote-148) and ensure that European settlers enjoy a standard of civilisation compelled them to assume governance wherever they were subject to two conditions[[149]](#footnote-149). Firstly, the Europeans had to consult each other in order to avoid unfair enrichment; and secondly to act while being mindful of the Native interest. [[150]](#footnote-150) The legal basis of colonisation as perceived in the past is beyond the scope of this thesis, though the inter-temporal legitimacy of colonisation discussed in Berlin Final Act was fifty years before the mandate system and manifested traces of customary international law, in addition to the treaty law concluded in the 1920s. As pointed out above the concept of sacred trust cannot be traced in Wharton, but Westlake referred to the existence of moral obligations toward the natives, that fell on the Europeans during colonisation of Africa in 1878, ”[T]he moral rights of all outside international society against the several members of that society remain intact”*.*[[151]](#footnote-151)

Hall writing in 1884 allocates no part or section, about the matter concerned with the people of Africa or about their subjugation.[[152]](#footnote-152)

As in the previous section, the historical evidence proved and explained the legal and political basis of the components and determinants of the hypothesis. First, the quest, for the formal state-centric international order was realised with the emergences of politically independent states system. Secondly, the formal international order was born out of necessity to respond to international disorder brought about by the conflicting national interests of the states. Thirdly, the state-centric international order had to reconcile the national interests with the expressly and implicitly agreed, positively codified, international purposes and principals. Purposes and principles of the Covenants found in Articles 21 and 22 endorsed the principles of political independence of states, their territorial integrity, even if it was selectively undertaken. Irregular compliance with these international obligations and their jural imperative survived and were reaffirmed in UN era since 1945. This historical fact proves two aspects of the hypothesis. Firstly the factual existence of a state-centric League of Nations and secondly, the Covenant provided the legal and moral aspects of the international legal obligations which maintained their jural imperatives despite irregular application, otherwise it will be impossible to account for the legal basis of the Second World War Atlantic Charter and the Charter of the United Nations and the principle of self-determination.

## 2.3 The Mandate System.

### 2.3.1 Legal Bases of the Mandates, Dispositive Right of Non-Subjugation

Since the hypothesis is about international legal obligations then international law basis of the mandate is essential. The very nature of mandate grants and its legal implications came under the scrutiny of the ICJ 1950 on South-West Africa.[[153]](#footnote-153) McNair, supported the majority view of the Chamber in 1950, and when writing, in 1961, viewed the mandate instrument, as being ’[D]ispositive in nature”[[154]](#footnote-154) He also expounded on the legal aspect of the Dispositive Treaties while referring to the Advisory Opinion to argue that the Dispositive Treaties had two unique characteristics. First, the third parties may acquire contractual rights in the mandates territories[[155]](#footnote-155) on the basis of express or implied consent, that is if one accepts the following, *’*[T]hat effect of certain treaties is erga omnes is to be attributed to some inherent and distinctive judicial element in these treaties –in some cases – are dispositive or real character of the transaction affected by the treaty*.’*

Second, ’[R]ights and duties arising from dispositive treaties hem are in personam’,[[156]](#footnote-156) As such, treaties creating territorial rights and boundaries or guaranteeing of neutrality since all are intended to operate in rem against the whole world *’*thereupon acquire or retain an existence independent of the treaties which created or transferred them’.[[157]](#footnote-157)These were Dispositive Treaty Law, known to Customary[[158]](#footnote-158)and International Treaty Law. The Covenant and Article 22 as shown above, in the second part of the first sentence of Article 22(i), constitutes an attempt to rationalise, the continued denial of self-determination. However, the Article also introduced conditionality. This was a right in personam which existed whether or not the league was in existence. Thus it implied that these arrangements had to come to an end in the future, subject to the accomplishment of certain goals implicit in Article 22. ’ (…) [N]ot yet able to stand by themselves under the strenuous conditions of the modern world,’*[[159]](#footnote-159)* This means that once these ’colonies and territorieswere able to stand by themselves as the member of the modern global community’ the mandate would come to an end. Yet, the alternative was certitude of annexation of the territory and subjugation of people to alien rule.

The obligations created for the Mandatory, are found in the first sentence of Article 22 (1). Yet, the parties would contest over the legal effect of the said obligation that [[160]](#footnote-160) even when the right to self-rule was no right in personam.

[T]here should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant*.[[161]](#footnote-161)*

Article 22, by identifying the prerequisites for the termination of the mandates, created the obligation to terminate the mandate under the supervision of the Council of the League of the Nations. [[162]](#footnote-162) First, consequences of this obligation were the creation of a due process fundamental to the legitimisation of the mandate systems. Second, consequences were an acknowledgement of the relevance of attainment of fairness and justice in the administration of the terms of the mandate. Without the free flow of the information, this was not possible. Recognition was affirmed during the UN era as noted in UNGAR.144 (II) (1947). The Resolution referred to the reporting of the state-of-affairs in the territories, under mandatory rule had several consequences. The third consequence was the prevention of subjugation of the non-self-ruling territories to the arbitrary rule of law. Article 22(1) was expected to provide stability to a dynamic socio-political order.[[163]](#footnote-163) It was hoped that the peremptory principles of justice referred to earlier as pacta sunt servanda (all obligations are taken under a moral duty to discharge) and ex iniuria ius obituary - and no legitimate benefit can be derived from the unlawful action - would now be practised.

Article 22 (2) imposed on the Mandatory the duty to discharge its obligations conditional to the ’relevant circumstances’ so as not to be perceived as unjust and arbitrary acts by the Mandatory. The’ [T]utelage was entrusted to advanced nations, by reason of resource, experience or geographic position (…)*’.[[164]](#footnote-164)*

The following number of legal conclusions is historically verifiable and supports the hypothesis.

 First, the international obligation directs that *’*there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant’*.[[165]](#footnote-165)* Second, the Covenant also relied on the customary international law of 17th century Europe, such as responsibilities for war reparations, war indemnities, not to mention commercial and military considerations, which placed millions of people, under the accountable alien rule.[[166]](#footnote-166) The legitimacy of the legal principles advanced by the Covenant is regressively traceable able to 17th century Public Law of Europe affirming the applicability of the hypothesis to all eras of the international political system with their unique definition of the self-rule and self-determination.

### 2.3.2 Conditionality of the Mandate System

It is propounded that conditionality of the mandate system was expressed in treaty terms thus effectively prohibiting colonisation. It also introduced the concept of international accountability to an international body. This also marked the start of procedural approach to rendering none-self-ruling territories, and self-ruling territories subject, to objective international norms. When changes are considered in general terms, the transition from formal to informal international order is one of them. This was a paradigm change from absolute sovereignty in informal statist international order, with no formal international institution, to a formal order in which states were expected to be self-regulating, and co-operate to attain, supervise and maintain international order. Therefore, the mandate system would be conditional and well regulative and rule-based but its implementation depended on circumstances, thus irregular application was inevitable:

Article 22 (3). The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.[[167]](#footnote-167)

Article 22 (3) further elaborated the conditional nature of the mandate system, with regard to its total discharge. While the aims of Article 22(4) by classification of the mandated territories reflected the normative evaluation which determined the implicit conditionality.

2(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory. [[168]](#footnote-168)

Although the intended consequences of this classification were the creation of an obligation to terminate the mandates, it took scores of years of judicial pronouncement to declare their inherent legal effect.[[169]](#footnote-169) It is an irony that the obligation to terminate was also envisaged by Article 22(5) and Article 22(6). Article 22(5) recommended constitutional rights within domestic jurisdictions, which would be supervised by the international organisations, as a legal imperative, evidenced by the word ’must’.

The other identical obligations created by the Covenant were implicit in Article 22(5). These were the measures, for the protection of the individual’s rights and freedoms in the newly-formed states by placing them under the supervision of the Council. The implication being that the constitutional measures, as well the implementations of Protection of Minority Treaties, were not sufficiently effective.

Article 22(7) imposes an obligation on the mandatory, with direct legal effect, with the word shall[[170]](#footnote-170)para. (7)’ [I]n every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.’[[171]](#footnote-171) Article 22(8) and (9) here below repudiated any arbitrary rule of law and tyranny by subjecting the Mandatory accountable to the Members of the League and it’s Council:

22(8) The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

22(9) A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates[[172]](#footnote-172)

Article 23 of the Covenant stipulated rules of administration of the Mandates including the adoption of domestic measures, according to international norms. These were extended to their colonies. The obligation to monitor international crimes, such as human and drug trafficking and secure international communications and control of disease[[173]](#footnote-173) emerged from the Covenant. Although the contents of the Covenant were broad, and in certain aspects were political,’ [T]he generality and political aspects do not deprive it of legal content’*.*[[174]](#footnote-174) Whether or not Article 23 created direct obligation is now academic. Nonetheless, twelve new European States were created after WW1, with their share of constitutional measures for the protection of national minorities and fundamental freedoms for the citizens.

Many cases came to the Permanent International Court of Justice (PICJ), involving the domestic affairs of the new states. For instance the German settlers in Poland,[[175]](#footnote-175) the Mavromattes Palestine Concessions (Jurisdictions)[[176]](#footnote-176) Chorzow’s Factory (Indemnity),[[177]](#footnote-177) the Albanian Minority School Case, [[178]](#footnote-178)to name but few. The PICJ recognised individual rights and freedoms, even ones not adversely affected by the war.

Franck is in agreement with Nicolson, and his contemporaries, Hurst, Lansing Miller and Temperly, all of whom took part in the 1919 Paris Peace Conference, and acknowledged the inconstancy in the application of self-determination. After all the Wilsonian idea of self-determination, was *’*vigorously’ applied to the peoples released from the ’embrace of German-Russian and Austro-Hungarian empires, even if sometimes imperfectly and expressly denying it them’. Internationally sponsored electoral consultation became a new practice in the Central European System while applied to Ireland only in the rest of Europe. Aaland Island sought to join Sweden by breaking away from Finland itself recently liberated from Russia. In denying their claim, a Versailles created commission did not even mention the principle of self-determination and that it has not yet attained the status of the positive rule of law.[[179]](#footnote-179)

Thomas Franck also reiterates another point:

[S]elf-determination played little part in disposing of the vast overseas territories and peoples of the former German Empire, but simply, to allotted to Australia, Belgium, Britain, France, Japan New Zeeland and South Africa. It was applied very badly, if all, to former Turkish dependencies in Asia.[[180]](#footnote-180)

Thomas Franck further noted that the League’s mandate system, contented itself with a supervisory role, with negligible concern for the aspirations of the peoples in those territories. The mandate system while being conditional was a legal prelude to self-government, independence, and to self-determination, as understood in UN era of decolonisation. All this supports the hypothesis that the legal principle, of self-determination, in spite of selective and conditional and confused aspects did not negate their rural imperatives (as pointed out in the previous three sections).

##  2.4 The Protection of the Minorities

The map of Europe, after WW1 changed, when, the Prussian-Germanic, the Austro-Hungarian, and the Ottoman Empires, were dismantled, at the 1919 Paris Peace Conference. The consequences of the irregular application of two of the Wilson policies, the fate of the newly-created minorities and the principle of non-annexation, soon became apparent. President Wilson demonstrated the importance he attached to the fate of the racial and national minorities, by insisting upon their protection in part VI of all his draft proposals for the Covenant.[[181]](#footnote-181) He insisted - without success - that any new State wishing recognition and entry to the League should ensure in fact and in law the same treatment and security to the racial or national minorities, as offered to the majority of their subjects.[[182]](#footnote-182)

Temperley viewed the same event as a continuum of the 19th-century policy of protection of racial and religious minorities by the Great Powers. These were originally deployed as a pre-condition for the recognition of *’*Kingdom of Greece in 1830’[[183]](#footnote-183) and in Roumania. Furthermore, the same principle was extensively deployed at the end of the Balkan wars in the 20th century in 1913, and after 1919[[184]](#footnote-184) during Paris Peace Conference. The 1919 Paris Peace imposed minority treaties on nineteen states.

Temperley considered Minority Treaties, as one of the two of the noblest functions of the League. First was minorities treaties, and the second was the mandate system.[[185]](#footnote-185) One was difficult and the other a sensitive matter. Temperly, like Miller, was personally engaged in the 1919 peace process after a short tour of duty in the Dardanelles Campaign and in the Balkans. Unlike Miller, Temperly was not a lawyer, but a romantic historian, and a Mystics and rejected the claims that President Wilson was first to advocate self-determination[[186]](#footnote-186) The Covenant did not contain Wilsonian measures. [[187]](#footnote-187)

In 1989 Barsh suggested that this might be due to two reasons. First, because minorities issues, were contentious, then as it is now, and second due to the state’s reservation and ’fear that any acknowledgement of minorities as a group, with collective political rights, will undermine State power’.[[188]](#footnote-188) Another was expressed in 1924 by Mr A. A. Mitchell during the 33rd annual Conference of International Lawyers in opposition to a resolution, which was proposed by Baron Haying of Berlin. The Baron proposed that all autonomous minorities ought to have the *’*right to plead before the International Tribunal at the Hague and of approaching the Council of League of Nations, without being obliged to appeal to the good offices of a member of the Council*’.* [[189]](#footnote-189) Mr Mitchell opposed by retorting to the applause of the hall, that intervening in the domestic affairs of the state would be’ [D]epriving a state of the power of regulating its internal affairs, ‘It seemed to me you have really no sovereignty or independence left to that state, and I think the principle as a of general application is dangerous one.*’[[190]](#footnote-190)*

In 1921 Temperly, was short of being dismissive, of President Wilson’s views on the Protection of Minorities, since protection of minorities were already the Public Law of Eastern Europe.[[191]](#footnote-191)

Verzijl recognised the resentment of the states, settled with the burden to Protect minorities, as a contributory cause for their failure.[[192]](#footnote-192) The element of controversy surrounding Minorities[[193]](#footnote-193) has a history identifiable in the Treaty of Westphalia (1648) of Utrecht, (1714) of Paris (1763), of Kucuk Kaynarca, Russo-Turko Treaty (1774).

Controversy was not surprising, since *’*Self-determination and the rights of minorities are two sides of the same coin.’*[[194]](#footnote-194)* As Thornberry explained when decolonisation occurred in the name of self-determination*,* ’[S]tatehood would rarely match by national unity and ethnic homogeneity (…)*.’*[[195]](#footnote-195)Verzijl saw’ [H]istorical grounds for combining minority protection and human rights under one heading*.*’[[196]](#footnote-196) Shaw writing many decades later acknowledged the significance of minority protection treaties in the perspective of modern concept and precept of self-determination which, ’[M]anifested itself after the First World War both in the context of the minorities protection regimes established by the peace treaties and with regards to mandates system created at the same time.’*[[197]](#footnote-197)*

The first-hand impression of the events adds greater reliability to historical evidence on Minority Treaties. As noted before and will be noted below regressive historical tracing supports the hypothesis advanced herein. Principles advocated during the Peace Conference, even if embodied within the Covenant lacked regular application, precision and universality. This is no fault of the legal principle or lack of its jural impediments but a defect in its application by the powerful states which fall beyond the remits of the hypothesis.

### 2.4.1 Treaty Bases of Territorial Settlements and Beyond

The 1919 Peace Treaties brought about dramatic territorial changes whilst the treaties for the protection of minorities wrestled with the future of millions of people affected by border changes. One cited figure was ‘47,000,000 inadaptable foreign element in other’s land.’[[198]](#footnote-198)

Treaty-based was an attempt to redress the adverse consequences of wars, and border settlements, on the lives and liberties of people as well as to minimise the minority related issues which existed before[[199]](#footnote-199), but now aggravated in view of racial passions which rose during the war.[[200]](#footnote-200)

 All of these challenges emerged in the context of the FSIPS of the League of Nations, ‘an international organism’[[201]](#footnote-201) subject to monumental change in two years. Temperley noted that the League was void of international legal personality. This soon posed difficulties and a dispute while attempting to conclude Minorities Treaties with Albania in 1921 which brought Albania to the Permanent International Court of Justice. After all, earlier treaties were concluded between the Principal and Associated Powers, assigning the supervisory role to the Council of League of Nations in which they sat. How could Albania conclude a treaty with League of Nations with no international legal personality?

The Minority Treaties contributed to the development of internal self-determination for a number of reasons, once international organisation were created and acquired an international legal personality. Firstly, they caused paradigm change in Treaty Law, since they created the legal effect by way of rights and obligations on non-signatory member states of the League. Secondly, while the territorial adjustments implicitly invoked principles of external self-determination, the Minorities Rights invoked internal self-determination, by means of constitutional measures. Thirdly, it was hoped that the difficult task of protection of rights and liberties of the ethnic and religious minorities would be achieved by international supervision, adjudication, and suitable collective action, by intervention, in the internal affairs of state under obligation.[[202]](#footnote-202)

This was the second paradigm change in the concept of state sovereignty, moving from inviolability of political unity of a state to shared authority of the state with the international community. After all, the international community under the treaties became guarantors, responsible for the Protection of the Minorities,[[203]](#footnote-203) with declared interests in their cultural, religious, linguistic, educational and political affairs. The occasion of becoming a member to the League of Nations, provided the other opportunity to impose Minority Treaties, while the League became their guarantor.

|  |
| --- |
| List No 1 |
| States and the articles on Minority Guarantee Offered by the League of Nations at the time of their admission of to the League of Nations.  |
| Albania, under Art 7, Lithuania under, Art 9, Bulgaria under Art 57, |
| List No 2 |
| List of states who had to make declarations already in the League of Nations in 1924 |
| Finland Albania Latvia Greece: |
| List No 3 |
| The Following treaties were concluded between Victorious Great Powers with articles incorporating the minority treaties |
| The Following treaties were concluded between Victorious Great Powers with Articles incorporating the minority treatiesThe Victors treaty with Poland, articles 2 and 8. The Treaty of St. Germaine with Austria included Section V Articles 62-69. The Treaty of Tranion with Hungary included Section VI Articles 54-60. The Treaty of Neuilly with Bulgaria contained Section IV Articles 40-57. The Lausanne Treaty concluded with Modern Turkey, contained Section III Articles 37-45.  |

‘Protection of Minorities’had four specific aspects:

 First, they offered general protection of life, liberty and property, and freedom of worship, for all of the inhabitants.

 Second, all inhabitants were allowed equality and protected from discrimination on the basis of race language and religion.

Third, minorities acquired right to organise their religious and charitable institutions.

Fourth, minorities were granted the right to use their language and free at elementary school education in their mother tongue.

Yet treaties were selectively applied because ‘Minorities’ rights remain a concern and an international interest so that they do not become foyersof irredentism’.[[204]](#footnote-204)The danger of minorities seceding is implicit. Firstly because minorities’ aim is non-integration and secondly this gives the impression to other communities of the same territory that a minority resented conforming to the political unity and does not support the territorial integrity of the state. This has been recognised by the UN resolutions, advocating internal self-determination always conditional to the observance of the sanctity of political unity and territorial integrity of the State concerned. Irregular application, of minorities’ rights in a state-centric international order meant conditionally applying the concept as long as it did not threaten the political unity and territorial integrity of the state. Once more conditionality of the international law emerges supporting the hypothesis as proven in the above sections and as will be argued below.

### 2.4.2 Aspects Versailles Treaty; Territory and the Protection of Minorities

When the Treaty of Versailles was concluded,[[205]](#footnote-205) between the victors and Germany, one cannot but ask if internal and external self-determination were taken into account when dealing with territorial issues, or the war indemnities and Article 22, thus the Mandate system, and the Protection of the Minorities. As Baron Heyking and Loewenfeld[[206]](#footnote-206)argued in Stockholm*’*[R]acial self-determination’, after Paris peace treaty had become the public law of Europe. Temperley agreed with this assertion[[207]](#footnote-207). Thus the principle of equality demanded that it should apply to the minorities of all member nations and not to the victors alone.

The territorial adjustments between Germany, Poland, Belgium and France and Denmark were controversial and a contributory factor in future conflicts. According to the substantive terms of the treaty, Germany ceded Alsace-Lorraine to France, without an initial plebiscite. Furthermore, the German province of the Northern Schleswig province was ceded to Denmark, yet when a plebiscite was held, South Schleswig reverted to Germany. Thus a degree of consultation with people, which was envisaged by the Covenant, was not implemented appropriately, or implemented at all. For instance, the Saar and Ruhr District were placed under the French administration without any plebiscite. This action had two legal effects. First, it had a negative effect in the political self-determination of the German people. Second, the victors took control of the natural resources of defeated states without their consent. This is noted in Article 45 of Versailles Treaty:[[208]](#footnote-208)

Article 49 of the Versailles Treaty declared that,

Germany renounces in favour of the League of Nations, in the capacity of trustee, the government of the territory defined above. At the end of fifteen years from the coming into force of the present Treaty, the inhabitants of the said territory shall be called upon to indicate the sovereignty under which they desire to be placed. [[209]](#footnote-209)

Other territories, such as West Prussia, Upper Silesia, Poznan and the Memel district were ceded to Poland, without a plebiscite, and Danzig was declared a Free City. Belgium ceded Moneste, Eupen and Malmedy regions, with 15 years’ Belgian rule before plebiscite.

According to Article 42, the Rhineland was to be occupied for 15 years while being totally demilitarised, implying that self-determination of peoples and demilitarisation go hand in hand. Article 42 expressly stated that: ’Germany is forbidden to maintain or construct, any fortifications, either on the left bank of the Rhine or on the right bank to the west of a line drawn 50 kilometres to the East of the Rhine’.

The 1919 Paris Peace Treaties are the starting point for the evaluation of furtherance or regression in the implementation of self-determination. As the war altered the modalities of governance in the Empire-states of Austro-Hungarian, Prussian-German and Ottoman, were based on unquestioning loyalty to the emperor, and to the aristocracy and the autocratic bureaucracy other changes followed.

Firstly, Versailles records regression of the principle of self-governance which did not advance self–determination at least to the losing side.

Secondly, it exhibited the unfairness of punishing citizens in an unrepresentative State. Similarly alien exploitation of natural resources and the economy, commerce and trade have an adverse effect on the innocent.

Third, borders were once more altered; natural resources such as the mining industry, factories and transport system were taken under the control of the victorious nations. Every measure of the treaty enhanced a more oppressive regime than the one it replaced.

 Every aspect of the concept of self-determination was overlooked with impunity. The treaty was not solving any territorial or people-oriented problem but was storing up one for decades to come. In total contrast, there was the Little Versailles Treaty, concluded between Poland and the victorious powers. Article 2 defined itself as *’*Fundamental law, and no law, regulation official action shall conflict or interfere with these stipulations (…) or assume supremacy over.’ [[210]](#footnote-210)Article 2 assured ’[C]omplete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion*’* [[211]](#footnote-211) Articles 3-6 dealt with the adoption of Polish Nationality by German, Hungarian, Russian and others, who rejected dual nationality, were compulsorily expected to resettle elsewhere. Article 7 affirmed equality before the law, and enjoyment of civil and political liberties, prohibition of prejudice, and discrimination in the matter of holding public office and employment, on the grounds of religion, confession, race, language, and creed. Article 8 affirmed to Polish nationals with distinctive religion, confession, race, language, *’*same treatment and security in law and in fact as the other Polish Nationals’ with equal capacity to establish and run their own religious and charitable institutions and educational establishments in their own language. Nevertheless, minorities were not placed under the protection of the League, unlike other treaties.

Several cases were brought to the Permanent International Court of Justice by Germany, Albania, Greece, Bulgaria, and Turkey, as disputes arose under the Minorities Treaties. Germany in support of her former nationals in Upper Silesia, proceeded against Poland, who argued that the Court had no jurisdiction. The Court rejected that view by 8 votes to 4. The Court also affirmed that German–Polish conventions concerning Upper Silesia had granted minorities freedom to educate in the language of their choice at their own cost.

This section showed that jural imperatives of the international treaties remained intact as declared by the PICJ in the Minorities cases that came to Court, thus proving the hypothesis.

### 2.4.3 The Territorial and People’s Aspect of the Peace Treaties of St Germaine, Neuilly, Trion, Lausanne

The Treaty of St. Germaine was concluded between Austria and the Victorious Allies on 10 September 1919. Article 46 reads, as follows,‘Austria, in conformity with the action already taken by the Allied and Associated Powers, recognises the complete independence of the Serb-Croat-Slovene State*.’ [[212]](#footnote-212)*

Thus Austria agreed to the secession of a region that she recently annexed from Ottoman Empire. The treaty also incorporated norms implicit in the Covenant*,* and measures which proposed to further the new international order, since the’ [P]rocess of civilisation has always been towards the League of Nations*’*[[213]](#footnote-213) replacing the previous ethnocentric cosmopolitan Imperialism.[[214]](#footnote-214) Former German, Russian, Austro-Hungarian and Ottoman subjects, in some parts of their respective Empire, instantly became either subjects of alien rule, if they chose to remain, or became stateless migrants, in search of a passage to America or walk to the smaller heartlands of their ancestral homes, to escape the threat to life and liberty. All of these options availed themselves with accompanying sufferings under Article 47:[[215]](#footnote-215)

Article 47. Austria renounces, so far as she is concerned, in favour of the Serb-Croat-Slovene State all rights and title over the territories of the former Austro-Hungarian Monarchy situated outside the frontiers of Austria as laid down in Article 27.[[216]](#footnote-216)

Article 48 created new committee to determine new borders, operating on majority voting.[[217]](#footnote-217)However, Article 49 created the obligation to resort to a plebiscite, in order to decide the future of the said territory. Paradoxically, effort to combine the people and territorial aspect of the self-determination, once more created minorities from the town dwelling German speaking Austrian inhabitants:[[218]](#footnote-218) The inhabitants of the Klagenfurt area were called upon, to the extent stated below, to indicate by a vote the State to which they wish the territory to belong;’[[219]](#footnote-219)

The Treaty of St. Germaine in Section V with Articles 62-67 addressed the Protection of Minorities. Article 67 availed the protection and equality of the national minorities in fact and in the law which received clear definition in the Albanian Schools case to be discussed later. The Austrian State assumed financial responsibility for the education of minorities as indicated by Article 68. Article 69 placed the Minorities ’under the guarantee of the League of Nations’.[[220]](#footnote-220) As to why the Austrian minorities received security while Poland’s did not is a matter for historical speculation.

The Little Versailles Treaty Article 1- Poland and Victors, was declared as part of the fundamental law. Article 62 of St. Germaine, concluded with Austria, and Trion Article 54, concluded with Hungary.

The Peace Treaty of Neuillywas signed on 27th November 1919 by Bulgaria and the Great Powers. It addressed territorial issues and the Protection of Minorities with Section IV Articles 49 to 57. Article 49, declared this section as fundamental law.

Bulgaria, under the Peace Treaty of Neuilly, guaranteed life and liberty of the national minorities with Article 50. Political and legal equality was guaranteed under Article 53, and so was the use of national language and freedom of worship, and conscience. Article 54 confirmed entitlement to the right to equal treatment and security in fact and in law. Free public education, religious and charitable institutions were offered to the ethnic-nationals.

Bulgaria like Austria was a defeated state and was, therefore, expected to pay for its national minorities’ needs from public funds under Article 55. Article 57 placed minorities in Bulgaria under the protection of the Council of League of Nations. This gave additional protection by formalising processes to seek intervention by the League of Nations if the intervention was necessary.

The Treaty of Trion was imposed upon Hungary on 4th June 1920 as a defeated central power. Subsequently, Hungary lost ‘3/4 of her territory, and 2/3 of her inhabitants,’[[221]](#footnote-221)at a stroke of the pen, to the parties listed in Article 27. According to article 27(1) scheduled identifiable border and population adjustments to Austria. Under Article 27(2) scheduled loss to Serb-Croat-Slovene State. Under Article 27(3) scheduled loss to Greater Romania. Under Article 27(4) scheduled loss to Czech-Slovakia.

Was this a treaty concluded with self-determination in mind? Did it bring peace in 1919 to the territories? President Wilson’s speech made in San Francisco on 17th September 1919 is quoted by Antonio Cassese by way of admission that self-determination and plebiscite were not applied to the territories of the victors, but to that of the defeated nations: ‘It was not within the privilege of the conference of peace to act upon the right of self-determination of any people except those which had been included in the territories of the defeated empires.’[[222]](#footnote-222)

Cassese noted that there was a serious inconsistency in the rhetoric of self–determination, and its application. The arbitrary application of plebiscite, whenever implemented, cast doubt over the Great Powers intentions. ‘[T]he arbitrary manner in which the Allies decided which populations were entitled to determine their fate defeats any suggestion that a ‘right’ to self-determination had existed.’ [[223]](#footnote-223)

### 2.4.4 Minority Treaties Forerunner of International Responsibility to Protect

Verzijl suggests that all of the blame for the minorities’ issues cannot be placed on territorial changes since it will be ’biassed or misleading’. But to absolve treaties of any blame that displaced 47 million[[224]](#footnote-224) people will fly in the face of truth.[[225]](#footnote-225)

The post-WW1 order according to Franck was a ’[R]udimentary international system’ [[226]](#footnote-226) which functioned very inconsistently and [B]adly, if at all*.’* [[227]](#footnote-227) Yet there is a tendency to overlook or underestimate the contributions made by the Minorities Treaties, to the development and the practice of self-determination.

Verzijl too repeatedly identified the shortcomings of the system and said that something’ [W]as amiss with it.’[[228]](#footnote-228) He also argued that the minority protection regime was constituted by diverse measures, selective application doomed to fail in view of’ [D]eclarations and the covenants brims with international hypocrisy.*’* [[229]](#footnote-229)Given the limitations of international law, Verzijl observed that it was a novel idea to put so much faith in the positive law. Nevertheless, by 1929 discussions among the international lawyers were supportive of the idea of adopting fundamental liberties, by all the nations.[[230]](#footnote-230) Baron Heykig, in 1924, argued that the imperative of consolidating proposed that minority treaties should be applied to all states, and the matter was referred to a committee.[[231]](#footnote-231)

Verzijl comments that when human rights were introduced 1948 and in 1969 were ineffective and remained *’*a cry in the wilderness’, and put it down to international hypocrisy. [[232]](#footnote-232) Nonetheless, the jurists agreed that the minority protection regimes were antecedents of more recent human rights and internal self-determinations measures which may invariably lead to secession. This was the foremost fear in the minds of the critiques and supporters of the minority treaties alike. These treaties were abandoned because they were not operated properly. They emerged as international norms under the UN system as argued in 1924-29 by the informed international jurists[[233]](#footnote-233)deemed utopian.

One is justified in wondering if the principle of self-determination was intended to be developing beyond any political philosophy.[[234]](#footnote-234) This doubt is justifiable in the light of Aaland Island deliberation and the rulings in the cases of the Minorities School in Albania. One has to agree with the views articulated by a line of contemporary academics, who also serve on International Tribunals such as Higgins Cassese, Franck and Verzijl, all of whom noted the inconsistencies in the application of the principle of self-determination. Furthermore one continues to run into inconsistencies throughout the League period over the implementation of self-government, for example, the Resolution adopted by the League on 21 September 1922[[235]](#footnote-235) which was confirmed again on 1933:

1. While in case of grave infarction of Minorities Treaties it is necessary that the Council should retain its full powers of direct action, the Assembly recognises that in ordinary circumstances, the League can best promote good relation between the various signatory Governments and persons belong to racial religious or logistic minorities placed under their sovereignty by benevolent and informal communication with those Governments.

2. The Assembly expressed *’*the hope that the States which are not bound by legal obligation to the League will respect minorities will never the less s observe the treatment of their own racial religious of linguistic minorities at least as high standard of justice and tolerations is required by any of the treaties and by the regular action of the Council*’*.[[236]](#footnote-236)

As Franck acknowledged, ‘The League’s Mandate system evinced only muted concern for the wishes of those territories’ inhabitants.’[[237]](#footnote-237) The judicial view expressed in the Minorities Schools in Albanian case summed up the general political indecisiveness leading to two distinctive patterns. Two conclusions emerged. First, nations with minorities were in need of clearly-expressed international obligations. Second, minorities needed international monitoring. Verzijl summed up the frustrating situation:

It is, therefore, very easy to understand that States which found themselves in this inferior position strongly objected to its continuances. A remedy could have been sought in two diametrically opposed directions, either by complete abolition of the existing law of minorities or by making it a general application.[[238]](#footnote-238)

In 1972 Verzijl was repeating the views of the contemporary jurists in 1924 such as Heyking, Loewefeld, Kunz. All referred to the above thoughts, demonstrating several aspects of the hypothesis propounded in Chapter 1.1.2. It was said that legitimacy of components and determinants of the international legal principle of self-determination was conditional in a formal state-centric international system without being deprived of its jural imperative. Firstly, this hypothesis about contemporary 21st century and UN post-decolonisation era of responsibility to protect, therefore League of Nations is distinctive from UN. Secondly, what is discussed in the 21st century is legal precept while in League of Nation was the implementation of a policy creating moral imperative to implement the policy. Thirdly there is a serious time gap between the transition of a national policy to an international one and more of a gap between adoption and implementation of an international legal principle of international jurisdiction.

The historical development of the current law of self-determination revealed two aspects. First, traditional permanent features of the components and determinants of self-determination in different epochs of the history of the international political system formed a common denominator and thus a general principle al. Second, the League of Nations as a formal era of an international political system and evolution of responsibility to protect as early as 1824, was about to accelerate.

## 2.5 Aaland Island Case

### 2.5.1 The Relevant Facts

The Aaland Islands are situated in the Baltic Sea between Sweden and Finland, and North of Latvia and Estonia with a strategic significance for the Gulf of Bothnia and Gulf of Finland. This is a relevant case study for two reasons.

Firstly, because it combines the islands’ geographical[[239]](#footnote-239) significance, with the people’s historically persistent, unanimous *’*sincere, and continuous expression of feeling*’* and call to remain Swedish subjects.[[240]](#footnote-240)

Secondly, it concerns inter-temporal aspects of the international law of title to the territory in the context of self-determination.

Finally, this case invoked principles related to nascent sovereignty and emergence of the legitimate will of the people, in compliance to the international political concept in opposition to the legal concept and practice of absolute sovereignty.

### 2.5.2 Findings of the Committee

Council of League of Nations sitting in London on 12 July 1920 asked a committee to consider an advisory opinion on whether or not the plebiscite by the population of the island and the principle of self-determination would revert sovereignty of the island to Sweden within the meaning of paragraph 8 of Article 15 of the Covenant, [[241]](#footnote-241) or remain with Finland. [[242]](#footnote-242)

The Commissioners had to be established whether or not Finland had a good title to Islands to oppose secession in law and in fact. Secondly, the Commissioners had the additional burden to establish if Finland had a good title before its annexation by Russia in 1808. Thirdly, the commissioners had to consider, the international legal status of Bolshevik Russia embroiled in a civil war.

The island was a sovereign territory of Sweden until Finland ceded the island to the protestation of the islanders. Finland had never been able to exert absolute sovereignty and had to grant autonomy. When Finland was annexed by Russia in 1808 they too failed to subjugate the islanders but kept them at bay. When Finland and Russia fell at odds in 1899 the islanders sided with Finland, to secede from Russia in 1917. As the Commissioners observed, this did not mean that the islanders wanted to share a common future with Finland. Furthermore, the chaos and anarchy that ensued and clashes between Red and White Finnish Soldiers, assisted by Red and White Russian, and elements of the Imperial German Army, the island sought and received military intervention from Sweden. The islanders maintained their Swedish identity and rejected all others. Not surprisingly, the Commissioners had not been satisfied that Finland ever established sovereignty over the island *’*by the facts themselves’[[243]](#footnote-243)

The Aaland Islands were undoubtedly part of Finland, during the period of Russian rule. Must they for this reason alone, be considered as definitely incorporated de jure in the state of Finland which was formed as a result of the events described above? [[244]](#footnote-244)

Sweden argued that the island with its homogenous Swedish population was annexed in 1809. Plebiscite results showed that islanders wished to unite with Sweden. Consequently, the Commissioners considered the principle of self-determination, in view of the territorial changes caused by the First World War, and the Bolshevik Revolution. Furthermore, the island’s status also changed on three accessions always vigorously opposed by the islanders. This was not an easy task when compelled to acknowledge the fact that on one hand the concept of self-determination was not endorsed positive of international law, or known to the Covenant of League of Nations.

Commissioners had to acknowledge the relevance, and contributory nature, of the will of the people in a dispute endowed with some *’*acquired right’,[[245]](#footnote-245) thus rendering them evocable.[[246]](#footnote-246) However, the commissioners were unable to elaborate on self-determination (save few observations).

First, they opined that if it was invoked as a matter of right, it would lead to domestic difficulties and international instability. This would run contrary to the aims and objectives of the League of Nations.

Secondly, the deliberation focused on the issues of legitimate claimable rights, and legitimacy of claimants and legitimacy of the party the claim was made from. If the islanders were claiming their residual entitlement, before being deprived unjustifiably, would their claim be legal, or legitimate? Was a legal title to the territory or legitimate title to the territory, claimed as islanders or as Swedish citizens?

Thirdly, was Finland a legitimate party, with international legal personality, to receive a legitimate title to the territory? After all, the Bolshevik revolution and civil war were still being fought and Finland has not yet seceded from Russia. Did Russia have a legitimate title, when annexing the island from Finland in the first instance?

The Commissioners declared that national self-determination has been applied in few cases, but it is not promulgated by the Covenant of League of Nations, thus there was no international right or obligation.

First, the Commissioners declared that the dispute between Sweden and Finland was not solely about the sovereignty of the island.

Second, the dispute was on account of the islanders’ desire to be reunited with Sweden, under the principle of self-determination, by discounting suspect Finnish claims of sovereignty.

Third, the dispute was in the purview of international law and jurisdiction of the international authority. Lastly, that the matter was within the competence of the League.

### 2.5.3 Findings of the Council of League of Nations

On June 24th 1921the Council of League of Nations delivered the second and a very odd and inexplicable opinion and possible rebuttal of the Wilsonian principle of the right to self-governance of people and self-determination in following terms:

(i) The sovereignty of the Aaland Islands is recognised to belong to Finland.

(ii) Nevertheless, the interests of the world, the future of cordial relations between Finland and Sweden, the prosperity and happiness of the Islands themselves cannot be ensured unless: (a) certain further guarantees are given for the protection of the islanders, (b) arrangements are concluded for the non-fortification and neutralisation of the Archipelago.

(iii) The new guarantees to be inserted in the autonomy law should especially aim at the preservation of the Swedish language in the schools, at the maintenance of the landed property in the hands of the Islanders, at the restriction, within reasonable limits, of the exercise of the franchise by newcomers, and at ensuring the appointment of a Governor who will possess the confidence of the population.

(iv) The Council has requested that the guarantees will be more likely to achieve their purpose if they are discussed and agreed to by the representatives of the parties. [[247]](#footnote-247) Finland granted autonomy to the island in 1920 and gave further rights in 1951 and in1993.[[248]](#footnote-248)

The question whether the plebiscite should be regarded as an important criterion for self-determination was avoided by both deliberations. This was odd, as the title to the territory of Aaland Island passed from one hand to another regardless of the wishes of the people. Both deliberations run contrary to President Wilson’s views and practice adopted by the 1919 Paris Peace Conference. Yet grant of autonomy and its eventual extension was implemented in keeping with the contemporary perception of self-governance.

In conclusion, Chapter 2 examined the hypothesis from the perspective of state practice, in compliance with the first formal international political system while noting that the hypothesis was built on three facts, formal international political system, and conditional application and current state-centric formal international order. Irregular application of the contentious international concept of self-determination was procedural accommodation of national and international jurisdictions. This accommodation of jurisdictions aims to prevent the negation of the jural imperative of the legal principle of self-determination.

In the Aaland Island case, a formal international body considered state creation and sovereignty in political terms and not as a legal principle, while acknowledging the principle of self-rule and inalienable rights.

The Covenant and the Charter evolved the international legal principles of self-determination in distinctive developmental stages. Leading to a jural imperative in spite of their irregular, selective, implementation. This supports the hypothesis when applied to all eras of international law.

The corollary of this proven aspect of the hypothesis is significant for several reasons. First, the League of Nations laid the foundations of the contemporary legal principle of self-determination. Second, every international era had its own perception of self-determination. Third, the general nature legal principle, in the state-centric international political system, allowed flexibility through irregular application to the reconciliation of conflict of interest between the national and international jurisdiction.

**CHAPTER 3 THE DEVELOPMENT OF THE LEGAL NORMS OF SELF-DETERMINATION WITHIN THE UNITED NATIONS ERA**

**3.1 United Nations Political System and its Capacity to Develop International Legal Principle of Self-determination**

UN Charter and international processes transformed the principle of self-government, to the modern internal and external self-determination, and state succession, and secession, and the principle of R2P. This chapter will defend that UN is a formal source international law, due to it's Constitutive and substantive capacities as formal state-centric international political system .thus proven the hypothesis.

### 3.1.1 The Legal Basis of the UN’s Norm Creating Capacity

The Charter and the Covenant formed FSIPS, with the capacity to conclude norm-creating treaties in compliance with, customary and international treaty law. FSIPS enabled international authorities function with legal effect, at international and domestic jurisdictions. Therefore it is factually inaccurate, and an intellectual historical fallacy, that one leader and one state for decades could affect international order without the support of the international political system in place.[[249]](#footnote-249)

If the Treaties of Westphalia, in 1648 and the Treaties of Utrecht in 1711-1714, brought about paradigm changes, they were treaties, among warring parties to establish the co-existence between the political nation-state with the religious Empire-states. The legacy of these norm-creating treaties has been long. Therefore, the constitutional and administrative law and legal processes remain an area of interest of this thesis. Historical regressive tracing shows that the above-said treaties developed the public law of Europe, and a European order constructed on the policy of balance of power[[250]](#footnote-250) and the principal of legitimacy[[251]](#footnote-251). Paradigm changes occurred when the Covenant created a formal international organisation, and the UN Charter advanced self-determination as an international norm and decolonisation as consequential policy. This affected the political independence and the territorial integrity of the European Empire State, the international and constitutional orders. It affected the fundamental freedoms of the citizens, as well as the acquisition of title to the territory. These international obligations were created by the constituent states, as distinctive entities from their national domestic order. The UN achieved this with its Charter parallel development in the customary international law. Therefore, when the Netherland’s permanent representative to the UN participating in the proceedings of the Security Council on 10th June 1999 said that the *’[C]harter was not the only Source of International law’*[[252]](#footnote-252) he was making a legitimate and accurate statement.

Higgins agreed that the frequently adopted resolutions, with overwhelming majorities, led to the formulation of international legal norms.[[253]](#footnote-253) Sloan writing twice on the same subject most persuasively, with a gap of 40 years, agreed with the identical thesis. Higgins and Sloan and many others such as Schechter to name few[[254]](#footnote-254) identify the UN as one of the sources the customary international law.[[255]](#footnote-255) Chapter 2 showed that the formal era of League of Nations facilitated the rapid development of the concept of self-government and self-determination.

In 1884, Hall wrote that the total practice of ‘national acts’ formed the basis of international law.[[256]](#footnote-256) Higgins and Sloan or Hall and Wheaton writing in different ages were in agreement with the Article 38 of 1945 Statute of the International Court of Justice Articles, 7 and 92 of the Charter:

Article 38. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply,

(a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognised by civilised nations; (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[[257]](#footnote-257)

In 1836 Wheaton linked the source of international law, and clearly and with the deliberations, declarations, and treaties emerging from the council of states sitting in a conference.[[258]](#footnote-258) Wheaton attributed this thesis to Grotius who in turn linked international law with the laws of nature and positive law through deliberations of the councils and international treaties. Wheaton also refers to Rutherford (the contemporary and critic of Grotius), who argued that States did not sit in Councils nor deliberate and make declarations. Rutherford’s arguments held true until 1648 and Westphalia. Wheaton also mentions Cornelius von Bynkershoek writing soon after Westphalia and restating the Grotian thesis *’[A]s qualification of cases frequently recurring referring natural; laws is the only law of those who are not governed by anyone.’* [[259]](#footnote-259)

Wheaton restates the international law from America in 1836 by elaborating on the legitimacy of the state’s usages (meaning practice) and collectively derived norms by reason, but conditional to their regular manifestation in the state action, and their consent in a treaty form. In 1854 Lord Phillimore the last single sitting Judge of Admiralty, supported Wheaton’s understanding of Grotius and Bynkershock even piously declaring that ’[I]nternational law is by the will of God and expressed by the consent tacit or declared of independent Nations.’*[[260]](#footnote-260)* In Chapter 5 of his Treaties, he declared *’Next and only source of international law are the consent of nations.’[[261]](#footnote-261)* It is’ *[E]xperience of two ways openly expressed by being embodied in positive conventions or Treaties,’* then Bynkershoek cited Grotius as an authority in support of his assertion.

In 1854 Lord Phillimore wrote almost a century and a half after Grotius while representing the best of the English natural law school thought, even after Austin’s book on jurisprudence and consequential popularity of Positivism.[[262]](#footnote-262)

The necessity of mutual course is laid in the nature of States as it is of individuals by God, who willed the state and the created the Individual (…) That law is not enacted by the will of any common Superior upon the earth, but it is enacted by the will of God: and it is expressed in the consent, tacit or declared, of Independent Nations.[[263]](#footnote-263)

Theocracy was still notable in the first sentence and second paragraph of Lord Phillimore’s preface. This showed the composite nature of international law.

The challenge of the United Nations found in theocratic, philosophic, and natural law eras was the transformation of ideals and moral principles, into practical and implementable policies. Thus, this historically consistent factor is the inherent challenge to the transformation of the concepts into consensus-based international policies.

The factual development of the concept of external and internal self-determination into a political reality required political state, and an organisation of political states, and centralised compliance system based on peaceful processes without resorting to threat or use of force.

The said requisites evolved after the disastrous First World War in 1919. FSIPS posed formidable challenges to state sovereignty, as it legitimately took place with the grants from state sovereignty by the states. Thus, the legal basis of the development and transition of self-determination from the concept to applied policy is built on three historical consistencies:

(i) The linkage between dominant philosophy and international political order,

(ii) The consistency of legal principles, and

(iii) The consistency of factual link between violence, peace, and preventive measures in the future as referred above.

In 1883 Hall, manifested the influence of Austin in his work,[[264]](#footnote-264) and reflects on two schools of thought regarding the source of international law (i) Discoverable absolute rights, (ii)*’* [G]rowth in harmony with changes in sentiments and external conditions of the body of state.*’[[265]](#footnote-265)* *Hall elaborates, ’*Positive international law derives its absolute right practically refer to positive law as evidence of what is right*.’[[266]](#footnote-266)*

In 1884, Westlake directly attacked Austin’s[[267]](#footnote-267) command theory, which literally removed the legitimacy of international law, by reducing it to mere collective sentiment. Westlake writing much earlier, in contrast to Higgins[[268]](#footnote-268)refers to the body of rules prevailing between states as well as *’[A]ll outside it’*[[269]](#footnote-269) showing remarkable insight to the legal effect of international law upon the individual. Westlake is the forerunner of the sociological school also adopted by Roscoe Pound and Brierly. Westlake adds *’It is an old saying ubi societas ibi jus – where there is a society there is law’*[[270]](#footnote-270)he concludes that’ *(…) [I]nternational law is product of consent of the international society.’* Brierley, writing in 1954, agrees with Westlake that law needs society to exist and no society can without a system of law. [[271]](#footnote-271)

Higgins issued a caution that, to consider self-determination beyond the liberation of the Axis-occupied territories since 1938, would be re-writing of the history if one assumed that the Atlantic Charter, initiated by Roosevelt and Churchill in 1944, included a policy of decolonisation.[[272]](#footnote-272) However, the Atlantic Charter was open to interpretation, furthermore, what America and USSR had in mind in contrast to Churchill’s thoughts on the future of the European colonial powers holds true equally.[[273]](#footnote-273)It was the American and Soviet’s anti-colonial sentiments which promoted a last minute Soviet insertion of the actual words of self-determination into Article 1(2) of the Charter, which supports the assertion that, if the Covenant terminated annexation of territory, it was the UN that ended colonialism. It is inconceivable that this could have been achieved without the express or implied consent of the USA.

The UN achieved paradigm change by adopting the policy of decolonisation while relying on, a deep-rooted customary international law which opposed unfair enrichment, undermining the moral rights of the oppressed native people of the non-self-ruling territories, as referred to by Wheaton, Wharton, and Westlake. Sources of international law evolved more positively under the UN Charter without the UN General Assembly becoming an international legislature or executive, thus without becoming a world government civitas maxima.

The customary and international treaty are irregular and general in nature emanating from FSIPS. It is a sui generis system and the irregular application does not negate the jural imperative international legal obligations and rights. This finding supports the hypothesis.

### 3.1.2 The Legal Basis of Self-Determination Imputable to the UN Charter and its Processes

Grotius, Wheaton, Westlake, Brierley, Higgins attached importance to inter-state agreements because legitimate international norms emerged from the Councils of States. The debate over the sufficiency of metaphysical consent, without physical manifestation with action, is contentious as noted by De Amato.[[274]](#footnote-274)Thus, when these conventions are frequently invoked, they would lead to the formation of international norms as supported by Higgins and others before her. Therefore, the Covenant in 1919 and the Charter in 1945 were such treaties directly contributing to the development of the right to self-determinations in international law, but not without contention or criticism.

Higgins’ argued that Article 1(2) and 55 of the Charter, are cited wrongly for subscribing to the right of self-determination.[[275]](#footnote-275) This is persuasive, especially if they are to be interpreted literally since these Articles were draughted in very general terms. Furthermore, their interpretation should be guided with specific reference to Article 73(B).

These Articles render political will of the people, conditional and not absolute, supporting concept of self-government, and not independence as a claimable right but an attainable right *’[A]ccording the particular circumstances of each territory and its people and their varying stages of development.’[[276]](#footnote-276)*

The developmental spirit of Article 76(B) is as relevant as Articles 55 and 56 since they are directly engaged in the creation of the general international obligation. This may be a contradiction in terms, as an obligation ought to be a specific manifesting certitude as found in the domestic jurisdiction. Alas, international law has its own standards. A literal reading of Article 56 is self-explanatory. It is helpful to read them together with Article 55:

Article 55With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote (…).[[277]](#footnote-277)

The intent of the Charter is to create an international obligation; this is evident from the words ’shall promote (…).’ as above Article 56.[[278]](#footnote-278) ‘All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.[[279]](#footnote-279)

In conclusion, the UN resolutions are positively codified source of international law according to 1945 Statute of ICJ Article 38(b). Furthermore Grotius, Wheaton, Westlake agreed norm creating a capacity of states while, Brierly, Higgins agreed that the UN norm creating capacities had customary law basis besides the Charter. General Assembly resolutions and Covenants, included the 1948 Universal Declaration of Human Rights, the 1966 Twin Covenants on socials cultural and political economic rights, and UNGAR 2625, on *’Friendly Relations’* adopted in 1970 prove this. These resolutions can be divided into two chronological groupings:

 (i) Those which led to decolonisation by external self-determination,

 (ii) Internal self-determination endeavouring to develop fundamental freedoms, and legitimate democratic order under the rule of law within the domestic order and the gambit of international jurisdiction.

When contextualised in contemporary substantive international law prove that the state sovereignty conditional to compliance to the international law. If the states do not comply with self-determination, then they are exposed to state succession and secession. This argument challenges the long-standing presupposition that state sovereignty is political and subjective while the maintenance of sovereignty is objective under international law.

This finding supports the corollary of the thesis that if internal self-determination fails secession or state succession is politically and legally inevitable.

In conclusion; (i) Self-determination has evolved into positively identifiable prohibitive and right-based obligation within a recognisable jurisdiction, (ii) The principle of claimable right of external and internal self-determination has diversified beyond its colonial context, by building on the customary international law on account of state action and collective state decision in the form of multilateral treaties, (iii) These fact has long been acknowledged by eminent jurist such as Wheaton, Phillimore, Wharton, and Westlake, referring to the normative values, positively stated, and forming part of the purpose and principles of the norm creating treaties and conventions, a century earlier than the Charter.

Therefore, these facts support an aspect of the hypothesis that selective application of self-determination does not negate their jural imperatives.

**3.2 General Assembly Resolutions and Processes**

### 3.2.1 UN Resolutions and their Legal Effect

In the previous section, the general legal basis of the UN and its empowerment was explained, with reference to the general customary international law (lex general) and treaty law, such as the Charter (lex specialis). This section will briefly refer to those significant resolutions (lex specialis) and to their legal effect, in furthering self-determination such as the 1966 Twin Covenants, and UNGAR Res 2526 1970 on Friendly Relations.

The hypothesis advanced that the claims self-determination reflects the international collective consciousness of the need and the drive, and acceptance of fundamental freedoms by the states. These freedoms are promoted by the international community, through the UN General Assembly, with resolutions and supervised compliance. Since self-determination is a part of the dynamic international political value systems, and subject to change, it continues to change in every decade of the UN. Therefore, international processes are as important as the international legal norms, which support all modalities of self-determination.

Self-determination is not synonymous with decolonisation alone but an international political activity and process within the UN with legal consequences on state creation noted during and after the decolonisation era under the monopoly of the UN General Assembly. One can see how the Security Council has acted in the matter of Rhodesia in 1965, over Cyprus with resolution 541 in 1983, and over Bosnia in 1992 and Kosovo in 1999, with Resolution 1244 (1999). All of them involved claims of self-determination leading to state creation and recognition, in defiance of the customary international law. The Security Council’s international directive, for the non-recognition of states, render the self-determination an objective normative role in the recognition of states and thus title to the territory.

This constitutes a paradigm change since the recognition of states was exclusively a sovereign act as argued in the Aaland Islands case. Nor rapid paradigm changes occurred without the empowerment of the formal UN international political system providing order and all UN organs functioning together as will be demonstrated in Chapter 4 and the role of the Security Council in Chapter 6 below.

The legal norm of internal self-determination as a lex specialist is concerned with the oppression of the people by their own state. If Resolution 1451 (UNGAR 1960) reminded the states of their obligation to decolonise, thus ending alien subjugation, exploitation and oppression of the people, then the 1966 twin covenants also served notice to oppressive states, that absolute sovereignty was no longer tenable and that it conflicted with peremptory international legal norms, subject to protection of states political unity and territorial integrity of the state. In support of the hypothesis, it must be said that both resolutions eventually led to legal obligations such as non-subjugation of the territories and the inhabitants and non-subjugation of the citizens. Both are selective and conditional and continue to have jural imperative.

### 3.2.2 The International Covenants of 1966 and UNGAR 2625 (XXV1970) “Friendly relations **(…).[[280]](#footnote-280)**

The UN Twin Covenants of 1966, assisted the progressive diversification of modalities of self-determination, beyond the era of decolonisation. They are an express rebuttal of the argument that since there was no colony left by the 1990s, self-determination was an anachronism also serving “Referring to the twin covenants[[281]](#footnote-281) here-within serves two main purposes compatible with its diplomatic history,[[282]](#footnote-282) and the hypothesis.

The first purpose is to prove the role played by the UN General Assembly in broadening the scope of self-determination and being declared as an applicable international law by ICJ in the *Nuclear Threat[[283]](#footnote-283)* and *Construction of Wall in the Occupied Palestine*[[284]](#footnote-284)-both discussed below. The second purpose is to prove that the hypothesis was conditional to the existence of a formal state-centric international political system in the form of UN which could give rise to important contentious, yet norm creating Conventions in 1966 Twin Covenants. In 1996 the ICJ in the “*Nuclear Weapons*”[[285]](#footnote-285) case referred directly to the ICCPR as an applicable law, even if in this specific case, to be considered together with other humanitarian laws. ICJ declared convention’s broad application in time of peace and war and extraterritorial nature of the obligation of the occupying signatory state.

Third, the extension of the scope of self-determination, by the twin covenants internally and externally is an express rebuttal of the argument that since there was no colony left by the 1990s, self-determination was an anachronism.” In 2004 the ICJ in its Advisory Opinion about the legal consequences of the construction of a wall in the occupied Palestinian Territory referred to the ICCPR and ICESCR and meriting several relevant observations.

(i) ICJ deemed both Covenants as Applicable Law with the Charter Art 2(4)[[286]](#footnote-286)

(ii) That the Covenants possessed broad application in peace and war[[287]](#footnote-287).

(iii) ICCPR and ICESCR in the furtherance of internal Self-determination acquired extraterritorial[[288]](#footnote-288) jurisdictional status, even if ICESCR intended to be territorial[[289]](#footnote-289).

The role of Committees established for ICESCR was essential to ICJ since it relied on its reports.

The role of the supervisory regimes, even if some are silent as in the case of if ICESCR[[290]](#footnote-290), are fundamental to the realisation of the instrument, through their invocation, application and state compliances. The accurate, impartial, objective international reporting of none-compliance and a violation for adjudication is fundamental as shown in the “Wall” case[[291]](#footnote-291). International due process of adoption or supervision or prosecution or intervention, starts with the impartial reporting and on diplomatic or coercive Security Council measures.

The International Covenant on Economic, and Social and Cultural Rights (1966)[[292]](#footnote-292) *(*Referred hereafter to as “ICCPR”) and the International Covenant on Civil and Political Rights (1966) (referred to as “ICECR”) were constituted with ideas enshrined in the Universal Declaration of Human Rights (1948)but beyond international norms, to create an international legal obligation. Novak suggested that the Covenant created collective and individual legal rights and not a human right.[[293]](#footnote-293) Novak also argued that the convention, in 1966, was not referring exclusively the colonial powers *’[B]ut rather to all state parties, both with respect to their own people (in so far as multinational states involved) and with respect to other peoples fighting for the right to self-determination.’[[294]](#footnote-294)*

Novak also commented that the twin covenants were silent as to the process it will set for individual’s to commence a collective action since the instrument was framed not to be a threat to the political unity, and to the territorial integrity of the states.[[295]](#footnote-295) During their drafting sessions, of the twin covenants particularly by the Human Rights Committee, colonial powers, mainly Belgium, France and the UK took the opportunity to oppose any reference to self-determination.[[296]](#footnote-296) Yet, Canada, the Scandinavian states and the USA lent their support to it, but they too did not recognise the Third World Initiative that the task of promoting the principle of self-determination was the responsibility of the Trusteeship Council. This was prominently done in the belief that the concept shall not apply to the individual in a newly formed state. However, most of the western states opposed the colonial peoples’ right to their natural resources. According to them the concept of self-determination was a political principle and not a justiciable right, and the concept was too vague to be included in a treaty. They also argued that self-determination, should not be part of the treaty because collective rights and Article 1(2) UN Charter already cited self-determination. The Soviet view however predominantly maintained that self-determination should be granted to all colonial people provoking controversy among other states.

Latin American countries, and some of the Western States, maintained that this right should apply to people oppressed by their despotic governments, so it may be inferred at the time of these two instruments that the delegates were concerned with the development of a system whereby all the individuals must be allowed their basic rights and freedoms and even the despotic governments should be required to do so. It was thus hoped that the mistake made with the selective application of Minority Protection Treaties would be avoided. Chile maintained that the right to self-determination also included economic rights of people, and indeed this eventually led to the 1962 Permanent Sovereignty over Natural Resources UNGAR. 180 (XVII). In 1965, few states still maintained that it should be limited to some situations and that if this right was granted in a general way, it might be inferred as conferring rights on the minorities.

The ICCPR and ICESCR are referred in the proof of the hypothesis in several ways. First, the twin covenants prove the role played by the UN General Assembly in broadening the scope of self-determination.

Second, the twin convents prove the point that the hypothesis is conditional to the existence of FSIPS in the form of UN.

Thirdly the extension of the scope of self-determination is an express rebuttal of the argument that since there was no colony left by the 1990s, self-determination was an anachronism.

Fourth the twin covenants and the Human Rights Committee, are essential administrative bodies of many. By reporting to the Secretary General or Security Council or ICJ of about the violations, the victims would still await further action to halt violation, establish responsibility by relying on their report but still needed compulsive measures mandated by the Security Council. Take the ICJ case of Walls in Occupied Palestine[[297]](#footnote-297) where the ICJ established a violation of Self-determination rights of the Palestinians. Has there been any UN SCR to their demolition? Human rights and humanitarian violations in Crimea and Eastern Ukraine and Syria has there been any UN SC resolution to halt and prosecute crimes against humanity? The answer is in negative.”

Finally assessing the actual contribution of any convention to legal enlargement of the concept is relevant to the hypothesis while comparing it with the contribution of the ICJ would be beyond the scope of the thesis.

UNGA Resolution 2625 (XXV) in 1970 *’Friendly Relation (…),* placed oppressive governments on notice, for the second time with section 5(7), with the term ’conditionality’ of the protection, of their political unity and territorial integrity to the application of self-determination(see below).

First, paragraph 5(1) reiterates the principle of equal rights and self-determination of peoples as in Article 1(2) of the Charter.

Second, it reiterated the state R2P with Section 1 of the 1966 International Covenant on Economic, Social and Cultural Rights UNGAR 2201(XXI).

Third, it affirmed all peoples’ right to determine their political status, without external interference.

Fourth, Section 5(2) articulates the state's responsibility, for the implementation of said principle, as well as creating the obligation to promote friendly relations, and end colonisation and unrepresentative governance: ‘[H]aving due regard to the freely expressed will of the people and domination and subjugation and exploitation of people was breach of fundamental human rights and contrary to the Charter.’[[298]](#footnote-298)

UNGAR 2625(XXV) 1970 Section 5(3)[[299]](#footnote-299) reiterated the state R2P to promote fundament freedoms, thus internal self-determination, as embodied in the constitutions in compliance with peremptory international legal principals.

Section 5(4)[[300]](#footnote-300) identifies methods of decolonisation, thus reiterating the aspects of UNGAR 1514 (XV) 1960[[301]](#footnote-301), all modalities of self-determination being freely determined by the will of the people.

Paragraph 5(5) refers to state responsibility not to resort to oppressive measures and prevent people from freely choosing their own modality of governance under the principle of self-determination. When people are opposed to the state, the oppressed people have a right to seek external support in keeping with the principals of the Charter.

Section 5(6) brought clarity over the distinctive legal personality, which the UN Charter recognised between colonies and non-self-ruling territories and the states administering them until the colonials and population of the non-self-ruling territories determined their own future freely.

Section 5(7) introduces conditionality, to political unity and territorial integrity, with the words *’conducting themselves’*[[302]](#footnote-302). If a state oppressed and subject its people to the arbitrary rule of national and international law, or commits acts of gross violation of human rights, then international law will not protect it's political unity and territorial integrity. As a result intervention for the protection of the said people will be defensible. Second, Section 5(7) acknowledges two conditions concerning self-determination within the context of sovereign state; first that it will not challenge the political unity and second the territorial integrity of the state:

Nothing in the forgoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent state conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above, and thus possessed of government representing the whole people belonging to the territory without distinction as to race creed or colour.[[303]](#footnote-303)

The passage above is a General Assembly Resolution forming the conditional legal basis of self-determination. The above section examined this conditionality by reference to primary evidence in support of the hypothesis.

**3.3 Judicial Development of the Legal Principle of Self-Determination**

While one is aware that rule 59 of the SICJ[[304]](#footnote-304) renders the decisions of the ICJ non-binding, it would be grossly misleading to assume that legal reasoning is not followed when the court chooses to do so. One notes this most clearly in the six South-West Africa cases which articulated the international legal obligation to transfer the mandated territories to UN Trusteeship for the purpose of decolonisation by 1971.

### 3.3.1 Capacity for Continual Development, Diversification

The ICJ, as the principal judicial organ of the UN political and legal system, contributed to the formation and development and diversification of the legal principle of self-determination. This point put forward by Crawford, [[305]](#footnote-305) is also propounded in Chapters 4 and 6 of this thesis. However, Doehring suggests that the ICJ is compelled by Article 38 of its statute to declare the law as it is while, Article 59 of the SICJ applies to its decisions, only to the particular case before it, thus limiting its opportunity to develop international law. These are defensible, and oppose the views of Crawford, yet, there is a third view suggesting that Crawford’s postulate, and SICJ Art. 38-59 are reconcilable if one focuses on the primary documents. Article 7 (1) of the Charter declared the ICJ as one of five principal organs, bound by the purpose and principles of Article (1). Furthermore in the absence of a hierarchic division of power, and function, or a hierarchic order, among the organs of the UN then one cannot assert that one organ is superior to another. Functional separation is not absolute, but in degrees and conditional, is the same as division of personnel and powers. This is evidenced by the decision taking the capacity of the General Assembly, under Charter Articles 10,18, empowering the UN General Assembly to enquire and make recommendations about any organ, Article, matter, or situation subject to Article 12(i) of the Charter. The purpose of this Article is to avoid duplicating decisions by the UN organs and cause conflict. Nevertheless, the Security Council has extensive decision-making powers. Article 33 (i) Compels conflicting nations to seek a pacific solution to their dispute. Article 33, (ii) Empowers the Security Council to direct the conflicting nations when they fail to find a pacific solution. In any event, the ICJ is defined as’ *[P]rincipal judicial organ of UN’* by Article 92 of the Charter, therefore, there must be secondary too. In conclusion, all organs of the UN are responsible for the continuing development of the legal principle of self-determination including the ICJ.

### 3.3.2 SICJ Article 38 and 59

Neither the Charter nor the statute of International Court of justice (SICJ) empowers the ICJ, to make laws or codify directly. Nonetheless, Article 13(1) (a) empowers the UN General Assembly to promote international cooperation in the political field and encourage progressive development of international law and its codification. Yet the ICJ is empowered to adjudge if needed according to general principles of law recognised by civilised nations. Nevertheless, it is the inherent function of the ICJ to declare the law in unforeseen circumstances thus indirectly assisting to broaden the scope of international law.

The implications of the concept of the sacred trust of civilised nations, and the moral duty of colonial rulers, and occupying powers, emanated from the classic international law era and having survived, formed the moral reasoning and the legal basis of the protection of minorities’ treaties and Article 22 of the Covenant. The same international moral obligations were applied to mandated territories, and to the 1948 Universal Declaration of Human Rights and the most modern concept of national and international responsibility to protect.

The first judicial articulation of this duty took place in the context of the mandated territory was south-west Africa, engaging the ICJ for twenty-one years, transforming the said international moral duty to legal obligation. The accumulated judicial wisdom was applied to the Spanish colony of Western Sahara in 1976 and was elaborated in Burkina Faso v. the Mali Republic in 1985. It was confidently referred to great effect in the East Timor case in 1996. To suggest that the court in each of these cases did not refer to previous cases will be erroneous. To suggest that the ICJ was following legal points created in the previous case will be defensible if they chose to follow the previous legal reasoning. The actual wording of the Article 59 SICJ is as follows, *’The decision of the Court has no binding force except between the parties and in respect of that particular case.’*[[306]](#footnote-306)The ordinary meaning of the word’ *[H]as no binding force’* represents no compulsion either to follow or not to follow. [[307]](#footnote-307) The effects liberate the ICJ from any inhibition. Article 38 (c) and (d) and citation Article 59, serves the same purpose, (d) subject to provisions of Article 59, judicial decisions and teaching of the most highly-qualified publicist of the various nations, as subsidiary means for determination of the rules of law.[[308]](#footnote-308)

The ICJ could and did apply the law to the last South-Western Africa cases it developed by the previous South-West Africa case except in 1966. The ICJ decisions manifested consistency on the concept of sacred trust, and the concept of tutelage were pivotal legal expressions used in Article 22. This created the conditionality of the mandate system.

The ICJ supported the transition of mandated territories to the trusteeship of the UN so gave legal effect to the transitional nature of the term tutelage. Thus the end of tutelage meant the gradual emancipation of the non-self-ruling territory, either to become independent or to join with a like community in a power-sharing federation, or join another existing state.

The decolonisation process involved making such choices. The legal basis of decolonisation was the conditionality of the mandate system, and its extension to the territories and the moral principle of obligation to care, for non-self-ruling territories to a point whereby they can become self-ruling. The tutelage process and the granting of self-determination are not articulated firmly until 1971 and even then it was not achieved, in South-West Africa until 1991. However, the principle was used in the Spanish colony of Western Sahara then discussed at some length in the Burkina Faso v. Mali Republic case.

### 3.3.3 Modern Challenges of Approximation of National and International Orders

One cannot suggest that the events to which Section 5 (7) (i) UNGAR2625 (XXV) 1970[[309]](#footnote-309) addressed itself, as in the Rhodesia crisis and South African minority rule, was a rarity thus resolution had a limited application. Section 5 (7) (i) in the context of its other parts, refers to non-representative governments which were never a rarity. Clearly, one must look at the primary purpose of the resolution and to the judicial views on modern constitutionalism, whereby democracy is not built on a single principle but on many, thus necessitating their moderate application.

Therefore, moderation necessitates the application of all principles without negating the effects of the others. The Supreme Court of Canada in 1996 drew attention to this as discussed in Chapter 6. Attempts to incorporate international norms were born out of international interests, in the domestic system, to necessitate approximation of the systems. For instance, on one hand, the subjugation, exploitation and oppression by every modality of governance, are prohibited by contemporary international law and on the other hand, such interference constitutes an infringement of traditional state sovereignty. In short, the UN General Assembly resolutions regarding self-determination need not be looked at doctrinally, and inter-temporally, but with moderation in their unique era.

UNGAR 2625(XXV) 1970, Section 5(7) manifest moderation, in the defence of the state’s sovereignty on one hand, while on the other implements internal self-determination. The UN practice of moderation, and conditionality and fairness and can be found in Article 2(4) of the Charter. Article 2(4) while defending the political unity of and territorial integrity of the state, the Article 2(7) also empowers the Security Council to act under Chapter VII to protect the international peace and security. Therefore moderation means enforcing one peremptory international legal norm without negating legal effect of other legal norms.

Article 24(1), of the Charter, empowered the Security Council to have primacy on matters concerning the maintenance of international peace and security. This empowers the Security Council to intervene to contain or remove the threat to international peace and security. This empowers the Security Council to engage and prevent the General Assembly from making recommendations in pursuance of Charter Article 12(1). Can this be considered as *’a temporary ban?’*[[310]](#footnote-310) When Article 12(1) is read in the light of Article 11(2), which refers to the UN GA policy of close cooperation with the Security Council and in the light of common interest in avoidance of threat to global peace and security, the ban is the too strong term. Moderation to avoid adverse effect non-cooperation between two UN organs bound by common *’Principles and purposes’* of Charter 1 Article 1. Furthermore, temporariness of the ban is implicit in the intent of the UN Charter as noted in the wording of Article 12(1) and choice of the word *’unless’*. Article 12(2) temporary and the conditional ban is confined to strictly monitored and notified timetables. Regrettably, practice differs from theory as noted in Kosovo. Events in 2007 brought three organs of the UN into the same arena in 2008 when the General Assembly asked the ICJ for an advisory opinion on whether or not the declaration of independence in 2008 was legal under international law, when the declaring body was set up by Security Council resolution 1244 (1999) and functioned while reporting to it. This is dealt in Chapter 6.

To this day self-determination remains vague, irregular, and contentious because the FSIPS wishes it to be so. The incertitude as to how it relates to the individual’s rights and to the freedoms or to the minorities and whether it should lead to statehood in extreme circumstances, remains morally, legally, and politically controversial, and unsettled. In 2007 non-democratic states constituted, just less than half of the global community.[[311]](#footnote-311)The tensions between domestic and international jurisdiction, lead to the challenges which can be resolved only if both authorities moderate their executive, legislative, and judicial functions and capacities. Fundamental challenges are distinctive from problems arising from non-compliance and breaches by the states. If states protect fundamental freedoms of its citizens and the international community discharge its obligation to supervise and demand the states to discharge theirs then problems will subside while inherent challenges persist a little longer. Chapter 3 demonstrate this clearly, supporting the hypothesis that components and determinants of self-determination are conditional. Determinants of such as serving international peace and security and international justice, fairness, good will and moderate approach to principles show that they remain contentious. Chapter 3 showed that self-determination evolves while being controversial and imprecise because FSIPS requires it as such without depriving its jural imperatives. This has been argued by the hypothesis advanced, here within.

# CHAPTER 4 THE FORMATION AND AFFIRMATION OF LEGAL NORM OF SELF-DETERMINATION BY THE ICJ SIX SOUTH-WEST AFRICA CASES 1949-1971 AND THE WESTERN SAHARA CASE 1976

**4.1 The Role of the Judiciary and Early Experiences**

Those who drafted the Covenants and the Charter morally justified their proposals and their challenge to the state sovereignty, by their rejection of the balance of power and war as means of dispute resolution. The following case studies show how legal basis of decolonisation was affirmed consistently with the decisions and advisory opinions of ICJ. Yet in 1949, when first of six South Africa Cases started, there were only four African States in UN during 1945-55. Furthermore, two of them opposed the third, in the ICJ over the future of South West Africa which developed and legal concept of the sacred trust of civilisation formed moral norms opened the route and processes for decolonisation. Therefore the role of OAU in April 1963 is irrelevant to the paradigm-changing events of formation of the legal basis decolonisation except the fact that Liberia and Ethiopia were also the founding members and J Kenyatta played an active role in the formation of OAU even if Kenya did not become independent until 12th December 1963.

Nonetheless, the method of the science of international law limits the nature of the evidence that may be used to prove the hypothesis, limiting the content of the thesis.

Decolonisation was fundamental aspect external self-determination. However the right to determine one’s future, should not threaten the political unity and independence and territorial integrity of the newly created independent state. Sanctity of the territory and its effective administration [[312]](#footnote-312) formed the basis of the of internal self-determination such as the right to participate in the modality of governance, human rights as well as humanitarian laws and moral and legal obligation of responsibility to protect.

First, in 1945 the United Nations Charter led decolonisation, by opposing the annexation of the mandate territories, preventing the termination of mandatory’s obligation to report to the UN and mandate Commissioners and by urging speedy transfer of mandates to UN Trusteeship. Therefore, African States when only 4 played an important role in decolonisation and has been used in evidence to prove an aspect of the hypothesis while the role of OAU very important remains irrelevant to the proof of the hypothesis.

Second, the method of the science of international law limits the nature of evidence used to prove the hypothesis, thus limiting the scope of the thesis. Decolonisation with external self-determination is based on the conditional right to determine one’s future. Legitimate entitlement is subject to preservation of political unity and independence and territorial integrity of the nascent independent state. This also forms the basis of internal self-determination such as the right to participate in the modality of governance, human rights as well as humanitarian laws and responsibility to protect.

Six ICJ cases are about the mandated territory of South-West Africa, with common aspects by the virtue of being mandated territory created during one specific era of the international political system:

(i) The ICJ in 1949, sat to determine the legal status of the mandated territory of South-West Africa after the dissolution of the granting authority (the League of Nations),

(ii) The ICJ in 1955 sat to decide if the mandatory owed any obligation to anyone once the granting authority had dissolved (and if so, were such obligations owed to the UN?

(iii) The ICJ In 1956, sat to decide whether or not additional obligations imposed on mandatory by the new supervising body had legality,

(iv) The ICJ in 1962 ruled on the merits of the application before it,

(v) The ICJ in 1966 had to retry, all over again the capacity of the applicants,

(vi) ICJ in 1971 declared the legal effects of the Security Council resolution regarding the future of the territory now called ‘Namibia’.

### 4.1.1 Contextualizing Facts in International Norms

The South-West Africa cases provided a judicial and rule-basedanalysis of the processes of how the international politics met the needs of the ideologically changing international society.[[313]](#footnote-313) Therefore, the science of international law is not a search to find principles of stability, according to the contemporary norms of social justice applicable today. The thesis seeks to identify the determinants of stability, in a state of constant change at all times, in spite of varying circumstances in the international community, by meeting the ensuing challenges[[314]](#footnote-314). The framers of the UN Charter, as mentioned above, manifested political and legal moderation over two aspects of self-determination. First, one is the people’s aspect since people were entitled to it as long it did not threaten the political unity and territorial integrity. Second, political unity and territorial integrity were assured as long as people enjoyed self-determination. Both supported the hypothesis which held that the conditionality of components and determinants does not negate the jural imperatives of international, legal principles.

In South-West Africa cases ICJ repeatedly held in the context of non-self-ruling, mandated territory that the jural imperative was said to be erga omnes[[315]](#footnote-315). In the previous chapters the Covenant was considered in depth but in Chapter 4 the ICJ decisions will be used to prove the hypothesis that regardless of the characteristics of the self-determination, it created an international legal obligation, and a jural compulsion so far referred to as a jural imperative on all nations to discharge- erga omnes.[[316]](#footnote-316)

###  4.1.2 The Legal Basis of the Mandate System as the stepping stone for self-determination

The South-West Africa cases directly engaged, three international political systems falling in three Greweian epochs, (i) The traditional era of the post-Napoleonic Congress (1814-1823),[[317]](#footnote-317)the Conference, (1815-56)[[318]](#footnote-318)and the Council of Europe;[[319]](#footnote-319) (ii) The traditional era (1856-1914); and (iii) The modern epoch, starting with the League of Nations 1919-46 during which the mandate system was devised. Incidentally, the UN trustee system should not be seen as its continuation, in another era but as a stepping stone to ending non-self-governing territories, decolonisation, and accountability of the governments to the governed and to the international community.

The common facts of the cases can be subjected to regressive historical tracing, to identify the development of self-determination. Constitutive tracing of the development of self-determination in the context of the international political system showed change. Departure from the acquisition of title by the annexation of territory to the establishment of negotiated sovereignty, under the auspices of the formal international political organisation, is identifiable in Article 22.

Changes always lead to legitimate persistent protestation justifying the reason for negotiated sovereignty. Creation of a new state depended on the title to the territory and peoples’ aspiration of the territory. Therefore, the peaceful transition was possible by satisfying supporters of both the determinants. Negotiated sovereignty minimises adverse consequences of change, by moderating those who want too much power and those who receive too little power in the new sovereign body. This compromise and balancing of interest of parties in power-sharing can be found in three distinctive epochs of international political order and law; philosophical, traditional, and modern eras, identifiable in Greweian terms, by regressive historical analytic methodology. This is what the hypothesis argued and supported administrative moderation and compromise as opposed to a dogmatic approach to principles.

The specific facts of the South-West Africa cases contextualise the developments of self-determination in the substantive law of the treaties, state succession and title to the territory. Comparing and contrasting changes in the juristic concept of self-determination in international law manifest progression and regression. Therefore, when one refers to the judicial guidelines of the international judicature, which assisted the development and diversification of law of self-determination, one also implicitly accepts the existence of formal international political systems as upheld by the hypothesis.

Facts common to these cases are due to treaties concluded during and after the 1919 Paris Peace Conference, and the conduct of policy conceived and implemented by the Supreme Council of Ten. The Council proceeded with the purpose of concluding several peace treaties, setting up an international organisation and to determine the future of the German colonies and the Ottoman territories.[[320]](#footnote-320) These were discussed in Chapter 2.2 and 2.3. It will suffice to repeat that the mandate system was created under Article 22 of the Covenant, and the historical evidence advanced by Judge Jessup suggests that Wilson and Smuts agreed on the principle of ’Open door and equality’ in relation to the mandate system before proceeding with the drafting of Article 22.[[321]](#footnote-321) It was based on two principles; firstly, the novel idea of non-annexation of the territory of the defeated enemy; and secondly, the sacred trust of civilisation and consequent tutelage of the inhabitations of the territories until they were capable of taking on and discharging international obligations with an international legal personality. [[322]](#footnote-322)

### 4.1.3 Moral Rights of the Colonial Subjects, Sacred Trust

The concept of the *’*sacred trust of civilisation’[[323]](#footnote-323) formed the basis of the mandate system with antecedents found in the customary law of the 19th century. In 1887 Wharton wrote that when a territory came under new sovereign authority it also received the benefits and burdens, reiterating the legitimacy of the municipal laws, prior to the change of the sovereignty. [[324]](#footnote-324)

In 1894 Westlake wrote on the legal basis of Articles 34 and 35 of the Final Act of the 1878 Berlin Conference on Africa. It considered the moral rights of the unrepresented peoples, whose administration was due to be assumed by the European powers, after due consultation with each other.

Therefore, the Great Powers in the 1920s were acting together, in keeping with the European political and diplomatic practice of being the trustees of global security, for national stability and common wellbeing.

This presumed historical legitimacy is notable in the post-Napoleonic era, and the Congress of Europe, with grossly-inflated titles such as Holy Alliance[[325]](#footnote-325) or Quadruple Alliance. Though the victors informally gathered during 1815-22 with the intent to meet regularly for noble ends, they engaged in secret agreements and thus they lacked moral righteousness. [[326]](#footnote-326) Nevertheless’ [E]urope had a Council of Europe if only an intermittent and imperfect one, from the Congress of Vienna to the outbreak of the First World War*.*’[[327]](#footnote-327)One notes the continuation of the same state practice in the League’s Council constituted by 5 permanent and 4 transient members in accordance with Article 4 of the Covenant, the Council *’*[S]hall be selected by the assembly from time to time in its discretion.*’*[[328]](#footnote-328)

A similar legally-binding policy is seen in the 1945 United Nations era[[329]](#footnote-329) and in the construction of the Security Council under its Charter chapter V-VII, constituted by the permanent and the elected members.[[330]](#footnote-330)

As a result of the hypothesis advanced applies to all epochs of international law; informal and formal era. The former invoked moral obligations while the later invoked legal and moral obligation.

4.2 The International Status of South-West Africa, Advisory Opinion of 11th July 1950 – 1st Case**)**

### 4.2.1 The Proceedings and their Findings

The first South-West Africa case was an advisory opinion concerning[[331]](#footnote-331)its international status.[[332]](#footnote-332) It was also the first time that the ICJ referred to the sacred trust of civilisation[[333]](#footnote-333) creating an international obligation erga omnes,[[334]](#footnote-334) meaning that that violation of which created an obligation on all states without material interest but by having legal interest. This was concluded in the last South-West Africa case heard 21 years later in 1971. [[335]](#footnote-335) In that case, ICJ referred to self-determination expressly for the first time. ICJ declared self-determination enriching the *’*corpus juris Gentium*’* meaning customary international law through the *’*Charter of the United Nations and by way of customary law*,’* because it was applicable to all non-self-governing territories.[[336]](#footnote-336) This was one of the two consequences of the said six cases. [[337]](#footnote-337) The other was the emergence of new international obligations under the Charter and the General Assembly resolutions. Sloan identified this development as early as 1948 in a well-known article which argues that all relevant developments were in keeping with the 19th-century customary law. [[338]](#footnote-338) The purpose of this is to identify and examine the judicial assistance provided by the ICJ in the development and extension of the principle of external self–determination from mandates to the colonies.

The former German colony of South-West Africa[[339]](#footnote-339) was designated as a mandated territory to the Union of South Africa[[340]](#footnote-340) by the Principal Allied and Associated Powers within the terms[[341]](#footnote-341) of Article 22[[342]](#footnote-342) of the Covenant and the terms of the grant instrument. The mandate system[[343]](#footnote-343) created sui-generis[[344]](#footnote-344) territorial administrations by the administering powers, under international law,[[345]](#footnote-345)subject to international supervision, for an unspecified term of years, and without granting sovereignty. In his separate opinion McNair held: [[346]](#footnote-346)

The Doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance: if and when the inhabitants of the territory obtain recognitions an independent State has already happened in the case of some of the Mandates sovereignty will revive and vest in the new State.[[347]](#footnote-347)

The contentious events leading to the ICJ proceedings started when the League of Nations resolved to dissolve itself.[[348]](#footnote-348) Four months later in August 1946, South Africa announced its intention to seek the consent of the UN General Assembly, to annexe the territory of South-West Africa. Eight months later in December 1946 the UN General Assembly passed resolution 65(I)[[349]](#footnote-349) and declined to consent to annexation. During 1945-48 South Africa inconsistently discharged her international obligations, and regarding the future of the territory. In 1946 South Africa repudiated the terms of the mandate and announced her intention not to submit annual reports voluntarily. As a result in 1949, the General Assembly sought the opinion of the ICJ on three issues, with the second in two parts: (i) Whether or not the mandate continued to exist, (ii)(A) if the mandate continued to exist then what would South Africa’s international obligation be? (ii) (B) Did Chapter XII of UN Charter apply to the mandate for South-West Africa and in what manner? (iii) Did the Union of South Africa possess the competence to alter the terms of the mandate?

South Africa argued that since the League was dissolved, there were no parties to whom to perform their obligations, thus the mandate*’* agreement’[[350]](#footnote-350) was no longer enforceable and consequently was unilaterally annulled.[[351]](#footnote-351) Therefore, South Africa contended that there was no longer any *’*treaty or convention in force’ to be referred to the Court under Article 37 of the Statute of the ICJ.[[352]](#footnote-352)

The Court rejected South Africa’s arguments unanimously finding that the Mandate continued to exist along with the international obligation to supervise the mandatory.[[353]](#footnote-353) ICJ affirmed, to 12 votes to 2, the continuation of South Africa’s international obligations to submit annual reports and petitions from the inhabitants of the mandated territory as a being fundamental aspect of the mandate system. The Court also reiterated that the jurisdiction of the Permanent Court was taken over by the International Court, in accordance with Article 7 of the mandate and Article 37 of the Statute of ICJ.[[354]](#footnote-354)

The ICJ relied upon the intentions[[355]](#footnote-355)of South Africa and the Principal Allied and Associated Powers documents drafted in Paris in 1919.[[356]](#footnote-356) ICJ held that Article 22 of the Covenants, created two sets of international obligations emerged principle ’[O]*of* non-annexation and the principle that the well-being and development of such peoples form a sacred trust of civilisation.*’*[[357]](#footnote-357)

The ICJ decided that the obligations imposed on the mandatory were for the benefit of the mandated territories, and not the mandate authorities and their subsequent dissolution in 1946 did not terminate[[358]](#footnote-358) the Mandate, the terms of the grant. Furthermore, the United Nations was a competent authority to undertake the supervisory functions which constituted an important aspect of the mandate system.

The ICJ declared that the concept of ’sacred trust of civilisation’, articulated by Article 22, created international obligation erga omnes,[[359]](#footnote-359) and thus endowed with the capacity to surviving without its source.

This was a very significant judicial declaration and fundamental to the future juristic developments in the substantive international law of self-determination.

McNair considered the mandate system to be *’*and a fortiori case’, creating *’*a regime in pursuance of this principle has more than a purely contractual basis and status subjected to it are impressed with a special legal status designed to last until modified in a manner indicated by Article 22.'[[360]](#footnote-360)

McNair in his judgment accepted that the dissolution of the League created some technical difficulties, but also pointed out that the UN had set up a Trusteeship system, to deal with similar issues mentioned in Article 22.[[361]](#footnote-361)

However, McNair also referred to the nature of the international obligations as being valid in rem–erga omnes,[[362]](#footnote-362) meaning having a binding effect beyond signatory parties. The ICJ in response to the first question whether or not the mandate[[363]](#footnote-363) continued to exist, was unanimous in its affirmation of the applicability of the Charter’s Chapter XII.

The second question put to the ICJ was in two parts; either UN had assumed responsibilities and secondly if the mandate continued to exist then what would South Africa’s international obligation be? The Court responded in the affirmative 12 votes to 2, and to the second part responded by ruling that the trusteeship system was not compulsory but upon an agreement.

 Third the Court in response to the question whether or not the Union of South Africa possess the competence to alter the terms of the mandate was emphatic. The ICJ held that mandatory had no unilateral competence to amend the terms of the mandate, because *’*the international status of the territory result from international rules regulating the rights and the powers and obligations relating to the administration of the territory (…).’[[364]](#footnote-364) Since the UN had created the trusteeship system, there were two options for the mandatory, either to declare the mandate territory independent or to transfer it to the trusteeship system. Thus, the proposed annexation was not an option.

ICJ decision was found *’*in fact and in law*.’* Even though League of Nations did not expressly transfer the mandates to the UN trusteeship system. The second the ICJ chose *’*textual interpretation*,*’ thus accepting the natural meaning of the words found in Article 80 (1) of the Charter. [[365]](#footnote-365) The Court held that an obligation to *’*negotiate’ was created under Article 80(1), but an agreement based on compulsion would remove the voluntary element of an agreement.

Finally, the ICJ accepted the textual interpretation, thus the natural meaning of the words in paragraph 2 of Article 80 and declined to acknowledge the stated intentions of the said paragraph.[[366]](#footnote-366)

### 4.2.2 General Implications of ICJ Pronouncements in South-West Africa Case

First, the Wilsonian international legal norm of non-annexation and non-subjugation of non-self-ruling territories by the administering powers was affirmed by reference to the Covenant and to the Charter, thus laying the stepping stone for self-determination.

Second, the ICJ asserted the UN’s authority as an international organisation with *’*purpose and principle*s’*[[367]](#footnote-367). Academic experts agreed that the drafters of the Charter[[368]](#footnote-368) did not want to give too much power to the United Nations at the expense of a reduction in States’ *’*reserved domain’[[369]](#footnote-369) because such a move would erode national sovereignty.

However, Judges McNair and Alvarez, in their own separate opinions supported the advisory opinion and believed that the classical absolutist concept of sovereignty could no longer be compatible with the new international political system created by the United Nations.

Third, Article 22 of the Covenant assisted the developments in the international as affirmed during the interwar years. In 1950 the ICJ affirmed the concept sacred trust of civilisation and transfer of mandates to UN trusteeships.[[370]](#footnote-370) This was achieved by regular adoption of resolutions, with the overwhelming support of its members.[[371]](#footnote-371) In the 1950s this was a matter of conjecture as one note in Sloan’s informative article, written in 1948.[[372]](#footnote-372)

Fourth, in 1971, the ICJ in the Namibia case was able to state explicitly, that it was now a peremptory principle of international law. It is defensible to suggest that the South-West Africa case in 1950 affirmed two Wilsonian [[373]](#footnote-373)policies. First was the rejection of arbitrary governance,[[374]](#footnote-374) by the implementation of the self-determination.[[375]](#footnote-375) The second was the principle of non-annexation of defeated states territories. This prohibition was affirmed in 1946 with UN GAR 65(I). Future status of South-West Africa rejected annexation of territory of South-West Africa to the Union of South Africa by 37 votes in favour, none against and 9 abstentions.[[376]](#footnote-376) When three years later, the General Assembly adopted the resolution to seek the advice of the ICJ again, the voting was 4 in favour and 7 against and 4 abstentions.

The decision supported Sloan’s assertion that the uncertainties over the future of the mandates persisted.[[377]](#footnote-377) Nonetheless, Sloan clearly points out that the *’*[J]juridical consequences of the recommendation’ and *’*[L]ack of the apparent absence of enforcement’[[378]](#footnote-378) was not to be misleading. Repeated resolutions of the General Assembly [[379]](#footnote-379) and its eventual references to the Security Council[[380]](#footnote-380) seeking enforcement was possible under Charter Article 92(1) which could lead to enforcement measures. To Sloan’s credit, this is exactly what happened 21 years later and led to the sixth South-West Africa case now called Namibia.

Fifth, the UN’s decolonisation was opposed by the colonial powers in the UN. They challenged the UN’s capacity to formulate new policies by the method of interpretation and create international obligations instead of the focus being *’*on the intention of the parties, [[381]](#footnote-381)thus opposing creative interpretation. The second doctrine to receive attention as a preventive measure against the growing powers of the UN was the doctrine of non-liquet and the arguments about problems of disputed issues being unjustifiable.[[382]](#footnote-382)

Sixth, Kelsen in his 1945 article rightly did not refer to Article 1(2) and suggested that the UN was a mere continuation of the League[[383]](#footnote-383). Higgins suggested that the drafters of the Charter were far more concerned with issues of post-war recovery than the future of the colonies and the principle of self-determination. [[384]](#footnote-384)

Brierley,[[385]](#footnote-385) McNair, Alvarez, Lauterpacht and Higgins, many years later who held high office in the ICJ argued that the UN was a new international political system, relying on inter-state cooperation rendering the classic meaning of sovereignty redundant. This progression started during the 1919 Paris Peace conferences. Initially, President Wilson placed a high premium on self-determination linking it with the upheavals in Europe since the 1860s. The implementation of self-determination beyond Europe after WWII was pursued less enthusiastically as described by Emerson[[386]](#footnote-386).

In 2004 Franck wrote that the concept of self-determination based on socio-ethnographic determinants was arrested by uti possidetis that is to say, decolonisation according to the colonial administrative boundaries[[387]](#footnote-387).

Nonetheless, the ICJ in South-West Africa (1950) declared that the sacred trust of civilisation created an international obligation to care for the moral and the material wellbeing of dependent people. This obligation led to the duty to render the dependent people independent. These policy imperatives were expressly stated in Article 22 of the Covenant, and by the purpose and principles[[388]](#footnote-388)of the Charter. Secondly, the ICJ categorically rejected any suggestion of annexation of the mandated territories. Thirdly, the ICJ rejected any administration of the mandates without international supervision. Fourthly, if mandates were to remain under subject to the terms of the grant, then they should also be subjected to United Nations supervision.

### 4.2.3 South-West Africa Voting Procedures. Advisory Opinion of 7th June 1955[[389]](#footnote-389) (2nd Case) and the Admissibility of Hearing the Petitions by Committee of South-West Africa, Advisory Opinion of 1st June 1956,[[390]](#footnote-390) ICJ 1956 (3rd Case)

1950 Advisory Opinion was ground-breaking because ICJ deliberations attained an enduring authority as ICJ repeatedly relied on its previous declared legal views.

The second case commenced when South Africa objected to the voting procedures on the basis of two third majority, set by the Mandate Committee[[391]](#footnote-391) of the General Assembly on two grounds. First, because the Council of the League Nations took unanimous decisions, and since South Africa would be invited to participate and would benefit from negative votes and veto unfavourable decision. Second, the South Africa argument was that the proposed three-quarter majority imposing stricter supervision, contrary to 1950 advice. The Court rejected this by stating that the Court in 1950 could not have directed the UN General Assembly on how to regulate it’s voting and, therefore, rejected South Africa’s arguments unanimously.

In the third case, South Africa objected to hearing oral petitions, as an additional burden of supervision, thus going beyond the advisory opinion. South Africa’s arguments were rejected by 8 votes to 5. The ICJ advised that if there was a departure, it was on account of South Africa’s failure to return annual reports. The remedial measure was now suggested to overcome the difficulties created by the failure of South Africa to discharge her mandate obligations.

### 4.2.4 Ethiopia and Liberia v South Africa: Preliminary Objections, Judgment of 21st December 1962[[392]](#footnote-392) (4th case)

The South-West Africa[[393]](#footnote-393) cases were bitterly contentious because both parties claimed to articulate the correct contemporary international law. One party relied on formal treaties and contended that these treaties were not era omens and thus binding only the parties who had material interest due to legal relations. Eminent Jurist such as McNair [[394]](#footnote-394)argued that mandate instruments were not ordinary treaties but norm-creating treaties empowering all members of the League to participate in the supervision of the mandatory state’s discharge of their power under mandate instruments.

Ethiopia and Liberia instituted proceedings against South Africa in order to bring legal clarity as to the continued existence of the mandate and continued performance of an international obligation by South Africa arising under the mandate instrument. South Africa filed four grounds of preliminary objection:

(i) That there was no treaty or convention in existence rendering its breach possible,

(ii) Neither party were members of League of Nations because it had been dissolved,

(iii) South Africa had no conflict with the other parties or they had material which had been breached,

(iv) That there was no dispute which could not have been resolved had it been negotiated justify recourse to the Court,

The ICJ rejected the first grounds due to the following reasons:

(i) The mandate was objective in character and it still existed,

(ii) ICJ did not find any similarity between mandatory obligations and contractual obligation,

(iii) It relied on its own jurisprudence as exhibited in the advisory opinion of 1950 that if the mandatory claimed that there was no mandate ’To retain rights derived from the mandate and to deny the obligations thereunder could not be justified’,[[395]](#footnote-395)

(iv) ICJ asserted that the supervision was an essential aspect of secret trust of civilisation and the nature of the obligations was such that they survived the institutions which created them.[[396]](#footnote-396) Thus the applicant could rely on Article 7(2) of the mandate and Article 37 of the Statute since the mandate continued to exist,

ICJ rejected the second set of objections. Therefore, all members became the recipient of the obligation to supervise the mandatory powers conjointly with the Council of League of Nations. The third ground of the preliminary objection was rejected because it ran contrary to the natural and ordinary meaning of the provisions of Articles 6 and 7 of the mandate instrument, which rendered supervision an imperative aspect of the mandate system. The fourth ground of preliminary objection was rejected it by agreeing with the Applicants, that there had been negotiations for the last ten years. Subsequently, the Defendant’s contentions were defeated by 8 votes to 7.[[397]](#footnote-397)

In a separate opinion Judge Bustamante-y-Rivero said that although in agreement with the reasoning and conclusion of the Court, he so held by virtue of his own reasons. [[398]](#footnote-398) First, because the ICJ affirmed Article 22, therefore, recognising basic rights to the inhabitants of the mandated territories. Second, because the ICJ identified three elements of the mandate system (i) personal (ii) real (iii) purpose. However the changes that occurred altered their form, and not their substance.[[399]](#footnote-399)

Judges Spender and Fitzmaurice[[400]](#footnote-400)appended a joint dissenting opinion,[[401]](#footnote-401) and suggested that the decision ran contrary to four major legal principles:

 (i) The Court was prejudiced *’*[O]nly been able to do this by adopting premises (…) largely assumed beforehand the correctness of the conclusion arrived at’[[402]](#footnote-402),

 (ii)Furthermore, the Applicants were described as subjective and short of objectivity and highly politicised,

(iii) The application was suitable to discussion in a political forum,

 (iv) The ICJ ’failed to give expression’[[403]](#footnote-403)to four major legal principles[[404]](#footnote-404) ’[E]either by ignoring them or advancing no adequate grounds for departing from them,*’*[[405]](#footnote-405)

### 4.2.5 South-West Africa Cases (Ethiopia v. South Africa and Liberia v. South Africa),[[406]](#footnote-406) The Second Phase, Judgment of 18 July 1966(5th case) [[407]](#footnote-407)

When the Court sat to hear the merits of the case whose preliminary objections were heard in 1962, the Chamber was divided right-down-the-middle, and the President used his casting vote, in dissension. This was in total disregard to the 1962 Preliminary Objections hearing’s legal principle on which the Judgment relied upon evolved legal principle. The majority judgment examined the preliminary objections already heard in 1962 *’*de novo’[[408]](#footnote-408) and adjudged[[409]](#footnote-409) whether or not the Applicants had the rights and tangible material interests to support their application.

The Court ruled that the Applicants had to prove first that they had expressly acquired the rights and tangible material interests collectively and individually at the time of the creation of the mandate system which formally instituted by Article 22 of the Covenant[[410]](#footnote-410) *’*so as to hold the mandatory to account under the Conduct clauses*”[[411]](#footnote-411)* of the Covenant and the mandate*.*’

The Court ruled that:[[412]](#footnote-412)

(i) The Applicants acquired legal rightsin the ’special interest’ but no material interest in the ’Conduct clauses’ either collectively as a member of the League of Nations or as an individual state. So, their, application had no legal basis to be heard.

(ii) The Court rejected preliminary objections, ruling mainly in that the recognition of ’Jurisdictional Clause of Mandate for South Africa’, Article 7 (2) It’ Presupposed the existence of rights under the conduct*’* provision. Two grounds of rejection were advanced. First, ruling on the preliminary objections must be separated from the ’Merits’ and no material rights can be deemed to be created by inferences from the access to the Court. Second, the 1962 ruling was not binding – res judicate. [[413]](#footnote-413)

(iii) Any kind of right must have material consequences[[414]](#footnote-414) and expressly given[[415]](#footnote-415) as in the case of the drafting of the Minority Treaties.[[416]](#footnote-416)

(iv) The ICJ rejected the arguments that the dissolution of the League created a necessity for the former members to assume the supervisory role of the Council by relying on the statement of the members during the last session of the League in 1946.

(v) The ICJ ruled that public interest was not an international legal principle[[417]](#footnote-417) known to international law and thus to Article 38 of the Statute.

(vi) Humanitarian consideration and moral obligation had no legal effect and nothing can be inferred from their presence since they were extra-legal principles.

(vii) The ICJ held that it had no power to assume a legislative role or set past wrongs right and fill the gaps in law due to circumstances.

Jessup in dissent[[418]](#footnote-418) declared that the Court’s judgment was completely unfounded in law, by deviating from the legal question before them, when they legally justified in stopping at threshold of the case, avoiding a decision on the fundamental question, whether the policy and practice of apartheid, in the mandated territory of South West Africa, is compatible with the discharge of the sacred trust.[[419]](#footnote-419)Judge Jessup also expressed his belief, that the judgment had misconceived the nature of the peace settlement after the WW1, the function of League, and the nature and function of the mandate system. In short Judge Jessup found the judgment wrong in law and in fact, and listed his reasons.

(i) The judgement was reasoned on grounds not pleaded.

(ii) The Court and the Defendant had shown no regard to the finality of the 1962 Merits phase which granted locus-standi to the parties. Rehearing the objections now in 1966, as though undertaking a judicial review is in disregard of Article 60 of the Statute. ’The Judgment is final and without appeal.’[[420]](#footnote-420) It was also in disregard of Article 94, which places an obligation on the parties to ’comply with the decision of the International Court of Justice.’ [[421]](#footnote-421)

(iii) Even if the purported breaches have been not been founded, the Applicants asked for a declaration, whether the practice of apartheid was incompatible with Article 22 of the Covenants and the mandate instrument.

Jessup concluded that the Judgment could not be binding because it reversed the judgment of 1962 and found no locus standi and could go no further. Thus:

 (i) The Respondent’s submission that the mandate had dissolved and the mandatory was no longer under any international obligation to carry out.

(ii) The judgment could not deliver any decision contrary to the fundamental legal conclusions of 1950, 1955, 1956, advisory opinions and substantially reaffirmed in its judgment of 1962.

(iii) The ICJ could not have ruled if the practice of apartheid was contrary to the sacred trust with which the Mandatory was entrusted.

Judge Tanaka also delivered a reasoned dissection;

(i) He declared that the Applicants had an intangible interest in the proper administration of the mandate. This was derived from the common or general interest created by the mandate system.

(ii) The Applicant being a member of the corporate body allocated with the common interest instituted proceedings not in the name of the corporate body but in their own.

(iii) The role of the Court in the matter of filling in the gaps in law *’*lacunae*’* was addressed to by Judge Tanaka who reminded all that it was part of the Courts’ function to fill the gaps and did not constitute a legislative function.

### 4.2.6 The Concluding Remarks on South-West Africa Pre-Namibia

According to Brownlie[[422]](#footnote-422) after 1962 *’*many western jurists now generally admit that self-determination is a legal principle. (…)*.’*[[423]](#footnote-423) The 1966 judgement exhibited and contrasted the distinctive political philosophy that the judges displayed.[[424]](#footnote-424) Jurists such as Higgins,[[425]](#footnote-425) Crawford,[[426]](#footnote-426) W. Friedman[[427]](#footnote-427) and Preston Brown[[428]](#footnote-428) agreed on one point: that the consequences of deliberations went beyond the termination of the mandate.

It is defensible that academics such as Brierley, Roscoe Pond, Lauterpacht, and Alvares, McNair, Tanaka, Higgins, Falk, and Crawford reflected on the greater picture, i.e., the role of UN organs engaged, formally[[429]](#footnote-429) and informally in the creation of legal norms. These legal norms eventually become legal precepts.

The arguments in 1966 reflected contemporary political and philosophical divisions of the international community. Those who supported the state’s reserved domain were opposed by those who supported growth and extension of international law. Therefore, without the impartiality of the international judicial processes, the Charter’s purposes and principles would have been frustrated. The political motives of the supporters of the UN were the creation of a political system representing the common interest of the members against any superpower hegemony, now most notable in UN General Assembly.[[430]](#footnote-430)

According to Judges McNair and Alvarez,[[431]](#footnote-431) the realisation of international cooperation was possible with a new re-defined concept of sovereignty. Brierly[[432]](#footnote-432) many years earlier citing Roscoe Pond who argued that if one was searching for the principles of stability then one should also look for the principles of change thus sovereignty needs to be re-defined.

The ICJ decision[[433]](#footnote-433) in 1966 was seen as a ’strategic‘[[434]](#footnote-434) move around the modern source of international law. Friedman considered it as a lost opportunity for the extension of the juristic concept of the secret trust of civilisation[[435]](#footnote-435) to the colonies. The decision caused uproar[[436]](#footnote-436) even though some observers suggested that it simply caused, ‘interest’.[[437]](#footnote-437) The UN General Assembly swiftly on 27 October 1966, adopted the resolution 2145(XXI) which expressed ’concern[[438]](#footnote-438) at the situation in the mandate territory, which had seriously deteriorated following the judgment of the International Court of Justice of 18 July 1966. Secondly, in paragraph 4 it declared,

(…)[T]hat the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the government of Union of South-Africa is therefore terminated, that South-Africa has no right to administer the territory and that henceforth South-West Africa comes under the direct responsibility of United Nations*.*[[439]](#footnote-439)

UN General Assembly resolution brought the matter to the attention of the Security Council as a potential danger to peace and security, therefore inviting it to act. This resolution also highlights whether one organ of UN may engage another organ if it suspects a diversion from the purposes and principles of the Charter. An identical situation is seen in Kosovo 2008 whereby the General Assembly and the ICJ and the Security Council engaged on the same situation see Chapter 6.3.1(i).

**4.3 Judicial Pronouncement on Decolonization**

### 4.3.1 Security Council Resolution 276 (1970) [[440]](#footnote-440)(6th Case), The Namibia case

In 1966 the General Assembly declared the said mandate terminated and brought the matter to the Security Council. In turn, it adopted an identical resolution in support of the General Assembly.

In 1970 the Security Council sought the advice of the ICJ on the legalconsequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970).[[441]](#footnote-441)

In 1970 ICJ opined; (i) That continued occupation was illegal, by 13 votes to 2. (ii) That all members and non-members were under legal obligation to recognise the illegality of South Africa and thus not to deal with her, as doing so would imply recognising the legality of her occupation, by 11 votes to 4, and the ICJ proceeded to formulate the above advice in the following stages.

ICJ dealt first with the jurisdictional and ’propriety’ issues. It rejected South Africa’s assertion that the Security Council Resolution was void because of voting irregularities, on two grounds. (i) It held that Article 27 recognised the vote in favour and against and no voting had implied neither. (ii) The language of Article 32 was mandatory. The Security Council is empowered to decide what is a ’dispute’ and what is a ’situation’ but this was not a dispute, thus South Africa’s presence was by invitation and not mandatory.[[442]](#footnote-442)

Second, ICJ considered Article 22 of the Covenant, (i) The ICJ rejected the argument of its 1966 judgment that the principle of secret trust created ’moral obligation thus could not be adjudicated upon in the Court of law.’[[443]](#footnote-443) (ii) ICJ established that the mandatory’s legal obligations under Article 22, and survival of the mandate were implicit from the acts of the mandatory[[444]](#footnote-444) and the United Nations.

The ICJ referred to 1950, 1955.1956 and 1962 and 1966 findings thus from its’own Jurisprudence’ in paragraph 45-83, ICJ referred to them 25 times[[445]](#footnote-445) and to the express provisions of the Charter.

The ICJ found that the dissolution of League of Nations did not nullify the mandate[[446]](#footnote-446) or the supervisory functions of the international community since they were to be transferred to the United Nations[[447]](#footnote-447) nor transition from the mandate system to the trusteeship was a cause of surprise nor unprepared.[[448]](#footnote-448)

The ICJ advanced the following reasoning in support of its findings:

(i) ICJ referred to ’subsequent developments in international law in regards to non-self-governing (…)’ and rejected the ’[S]static view of Article 22.’ by referring to ‘Self-Determination as being the aim of mandate system and colonies at large rather than annexation of the mandate territory upon the dissolution of the League of Nations.’

(ii) Relied on the declaration of dissolution of the mandate by UNGAR 2145 (XXI) dissolving the Mandate for South-West Africa, held that mandate had survived. Furthermore, the United Nations had acquired the supervisory rights which were fundamental to the mandate system. However since the mandatory refused to perform its duties and acknowledged their obligations to the UN, the UN declared the mandate at an end, and thus the mandatory nullified its authority under mandate over the territory.

(iii) The Court dismissed the allegation that UNGAR 2145 (XXI) was ultra vires. (a) Arguing that no express mention of the irrevocability of mandate in any instrument, could not imply irrevocability. (b) The Court relied on the principles of law that any agreement was revocable when the fundamental breach occurred.

(iv) The Court reiterated an international legal principle, which purported that no benefits, can be derived from a principle if the party does not recognise ensuing obligations from it.[[449]](#footnote-449)

(iv) The Court relied on the Vienna Convention[[450]](#footnote-450) on Treaties.

ICJ‘s advice was based on, (a) Evidence derived from the actions of the parties, (b) On the instruments of *’*treaty and convention nature*.*’ (c) The principle of *’*No annexation and conditional tutelage*.’* (d) And the transitional policy of non-self-ruling territories under supervision, for final objective of self-determination.

These grounds were articulated in the first paragraph of the Court’s response to the first question raised in the ICJ in 1950.[[451]](#footnote-451) The Court’s rejection of the staticinterpretation of the instruments pertinent to the mandate system, in favour of interpretation, based on the intent and their spirit thus reconciles the emergence of Untied Nation under its Charter and its purpose and principles and announced the commencement of de-colonisation.[[452]](#footnote-452) The ICJ declared as the most poignant view as far as this research is concerned in the following paragraph 52:

Furthermore, subsequent developments of international law in regards to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all them. The concept of secret trust was confirmed and expanded to all territories whose peoples have not yet attained a full measure of self-governments (Art. 7-3).Thus it clearly embraces territories under a colonial regime. [[453]](#footnote-453)

Paragraph 52 refers to the UNGAR 1514(XV) Declaration on the granting of the independence to the colonial countries, which embrace all people and territories which have not yet attained independence. Today only two of 15 Trust territories excluding Namibia remains under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new states.[[454]](#footnote-454)

### 4.3.2 The Concluding Remarks on the Namibia Case

The advisory opinion of the ICJ on Namibia[[455]](#footnote-455) in 1971 declared South Africa’s rule unlawful, 21 years after its first advisory opinion in 1950. It did so while relying on the declared principle of secret trust which, created international obligations. However, the Court in 1971 extended the principle of *’*sacred trust*’* to all non-self-ruling territories. The ICJ referred to self-determination as enriching the corpus Uris gentium meaning customary international law through the ’Charter of the United Nations and by way of customary law’,[[456]](#footnote-456) applicable to all non-self-governing territories all over the world.

According to the academic writers Brownlie[[457]](#footnote-457) and Cassese[[458]](#footnote-458) and Harris,[[459]](#footnote-459) the ICJ also declared self-determination as a principle of international law. Crawford suggested that the ICJ actually instigated its developments.[[460]](#footnote-460) The academic views of Sloan,[[461]](#footnote-461) Schechter,[[462]](#footnote-462) Falk,[[463]](#footnote-463) Emerson,[[464]](#footnote-464) and Higgins,[[465]](#footnote-465) General Assembly of the UN provided the forum to the states to exhibit their support for self-determination and the suitable international political order for its appropriate implementation. This is a historically verifiable fact. Nonetheless, it was the ICJ in 1950 onwards that contextualised the legal norm of self-determination in the contemporary international law, instigating changes. First, ICJ declared annexation unlawful. Second, ICJ affirmed General Assembly as a forum with a capacity to create new international norms. Third, it starts the ontological argument; when does a legal norm become a peremptory international legal norm?[[466]](#footnote-466) Should jus cogent[[467]](#footnote-467) and erga omnes though a different face of a coin[[468]](#footnote-468) but till part of the same coin, functionally inseparable be considered confusing? Oughtn’t one to ask if R2P is developing while relying on internal self-determination? Is this not the identical manner in which the principle of decolonisation developed by relying on external self-determination?[[469]](#footnote-469) Though the said development process justifiably resembles an incomplete project? Ought this to be surprising, with a legal principle proven to be controversial, the lacking certitude of definition, and regular application in an FSIPS? It ought not, because, the proven hypothesis is about the conditionality of legitimising components and determinants of the legal principle of self-determination, in FSIPS not being deprived of its jural imperative. This due process, as Schechter[[470]](#footnote-470) and Higgins and Sloan, pointed out, were with the general consent of the states, is deduced from their repeated statements, resolutions and treaties in the UN.

**4.4 The Judicial Affirmation of Decolonization and Self-Determination as a Peremptory Legal Principle,[[471]](#footnote-471) the Western Sahara Case [[472]](#footnote-472)**

The Western Sahara case is very important for two reasons,-without being indifferent to the suffering[[473]](#footnote-473) of the people; Firstly, it affirmed the obligation of the colonial authorities to the inhabitants of the non-self-ruling people.[[474]](#footnote-474) Secondly, it extended the right to self-determination to the colonies in view of UNGA Resolutions, the Charter and the Covenants.

The dispute arose in the 4th Committee of the UNGA when Spain announced her intention to decolonise. Regrettably, after initial expressions of intent to resolve the matter peacefully parties took a confrontational stand. Morocco, Mauritania and Algeria and representatives of the Sahrawians, became belligerent instead of cooperative and the process lapsed into violence including a short but costly conventional war and a guerrilla warfare.

The second phase was the judicial proceedings. The third was a new UN diplomatic initiative. Franck[[475]](#footnote-475) felt that the findings of the ICJ were frustrated by the United Nations monumental mishandling and implementation of the established rules on decolonisation. The General Assembly asked two questions to the ICJ:[[476]](#footnote-476) Was the territory inhabited at the time of Spanish colonisation?[[477]](#footnote-477) If the answer was in the negative, what were the legal ties with the kingdom of Morocco and Mauritanian Entity at the time of its said colonisation*?*

Morocco claimed to have historical ties from time immemorial. Morocco further argued that since the decolonisation process set out in UNGAR1514 is unsystematic, and the method of decolonisation had yet to be determined by the General Assembly, the most natural way of decolonizing would be by uniting the territory with its motherland thus it argued for the doctrine of contagiousness later in the proceedings.[[478]](#footnote-478)

Mauritania too claimed to have historical ties and objected to the claims made by Morocco. Mauritania assured that General Assembly resolution 1514 (XV) proposed decolonisation in an unsystematic manner. Mauritania also referred to other UNGA Resolutions such as 2625 (XXV) 24.10.1970 to be regulative of the decolonisation process. Furthermore, Mauritania claimed’ (…) [T]hat the principle of self-determination, cannot be disassociated from the respect for national unity and territorial integrity (...)’[[479]](#footnote-479)

Algeria expressed its support to the self-determination claims of the Sahrawians and referred to their free expression of their wishes as people claiming their right for self-determination. Incidentally, Spain as the decolonising power proposed a referendum, but Resolution 3292(XXIV) [[480]](#footnote-480)was not supportive of it and asked for its postponement. The court in its decision, paragraph 59, [[481]](#footnote-481)deemed a referendum in this case to be unnecessary. The Court’s advisory opinion is as follows:

(i) The Court rejected Spain’s argument, and that the decolonisation had been well articulated by the Charter and by numerous United Nations Resolutions, and therefore found the proceedings superfluous by 13 votes to 3.

(ii) The Court unanimously held that Western Sahara was not a terra nullius (unpopulated territory) but had a history, by 14 votes to 2.

(iii) The Court declared that Morocco had legal connections with the territory with 13 votes to 1. But also that Mauritanian entity too had legal connections[[482]](#footnote-482).

(iv) After exhaustive analysis of historical legal ties, ICJ declared:

[T]he information before the Court does not support the Morocco’s or Mauritania’s claim to exercised territorial sovereignty over the Western Sahara. On the other hand, it does not appear to exclude the possibility that the Sultan displayed authority over some of the tribes in the Western Sahara*.*[[483]](#footnote-483)

(v) In concluding parts of paragraph 162 ICJ declared:

Thus the Court has not found legal ties of such nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.[[484]](#footnote-484)

### 4.4.1 Western Sahara Advisory Opinion of ICJ [[485]](#footnote-485)

The legal reasoning in Western Sahara case is very significant because it affirmed decolonisation according to the principle of self-determination as the international legal norm , erga omnes.

First, ICJ relied on the legal reasoning in South-West Africa cases.

Second, ICJ relied on UNGAR1514 (XV) 1960[[486]](#footnote-486) while responding to Spain’s preliminary objections, as to its jurisdiction. ICJ reviewed the contemporary international law of decolonisation and self -determination. The ICJ was mindful of the wording of the said resolution:

 [U]until the general Assembly decides on the policy to be followed in order to accelerate the decolonisation process in the territory, in accordance with resolution 1514(XV) in the best possible conditions, in the light of the advisory opinion to be given by the International Court of Justice.[[487]](#footnote-487)

Third, Western Sahara case confirmed the Namibia ruling on the decolonisation in several stages;

(i) By reference to previous views of the ICJ and by direct references to the 1971 Namibia opinion

(ii) By reference to the Charter in paragraph 54 lends its own support to the United Nation’s purposes and principles, Article 1(2) and Articles 55 and 56:‘To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.’*[[488]](#footnote-488)*

 (iii) The ICJ affirmed the contemporary international law of self-determination and referred to the United Nations Charter Articles 55 and 56. The ICJ relied on the policy aspect of Article 55 and Article 56, which created the international obligation. It clearly refers to members pledging themselves, to cooperate. The legal significance is enforced by Article 103 which clearly suggests Charter to be a higher law to domestic in the case of conflict of laws.[[489]](#footnote-489)

(iv) The ICJ in Namibia[[490]](#footnote-490) relied on General Assembly Resolutions to sustain its affirmative support to the legal norm of self-determination and referred to UN GAR 1514(XV) (1060), sections (2) and(5):

(2) 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.

(5) Immediate steps shall be taken in Trust and Non-Self-Governing Territories or other territories which have not yet attained independence, to transfer all powers to the people of those territories, without any condition or reservation, in accordance with their freely expressed will and desire, without any distinction as to race creed or colour, in order to enable them to enjoy complete impedances and freedom.*[[491]](#footnote-491)*

ICJ referred to Section (2) of the UNGAR 1514(XV) 1960, which contained the policy while Section (5) referred to the specific and imperative aspects of the resolution as indicated by the simple meaning of the words ’[I]mmediate steps shall be taken (…).’ in paragraph 57[[492]](#footnote-492) of the Namibia Advisory Opinion as well referring to the resolution UNGARO 1541 (XV) 1960, declared that, ’Free association should be result free and voluntary choice by the people of the territory concerned expressed through informed and democratic processes.’[[493]](#footnote-493)

(v) ICJ in para. 57 opined and relied on Principle IX of the resolution [[494]](#footnote-494) which implicit held that that the people should act in fully informed, and free to vote. It should be based on universal adult suffrage. Paragraph 57 elaborate on methods by which decolonization can attain, besides statehood,

(vi) General Assembly Resolution UNGAOR1541 (XV) 1960, has been invoked in the present proceedings. The later resolution contemplates for non-self-governing territories more than one possible: namely, [[495]](#footnote-495)

(a) Emergence as a new independent state,

(b) Free association with an independent state, or

(c) Integration with an independent state.[[496]](#footnote-496)

 (vii) ICJ in para 56 of their decision In Western Sahara case[[497]](#footnote-497) referred to Para.52 of the 1971 Namibia opinion,

 ‘[S]subsequent developments of international law in regards to non-self-governing territories as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all them.’[[498]](#footnote-498)

The Court must take into consideration the changes which have occurred in the supervening half a century, and its interpretation cannot remain unaffected by the subsequent development of law through the charter of the United Nations and by way of customary law.[[499]](#footnote-499)

The ICJ in Western Sahara referred to the concluding part of the said passage with the following words:

These developments leave little doubt that the ultimate objective of the sacred trust was self-determination and independence of the peoples concerned. In this domain, and as elsewhere, the corpus iuris Gentium has been considerably enriched, and this the Court, if it is faithful to discharge it function, may not ignore. [[500]](#footnote-500)

### 4.4.2 International Jurists and their Views

Academics’ views on the developing and diversifying legal norm self-determination were many. According to Harris ICJ in the Western Sahara in para 56 accepted the principle of self-determination as part of the customary international law.[[501]](#footnote-501) One is justified in saying corpusjuris Gentium has been considerably enriched. These are supportive of Harris’ statement, suggesting that, *’*In the view of some writers, the principle of self-determination is also jus cogens*.’*[[502]](#footnote-502) This means, that legal norm of self-determination has become peremptory norms of general international law.[[503]](#footnote-503)Harris in a footnote named Brownlie and Cassese as supportive of this development of self-determination while Crawford’s did not.

Brownlie contextualised peremptory legal norm of self-determination from the Lotus Principle, that is to say, what is not prohibited by international law is permissible. Brownlie therefore, started with the classification of incidents of illegality,[[504]](#footnote-504) according to peremptory legal norms, under four headings:

(i) Acts or omissions with varying content of illegality[[505]](#footnote-505) notable in unilateral actions. Yet these actions which include breaches of human rights, and self-determination were ipso facto wrongful acts and need not show any damage. Therefore this was a recent development in the conflicts involving claims for self-determination,

(ii) The objective consequences of illegal acts, such as the use of force to establish legal regime, and there are the general wrongs such as abuse of state competence,

(iii) The maxim of ex-injuria on orbiter jus (no benefit can be derived from an illegal act),

(iv) Categories which include self-determination and the incidents apparent in the South-West African cases, involving extraterritoriality of concern over abuses undertaken by other states. The abuse of state competence without material harm third parties state was a central argument in 1962 Preliminary Objections and 1966 The Second Phase of South-West Africa cases. The matter was never resolved since the final view in both cases contradicted each other. Could sovereignty attain extraterritoriality thus beyond limits set by international law? [[506]](#footnote-506)

Finally, Brownlie does not consider attempts to define jus cogens with terms such as rights, rules, and duties, in the international plane[[507]](#footnote-507) by the use of terms such as *’*fundamental*’* or ’in respect*’* of rights *’*inalienable*’* or *’*inherent*’*[[508]](#footnote-508) successful:[[509]](#footnote-509)

[I]n the recent past some eminent opinions have been supported the view that certain overriding principles of international law exist, forming the body of jus cogens .[[510]](#footnote-510)

These are inalienable from part of the customary law and they cannot be overridden by treaty or acquiesced. They also include responsibilities to the international community as a whole:

’Other rules which have special status include principle of permanent sovereignty over natural sources and the principle of self-determination.’[[511]](#footnote-511)

Cassese maintained that self-determination imposes obligation on the whole international community, and as part of jus cogens because of its two distinguishing features ’[W]hich are indicative, at the legal level, of the overriding importance self-determination has now acquired in the world community*.*’[[512]](#footnote-512)

Cassese[[513]](#footnote-513) accounts how the international law changed in the 1960s, from classic to modern, with the development of the custom-created peremptory principles of international law. He explains that in the classic international law, as now, there were two sources of law, treaty and custom, producing a law of equal standing since there was no hierarchy of law.[[514]](#footnote-514) The states did not want to place limitations on their sovereign powers. They would not be bound, unless they had expressly or implicitly agreed, to any norm even if created by custom. No customary law could override express terms of treaty law unless it is peremptory international legal norm jus cogens. The rules remain the same today, and there is no hierarchy of laws. However, the custom created a special class of general rules, and they are now emerging with special force, so much so that no treaty term can override them expressly or implicitly or be derogated from, and when peremptory rules are ignored, then the offending clause or article or treaty will be declared null and void. These are effects of peremptory norms, and rank superior to all other rules of international community: *’*Creation of these rules took place in the 1960s (…)*”* and they include *“*self-determination of peoples, prohibition of aggression genocide slavery racial discrimination and racial segregation and apartheid*.*’[[515]](#footnote-515)

Cassese considered decolonisation and self-determination as era omens, and listed several samples of erga omnes which were supported by the international community:

(i) Self-determination must be respected by state (including colonies),

(ii) State must support third party claims even if one finding itself in an identical self- determination claim.

(iii) Any other international subject is entitled to demand self-determination.

One notes Cassese’s interpretation of the right to self-determination, extending beyond colonial and non-self-ruling territorial context to include every form of oppressive tyrannies and alien rule.

Cassese is supported by paragraph (V) of the UNGAOR 1541 (XV) 1960 [[516]](#footnote-516) since this annexe, refers to’ [A]pplication of the Charter’s Chapter XI should be applicable to territories which were then known to be colonial type*.’*

It reasonable to conclude that Cassese is referring to the extension of self-determination to non-colonial alien rule. Cassese’s arguments direct one to the conclusion about self-determination being the customary international rule, but also the customary international rule of peremptory principle in nature (jus cogens ) even if the distinction between customary, and peremptory rules are left unsettled.

His argument poses a question: if self-determination is so widely available why it is not claimed by many within domestic jurisdiction? Without state action can this be the rule of customary law? This is very suggestive, if some state’s affirmation of belief of legality is sufficient, for the purpose of formation of customary international law, without state actually implementing them.[[517]](#footnote-517) This too is a departure from normal understanding of opinio iuris.

Why did Crawford not consider self-determination as a peremptory rule of international law applicable to all? Although he does not expressly state why it can be deduced from the passage to which Harris also referred, it deals with the threat and use of force in the attainment of self-determination.

Crawford’s reading of Article 2(4) leads him to the following propositions,

(i) A self-determination unit (other than a state) is prevented from exercising its right to self-determination by the use of force

(ii) A self-determination unit is invaded and annexed by force without being allowed to opt for incorporation or any alternative status.

(iii) An effective self-governing entity is created in accordance with an applicable right to self-determination by unlawful external force.

(iv) An effective government is created by invasion and unlawful use of force in isolation of applicable right to self-determination by external unlawful force. [[518]](#footnote-518)

According to Harris, Crawford does not support Brownlie or Cassese on the basis of the four pre-suppositions, stated above. After all, the ordinary reading of these passages implies that force can be used legally by the state to assert its authority and end secessionist movement. This is because it is not legal for the secessionists to use force, to defend their rights (according to that argument), even if the state, using force was created by international treaties, and guarantee agreements to protect the secessionist. Furthermore, guarantors were able to station their own armed forces to safeguard the rights of the secessionists before the creation of the said state. This argument unreasonably places a higher value on the state’s use of force compared with the use of force for the defence of the oppressed.

What if the state is a failed state, and a usurper of power, is now an oppressive regime? These are not hypothetical issues but real events which the UN General Assembly and other UN organs including the ICJ and the Security Council have elaborated since self-determination has extended beyond its decolonisation context. The second Western Sahara dilemma is how to resolve the conflict brought about by the dichotomy and paradox which self-determination inherently possesses without unilateral intervention?

In the Western Sahara case, Morocco and Mauritania claimed historical territorial title prior to the decolonisation. Spain and Algeria claimed the right of the people to self-determination in accordance with the United Nations Charter and United Nations General Assembly Resolutions 1514(XV) of 14th December 1960.

The academic view on the Western Sahara is grim. According to Franck, (ex officio ad hoc Judge at ICJ), the situation was due to total UN failure.

(…)[H]ave took the international system a blatant step towards a new set of mutually shared exceptions about state behaviours–incipient new norms –which are much more likely than their predecessors –rules to be conflict-inducing, even if their outlines are as yet dimly perceived.[[519]](#footnote-519)

Franck warned[[520]](#footnote-520) adverse consequences of the unleashing the claims of historic title*,* ’so far been restrained by the insistence of the international communities that established boundaries can only be changed with the free consent of the people living in each territory.’[[521]](#footnote-521) Such consequences were being felt all over the world including in East Timor, and Africa. Franck expressly points out that ’Morocco and Mauritania by their takeover of Sahara without the consent of its people, have succeeded in frustrating the application of this norm’,[[522]](#footnote-522) that norm being changing borders by consent.

Franck concluded that policy-oriented grounds, in inter-state relations, while being indifferent to international norms, may have short-term gains, leading to insurance long-term losses.[[523]](#footnote-523)

If these are the results of a strategy based on winning, perhaps even political realists might yet be persuaded to try a strategy based on concern for normative reciprocal principles. [[524]](#footnote-524)

Thus the suggestion is not to keep changing the rules of decolonisation, and self-determination when trying to implement them but to ensure fair application.

Shaw too considers the dichotomy and paradox of decolonisation under self-determination principle, involving, peoples, territories and boundaries. [[525]](#footnote-525) He pointed out that’ [A] new state’[[526]](#footnote-526) may seek to legitimise its arrival within international law in two ways. First, by referring to the territorial conceptions, and second by reference to the consequence of self-determination, with its focus on the people in question.[[527]](#footnote-527) He also refers to the effective management of the territory but rejects it since it is based on force.

One can suggest that this is affirmative of reliance on social cohesion when considering the issue of self-determination*, ’*(…) [A]s the founding principle governing the positioning of the boundaries in the case of newly emerging states.*’*[[528]](#footnote-528) One notes that he has to reconcile the difficulty, he found himself in with legal entitlement based self-determination and agreement based borders so he wrote, ’Although question the basis of legitimacy of new states is different in law from the establishment of its boundaries, in reality, there is a close relationship between the two .’[[529]](#footnote-529) Shaw agreed with Franck, and Crawford that:

The principle also received judicial approval in the Namibia and Western Sahara and East Timor. In this last case, the erga omnes character of the principle was proclaimed and it was stated that self-determination was indeed one of the essential principles of contemporary international law.[[530]](#footnote-530)

### 4.4.3 Concluding Remarks

TheSouth-West AfricaandWestern Sahara cases made several contributions to the developments of the legal concept of self-determination;

(i) They affirmed the conditionality of the mandate system, affirmed sacred trust, and moral obligation of the mandatory and international community, and the international legal norms. This confirmed the customary international law developing since pre-Westphalia epochs.

(ii) Introduced conditionality of sovereignty, and the rejection of the arbitrary rule of law in interstate and intrastate relations as well as with non-Christian states notably in the writings of Grotius and Vattel, Wheaton, Wharton, Westlake, Moore, Oppenheim, Hackworth and Lauterpacht. The development of humanism through confused was invoked and opened the way to R2P some forty or so years later.

(iii) These judicial pronouncement came in an age, when international community became formally organised with formal purpose and principles assisting Self-determination externally and internally evolve as Brownlie and Cassese pointed out that in colonial context, it became a peremptory international legal norm, higher than the other international norms, applicable to everyone all over the world jus cogens creating obligation all states to support (erga omnes). This peremptory principle of international law also had an effect on the creation and nature of the international obligation. This proved the pre-condition to the hypothesis advanced, that it holds true as long as there is a formal state-centric international order.

(iv) These cases brought the legal debate in self-determination, by reference to the territory, and to rights of the people, beyond mandates, to include non-self-ruling people of the colonies and oppressive states. ICJ broadened the scope of the application of the legal principle. As Franck argued, that it is not enough to have a consistent legal principle of decolonisation and self-determination without its regular implementation. If the United Nations fails in closing the gap between the theory and practice then, as Cassese’s argued, the lack of state practice of customary law of self-determination, will lead to its nullification as an obligation.

(v) Self-determination affects title to the territory, directly and indirectly, challenging it without nullifying principles of title to the territory. The memorable obiter dictum of Judge Dillard[[531]](#footnote-531) ’It is for the people to determine the destiny of the territory and not the territory the destiny of the people is not moderate view but challenges equally immoderate and doctrinal approach to the opposite, status quo camp.

(vi) One is equally mindful of Judge Jessup’s rhetorical question: what should be done with the title to the territory every time there is change in international law in response to Judge Huber in the Palmas Arbitration[[532]](#footnote-532) ’ [I]s notable for its contradictions of the frequent assertion that the doctrine of discovery, occupation, prescription etc. are today only academic and historical interest.’[[533]](#footnote-533)

The title to the territory as Huber and Jessup and Dillard suggested is equally contentious as self-determination. South-West Africa and Western Sahara caused paradigm change in customary international law by placing fundamental freedoms on a par with title to the territory in an age of formalised international society.

(vii) These judicial deliberations proved surrounding controversies of self-determination because legal principles are general, imprecise conditional, controversial yet the ICJ identified jural imperatives, established international obligations in their reasoned judgements as well as in their opposition to the majority view of the Court, proving every aspect of the hypothesis advanced in part 1.1.2 above.

# CHAPTER 5 THE CRITIQUE OF SELF-DETERMINATION

**5.1 The Basis of Justifiable and Fair Criticism**

The purpose of fair criticism is to consider the aspects of self-determination and the hypothesis, guided by four principles:

 (i) A criticism is fair, within the context of the existing FSIPS examined with moderation, deconstruction and critical construction, without pitching objectivity against subjectivity. Therefore, one ought to be content with halting the grievance and proceed with restitution, rather than punishment, and to seek lasting just negotiated settlement.[[534]](#footnote-534)

(ii) A criticism ought to be normative in the context of legitimate politics and correctly stated contemporary international law.

(iii) The subject of criticism should be in the context of legitimate constitutional and administrative law, constructive and in good faith.

(iv) The method of criticism ought to be suitable to contemporary international law.

These will guide the enquiry into the allegation of incertitude of definition and claimant, and irregular application of self-determination.

### 5.1.1 Criticism of the Incertitude of Definitions

Incertitude of self-determination is analysed in the context of the inherent, substantive and constitutive challenges, found in domestic and international legal systems pursuing inter and intra-national order thus in the formation, and application, and monitoring of self-determination.

Contemporary self-determination is an international legal norm and a precept justiciable by the ICJ, and other international tribunals. The progress of self-determination from legal concept to legal precept in a given situation depends on the states’ foreign policies and their perception of national interest and Security Council resolutions. Therefore, as a norm has the propensity to manifest political and legal traits simultaneously in a given time, in different circumstances manifesting appropriate but irregular application. This is a common aspect of the Charter. Article 22 was implicit, inclusive of external self-determination, by prohibiting conquest, and introduced the mandate system, as a process and the method of achieving self-governance, in phases for the colonies of the defeated nations in 1920. However the Charter with its Articles 1, 55 and 73(b) implied evolution of a general legal precept of self-determination and therefore a legal obligation. Self-determination was intentionally framed as a general legal principle, instead of as an express legal precept, so as to develop beyond decolonisation.

The process of transition of self-determination from political concept to international legal precept for decolonisation was assisted by repeated pronouncements by the ICJ in the South-West Africa cases in 1949-1971. In 1975, the decolonization of the Western Sahara brought the concept to the attention of the ICJ in colonial contexts, after all, the South-West Africa case was about a mandate territory becoming a trust territory. In 1985 Burkina Faso and Republic of Mali border dispute caused the ICJ to consider the application of self-determination among two independent states. In 1996, East Timor provided the ICJ with the opportunity to consider the principle in modern decolonization processes. Therefore, the ICJ created its own jurisprudence of self-determination[[535]](#footnote-535) and the peremptory international legal principle, applicable to all subjugated people, under any modality of subjugation, while denying any states their right to derogate with reservations– jus cogens.

The International legal principle is an all-inclusive term, constituted by juristic concepts, legal precept, and peremptory international legal norms – jus cogens. This begs for the certitude of a better description, even if international law belongs to the moral sciences of ethics, jurisprudence and politics. However, the certitude of a claimable right of external and internal self-determination, arises only after it is contextualised and considered in the perspective of the customary and international treaty law, and not in terms of certitude sought by the domestic lawyers within the domestic jurisdiction. [[536]](#footnote-536)

Incertitude without justification and fairness lacks legitimacy and it is unjust. Legal norms are useful when applied proportionally, suitable and reasonably, and discretionally at a given transient moment for a legal effect. Only then can the right to self-determination exist legitimately, and in compliance with the domestic and international law, based on natural laws[[537]](#footnote-537)and distributive justice, and maintain the moral justification, as an international obligation. [[538]](#footnote-538)

The incertitude of the definition of the legal precept of self-determination is determined by the consent of the states, expressly stated in treaties in and conventions in 1919 and 1945 and by implicit acquiescence. It is paradoxical that when the subjugated people and peoples claimed their right to external self-determination and attained their international legal personality, they preferred incertitude of the right to self-determination.

To consider international law obligation and rights, to be void of certitude is unhelpful. General and normative laws inherently lack certitude, because their flexibility entails adaptability to distinctive circumstances. The Ordinary reading of Article 73(b) of the Charter supports this notion.

If the legal precept was defined in absolute or in weak terms, unlike Article 73(b), its legal effect might have been detrimental to the political unity and the territorial integrity of the new and the established states.[[539]](#footnote-539) First, if self-determination was framed in specific but weak terms today, scores of states would still be subject to alien domination. Second, as the states in 1919 and in 1945 preferred incertitude of general norms, then it was a legitimate choice. General legal norms are also part of the customary international law according to the doctrine of opinio juris. One can see general normative primary principles of international law such as self-preservation and legal equality of sovereign state. Third, if the framing states gave a very weak definition to a legal norm, in defence of sovereign absolutism, they would be acting contrary to developing a general consciousness of the nations, that absolute sovereignty encouraged the arbitrary rule of law and tyranny and autocracy for the oppression of their own citizens. Fourth, a pragmatic and non-doctrinal approach to the legal norm favours maintenance of state sovereignty as well as protecting individualism in the context of collective social living. There is a Huberrian[[540]](#footnote-540) compliance to inter-temporal rule, that is to say, state sovereignty is a legal expression but it is subject to change, in another era, in compliance with changing international law thus affecting the title to the territory without leading to absurdity as warned by Judge Jessup.[[541]](#footnote-541) This is why the hypothesis advanced has to accept the intertemporal principle, and apply to the past, and to the contemporary, and future meaning of self-determination.

Several observations are relevant to the hypothesis. First, the hypothesis is about an international legal rule leading to predictable results. Second, the hypothesis was applied to the mandate system, and the ICJ with its pronouncements in South West Africa cases as discussed in Chapter 4.2. Third, hypothesis applied to decolonisation as noted in the Western Sahara case. The ICJ upheld relevant parts of the Charter created an international obligation for decolonisation, proving that the hypothesis is applicable in the UN era as well.

### 5.1.2 Incertitude of the Claimant of the Right to Self-Determination

The claimants of external self-determination, in the post-decolonisation era[[542]](#footnote-542) since 1992, and in the pre-League of Nations era, are the states and autonomous regions or federations without international legal personality. The assumption of international legal personality means, attainment of capacity take on state responsibilities and adhere to international obligations.

Claimants of internal self-determination are the citizens of the state with identifiable constitutional freedoms and legal rights. The debate whether these rights are claimable individually and collectively, or claimable by identifiable cohesive communities, has to end with their incorporation into constitutions and supervision by the international community. What remains unsettled, is the administrative challenges of effective international monitoring of the international and legal order and compliance to it. For instance, compare a self-determination claims from, an oppressive and illegitimate constitutional order, with that a section of the community exposed to the tyranny of arbitrary rule of law, with the claims of a community enjoying non-oppressive constitutional order. One is legitimate and the other is not. Therefore, the legitimacy of the claimant and the claim are as much factual as they are legally and morally defined for their fairness and the remedial aspect of the action. Illegitimate components and determinants do not create an international legal obligation. Legitimate components and determinants create an international legal obligation, therefore, conditionality does not negate the rural imperative of the self-determination. This once more supporting the hypothesis.

### 5.1.3 Irregular and Non-Application

Criticism of the irregular application of self-determination during the decolonisation era is unfair since the ordinary meaning of Article 73(b) of the Charter suggests that the application of Article 1(2) be subject to circumstances thus making self-determination during decolonisation as a conditional right.

Conditional rights always create an irregular application. Nevertheless, this argument in the post-decolonisation era is redundant. Alien subjugation and exploitation of natural resources and annexation of one state by another other is prohibited under the treaty and customary international law. This had been sufficiently argued in the previous chapter.

Current challenges of irregular and unorganised international intervention are far too dependent on international politics. The International response to ethnic cleansing, crimes against humanity in Bosnia and Somali and Rwanda came too late too ineffective. In Kosovo, it was timely yet subject to the ICJ deliberation. One UN organ needed an advisory opinion from another UN organ, concerning its care management of Kosovo. Therefore, criticism of irregular and discretionary intervention is not unfair and unjustifiable.

If a general definition of the legal norm of self-determination means the capacity of peoples to determine their own future, it is conditional to the maintenance of political independence and territorial integrity of the state. Claim for external and internal self-determination ought not to threaten international peace and security nor breach fundamental principles of international law, such as title to the territory, crimes against humanity, humanitarian law breaches, and ethnic cleansing.

Three situations of grant and denial of self-determination will briefly demonstrate this point.

In 1917 the Aaland Island referendum results showed 95% of the population professed to be Swedish yet Finnish sovereignty was recognised.

In 1971 in the ICJ the Namibia case was decided on the basis of repudiation of racist minority rule.

In 1975, in the case of Western Sahara, the people were not consulted at all. The people’s history in Bosnia and Kosovo led to the principle of rectification of historical wrongs, perpetrated on the subjects in 1878.

In 1996, the Quebeques claim self-determination from Canadian federation was not heeded.

In South-West Africa, the claimants were inhabitants of a trust territory. In Western Sahara, claimants were colonial subjects. In Quebec’s case, it was a regional and communal claimant, in a federal autonomous structure. In Bosnia and Kosovo claimants were a constituent state of a federation, while the later was an autonomous regional authority. Colour, race, religion or indigenousness aspects of the disputing parties, played a substantial role. Yet, the modality of the application of the principle of self-determination is not only irregular due to its development as external and internal, but also dependent on the facts related to the claimant and their claim.

The break-up of Czechoslovakia constitutes a peaceful application of self-determination. The disintegration of Yugoslavia was not. International treaties in the 1920s actually excluding self-determination in preference to a constitutional order by incorporating the, as in the case of the Constitutions of Austria (1920), Germany (1919) and Poland (1921).

Therefore, rule-based grant of self-determination, based on historical, sociological or legal doctrinal approaches will do no justice to the claimant or the respondent. This view was upheld by Lansing in 1918 and by the Chairman of the Committee for Human Rights commission in 1982. Therefore, it is fair to refer to self-determination as a conditional right, subject to legitimate circumstances, rather than take a very narrow definition and minimise its application as an absolute right. This is pleaded by the hypothesis herein.

**5.2 Critics and their Arguments**

Some of the critics were eminent jurists and some contemporary participant’s witnesses to significant events as the American and British delegations at the 1919 Paris Peace Conference such as Lansing, Miller, and Nicholson. Other Critics reflected on UN epoch.

### 5.2.1 Robert Lansing’s Criticism in 1918

In 1918, Lansing was the US Secretary of State in the President Wilson’s administration and is the first critic to allege ’inappropriate approach’ to the concept of self-determination by the victors in the Paris Peace Conference.[[543]](#footnote-543) Lansing doubted the value of self-determination to world peace and suspected that President Wilson excludes it, from his foreign policy because of this reason even if he attached importance to include the principle of self-determination his three drafts of Article III for the ’s collective guarantee section.[[544]](#footnote-544)

According Lansing, the President’s action manifests an inexplicable inconsistency since his policies, aimed to achieve political unity, and territorial integrity of the member states and deemed implementation of self-determination, essential to the world peace, ’ [W]without reservation the principle that the peace of the world is superior in importance to very question of political jurisdiction or boundary.’[[545]](#footnote-545)

In retrospective Lansing is justified for questioning the morality of prescribing a policy to other states while not practising in the US. Lansing laments the President’s continued interest, even when removed from above mentioned drafts, for reasons known only to the President. Nevertheless, his continued reference to the expression of self-governance was most implicit in Article 22 of the.

Lansing had two criticisms. First was for the non-application of the policy in German territories, and Austria and Austro-German relations,[[546]](#footnote-546) while in contrast for supporting Russia’s refusal to granting self-determination to component nation-states within the Soviet system.[[547]](#footnote-547) The second criticism emanates from the consequences of availability of self-determination to all as a matter of right, in view of the international view of the day. In the Island of Palma case, the Judge Max Huber refers to some people as ’savages’. The presumption in Article 22 and in the principle in mandate system is the Eurocentric view of Non-Europeans. This presumption was the reason why an international obligation under the mandate system aimed to provide tutelage to inhabitants of non-self-ruling territories, to become capable of undertaking international responsibility. This presumption and the envisaged measure were based on an assessment of the victorious powers that non-self-ruling territories were not ready to be self-ruling.

In 1918, Lansing was not an unduly cynical realist nor doctrinal fanatic, but fair because he was making normative observations from the perspective of domestic jurisdiction. The fact that the hypothesis supports the view that international law is sui generis does not deny others the option to compare the incomparable. Yet Lansing was right on other accounts. Contentious principles can hardly contribute to international peace and security. But the hypothesis suggests a selective application. Therefore, Lansing’s criticism cannot extend to the hypothesis.

### 5.2.2 Verzijl’s Criticism in 1968

Verzijl writing in 1967 expressed his views on the subject very clearly:

Seldom has there been advanced as legal right a claim of a political nature and of such a slogan-like quality as so called ‘[R]ight to self-determination’ and ’[S]eldom has a would be right been exercise or negated with such arbitrariness and with such flagrant international hypocrisy as this.’[[548]](#footnote-548)

Vergil's eight volumes on the history of international law qualify him, under Oppenheim’s[[549]](#footnote-549) criteria and Article 38 paragraph (d)[[550]](#footnote-550) of the statute of the ICJ (1945), as an authority within meaning in ’[T]he teachings of the most highly qualified publicists of the various nations.’[[551]](#footnote-551)Verzijl laments the introduction of the concept of self-determination, and the attempts to legitimise it with pseudo socio-legal arguments, without defining the right or the entitled claimant. It was ’floating in the air’,[[552]](#footnote-552) thus contributing to ambiguity, confusion, and heated discussions.

Subsequently self-determination led to a practice of ’ [P]lebiscite, or voluntary grant or forcible extortion of independence (…) but more often met with disavowal.’[[553]](#footnote-553) In 1965 at the height of decolonisation, this was defensible rhetoric, but now it has a historical value only since what was unacceptable then as is now peremptory legal norms applicable to all

Verzijl’ s analysis of Article 1(2) of the Charter and General Assembly Resolution referring to self-determination and peoples and nations on account of his positivist perspective, runs contrary to the spirit of Article 73(b) of the Charter since both use the term ’[P]eoples and nation.’[[554]](#footnote-554)When given a correct interpretation, one refers to multi-national citizens of a unitary state and the later to states’ nationals. Verzijl overlooked the fact that former refers to internal and the later to external self-determination. One refers to measures against the state with an oppressive policy against its multi-national groups and the other to alien subjugation and annexation of a state by another or collection of others.

Verzijl is critical of the international community for choosing one kind of definition, thus allowing all states with multi-nationals, not to remain unitary with constitutionally endorsed internal self-determination, supervised by the international community. His criticism of the pragmatic approach, instead of international-law-based relations, demanded a level of certitude anticipated within domestic jurisdictions. Verzijl’s three samples of irregular application, whereby free will of the peoples and nations was ignored, the Aaland Island Case (1918), Cyprus Dispute (1959-1963) and the Southern Tyrol Settlement (1946).All have empirical, historical and moral value. In the case of Aaland Island, the wishes of the people were totally ignored at a crucial time, in 1923 when the PCIJ approved a policy of ignoring the will of the people. In the case of the Cyprus Dispute, Verzijl pointed out that, the parties with material interest set up a constitutional order at the time of decolonisation,‘[W]as clearly the implementation in common accord and in a specific variant, of the right to self-determination of the Cypriot People and it should thereof have terminated the dispute’.[[555]](#footnote-555)

The 1946 Southern Tyrol settlement was between a defeated state, and the victors, at a cost of loss of territory and population to the former, and gain to the others with a measure of internal self-determination. These cases occupy an odd chronological order in the history of self-determination. While the Aaland Island or the Austro-Italian matter remains dormant, the Cyprus Dispute remains active before the Security Council, unsettled since 1963. These cases demonstrate enduring contentiousness of the subject matter.

Verzijl is aware that in reality, the states, the nations, and peoples and non-self-ruling territories, colonies, and mandates, with their historical heritage actually contribute to incertitude. Yet Verzijl suggests that an undefined and uncertain and incoherent application led to an unsatisfactory conclusion. Thus, at the crucial time of decolonisation, the principle of multi-nationality and internal self-determination should have been observed instead of uti possidetis or political choice of the victors after two costly wars. First, he is absolutely right about this. The international community ought to have but did not. Secondly, Verzijl is right about imprecise rules of decolonisation at the time of writing. Since rules and scope of self-determination continue to develop. Thirdly, Verzijl is writing about the rules how they ought to be while the hypothesis is built on the rules as they are. Nevertheless, the international legal principles develop as the international community determines, it is conditional to the state-centric international political system.

### 5.2.3 Post -Decolonization Era Views

When one considers Lansing’s concerns over self-determination in 1918 ’ [W]ithout imperilling national safety, always the paramount consideration in international and national affairs.’[[556]](#footnote-556) One would rightly reach the conclusion that if all oppressed and subjugated and the non-self-ruling-territories claimed this right, they would also pose a threat to international peace and security. It is paradoxical that the decolonisation ended by the 1980s, but the demand for self–determination surged. 74% of the States in 2007[[557]](#footnote-557), were experiencing self-determination based discontentment, justifying the longevity of the self-determination.

In 1984, the UN Human Rights Committee Chairman reflected on the unspecific nature of the right to self-determination.[[558]](#footnote-558) Since rights are specific and manifest exactitude by nature, even when it has a narrow application or subjected to many prerequisites, the reasoning that followed was also unhelpful. The Chairman explained that such generality was born out of necessity since detailed right would pose a threat to international peace and security on account of the multitude of claims for self-determination.

The similarity of concerns between Lansing in 1918 and the Chairman of UN Human Rights Committee in 1984, separated by half a century, during which another world war was fought, and decolonisation ended, suggests that self-determination has always been contentious.

 Lansing has initially engaged in post-international conflict and in the drafting of the Covenant of the League of Nations whose ultimate aim was the attainment of international peace and security, and measures against threat or aggression against member states, and the principle of political equality among the member states. Lansing was concerned with issues of annexation and alien subjugation and thus with external self-determination.

The Chairman of the Human Rights Committee, in 1984, was concerned with the individual and collective fundamental freedoms, and the legal rights within a constitutional order, and thus with internal-self-determination supervised by the international community. Lansing was not critical of the political concept or legal precept but was critical of the inappropriate application and non-application.

The two statements separated by 60 years may seem paradoxical that the former sought peace and security within a national and international domain by championing the virtues of cooperation among the states. The latter championed the individual’s freedoms and legal rights by offering protection against their own states, justifying several conclusions:

(i) In every age self-determination diversified to meet a particular challenge,

(ii) Some see merit in uncertainty of definition while others do not,

(iii) Challenges of self-determination are perpetual and short-term fix failed over the last 40 years, statistically proven by 5 million destitute stateless refugees in 2008.[[559]](#footnote-559) These figures are subject to dramatic increase as Civil War in Syria shown since 2011. The population of Syria stood at twenty-two million and five hundred and thirty thousand in August 2014 when UN statistics show that in August 2015 over four million became refugees. [[560]](#footnote-560)

One cannot but recollect Verzijl’s arguments and note their merits. He noted the aversion of the colonial powers even to the term of self-determination or self-government, let alone to its transition to legal right. State practice was so irregular and refuted by the opposing nations, that they negated the moral justification of the policy and removed any legitimacy that the legal concept and precept might have claimed. Pomerance, writing in 1976, refers to the continued irregular application of the doctrine even beyond its decolonisation contexts in ’Katanga, Biafra, and Eritrea remained, not to mention the problems of South Africa, Northern Ireland, and the Middle East and Indo-China.’[[561]](#footnote-561)

Higgins, in contrast, makes two propositions in 1993. First, that it is an important and contentious human right – a view shared by Watts[[562]](#footnote-562) Second, the proposition is that it is a right not confined to a single act in time. In short, self-determination developed during the decolonisation era as a right and is an ongoing process. Higgins refers to the Friendly Relations Convention of 1972 which extended self-determination beyond the decolonisation context, as an ongoing right.[[563]](#footnote-563)

Cassese, writing in 1995, considers self-determination, in the context of the arbitrary and discriminating modality of governance, as a breach of the international legal norm, applicable to all peoples without any exception.

In 2006, Crawford, considered self-determination and propounded that statehood is based on facts rather than founded upon rights.[[564]](#footnote-564) He deems self-determination not so much as a right but as a political engagement with legal consequences, so he attests to the enduring views of Lansing. In conclusion, not all criticism of external self-determination is just or fair. Nor should one suspect an end to criticism on account of the conclusion of one phase and be indifferent to the emergence of different modalities of self-determination.

**5.3 Critics and their Pre-suppositions**

### 5.3.1 Is there an International Community?

Nature of the international organisation is a very fundamental issue to the hypothesis. The formal state-centric political system solved many problems. It also created new challenges. For instance, the treaty-based s and the Charter, in theory, identified their purposes and principles and composition of the organs, functions. In practice, states remained unwilling to implement the system, as they perceive an international organisation as a potential threat to their political independence. Therefore, in practice, the capacity and authority of the international, supervision, and accountability of the international organisations remain controversial and a legitimate subject of academic discourse and inquiry.

Oppenheim, Brierley, and Lauterpacht to name few, considered the existence of an international community and consider the League of Nations as a form of loose federation. Schwarzenberger considered international society rather than an international community with the capacity to have an ’international constitutional law’.[[565]](#footnote-565) The matter remains unsettled.

The recent publication edited by Cassese consisting of 48 contributions by international jurists, conceded to the following, [[566]](#footnote-566)(i) The state will remain principal actor in international relations, (ii) There is no hope reforming the UN, (iii) World society is still run by state interests.

Cassese, having presided over the International Criminal Tribunal for Yugoslavia was able to form an informed view of interstate and intra-state relations because the states responded slowly to their obligations. [[567]](#footnote-567) Cassese has held a reasoned pessimism for two reasons. First, because human rights have taken a foothold. After all, international political and moral norms became international legal precept of internal self-determination. Second, because there is more inter-state co-operation against common-organised crimes, leading to the closely knitted international community.

Brierley and Lauterpacht relied on the maxim that law emerges from social living and concluded that since there is international law then there has to be an international community. Hobbes suggested that law could only emerge in civil political order along with enforcement and distributive justice in accordance with natural laws.

Schwarzenberger refers to the Lotus Judgment and how it defined international law applying to’ [N]ations belonging to a community of states.’[[568]](#footnote-568) He also pointed out that the treaty between Greece and Bulgaria defined community as a group of persons living in a country or locality having a race, religion, language and tradition of their own, mainly their own form of worship.[[569]](#footnote-569) The conclusion is that the matter is unsettled. If there is an international community then it can have the capacity to have interests and concerns and to formulate policies for implementation.

The judges in the ICJ repeatedly referred to the existence of an international community in the process of change. In the Lotus case,[[570]](#footnote-570) it was described as a community of states. Judge Alvarez in his dissenting opinion in 1950 saw no importance and referred to both,

The community of States, which had hitherto remained anarchical, has become in fact an organised international society. This transformation is a fact which does not require consecration of an international agreement. This society consists not only of States groups and even associations of states but also other international entities. It has an existence and a personality distinct from those of its members.[[571]](#footnote-571)

It is not useful to assume a legal dogmatic position, whether there is international community. Nor are the arguments weigh whether it has legitimate and legal organisations with the capability to express the will of the global community, as well as formulate and implement international policies. After all, the matter received the attention of the ICJ in the Reparation of Injuriescase, where the ICJ clearly referred to UN as being a political body and more:

It must be added that the Organisation is a political body, charged with political task of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations and the achievement of international cooperation in the solution of problems of an economic social, cultural or humanitarian character (Article 1).[[572]](#footnote-572)

ICJ held, ’[A]ccordingly, the Court has come to the conclusion that the Organisation is an international person*,*[[573]](#footnote-573)though not a state but ’[T]hat it is a subject of international law and capable of possessing international rights and duties and that it has the capacity to maintain its rights and by bringing international claim*.’*[[574]](#footnote-574)Therefore, the criticism of the international law, referred to by Cassese above, is fair and reasonable if it is taken in general normative terms.

### 5.3.2 How Credible is the Notion of International Rule of Law?

Critics’ view of self-determination is often based on certain presuppositions irrespective of their epistemologically accuracy, or reasoned, explained, or deemed just and fair. However, are they accurate? In the above sections, it has been noted that there were some jurists in 1970s that doubted, and even suggest, that self-determination in its colonial context was not a legal norm but a policy with legal effect.

International rule of law is theoretically central to the external and internal legal obligation of self-determination. After all, if there is an international community and self-determination serves its interests, then the principle of the rule of law, which protects citizens and states from hegemony and arbitrary governance, is essential to external and fundamental to internal self-determination.

In 1958 Wade wrote: ’It is within memory that principal war aim of the Allies in the Second World War was the restoration of rule of law in Europe (…) ‘.[[575]](#footnote-575)

Wade explained that this entailed the restoration of whatever systems of governance they preferred, in place of the system imposed by force of arms. Wade and Philips, in 1970, propounded that the concept of the rule of the law opposed arbitrary modality of governance, no longer enjoyed only by common law systems, but all other systems. Wade also referred to the 1957 UNESCO-sponsored International Commission of Jurists, a colloquium of 34 eminent international jurists from 28 countries in Chicago University, under the secretariat- ship of J.A. Jolowicz. The 1958 Delhi communiqué stated that rule of law was a phenomenon of a free society and a mark of it. This constitutional device forms checks and balances between protecting individual liberty, and collective public interest. The concept of the rule of law in Britain and France meant judicial control of the executive branch of the state while it also meant judicial control of the legislature in federations such as the USA and West Germany. What the UN resolutions meant by ’rule of law’ is subject to interpretation.

Resolution 2625(XXV)-Friendly Relations (…) is third justification for belief that there is international rule of law’ since it directly refers to rule of law as contributing to the development of:

 [W]world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the Principle embodied in the Charter.[[576]](#footnote-576)

First, the role designated to rule of lawin the process of developing international law and relations along the Charter’sPrinciples is to strengthen world peace and security. The moral justifications for the Charter’s obligations are in the Article 1. ’To maintain international peace and security’[[577]](#footnote-577), is the first sentence.

Second, rule of law pursues the suppression of aggression or other breaches of peace, by peaceful means, in conformity with principles of justice and international law,

Third, justice is the fundamental link between objective ends pursued with the principles outlined in Article 2. The actual phrase rule of law is found in the Article 2. The full purpose of UNGAR 2625 (XXV) is to enforce and reiterate the principles of the Charter. Therefore, the rule of law is the expressly stated means of achieving international peace and security and, therefore, orders in the international community.

Higgins, placed the rule of law in a jurisprudential context while referring to Franck, democracy, legitimacy and rule of law as ’Our Virtues trilogy.[[578]](#footnote-578) Accordingly, democracy allows the individuals to participate meaningfully in the processes of formation and implementation of values and priorities. Legitimacy validates, the institutional decision in the context of the constitution, the social traditions, and historical custom, while the rule of law ensures impartial resolution of disputes, by reference to primary rules by independent parties to the dispute and the rules.[[579]](#footnote-579)

During 2004-2012, the UN Secretary-General reported on the rule of law in the context of transitional justice in the post-conflict context, in 2004,[[580]](#footnote-580) and again in the same context in 2006 leading General Assembly resolution[[581]](#footnote-581) and A/res/61/39,[[582]](#footnote-582) reiterating the link, between the Charter and the necessity to implement human rights and rule of law at national and international levels. The resolution underlined the link between the rule of law and peace and security and economic and social development. It urged the Secretary-General to report on global compliance to rule of law. The General Assembly Legal Committee sat and discussed the matter in 2007 while the Secretary-General, in 2009, presented a report on strengthening and coordinating UN rule of law activities A 64/298,[[583]](#footnote-583) subsequently leading to the creation of the Rule of Law Coordination and Resources Group and the rule of law united under the Deputy Secretary-General.

The doctrine of the rule of law like all other jural doctrines is subject to moderation, goodwill, and cooperation if it is to remain in international practice. It has conditionality while linked with self-determination being an essential aspect of the formal state-centric international political order. After all, without formal self-centric international political order, the hypothesis does not hold true.

**5.4 Legal Critique and Challenges of Article 1.2**

There is a consensus among the jurists that the Charter referred to the political principle of self-determination in most unspecific terms. The following sections will examine fairness and justification for this criticism. For instance, Verzijl called Article 1.2 ’devious’[[584]](#footnote-584) while Higgins called it ’myth’[[585]](#footnote-585)yet, thestateschose to adopt them as such.

### 5.4.1 Verzijl and Higgins and Crawford

Verzijl attested that imprecise wording of the Article led to two antagonistic interpretations. The first refers to the population of nations, (not states) being different from others linguistically and ethnically and social grouping, being deemed equal, and entitled to the right to determine their future. The second concerns peoples with a socially distinctive multi-ethnic population of a state being entitled to equality and the right to self-determination. Referring to the appearance of Article 1(2) Verzijl wrote: ’But even then it was not positively and with any palpable content conferred on anybody, in particular, it was not even conferred directly, it was simply introduced somewhat deviously in an aside.’[[586]](#footnote-586)

Verzijl is clear in his interpretation of the imprecise principle or ’slogan’ that it was totally ambiguous.

Higgins is adamant that the term referred to equal rights of states and self-determination of their peoples. In another word, Higgins postulates that the paragraph is addressing the political and legal equality of the states within which their people have the right to enjoy self-determination – thus internally. Elsewhere Higgins suggests that self-determination is an important human right. Higgins’state is endowed with international legal personality with a right to enjoying sovereign equality, without infringement of their political unity and territorial integrity by other states. One may also point out that Article 2(7) enforces this. Furthermore, this entitlement was available to the colonial and non-colonial state. Higgins’s consistency cannot be doubted because she emphasised this issue during every occasion of informed public discussions.

In 1993 Higgins referred to Tom Franck’s ’Postmodern Tribalism’[[587]](#footnote-587) and to his explanation, that this was due to imperfect implementation of self-determination after World War II, and the re-emergence of a European concept of self-determination, ’[A] new lease of life’[[588]](#footnote-588) as it was applied to former colonies and trust territories through the text of the UN Charter. Higgins agrees in part:’While this is true, it is one of the great myths that the UN Charter provides for and required self-determination in the form in which it evolved.’[[589]](#footnote-589)

Higgins’ self-determination is right and an international obligation. One can suggest this being a right for the claimant, and obligation upon the respondent state to comply and duty upon international compliance.

Crawford’s interpretation of Article 1 (2) is safe, prescribing sovereign equality, and freedom of people to decide their modality of governance to existing states. As to the matter of a legal obligation being created, this general idea is too ill-defined to constitute substantive legal entitlement applying of its own force to ’peoples’ in general.’[[590]](#footnote-590) Crawford to some extent is in agreement with Higgins. Higgins considered the political preconditions that legitimise the claimants and claim of self-determination. Crawford suggests that the principle of self-determination is a political act with legal consequences> Therefore, the hypothesis is not contrary to the conditionality principle.

### 5.4.2 Cassese and Doehring

Cassese, regarding Article 1(2) of the Charter, suggested several points:

(i) Self-determination creates a legal obligation although the framing nations of the Charter could not decide upon a definition of it,

 (ii) It did not grant the right to the minorities and other nationals within the state,

(iii) It did not apply to the colonies,

(iv) Internally it did not mean democratic modality of governance, but simply right to self-governance,

(v) It did not allow secession of several nations, from a sovereign state’ or to unite as one.

Cassese concluded, ’It follows that the principle enshrined in the Charter boils down to very little (…).’[[591]](#footnote-591) Cassese like Crawford and Higgins acknowledge that the implication of Articles 73 and 76 of the Charter was merely a suggestion that the states should grant self-government to the communities within their jurisdiction. Cassese’s choice of the word is ’should’, which imputes moral imperative. Higgins and Crawford also make identical imputation to the Charter, in justification for the international political act to decolonise.

Doehring also resorts to the interpretation of Article 1(2) and like Verzijl, sees no impediment to reaching two distinctive conclusions that it created either a legal or a political right. He supports his position with the literal and objective interpretation of the UN Charter Chapter 1 Purposes and Principles. One can see his reasoning since the Charter is an international treaty (see Article 103) then it can achieve its purpose’ [E]ither directly applicable law, or by political prescription.’[[592]](#footnote-592) His preference of the objective interpretation of the purposes of the United Nations is strengthened and legitimised, since the legal nature of the principles has not been challenged, and enforced by Article 2(4). Moreover, the UN organs treated self-determination as a legal principle and affirmed it repeatedly with General Assembly resolutions.

 Finally, the absence of any challenge that the provision has legal effect, enforces his argument that the Article 1(2) created a legal obligation:

[R]eference to the right of self-determination in Article 1 of the UN Charter, which confirmed the legal nature of this right and thus denies it’s being merely political in character, does not sufficiently clarify the content and scope of such a right (...).[[593]](#footnote-593)

The Drafting Technical Committee observed that equal rights and self-determination of the people are normatively helpful,*’* [W]ere two complementary parts of one standard of conduct that the respect of that principle (…).*’*[[594]](#footnote-594)

In conclusion, the Drafting Technical Committee referred to self-determination as a standard of conduct and regulative in nature with an objective purpose. Therefore, self-determination is a policy as well as a legal norm thus, the jurists referred to above are justified and been fair in their comments.

### 5.4.3 Whiteman

Whiteman was as an eminent United States publicist.[[595]](#footnote-595) This is not a discursive work at a jurisprudential level but descriptive of state action, opinio iuris. Whiteman’s 5th volume (of 15) in June 1965 provides a realistic initial commentary on Nations’ response to decolonisation. Having referred to the British Crown Policy practice, which preferred the expression ’self-government’[[596]](#footnote-596) within the British Commonwealth and the French Constitutional Commitment, she refers to a statement by Secretary of State Dulles, on 2nd October 1956, when he referred to America’s position on the ’so called colonial problem of Asia and Africa.’[[597]](#footnote-597) Dulles thought that the matter would take another 50 years, and described the role of the USA as a stabilising moderator, which aimed to speed up the process when it came to a halt and to slow it down when was violent, revolutionary and destructive.

Secretary of State Mr Herter[[598]](#footnote-598) referred to self-determination in the context of Tibet during exchanges on 21st October 1956 in the UN. Secretary Herter pointed out that the American people have a history of supporting self-determination one can guess that he was referring to the Declaration of independence and Woodrow Wilson. Furthermore, since Tibet has been an autonomous nation under the suzerainty of China, the American people support the people of Tibet, having the determining voice, in determining their own future.

President FJ Kennedy speaking in Puerto Rico on 10th July 1962,[[599]](#footnote-599) referred to UN action over Greenland and how three distinctive Dutch Colonies decided, at the time of decolonising; one chose to unite in the commonwealth with the USA, another sought greater autonomy and the third independence.

Mexican delegate Cancino, on 11th October 1960, articulated the importance of Article 1.2 and 55 and 73 and 76 2(7) of the Charter in the context of self-determination thus adding support for Major State besides the US to self-determination on the American Continent

In the earlier sections on self-determination, Whiteman referred to Woodrow Wilson,[[600]](#footnote-600) the Atlantic Charter,[[601]](#footnote-601) the Yalta declaration and the conference on the future of Germany, to be determined according to the principle of self-determination. Therefore, one need to be aware and question to what extend colonies were in the mind of framers of Charter’s Article 1(2).

Hammarskjold, in his report on Charter 1955, was most expressively against any suggestion that the Charter created an international legal right to self-determination. The UN Secretary-General Hammarskjold, perceived self-determination as a right, in unfavourable terms. This stand supports President Kennedy’s statement in 1962 when he refers to the UN and the right to self-determination being a new development since in 1955 even Hammarskjold, as UN Secretary General shunned it.

In conclusion, Whiteman published in 1965 and reflected on the state-of-affairs on self-determination as it was around 1964. The European colonial powers preferred the term ‘self-government’ to ‘self-determination’. Whiteman provided literature that shows that self-determination was often attained with a revolt and this was not prohibited under international law. Moreover, the USA was in favour of decolonisation in any manner – which included possible forms other than independence. The USA preferred self-determination, by evolution and not by revolution. Soviets were benevolent to external self-determination, while indifferent to internal self-determination.

**5.5 Legal Critique and Challenges of the Charter**

Previous sections showed that state’s response to the broadening of the scope of legal norm of self-determination has been reserved. Their reluctance to accept decolonisation and the creation of norms with international and the intra-national application was noted. Currently, states are reluctant to create express obligations on themselves and upon international communities the R2P, the states and the citizens from own state’s policy of oppression. R2P**[[602]](#footnote-602),** states from other states and individuals from the oppression of their own states. It is legitimate to question why states behave with reservations, reluctant to act and hostile to a legal norm, they developed. Reasons are inherent Constitutive and substantive in nature.

###  5.5.1 Inherent Challenges in the Charter

Substantive aspects of the Charter of the UN Conventions, and norm creating resolutions create obligations, prohibitions and therefore legal precepts. Because these instruments are in general terms they necessitate interpretation to meet the demands of specific circumstances and thus controversies are caused. Consider that four paragraphs of Article 1 of the Charter start with the word ’To ‘, which is a command to do something: to maintain, to develop, to achieve, to be centre for.[[603]](#footnote-603) All these actions are expected to take place in diverse states and cohesive communities and circumstances.

Article 2 is descriptive and empowering. It described how the Charter might achieve its objectives. An instant challenge arise with the ordinary reading of Article 1(2), 2(4) and 2(7) when a self-determination claim is made, and opposed: (i) Because the claim is not legitimate (ii) Because the claimants are motivated beyond desire to determine their own political future (iii) the prospective grantor’s response, are in total disregard to the customary international law, and the contest lapses into violence and mayhem. This is the very act, which Article 2(4) bans. Prospective grantors may argue that what is claimed, runs contrary to Article 2(7).

These are the substantive legal challenges. The constitutive challenge in a formal state-centric international political UN system arises where UN engages in norm-creation and executive function in pursuance purposes and principles of the Charter. This involves conflict resolution and regulates inter and intrastate relation. Another legal challenge arises with R2P when Article 2(7) directs all member states, not to assume any right to intervene with the political independence and territorial integrity.

### 5.5.2 Do Articles 1(2) and 2(4) and 2(7) Create Hierarchic or Horizontal Order?

The controversial nature of Articles 1(2) and 2(4) and 2(7) requires their better understanding. Franck and Shon separately suggested that the Charter is interpreted directly by the related organ of the United Nations. In the event of a conflict, the matter is dealt with by the ICJ[[604]](#footnote-604). Since Article 1 of the Charter lays the purposes and principles and Article 2 directs member states on how to achieve them, their interpretation, is open to all organs of the UN. Brownlie[[605]](#footnote-605) also suggests that not every Article creates an obligation but are hortatory in nature. Article 1(2) forms the treaty basis of the juristic concept of self-determination from which it evolved into legal precept and a peremptory legal norm erga omnes. Article 2(4) declared the general ban on the resort to the threat or use of force. Article 2(7) reminded the international order that its empowerment was at the expense of a sovereign state’s inherent right to supremacy within its domestic jurisdiction and inviolability of her territorial integrity.

Self-determination in the post-colonial context creates international obligation prohibiting the subjugation of citizens externally by another state and internally by their own states with denial of their fundamental freedoms and their legal right. Modern self-determination is a protection against the arbitrary rule of governance that commits crimes against humanity and justifies multilateral intervention and, if that fails, justifies unilateral action to assist regime change. If one accepts the narrow meaning of Articles 2(4) and Article 2(7) what is proposed in the name of self-determination is illegitimate.

Article 2(4) of the Charter, like Article 1(2), received the support of the ICJ. In the Corfu Channel case,[[606]](#footnote-606) when the Albanian State failed its international obligation to facilitated safe passage through the Corfu Channel and cost the lives of British Sailors, Great Britain undertook a military operation and removed the Albanian mines. The British pleaded that mine clearance did not adversely affect Albanian political independence or territorial integrity. The Court was not convinced that the gathering of ’large number of warships’ [[607]](#footnote-607)engaged in mine clearing in the territorial waters of a state, without their permission was nothing more than ‘manifestation of force’, such as that has in the past gave rise to most serious abuse and as such cannot, whatever the present defect in international organisation find a place in international law. ‘Intervention is still less admissible in particular form it would take here’ [[608]](#footnote-608)since the Court thought that most powerful States ’[W]ould lead to preventing the administration of international justice itself.’*[[609]](#footnote-609)*Clearly, the ICJ could not support such proposition.

ICJ’s reasoning is clear. First, unilateral action by sovereign states, in the territorial waters of opposing sovereign states, without their consent is not convincingly friendly and constitutes a threat of force.

Second, if a State contemplated unilateral action on account of another State’s breach of international obligations, then it should first seek a peaceful resolution of the dispute and act unilaterally only if it fails to resolve the problem.

Third, threat or use force by the powerful may prevent discharge of international justice.

These three principles are sustainable by international diplomatic history and state action reappear regularly during discourses on self-determination as an international obligation, especially when it is not discharged, or when multilateral action with international due processes is undertaken. This is due to the fact that international justice is best served by compromise and balancing of purposes and principles and interests of sovereign, equal nations.

The Charter as a normative instrument aims for compromise and conditionality as suggested by the hypothesis. Therefore, it is more helpful for global peace and security and international justice to consider the Articles 1(2) and 2(4) 2(7) not in a hierarchical order but as complementary parts of a useful process, when primacy of one Article over the other adversely affect the process and the hypothesis will not hold true.

### 5.5.3 Article 2(4) and Legal Norm of Self-Determination; Franck vs. Henkin

The debate between the two eminent jurists[[610]](#footnote-610) Franck and Henkin, took place in 1970-1971 starting with Franck’s article titled,’ Who killed article 2(4)? Or changing norms governing the use of force by state.’[[611]](#footnote-611) The debate seems to be about the Article’s total irrelevance after 25 years, like the relevance of a ’Magellan’s map’[[612]](#footnote-612) to the modern navigator. This was not a discourse on methods of interpretation of the Article but on its relevance on specific events. Both jurists occupied the same jurisprudential position in view of their assertions and their rebuttal, they could only content with the rebuttal of each other’s specific aspects of the events and not the general intended legal effects of Article 2(4).

Franck blamed the nullification of Article 2(4) on three causes:

 (i) The states,

 (ii) The paradoxes unforeseen by the framers of the Charter,

(iii) The changing nature of war.

First, the states often fail to settle their disputes or pursue national interests by resorting to the threat or use of force.

Second, the Charter was drafted on the misconception that wartime alliances formed by ideologically distinctive states, would continue.

Third, a change occurred in the nature of warfare. Nuclear warfare meant building peace on the doctrine of Mutually Assured Destruction (MAD). The super-power wars-by-proxy aimed to undertake regime change and arrest the spread of influence of a particular block. These modalities of war are distinctive from the experiences of the framers of the Charter.

The Frank-Henkin discourse raises several issues. First, it is an implicit suggestion that these armed conflicts, particularly wars of liberation to achieve self-determination, were beyond the kind of war envisaged by Article 2(4). It is reasonable that Article 2(4) soon after World War II is referring to that kind of war and therefore it prohibited it. It is odd that war is subdivided into distinctive types when their consequences are same, refugees, displaced people, death and interruption of lives and destruction of societies and economic infrastructure. Consequences of war are the reason justifying its prohibition and not its specific type.

Second, there is an implied consensus among them over defensibility of use of threat for stability. Henkin’s arguments’ [A]nd the law of the Charter, surely, does not forbid a people to liberate itself from colonial yoke*.’*[[613]](#footnote-613) The title, ’The Reports of Death of Article 2(4) Are Greatly Exaggerated’[[614]](#footnote-614) suggests that degree of tolerance of violence is practised and accepted without damaging the integrity of Article 2(4) in total.

Third, Henkin’s rebuttal is based on an assertion that the purpose of Article 2(4) was to establish a norm of national behaviour, and to deter total violation of it. Therefore, it was instructive rather than totally prohibitive. Diplomatic history suggests Article 2(4) has indeed been a norm of behaviour, assisting decolonisation yet able to prevent another world war unflinchingly.[[615]](#footnote-615)

Henkin disagreed with Franck’s view that Article 2(4), prohibited the threat and use of force, in international relations, and has been nullified. Henkin suggested that because Frank’s arguments were based on incidents in which normative law had failed while overlooking the occasion it succeeded or where intervention by the superpowers occurred, they were doctrinally defensible or insignificant.

Henkin pointed out first, that even though President JF Kennedy supported covert operations against Cuba, he did not invade it, while the Soviets claimed to have intervened within their internal affairs in Hungary and Czechoslovakia were effectively under Moscow control, were not annexed, but subjected to regime change.

Henkin’s second argument was that the Charter’s success should be measured with disputes it prevented and settled, against the few that remain politically and territorially unsettled. Furthermore, the ’Cold War has remained cold, threats remained threats, issued remained only issues, for peaceful settlement or non-settlement (as in Cyprus Kashmir and Berlin).’[[616]](#footnote-616)

Henkin’s third point was that Article 2(4) did not render the act of war ’obsolete’[[617]](#footnote-617) as noted in the case of Greece and Turkey, Pakistan and India and China, Egypt and India; however ’what has become obsolete is the notion that nations are as free to indulge it as ever, and death of that notion is accepted in the Charter.’[[618]](#footnote-618)

In this discourse, two discrete issues reside. The first is that Frank and Henkin accept state action as a source of law, and both laments the distinction between what is intended, and what is achieved. The second is the role attributed to self-determination oriented armed clashes, which clearly Frank considered as a reason for the nullification of Article 2(4). Henkin also supports the view that oppressed were justified in resorting to arms ’[N]ot international law not the law of the Charter surely does not forbid a people to liberate itself from the colonial yoke?’[[619]](#footnote-619)

### 5.5.4 Article 73 of the Charter

Higgins in all her discourses referred to the relevance of Articles, 73 and 76 as being more relevant to decolonisation then Article 1(2).

The chairman of the US Delegation to the San Francisco Conference reported to President Roosevelt, giving us a historically credible insight, to the views of one of the four drafters of the Charter, as well as the other three national members of the drafting committee. Unlike Kelsen’s view, they suggested that the treaty creates political rights. Chapter 1 aspired moral obligation, the report on the purposes of the Charter purported the following: ‘The Purposes are binding on the Organisation, its organs, and its agencies, indicating the directions their activities should take and limitation within which their activities should proceed.’[[620]](#footnote-620) With reference to Chapters XI Art 73 the Presidential Report wrote ’three basic principles of far-reaching significance to the future of dependent territories and their people.’[[621]](#footnote-621) First, the colonies of the colonial powers were now accountable to the international community over their administration of their colonial subjects. Second, their political social and educational advancement were also ’primary concern’. Third, colonial powers were now under obligation to administer in such a manner that they will contribute to the maintenance of peace and security.

It is the finding of this research that since 1945 the colonial powers came under an obligation to administer according to the will and best interests of the colonial subjects in pursuance of customary international law.

The wording of Article 73 leaves no doubt that the concept of sacred trust creates an international legal obligation that has moved beyond the scope of Article 22 of the 1918 s:

CHAPTER XI DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES Article 73 Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well- being of the inhabitants of these territories, and, to this end.[[622]](#footnote-622)

The term ’administration of territories those already under UN or members assume responsibility,’ refer to the trust territories, and the mandated territories. Colonies are included since their people have not yet attained a full measure of self-government thus colonial powers also had obligations to discharge, as listed below:

(a) To ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;[[623]](#footnote-623)

This paragraph brought colonial powers under supervision:

(b) 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;[[624]](#footnote-624)

Article 73 (b) of the UN Charter expresses the intent and ideal ends and interest of the international community, and imposes a clear obligation on the colonial powers with paragraph (e) ’[T]o transmit regularly to the Secretary-General for information purposes (…) territories for which they are respectively responsible.’[[625]](#footnote-625)This provision is an express reiteration of a UN empowerment, to supervise colonial powers to discharge their international obligation.

Therefore, it is respectfully suggested that the word “to” carries an international jural imperative and as such a choice of word, by the delegates of sovereign nations engaged in the drafting of the Charter as reported to the US President about the San Francisco Conference. In 1945, the Charter was not perceived as a political but also a legal instrument creating legal and political consequences for the future peace and security of the global society. [[626]](#footnote-626) This assessment supports the hypothesis pre-requisite; (i) formal international political systems, (ii) normative in nature, thus reliant on moderation and good faith and cooperation.

**5.6 Contemporary Constitutive Legal and Political Challenges of the Principle of Self- Determination**

### 5.6.1 Title to the Territory versus People’s and Peoples’ Rights

Self-determination challenges title to the territory. Thus, title to the territory and people rights are two irreconcilable challenging determinants of self-determination.

In 1975, Judge Dillard[[627]](#footnote-627) in Western Sahara identified the challenge succinctly when he said that it is the people who determine the law of the land and not the reverse. Therefore, the definition of a political state is a good starting point and it is found in the Montevideo Convention:[[628]](#footnote-628)

ARTICLE 1 The state as a person of international law should possess the following qualification: (a) a permanent population,(b) a defined territory (c) government; and (d) capacity to enter into relations with the other states.[[629]](#footnote-629)

The title to the territory means sovereignty over it. The relevant components of sovereignty are an effective political organisation of the settled citizens, their capacity to establish law and order, defend the realm and transact with other states. There is no suggestion of legal hierarchy among the four sub-paragraphs. They are, inseparably interrelated. No state can have territory over which, its writ does not run, and claim to govern that territory. Similarly, under the customary international law, a state cannot assume international obligation over a territory in respect of which it has no effective rule. The current international political system is built on a statist system, and three incidents of state’s sovereignty: (i) inalienable supremacy of a state within its domestic jurisdiction, (ii) its political independence, and its territorial integrity, (iii) sovereign equality among the states, these are all reiterated by Articles" 2(4) and 2(7) Chapters 1 of the Charter of United Nations:

2. (4). All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. [[630]](#footnote-630)

This Article is not hortatory because the word ‘shall’ create an obligation even though the matter of compliance by coercion remains debatable.[[631]](#footnote-631) Similarly, Article 2(7) of the Charter is self-explanatory:

2(7). Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under. But this principle shall not prejudice the application of enforcement measures under Chapter VII.[[632]](#footnote-632)

Political unity and territorial integrity are assured in all UN instruments supporting the creation of external and internal self-determination. This is repeated in Article 5(1) of the 1966 International on Civil and Political Rights:

Article 5(1). Nothing in the present may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present .[[633]](#footnote-633)

Identical reservation is repeated in the 1966 International on Social and Economic Rights and in UN GAR 2635 (1970) “Friendly relations (…).”articulates self-determination, more expressly being subject to the following:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations,

(b) (Excluded)

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.[[634]](#footnote-634)

Self-determination is an international legal norm constituted by the people’s aspect and territorial aspects, thus its external and internal modality. The balance between these two factors is achievable through moderation, goodwill and co-operation, thus elements of conditionality emerge without negating the jural imperative of the legal precept in keeping with the hypothesis.

### 5.6.2 Use and Abuse of the Doctrine of Uti Possidetis

The term means adoption of colonial administrative borders, internationally recognised borders at the time of decolonisation.

In 1887, Wharton considered the contemporary customary international law and referred to several rules: (i) an occupying state may acquire title and the benefits but also the burdens and duties and obligations of the sovereign power it replaces. This principle was also referred to by the ICJ in the South-West Africa case (section 4.3.1), (ii) the administrative borders at the time of occupation remained intact. Wharton refers to treaties concluded by the newly-born USA with Great Britain in 1783, which claimed nothingnew under treaty from Great Britain save what colonial Americans already had by way of territory affirming uti possidetis.

In 1906, Moore also follows Wharton two rules and argues that determining states’ boundaries is a political matter. He argued that the courts were bound to follow the decision of the department of the government to which the assertion of its interest against a foreign power is confined to legislature and executive[[635]](#footnote-635) thus by the decisions of the relevant ministry, and their ’confided national interest’. [[636]](#footnote-636) There is no mention of uti possidetis as a term referring to rule.

In 1944 Hackworth referred to the term. When it is simplified it can be traced to the Boundary Settlements of 1810 between Columbia and Venezuela and between Guatemala and Honduras in 1821 and to the Swiss arbitral award of 1924 on the Columbia and Venezuela matter.

When the Spanish colonies of, Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of constitutional international law to which they gave the name uti possidetis juris in 1810. It meant that in law, there was no territory in the formerly Spanish America without a master. Finally, this principle excluded the attempts of Europeans colonising state on territories which they might have tried to proclaim terra nullius, the international situation of the Spanish America, was from beginning entirely different from that of Africa. This principle later received a general confirmation with a new name; Monroe Doctrine while being the basis of South American Public Law.[[637]](#footnote-637)

In 2002 Franck agreed that the adoption of the principle in Africa during decolonisation in the 1960s was most unfortunate since the Latin American geopolitics were distinctive when compared with North Africa, the Levant, and the Middle-East and Mesopotamia. [[638]](#footnote-638) Franck observed that it was uti-possidetis which arrested self-determination, as decolonisation occurred along former colonial borders with little consideration for their inhabitants, entrapping them in pockets as subjects of new states, often at odds with each other thus creating discontented national minorities, as well as new self-determination disputes in the post-decolonisation era.

Hackworth in 1944 refers to the advantages Latin America drew from the principle in the 1820s and how it formed part of the Monroe Doctrine of 1823. Of course, writing in the pre-decolonisation era, Hackworth could not have commented as the modern writers noted that uti possidetis was arresting self-determination.

Franck acknowledged uti possidetis served peaceful decolonisation in the 1820s in South America but that it was also preventing peace in 1970s by arresting self-determination and perpetuating consequential conflicts into 21st Century.

**5.7 Legal and State Practice in Justification of Necessity of Moderation in Diplomacy of Peace Invocation of Articles 1(2) and 2(4) and 2(7)**

The administrative challenges between theory and practice of legal principles can be reduced by moderation. Moderation is a normative expression relevant to the application of norms since they are general by nature and possesses a propensity to be counterproductive as well as productive. When many colonial territories sought independence it was also implicit that the population will also attain the right to participate in self-governance. Regrettably, this was not realised nor does it explain why so many self-determination issues existed in 2007 when there were no colonies left to decolonise. It is argued here that academic debates over abstractions deepen the ideological gap while moderation in practice reduces the conflict.

### 5.7.1 Reisman and Schachter Debate on Article 2(4) and Self-Determination 1984

The debate between Reisman and Schachter was about the threat and use of force and intervention, together with Article 2(4) and self-determination.

Reisman propounded[[639]](#footnote-639) that the Charter could not have been ethically adverse to the use of force, and to retribution and coercion, because it sought international order with collective security*,* empowering its organs to act, especially the Security Council, in response to situations threatening international peace and security. Therefore, he concluded that Article 2(4) should not be interpreted out of the context of the Charter, with a presumption of the absolute prohibition of intervention or threat or use of force multilaterally. Furthermore, when multilateral action is not available, self-help, by way of unilateral action, is legitimised. Reisman also pointed out that (a) unilateral action is not without its limitations and has to be morally justifiable and (b) should not undermine world order but enhance it and (c) intervention should be politically legitimate and distinguishable from those situations which are not. He distinguished between Soviet intervention of Hungary in 1956 and Czechoslovakia in 1966 and Uganda and Tanzania in 1979. The two Soviet interventions were against popular governments and the third intervention opposed a dictatorial regime. Reisman considers the acceptability of morally justifiable unilateral intervention, but rejection of a unilateral war beyond self-defence, with contemporary political legitimacy, totally unreasonable thus ’[R]apes common sense.’[[640]](#footnote-640)

Schachter responded in the same issue of AJIL under the title ’The Legality of Pro-Democratic Invasion’. Although Schachter agreed with Riesman’s postulate that political legitimacy is derived from the will and consent of the governed, he held that it did not place the legal obligation of self-determination at a higher level than the legal obligation created by Article 2(4).

Thus, Schachter argued that Reisman did not provide any legal or empirical evidence to justify his assertion of the primacy of article 1(2) over Article 2(4). Moreover, Riesman’s view, due to a creative interpretation and presumed conceptual primacy, would have consequences contrary to the general purposes and principles of the Charter.

The balanced and fair argument should limit its parameters to the strictly stated postulates and exclude arguments about the implicit possible consequences in the future. Since the discussions are about norms in general, their credibility and sustainability should not be rebutted, by reference to another norm. Finally, Schachter argued that if proposed normative postulates fail in achieving what they set out to achieve, then their degree of failure and degree of success should be stated. The criticism of the consequences of the norms should be legally and philosophically analysed and enquired if they are useful and just.

In conclusion to the debate***,*** Schachter first suggests that Reisman’s justified evolution of a new norm is contrary to the purposes and principles of the Charter. Thus, one can also argue first that, Reisman set out to create a new normative justification for the unilateral use of force for the purpose of regime change, as long as it furthered the purposes principlesof Article 1(2), without causing a threat to global peace and security.

Second, Reisman’s proposals are subject to prior conditions, that the Charter is normatively dynamic and that such dynamism was only possible, subject to interpreting the Charter while staying true to its purposes and principles. Therefore, if self-determination meant non-subjugation and prohibiting annexation of territory and subjects of states by another state, and did not disturb global peace and security, resort to arms and intervention was defensible. Otherwise, Article 2(4) assumed normative dominance. What were the options, of the subjugated and the oppressed and annexed people of the territories? The inherent right of subjugated people to self-defence allows the resort to arms.

This too is acknowledged by Article 41 of the Charter, which suggests collective action, while Article 51 allows the unilateral action of use of force in self-defence.

### 5.7.2 Legal and Political Basis of Administrative Necessity of Moderation

The rejection of war by the international community as an instrument of international diplomacy in preference to the adoption of diplomacy of friendly relations, and diplomacy of international law, among the states, forms the two pillars of the UN Charter-based formal international political system.

These are stated in the preamble and repeated in Article1 of the Charter. The necessity to call for collective measures, against war is noted in the s and the Charter with their choice of words scourge of war and inhumanity while man inflicted on a man twice in 1914 and 1945.

Therefore, necessity caused the international community, not only to adopt a change of policy and formalisation of friendly relations under international law but as a legal expression of intent. This intent is found in the UN Charter which is an exceptional international treaty, forming an international constitution-like document for the regulation of intro and international relations.

Therefore, in theory, the said change regulating inter and intra-national relations are a formalised administrative policy due to several reasons.

First, evidence of moderation is a rejection of power-based relations and accepts sovereign equality.

Second, the moderation is present in the classification of states since a state is a legal person, and all are legally equal.

Third moderation is in consent-based international order inclusive of democratic principles, rules of legitimacy, and international rule of law, and sovereign quality protects the minority of states from the majority of states.

Fourth moderation protects the legitimate international values subject to international processes of, the rule of law and generally accepted moral principles not only of the powerful but less powerful states too.

Fifth moderation and legitimacy and therefore fairness and justice which are formed in compliance with international norms inclusive of intrastate conditions. Such conditions allow people to express their freely formed will, to determine their political future without being subjected to headcount.

Sixth moderation in a democracy does not mean subjugation of minority to the rule of the majority. Only moderation of all constitutional norms inclusive of separation of power and fundamental liberties can prevent democratic oppression. The necessity of moderation in the interpretation of Articles 1(2) and 2(4) and 2(7) of the Charter has already been discussed above; similarly, the proportionality of threat or use of force is equally relevant to the diplomacy of peace.

Seventh, moderation in the peaceful resolution of international disputes and administration of international policies and legal principles does not mean continued search for political resolution by one party within international law, while the gross benefactor from the disputed situation, insists on a political solution while being indifferent to contemporary norms of international law. This posture was taken by South Africa with regards to its mandatory duties over the mandated territory of South-West Africa. The ICJ in 1966 case rejected South African arguments that complainants were not justified in their cause of action since they were acting in compliance with Article 75.[[641]](#footnote-641) Article 75 stipulated that the trusteeships over former non-self-governing territories, meaning colonies and mandated territories, shall be established for the administration and supervision’ [B]y subsequent individual agreements’.[[642]](#footnote-642)

In conclusion, moderation means undogmatic approach to policy implementation in international jurisdiction and administration of international rules. Moderation means conditionality and general application of norms creating irregularity. All of these support the hypothesis concerning self-determination that irregularity and conditionality do not negate jural imperative of the legal precept.

### 5.7.3 Challenge of the Moderate Approach to Implementing the Self-determination and Remain Compliant with Article 2(4) and 2(7)

A moderate approach to the interpretation of the Charter is justified because it formalised principle of moderation. There are other reasons.

(I) The Charter is an international ‘constitution-like’[[643]](#footnote-643) multilateral treaty, with a degree of certitude found in the articles of a constitution of a state and both are normatively general.

(ii) Charter balances domestic and international community’s interest.

(iii) International peace and security of 192 states come first before the justice for one state, as noted in most of the self-determination based disputes in 2010 due to failed decolonisation of some 40 years earlier because resolving in another way would pose a threat to international peace and security (Cyprus, Kashmir, and Palestine)

(iv) Moderation in implementation of self-determination is justified for several, reasons; (a) Directed by the Charter, (b) the diverse modalities of self-determination, and the improbability of an absolute ban of threat or use of force, necessitate moderation in state action too, (c) Article 2(7) is an express reminder of limitations of international jurisdiction and the fact that without the support of the States in practise of moderation these limitations are insurmountable.

Application of moderation in self-determination as a state practice is seen in Canada and deliberation of the Supreme Court of Canada (SCC). There was no resort to the threat or use of force. There was no need for UN involvement, nor could one describe it as being a typical self-determination attempt noted during decolonisation era. Therefore, neither Article 2(4) nor Article 2(7) was invoked. The SCC stated that:

In our constitutional tradition, legality and legitimacy were linked …and governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.[[644]](#footnote-644)

The Court, with 150 years of stability, saw no reason to suspect any breach of internal self-determination within the confederation and so the whole matter was beyond Article 1(2) and totally beyond Article 2(4), and since no other state or international organisation had acted contrary to the Constitutional Court there was no need to invoke Article 2(7) of the Charter.

One could blame immoderation to unsatisfactory decolonisation of Western Sahara. First, it was violently contested by two neighbouring states since both laid claims to the territory. Contrary to Article 2(4) they even fought a short inter-state war. Claims of sovereignty over the territory came before the International Court of Justice. Furthermore, free will of the people to determine their own political future by plebiscite was not used. Eventually, the UN took a more active role with the transitional administration and the political future of Western Sahara yet to be constitutionally concluded. One can suggest that in Western Sahara Article 1(2) and the peremptory legal principle of self-determination that evolved through the ICJ’s own jurisprudence during 1950-71 was not followed. One could sympathise with Sahrawian and with Franck and his criticism of UN with his article titled: “Stealing of Western Sahara*.*”[[645]](#footnote-645)Events in Western Sahara were contrary to Article 2(4) where opposing parties engaged in a civil war and a short conventional war. UN-supervised general elections years later without resolving the contested issues and conventional war.

Moderation has a limitation in its application to self-determination, as noted in the violent events in Balkans to be discussed later in Chapter 6.

In conclusion, moderation is justifiable in self-determinations subject to limitations of its determinants and components.

**5.8 Challenges of State Practice, Moderation, East Timor, Kosovo, Canada**

If moderation is a moral administrative norm, then it ought to be traced and identified within constitutional disputes with varying degree of intensity of disorder. East Timor was a violent decolonization necessitating intervention. Kosovo was part of a federation that broke up with violence, necessitating international intervention. Quebec has a history of political agitation over a century. All three represent different phases of state creation, decolonisation, secession, and succession.

### 5.8.1 Moderation, as an Imperative in State Action

The exercise of moderation, in the discharge of international obligations, brought about by the international legal norm of self-determination was justified on legal and political grounds.

First, the strict interpretation of the Articles of the Charter is not always helpful because they are general, and normative in nature (legal arguments).

Second, due to the diversity modality of self-determination and the improbability of a total ban of threat and use of force (state practice).

Third, Article 2(7) highlights the practical relevance of moderation in the current international political system.

For instance, the cases of South-West Africa (Namibia) and Western Sahara and East Timor directly concerned non-self-ruling territories, colonies, and decolonisation, under the self-determination principle. Decolonisation meant the ending of alien subjugation thus associated with external self-determination. This is distinctive from achieving internal self-determination, effective, representative, participatory, constitutional order inclusive of principles of democratic accountability, the rule of law, protection of minorities from the oppressive majority, and to uphold fundamental freedoms for all of the citizens one has to rely on internal self-determination. Therefore, moderate description of self-determination is broad in range and scope.

Although decolonization was achieved to some extent in South-West Africa by 1971, and Western Sahara by 1975 and East Timor by 1996, one could not reasonably argue that self-determination was also achieved simultaneously. Regrettably, UN agencies remained engaged with some issues as in Palestine and Kashmir since 1945 to this day. The search for peace in Cyprus started in 1964 and still continues.

The significance of the cases of East Timor, Kosovo and Canada is that they demonstrate how self-determination claims and processes arise in the post-decolonisation era, thus demolishing the fallacy that self-determination was confined to the decolonisation era.

The historiography of self-determination demonstrates stage-by-stage development. South-West Africa was a mandated territory, while Western Sahara and East Timor were colonies that were not self-ruling territory as announced, by the ICJ in 1996, even though it was decolonised in 1974, and occupied by Indonesia and then annexed in 1975. Kosovo until 1999 was UN-administered. Before 1989, it was an autonomous region. After 1989, its constitution was unilaterally changed, by Serbia. Opposition to Serbian subjugation led to a civil war. Quebec, in contrast, has been and continues to be, part of the Canadian State since 1868 a portion of its population manifesting desire to become an independent state.

If South Africa had been moderate in its application of its mandatory powers and had facilitated the transfer of the administration of South West Africa to UN trusteeship, and be contented with years of exploitation of the natural resources of her mandate then Namibia would have acquired her independence before 1991.

In the case of Western Sahara, had Morocco, Algiers and the Sahrawians negotiated as originally agreed and not resorted to separate, unilateral action, and engaged in a short conventional war, and not ignored the wishes of the inhabitant dispute would have been resolved long ago. Instead, Morocco marched thousands of non-inhabitants into the disputed territory to lay a claim as if it was a newly-discovered and unpopulated territory (terra nullius). This prolonged the dispute for half a century.

Franck rightly expressed his dissatisfaction with the ineffective UN involvement by titling his article “Stealing of Sahara”,[[646]](#footnote-646) while Drew famously called her article on East Timor with reference to 1996 ICJ proceedings: ‘International Law on Trial’.

### 5.8.2 Discourse in Fairness: Relevant Facts in the Matter of East Timor

In 1960, the UN recognised East Timor as a Portuguese colony thus entitled to be decolonised. In 1974, Portugal expressed its intentions to decolonise when the rather non-cohesive inhabitants (fewer than 100,000 in number and speaking 12 languages) went to vote to determine their future.

A transitional administration was established in 1975 as Portugal went through a revolt ending the long rule of General Salazar’s regime. However, the abrupt power vacuum led to a rift in the transitional administration constituted by those who supported integration with Indonesia, and those who wanted independence. The ensuing violence and the call of a minority to unify with Indonesia provided the opportunity to Indonesia, to intervene and eventually to annexe the island.

The armed struggle led to repression, and the death of thousands. The UN General Assembly and Security Council remained engaged simultaneously with the events.

The East Timor Case came to the ICJ in 1996 in the context of adverse consequences of the TimorGap Treaty between Australia and Indonesia on the self-determination rights of the inhabitants of the Island. The ICJ in passing also declared that East Timor was still a non-self-ruling territory and self-determination was their right entitlement thus effectively dismissing the Indonesian claim to the title and nothing more. Academic views from Scobbie, Chinkin, and Bowering, Clerk, and Susan Marks, to name but few are aware that Australia had no legal basis to conclude a treaty with Indonesia, with an imperfect title verging on illegal occupation (Chinkin).[[647]](#footnote-647) The clerk[[648]](#footnote-648) could not see how Australia’s argument that there was no Security Council Resolution as in the case of Rhodesia, Namibia, Cyprus, Iraq rendering new regimes illegal, the treaty was valid in view of the fact that, the Security Council was relying on General International Law .5.9.3 Has the international community failed the inhabitants of East Timor?

Catriona Drew[[649]](#footnote-649) in two separate articles[[650]](#footnote-650) stated that the international community and law failed to assist the islanders. She titled one of her articles ’East Timor Story: the International law on trial’.[[651]](#footnote-651) Bowering argued that it was not the international law of self-determination but the international community’s ’political betrayal’[[652]](#footnote-652) of the islanders which denied them self-determination.

The implications of her arguments in 1999, one that, first since the island has been identified as a colony and entitled to self-determination, as of 1960[[653]](#footnote-653). Furthermore, its independence should have been protected from Indonesian invasion in 1974, and the ICJ in 1996 should have had more to say beyond that the islanders were entitled to self-determination.

Drew’s second criticism is substantive and does not consider incertitude of entitlement to self-determination.[[654]](#footnote-654) This may be viewed as being misleading.[[655]](#footnote-655) After all UNGAR 1514(XV) 1960 paragraph 2 reference to’ [A]ll peoples have the right to self-determination (…).’[[656]](#footnote-656) The concept ought to be read in conjunction with para. 6 of UNGAR 1514(XV) 1960, which prohibits 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*.*’[[657]](#footnote-657)

The third criticism is procedural thus constitutive urging that better procedures should be available to attain self-determination, in contrast to the hazardous processes of the General Assembly and that of Security Council which are distinctly polarised. The intention here is not to criticise these two excellent articles, but to refer to the paradox and dichotomy of national and international jurisdictions, legally separated yet legitimately integrated on the matter of self-determination whereby a lawyer is compelled to criticise political realities, because the law falls silent in view of gross violation breaches of international norms and legal precepts.

The articles highlight the paradox of claiming a right which is political in nature, thus unjusticiable – Drew’s justifiable criticisms. Two points must be made. First to make a case against the general international law of one specific case, and overlook incertitude of international law in general and impute it to self-determination is unfair. Second, to overlook incertitude of international law because of associating it too closely with the domestic law is not helpful because it manifests assumptions of similarities between international and domestic law and order when they are distinctive.

Firstly, the expectation of similar degrees of certitude in international law in comparison with domestic jurisdiction is unreasonable. Which institutions of both legal systems are so familiar, that have given rise to such expectations? Can one point to similarities between domestic and international sources of law? What are the similarities among the executive agencies in both systems? Similarities and diversities in judicature are apparent as well their diversities. Consider the following statistics from[[658]](#footnote-658) East Timor: some 21.5% voted to unite with Indonesia while 78.5% voted for independence. The ensuing violence between the two groups led to such carnage that the colonial authority declared its inability to manage the island thus giving Indonesia cause to intervene and subsequently to annexe. Moderate assessment of the political aspect of these two incidents in the context of decolonisation will show the former to be legitimate, and the latter annexation not lawful.

In response to the sum of Drew’s criticism, one must note that the administration of international law and justice are best served by assessing the appropriateness of a general legal principle to diverse, specific, and legitimate circumstances.

Although decolonisation as a modality of self-determination and non-subjugation to alien rule in the colonial context is applicable to all people, in the post-colonial context the expression all the people needs further qualification. The claimant has to be a legitimate and cohesive body that has exhausted all multilateral constitutional and international processes before resorting to independence by way of secession. Legal incertitude should not detract administration of international law. Nor similarities between domestic and international law make them same.

Moderation in international law may be helpful while in the domestic legal process it is an impediment in the prosecution of justice. Nevertheless Drew’s above referred two articles written in 1999 and 2001 like Franks’ article on Western Sahara, admirably highlight the controversy which surrounds the legitimate practice of self-determination. Therefore, Drew’s suggestion that international law is on trial, is opposable, even if her conclusion inspires sympathy to the injustices suffered by the former colonial population.

Nevertheless, Drew’s appealing for timely intervention, to elevated adverse effects of the irregular application of self-determination, is a moderate view and a fair point. Doctrinal approach to intervention and non-intervention has to be moderated. Moderation means appropriateness of the measured action or inaction thus allowing the formation of legitimate practical defences in international humanitarian law, in view of general bans on intervention.

Intervention by Indonesia in the absence of intervention by the colonial power and UN was justifiable, but her annexation of the territory was not. Brownlie and Cassese pointed out that self-determination is aperemptory legal norm erga omnes, therefore, all nations including the third party nations (i.e. Australia) were under some form of obligation within a due process, to further the achievement of self-determination. This may involve giving armed support to the legitimate claimant in legitimate circumstances. Similarly, the right to armed struggle by a claimant of self-determination arises, once all internal self-determination possibilities are exhausted and Constitutions lose their legitimacy. Therefore, the justification for secession and intervention are circumstantial and factual rather than an absolute right, or an opposable act by immoderate acts of a Sovereign States in pursuance of Article 2(7). This means conditionality of intervention and state succession and secession as modalities of self-determination as stipulated by the hypothesis herein.

### 5.8.3 Assessing Fairness in Post-Colonial State Practice of Self-determination in Kosovo and Canada

To assess the fairness of implementation of self-determination in the post-colonial era, two case studies of Kosovo and Canada are cited where several questions are raised. Did the constitutional order have the capacity and the state have the political will to implement self-determination? Could state resist immoderate state policies, and measures negating international obligation, arising from Articles 1(2) and 2(4)?

Immoderate behaviour in the Canadian constitutional dispute was not prominent. Ethnic hate and religious intolerance in Serbian, Bosnian, and Serbian-Kosovar wars were prominent and historically verifiable. In Yugoslavia, the role of history and geopolitics where Christendom and Islam impressed their mark on the region’s history ought not to be overlooked. Huntington’s arguments even if Edward Said did not agree with them, historically support this view.

First, the historical continuum of attempts to moderated doctrinal oppositions and conflicts, in preference to peacefully regulated relations between different religious sects, go far back as far as Westphalia. Seven Year War of Europe (1756-1763) were fought to settle Spanish and Habsburg supremacy in Europe and all around the world just like the WWI and the WWII by the Democracies[[659]](#footnote-659) against non-liberal alliances.

Second, the European political and legal developmental continuum can be analysed while relying on records as primary materials. These demonstrate uninterrupted socio-legal and geopolitical strands, in the diplomatic and political history of the Balkan states from the Westphalian era to that of the UN, whose effects are obvious in the development of liberal constitutionalism.

While looking at this continuum, one is able to ask: is it reasonable to expect stability and peaceful change within the Constitutional order of Yugoslavia in 1989, in view of the unilateral abandonment of the 1963 Constitution by the former President Milosevic? Could his attempts to create a unitary state from a federal modality of governance in view of the diverse diplomatic, political history of the region progress unchallenged? This part of the Balkans was not an Islamic colony but an Islamic province of an empire with 800 years history thus a part of a regional administrative system of an established Empire.

Europe was divided along ethnocentric divides until 1918 as the victors defeated the Central Powers, and their modality of governance, and reconstructed the Balkans without paying any attention to social facts. These social facts clashed, leading to the civil war of 1988-1991, a war of secessions along ethnographic divides, thus presenting an uncanny reversion to the past. The map of the Balkans now resembles far more pre-1876 since 2010, than it did in 1945.

|  |
| --- |
| ***Chronology of Names given to the former Socialist Federal Republic of Yugoslavia*** |
| *1918 Kingdom of Serbs, Croats Slovenes ( anti-non-Christian modality of governances)* |
| *1928 Kingdom of Yugoslavia ( total undermining of other regional governments )* |
| *1943 Democratic Federal Yugoslavia- acknowledging autonomous governments* |
| *1963 Socialist Federal People of Yugoslavia (empowering federal states)* |
| *1963 Socialist Federal People of Yugoslavia (empowering federal states)* |
| *1974 joined also region of Vojvodina Kosovo as equal Federal States(enlarging federation)* |
| *1989 Attempts of Serbian Hegemony* |
| *1991Civil war and secession of SFPY*  |

An administrative region of an empire, lasting from 1348 to 1918 underwent three changes i.e. (i) Austro-Hungarian Annexation of 1875, (ii) First World War and the emergence of new states (iii) The Second World War and the emergence of the Iron Curtain in 1946 till 1990. These were not evolutionary but socio-political upheavals.,

How reasonable is it to expect compliance with international law in the midst of constitutional disorder in a region that has been the scene of the clash of civilisations as Huntington would have explained? Whether or not the Paris Peace Conference in 1918 was able to restore a new European public order, the world was witnessing the emergence of a new international legal order. Is it remotely fair to expect the effective application of the Charter or peaceful application of self-determination to violent political changes in the Balkans?

Berman observed that *’*[C]ontrary to some assessments of this period the way certain interwar texts articulated this reconfiguration inaugurated an intellectual revolution in international legal history’[[660]](#footnote-660) whereby liberal nationalism and statist positivism gave way to decline in state sovereignty and an impetuous to the emergence of a new international order sharing the Wilsonian vision. Regrettably, this vision shattered due to its shortcomings [[661]](#footnote-661)(that are well-articulated by Pomerance), when self-determination emerged again in 1945 with the UN Charter. It is equally possible to see the events from Franck’s perspective, whereby an attempt to democratise totalitarian states, by the people claiming their right to democracy[[662]](#footnote-662) brought internal self-determination back into Europe. Lee Brilmayer argued that secession and current international law supporting political unity and territorial integrity[[663]](#footnote-663) are not incompatible thus giving credibility to ethnonationalism and its continuing role in state creation.[[664]](#footnote-664)

What was being witnessed in the 1990s in the Balkans did not fall short of an anomie,[[665]](#footnote-665)as Durkheim would have described, for several reasons. First, new political and constitutional values, and social orders emerged since Westphalia. Second non-stop violent changes in a region, with incredible ethnic and religious persecutions caused deep socio-political rifts. Third, the battle of ancient empires for supremacy was displaced by an ideological confrontation introduced by the Russian Bolshevik Revolution and added new dimensions to the social change that was brought by WWI. Thus, as the old order faded and the new order failed to deliver the anticipated expectations, despondency and negation of moral rectitude, ushered social disorder and untold barbarity at the end of the 20th century into the heart of Europe.

In the case of Bosnia and Kosovo, the claims for self-determination were violently opposed and the claimants sustained their demands with equal violence when their constitutional processes failed. In short, the modern international order had no answer on how to respond to changes at the end of the Cold War. The EU set up a special arbitral committee headed by Judge Badinter of the French Constitutional Court, to consider the legal status of the fracturing federation. After the bloodshed and UN failure, Bosnia received its international legal personality.

Not only did the UN fail to assist the self-determination process, they could not stop breaches of Articles 2(4) and 2(7). Serbia and Montenegro and Serbisca,the Serbian region within Bosnia-Herzegovina attempted to preserve state secessions by force of arms until brought to a halt. It is intellectually defensible to contrast Quebec’s attempt to break away from Canada. The former attempted but Kosovo succeeded in secession. Kosovo also created its own ethnic minorities with constitutional safeguards. Nevertheless, Quebec and its indigenous population’s claims too, await settlement.

**CHAPTER 6 CONTEMPORARY SELF-DETERMINATION CLAIMS AND PROCESSES IN QUEBEC AND KOSOVO**

**6.1 Suitability of Canada and Kosovo as a Case Study**

Quebec’s attempted and Kosovo’s achieved, secession makes them two suitable case-studies on state practice, and theory of external, and internal self-determination, in the post-decolonisation for several reasons. First, both have similarities and dissimilarities and provide an opportunity for analysis in view of the scarcity of secession cases.[[666]](#footnote-666)

Second, both have a similar imperial history, ideological clashes and persisting claim for self-determination.

Third, the federal constitutions of Canada and SFRY acknowledged the political union among the constituent states. Yet only SFRY had an express constitutional process for secession.

Fourth, Quebec does not have the recent violent history of inter-communal strife, or religious intolerance and ethnic violence. The Balkans has known little peace since 1902. The Balkan Wars of 1912-1913 were followed by WWI and then followed by WWII. Within the space of 26 years, no fewer than 11 years of war were fought. Two federations developed distinctive self-determination process. One peaceful and the other one violent. For instance, Quebec’s domestic legal process led to the judicial view that the legitimate secessionist claims cannot be frustrated by non-responsive constitutional order by resisting amendments.

Kosovo’s secessionist movement commenced upon the demise of SFRY, and commencement of a civil war. Kosovo’s secession in 2008, occurred at a time when Serbian sovereignty claims over part of its territory were suspended as a direct result of the failure of extensive diplomatic negotiations for an agreed future status, without turning to the pre-1999 constitution. The act of suspension commenced with the UN management of the region. In 2008, when the Kosovar assembly declared independence, the UN General Assembly requested an ICJ advisory opinion, thus, every organ of UN was engaged in the process of determining the status of Kosovo.

Fifth, these two case studies support the hypothesis presented in Chapter 1.1.2 that moderation, cooperation, harmonisation, goodwill, international justice fairness, international peace and security are deemed to be legitimising determinants of international law and thus of the international legal principle of self-determination. Furthermore, these determinants are normative administrative processes, which overcome two inherent challenges of international law. (i) Those inherent aspects to a formal state-centric international political system and the clash of national with international jurisdictions, laws and interests and processes. (ii) Challenges arising due to conflicts among international peremptory norms and conflicting constitutional principles. The inherent challenge of self-determination necessitates moderation, cooperation, harmonisation, goodwill, for its implementation without disturbing international justice fairness thus international peace and security. Furthermore, the inherency of the challenges affects the legitimacy of policies and the implementation of the legal principle of self-determination by reference to the rule of law and legitimate constitutional order. When the peace process fails, threat, and use of force and violence sets in reaching peaceful negotiated settlement difficult to achieve.

Sixth, the extreme contrast between the Canadian and Yugoslav Federation’s self-determination claims through secession manifests the legitimising determinants of unilateral and multilateral intervention. The customary and the international treaty law prohibit intervention, in the domestic jurisdiction of a state, or with its territorial integrity. The exception to this is multilateral intervention after UN due process. Therefore, self-determination is legitimate when the claimant, the claim and claim process are in compliance with the international law. Legitimacy is the very issue raised and dealt with by the hypothesis advanced in Chapter 1.1.2. Events in Canada and in Kosovo demonstrated that legitimate claims, the claimants and legitimate processing of self-determination are contingent on the constitution’s responses and its implementation. These include appropriate amendments, by upholding the rule of law, by protecting rights and freedoms of all political entities within the state. It will be demonstrated herein that an arbitrary claim and an arbitrary objection negates rule of law, and removes the legitimacy of civil society.

### 6.1.1 Legitimacy of Secession; Quebec’s unilateral attempts

The process of implementing self-determination is subject to its legitimising component and determinants (Chapter, 1.1) in compliance with contemporary peremptory international legal norms with a legitimising purpose:

(i) The legal norm is for the protection of international peace and security, by prohibiting aggression, and other breaches, in preference to spreading friendly relations. [[667]](#footnote-667)

(ii) To attempt, to protect states political independence, territorial integrity and their sovereign equality and the self-determination of peoples, through friendly relations.

(iii) To co-operate, in good faith to resolve common social economic problems and achieve greater freedoms by confronting discrimination and inequality.

(iv) The harmonisation of collective actions to implement legitimate self-determination without breaching other equally important peremptory legal principles.

The above international purposes compel the international community to intervene legitimately, in the domestic jurisdiction of a state, subject to the qualifying legitimacy of the claimant, claim, and process of claiming without causing a threat to international peace and security by diplomacy, with non-violent retributive measures. When they fail, international threat and use of force and secession, become the choice of last resort.

The inability of the UN to respond to the crisis in Ukraine, and Syria, since 2013 show that intervention is normative and multilaterally political decision. If and when the international community does not discharge its international R2P, the citizens remain exposed to crimes against humanity and breaches of humanitarian laws by the conflicting parties. Therefore, challenges of intervention and secession state succession are political and legal under the current international law. They were confronted by ICJ in the case of Kosovo and by SCC in the case of Quebec, justifying their relevance to the hypothesis advanced herein.

Quebec has been trying to secede since the 18th Century, providing examples of challenges related to secession, state creation, and recognition and consequents caused where the will of the people does not coincide with title to the territory. This can be summed up as follows:

(i) The legitimacy of the components and determinants of self-determination defined as the claim, the claimant, and the claim process of self-determination were identified and defined in 1953 by UNGAR 742VIII in the context of external self-determination. Furthermore International Covenant on Economic, Social and Cultural Rights (1966) UNGAR 2012 (XXI) (A-C) *[[668]](#footnote-668)*and the International Covenant on Civil and Political Rights (1966) UNGAR 2200(XX1) A[[669]](#footnote-669)concerned the existing states and internal self-determination subject to maintenance of political unity and territorial integrity of the states.

(ii) Secession is not a legal entitlement but a political fact thus subject to moral justification. As such it is not subject to any imperative for uniform application. Nevertheless, secession is subject to the legitimising circumstances, creating the legal effects, such as the acquisition of an international legal personality through independence, state succession and secession.

(iii) Given the right circumstances, unilateral secession ’may eventually acquire legal status if recognised at the international level*.*’*[[670]](#footnote-670)*Nonetheless,as the Supreme Court of Canada (SCC) declared that State*-*Recognition was no longer’ [A]n exercise of pure sovereign discretion, has become to be associated with legal norm.’ *[[671]](#footnote-671)* SCC relied on historical claims for succession and even if a claim cannot benefit from international law by way of right, can be furthered on account of its legitimacy. The SCC reached this conclusion, by distinguishing between legal and political, thus constitutionally granted, legitimate rights and international legal entitlements.

(iv) SCC held that state-creation, on secession and recognition were political acts, and were not of legal nature. It is, therefore, implicit that secession is achievable with the political will of the people, without unjustly challenging other’s title to the territory, or depriving other’s legal and legitimate political entitlements, and by compliance with international law. It, therefore, follows that secession is as much legally subjective as it is politically objective.

(v) The valid title can be challenged and the legitimacy of the challenge verified by regressive tracing of the will of the people, at all material times. Historical tracing of the legitimacy of ’material times’, manifests the inter-temporal challenges of self-determination. Attainment of legitimate title today differed from the past, but is still subject to rules and therefore protects current title regardless of their legitimate attainment in the past.

The review of legitimising relevant facts of the Canada case-study starts in 1763 when Great Britain received Quebec from France at the Paris Peace Conference, held at the end of the Seven Year Wars.

Canadian territory today was established under treaty law, conquest, discovery and new settlements after the American War of Independence under the 1774 Quebec Act legitimately in compliance with the inter-temporal doctrine (the international law of the day.)[[672]](#footnote-672)

The 1791 Canadian Constitution,[[673]](#footnote-673) granted by the Crown, divided Quebec into two administrative provinces of Upper and Lower Canada, dominated by English Protestants and French Catholics respectively. The Crown granted land to the British refugees from the American War of Independence, 100 acres for the families and 70 for a single person as well as funds to start a new life. Although one-seventh of the new lands was granted to the Protestant clergy for their sustenance, the right of the Catholic Church was affirmed [[674]](#footnote-674)

Autonomous self-rule of the former French territory of Quebec initially served British national interests in view of the incessant hostilities between Protestant England and Catholic France. However, the 1837 rebellions and 1839 secessionist movement in Lower Quebec led to Lord Durham’s report[[675]](#footnote-675)and his recommendation of the union of the two Canada’s. The report advocated two policies ’in order to deny French Nationalism*’*[[676]](#footnote-676) and to hasten what Lord Durham saw as the inevitable assimilation of the French-speaking Canadians into the English-speaking majority.

The Crown’s 1867Canadian territorial settlement policy relied on the belief that legal citizenship could only be created upon realisation of separateness[[677]](#footnote-677)of the French, English, minorities and the First Nations. Ethnically grouped communities were granted equal political rights and degree of autonomy conditional upon respecting others in Canada as a whole. In 1865 Sir George-Étienne Cartier during a debate in the Parliament said that ’Federalism was a legal response to underlying political and cultural realities that existed at Confederation and continues to exist today.*’*[[678]](#footnote-678) That view received judicial recognition in 1996. Thus, Quebec’s secessionist claim has a historically persistent legitimacy. However, the Court could not find factual justification for secession.

### 6.1.2 Quebec’s National Assembly Bill 150 - Commission on Independence

In 1991 the Quebec Provincial Legislature passed the ‘Bill 150**’,** empowering the provincial authorities, to appoint a Commission, to report on the process of determining the political and constitutional future of Quebec. Five eminent international jurists; Franck, Higgins, Pellet, Shaw, and Tomuschat, gave a legal opinion on two specific questions. (i) The future international borders of an independent Quebec [[679]](#footnote-679)(ii) Protection of the territorial integrity of the state in view of self-determination claims within Quebec.

The Commission divided its reasoning, into three temporal segments: before, at the time of becoming independent and afterwards. The Commission opined that the territory of Quebec will be the same as it stands today, since 1898 and 1912 drawn by the British Imperial Parliament in accordance with Federal Legislation.

Commission opined that the political independence and territorial integrity of Quebec would be protected by the constitution and international law since indigenous people in Quebec have no right to secede. ‘[P]arsons residing in certain border regions of Quebec, who, as such enjoy no particular protection under international law.*’*[[680]](#footnote-680) Principle of Equal Rights and Self-Determination of Peoples has limited relevance …’furthermore ‘[T]hat international law as it currently stands does not spell out all the implications of the right to self-determination’,[[681]](#footnote-681) that *’*[T]here is no universally accepted definition of the word peoples nor the notion of self-determination*.’*[[682]](#footnote-682)

Not only is this a very narrow but it is also a very contentious interpretation of self-determination, unlike the ones pronounced by ICJ over the years. It justifies decolonisation of some communities and continued the subjugation of the First Nations of Canada. Thus, decolonization as an imperative without the right to derogate would be denied to them unfairly and unjustly.

The Opinion interpreted self-determination, with reference to the Charter and to the norm-creating UN conventions, resolutions, and to the ICJ deliberation. It was a narrow interpretation when compared with the findings of the CSC.

The Commission acknowledged the existence of First Nation’s rights in terms of internal self-determination without consideration of their colonial history and subjugation and denied any rights to the title Canadian Territory.

The commission opining from an unjust position of having started their enquiry on the assumption that Quebec had succeeded in achieving independence. The Committee exempted itself from explaining the First Nation’s entitlement on historical grounds while using it in support of Québécois right to the title to the territory. Nonetheless, decolonisation was right for all peoples[[683]](#footnote-683)of Quebec.

### 6.1.3 The Critique of the Commissioners’ Opinion

Commissioner’s narrow interpretation of self-determination deserve additional criticisms in support of the updated definition advanced by the SCC:

 (i) Commission’s findings overlooked the colonial heritage of Canada,

(ii) Over-reliance by the commissioners on the principle of uti possidetis, while indifferent to developed peremptory legal principles,

(iii) Ignored the imperfect decolonisation process, pursued by Canada.

Colonial heritage of Canada is part of her administrative and the constitutional, legal, and diplomatic history that demonstrates adoption of piecemeal self-rule decolonisation. This might have spared the people of Canada from the ravages of wars of liberation.

Canada was denied the benefits of the radical norms of decolonisation, as expounded by 1960 UNGAR 1541(XV).[[684]](#footnote-684) Principle V of the Annex postulated that the people were entitled to befit from the decolonisation in a particular colony, whose identity may be established by reference to,

Prima Facie geographical and ethical, or cultural distinctness of a territory exists, other elements may be brought into consideration. These additional elements may inter alia, of an administrative, political, judicial, economic or historical nature.’[[685]](#footnote-685)

Principle VI of the Annex[[686]](#footnote-686) postulates the following in no uncertain terms:

A non-self-governing territory can be said to have reached a full measure of self-governance by; (a) Emergence as a sovereign independent State. (b) Free Association with an independent State; or, (c) Integration with an independent State.

The Resolution’s principle VII stated that free association should be the result of a free and voluntary choice by the people of the territory concerned, expressed through informed and democratic processes based on respect to the cultural characteristics of the people of the territory, and constitutionalism that legitimises the will of the people.[[687]](#footnote-687)

Quebec’s desire to break away from British rule, and now from the Federation, has a historical persistence manifesting its popularity with referendums and their outright rejection of the Provincial Government proposals. This led to the 1982 North America Bill and repatriation of the constitution[[688]](#footnote-688) to the Federal Parliament. This persistence is because Quebec never deemed itself decolonised beyond attaining self-rule and thus internal self-determination. Therefore, Quebec failed to attain international legal personality but had to be content with a constituent state of the Canadian Federation without attaining full international legal personality.

There are merits in these arguments based on history, as well as in the policies of the British Crown over settlements in Canada in the 18th and 19th century since there were in compliance with the contemporary international law. The new international political system had been established by 1996 with several challenges.

First, the evolutionary process leading to self-governance, (a) denied dramatic decolonisation whereby all peoples indefinable under Principle V could have claimed their right to self-determination and, (b) Canada was denied the choices presented by Principle VII and failed to attain one of three modalities of self-determination identified under Principle VI of Resolution 1541(XV).[[689]](#footnote-689)

Second, the Canadian Confederation has been self-governing, since 1867 and this encouraged evolutionary processes. The 1982 Repatriation of Constitution, made Canada totally self-governing when the British Parliament formally rendered the Canadian Parliament supreme. Therefore, identical self-rule and title to the territory should be granted to indigenous people and the First Nations as demanded by the Québécois. After all, the moral justification for political independence and territorial integrity of Canada and Quebec, are identical to the legal principle of external self-determination. Furthermore, legal consequences of external self-determination are distinctive from that of internal self-determination. One offers full sovereignty while the other autonomy thus the legal consequences of partial sovereignty notable in self-governing territories cannot be the same as those of total sovereignty states. Finally, since Canada has become sovereign as a constitutional federation, the federal state’s incidents of sovereignty cannot be equated with those of unitary states. Nor can the territorial integrity, and political unity of a federal state, be compared with a unitary state. The latter is conditional to the satisfaction of the constituent states, while the former is unconditionally sovereign, subject to constitutional principles in compliance with international law and processes.

Third and finally, succession and secession are extreme forms of self-determination but still one of its modalities. The Commission constituted to report held the view that the Québécois may attain absolute independence and maintain their borders, as drawn by the colonial powers.[[690]](#footnote-690) As mentioned above, the title was attained by conquest and by treaty and discovery by the original colonists who took the territory from the First Nations.

 It is most respectfully suggested here if the First Nations of Quebec are denied self-determination while secession of Quebec is achieved, then uti posidetis will be reaffirmed in the 21st century. Usefulness of uti possidetis ought to be questioned in the 21st century. The concept legitimised colonial boundaries of Americas in the 17th century. It was confirmed in the 18th century and affirmed during decolonisation in the 20th century.

**6.2 The Canadian Case Ref: re Secession of Quebec 1998(2)**

In 1996 the Governor-in-Council[[691]](#footnote-691) asked the SCC to give an opinion on three questions:

(a) Can Quebec unilaterally secede under the current constitution?

(b) What were the legal implications of secession in international law?

(c) In the event of the conflict of law which one will prevail?

The SCC opined on the legal consequences of international norms on constitutional legal norms and practices amplifying the importance of legitimacy to politics and legal processes while declaring the third question redundant.

### 6.2.1 The Opinion

The Court answered two questions in the negative and deemed the third question redundant. Also, the SCC pronounced that unilateral secession meant severance of constitutional ties from the rest of the federation, without negotiation.[[692]](#footnote-692) There was no provision under the present constitution to effect secession, thus it was possible for a constitutional amendment.[[693]](#footnote-693) Furthermore, it ruled that the Constitution could not act as a straitjacket, as the SCC declared the constitutional legal precept, that the states’ sovereignty is vested with the people.

First, the SCC Advisory Opinion is an affirmation of Canadian State action and its perception of its international legal obligation (opinio iuris) emanating from the international legal norm of self-determination.

Second significant observation is the SCC’s declarations on the constitutional legal principles’ co-existence with constitutional conventions. Conventions are political and non-justiciable, yet their implementation, by the legitimate political entities as an indispensable formal constitutional component has a liberating effect, essential for the protection of the fundamental freedoms and legal liberties of the citizens, and the rights of the Aboriginal People and the First Nations of Canada.

Third, the SCC’s legal reasoning for secession is given with reference to the domestic and international law and provides a rare insight into the working relations between two jurisdictions. Their interdependence, the pragmatic treatment of the substantive aspects of the norms, as opposed to the doctrinal approach, is very clear in the approach of the SCC to two diametrically opposed findings:

(a) That the Canadian Constitution has no provisions to allow secession, and all constitutional principles relied on negotiated settlements in the event of dispute,

(b) That the general will of the people of Quebec, which has been legitimately expressed through the ages and opposed for a good measure, cannot be frustrated by the Constitution. The Constitution vests sovereignty on the people and the denial of the will of the people runs contrary to the doctrine of sovereignty. In par.84 the SCC opined that secession is possible by constitutional amendment and negotiations,

Fourth, the SCC defined unilateralism to mean non-negotiation that runs contrary to all principles of the Canadian Constitution. In para. 90-96 the SCC opined that what seemed as two irreconcilable two positions were, in fact, reconcilable. Quebec has to negotiate secession and it cannot proceed without negotiation. Nor can the constitutional amendment be resisted, in view of the legitimate demands of Quebec, as it will render the constitution illegitimate.

Fifth, the legitimacy of the claim to secession is contingent, to the constitutional protection of the fundamental freedoms of all the citizens, the minority interests, thus of the Aboriginal People and the First Nations and citizens of the other constituent confederated states in the Canadian federation. Mutually reciprocal give-and-take is expected in the federal constitutions and if the negotiations fail, then the matter rests in the hands of the legitimate political entities.

Sixth peaceful unilateral succession after long negotiations, may not give rise to a legitimate secession but to a de-facto state: (a) However, even though the effective[[694]](#footnote-694) administration of the seceded territories does not add legitimate recognition of the ceded state, it may actually create a new international legal personality without retrospective legitimising effect.[[695]](#footnote-695) (b) It is this admission by the court, which demonstrated how international jurisdiction and domestic jurisdiction interact, when the international community deems a constitutional order is acting oppressively in view of the legitimate, explicable, reasoned, anticipations of the claimant people and peoples.

It seems that unilateral secession is illegitimate if it is not negotiated, but the legitimacy may be acquired in the future because negotiations might fail due to unjustifiable obstruction to negotiated peaceful settlement while commissioning acts in breach of international law.

### 6.2.2 Observations on the SCC Opinion

In the 1998 Quebec case, the SCC based its advisory opinion on the evidence on the legitimacy of the claim, and the constitutional opposition to secession, and appropriate application of international law of self-determination.

Corollaries on the rule of law and responsive constitutional order in fact and in law are equally groundbreaking.

First, the SCC distinguished internal from external self-determination and referred to their conditionality to the retention of the state’s political unity and territorial integrity.

Second, SCC relied on eminent jurists such as Wade[[696]](#footnote-696) and Cassese as well as Sir Robert Jennings and curia amicus.

Third, the SCC, distinguished between two legitimate circumstances in which international law of self-determination may be applicable: (a) people were entitled as of right to self-determination in the colonial context,[[697]](#footnote-697) (b) upon an alien invasion, subjugation and exploitation.

Fourth, the SCC referred to the third set of circumstances[[698]](#footnote-698) in which self-determination may be invoked. Such an invocation is not a right but as a justifiable challenge to the political unity, and territorial integrity subject to exhaustion of constitutional remedies as result the claimant faces total annihilation, (a) secession is not founded upon the international legal principle of self-determination, not as of legal right, but as a natural right of self-preservation, (b) if state frustrates all the legitimate constitutional processes, then unilateral secession may be recognised by other states.[[699]](#footnote-699)

Fifth, the SCC opined that recognition by other states was once considered to be an exercise of pure sovereign discretion, but now it has become associated with international legal norms[[700]](#footnote-700) ’[A]s demonstrated during emergence of new states from former Yugoslavian Federation and USSR.*’*[[701]](#footnote-701) These would be subjective reasons rather than objective legal ones. Therefore, an illegitimate claim and process may give rise to de facto or de jure (in fact and in law) recognition, which may eventually entitle the ceding party to attain international legal personality without retrospective legitimisation of unilateral secession.

The SCC, ruled:

 (i) Quebec’s claim to be legitimate, yet found no constitutional provision to affect unilateral secession,

(ii) There are factual circumstances of discrimination or deprivation of political or civil or constitutional fundamental rights of the citizens in Quebec,

(iii) There is no breach of rights within Provisional Confederacy[[702]](#footnote-702) nor within other Federal State or in the rest of the Canada.[[703]](#footnote-703)

In conclusion, the court found no facts, which may legitimise the application of international law in support of secession. Furthermore, Canadian constitution was very silent on the issue of secession.

The Court literally referred to three of the four components of self-determination advanced by the hypothesis in Chapter 1.1.2:

(i) Legitimacy of the claimants,

(ii) The legitimacy of the claim is based on actual grievance of deprivation of fundamental freedoms and legal rights, and the attainment process is due to the failure of constitutional and administrative law practice,

 (iii) The emergence of international law of state succession.[[704]](#footnote-704)

SCC opined that claimant was legitimate but claim in the absence of factual circumstances in which internal self-determination and Federal Constitution has been breached, unilateral secession under constitutional or international could not be justified. Nor could the constitution restrain demands of a legitimate claimant forever.

The involvement of the international community in the Kosovo Crisis, since 1997, forms part of the primary evidence of diplomatic historical narrative, and legitimate state action, in contradistinction to Quebec’s historical narrative supported by the SCC. The SCC in its advisory opinion contained obiter dicta, that if the people want secession, the constitution can be altered to allow secession

The People of Kosovo had a legitimate claim for secession in fact and in law, unlike the Quebecois. It will be propounded first that Kosovars had no political capacity to claim their Constitutional provisions, which in theory provided legitimate secession from the federation. Second, because Serbia resorted to threat and use of force to suspend Kosovo’s autonomy. Third, Kosovo had no say in the drafting of a new constitution. In Kosovo, there was an alien regime.

In Quebec, there was no malfunctioning internal self-determination. What was noted by the SCC in the Quebec case was a factual constitutional order, which was totally absent in the former Yugoslavian Federation. Accordingly, the findings of the Badinter Commission mentioned in Chapter 6.4.1 below.

By way of critique of the opinion, one notes that Canada sought guidance require into the future of the federation. The court could not engage in speculation. Nonetheless, some preventive measures to ensure meaningful referendum have been introduced by the Federal with the Clarity Act SC 2000 c 26. It empowered the Federal Assembly to take measures to ensure any referendum to secede, ’must be free from ambiguity both in terms of the question asked and in terms of the support it achieves if that result is to be taken as an expression of democratic will that would give rise to an obligation to enter into negotiations that might lead to secession.’[[705]](#footnote-705)If the Canadian House of Commons considered the question unclear or refer to other measures, but to secession, then there will be no negotiations and if and when conditions are met and secessions remain clear expression of the will, then negotiations for the amendment of the Constitution will commence,’ [A]t least with the all of the Canada and its Government.’[[706]](#footnote-706)

**6.3 Moderation in application of Self-determination and Secessionism**

### 6.3.1 Moderate Interpretation of Self-Determination

There are several reasons why secession as an extreme form of external self-determination, ought not to be classified as self-determination:

(i) Unilateral secession, in the post-decolonisation era, is an extreme external self-determination and they are not synonymous. Former is a one-off event, the letter is an ongoing process.

(ii) Secession in the post-decolonisation era means the creation of new state and state recognition. In the past, it was deemed to be political and non-justiciable. In the 21st century, unilateral secession cannot be totally political or legal but legitimate if based on negotiation and consent of the international community. R2P enforced international norm and compulsion to intervene.

(iii) Unilateral secession means a violation of a states’ political unity, and its territorial integrity. Such violation entitles the state to fight for self-preservation. This is the only occasion in modern international law when proportionate resort to threat and use of force is justified within the constitutional order and subject to the rule of law at national and international level. This can explain why states are not keen to support secessionism and support war.

(iv|) Sovereignty is no longer a defence for being an oppressive regime, or free to commit crimes against humanity, breach humanitarian laws and commit aggression and other breaches of international peace and security.

(v) International community’s vigilance, even if ineffective and posthumous, with a little preventive aspect, leads to eventual diplomatic intervention.

(vi) The legal basis of intervention is founded in customary and international treaty law, while the incidents of state sovereignty are also protected. In modern era defensive alliances may be activated, subject to due processes. In earlier epochs of international law, the concept of just war restricted on the grounds of Christian teaching. Similarly unjust enrichment or unjustly preventing the legitimate enrichment of another country, justified use of threat and use of force on the grounds of self-defence. This too was open to abuse as the principle of Just war (ius bellum iustum). Once more this shows the significance of moderation in the application of a principle.

(vii) Diplomatic history shows that unilateral and multilateral intervention was common when the strictest concept of sovereignty existed. The zenith of absolute sovereignty coincided with the absence of formal organised international political system. This ended in 1919.

(viii) Moderation invocation of Article 2(4) and 2(7) render them compatible as discussed earlier.

### 6.3.2 Moderation, Self-determination, Intervention

Moderation in intervention and secession, are very relevant to the application of self-determination. Secession may be normatively possible with multilateral intervention undertaken in compliance with the international due process.

Intervention is contentious, yet Charter VII empowers the Security Council to intervene. Article 2(4) and 2(7) moderate each other. Differences of opinion among the permanent members moderated each other by veto or delayed action. In March 1998, there was such a disagreement over Kosovo dispute. Many thought it constituted a threat to international peace and security. Russia and China thought that it was an internal matter not necessitating intervention. On that occasion none of the permanent members vetoed and the British draft resolution was adopted.[[707]](#footnote-707) This resolution was a negation of Serbian[[708]](#footnote-708) sovereignty over Kosovo when the UN Mission in Kosovo (UNMIK) took over civil administrative responsibility as well as the security of the province until 2008. This was a multilateral intervention with a high probability of legitimacy in comparison with unilateral intervention with suspect legitimacy. Thus multilateralism and unilateralism also moderate each other

**6.4 Kosovo’s Unilateral Secession in 2008**

Kosovo unilaterally declared independence while being under UN administration without the agreement of Serbia or prohibited by UN. This was partly due to the disapproval of Serbian aggression by Security Council. Also greater international consciousness of R2P.

Therefore, the term unilateral implicitly demonstrates the precarious aspects of international relations and law and supports the theory, advanced in the current hypothesis that, conditionality of the legitimising components and determinants of the legal principle of self-determination does not deprive its jural imperative.

### 6.4.1 Badinter Arbitral Commission’s Findings 1991-92

In 1997 the European Community convened a Conference on Yugoslavia and Russia. Lord Carrington the President of the Conference wrote to the Arbitration Commission,[[709]](#footnote-709)‘We find ourselves with a major legal question I would like the Arbitration Committee, to consider the matter, in order to formulate any opinion or recommendation which it might deem useful.’[[710]](#footnote-710)

Ten opinions were commissioned[[711]](#footnote-711) and the Arbitrators restated many points of international law during 1991-92. In 1991 the Badinter Arbitral Commission opined that SFRY was in the process of dissolution. In its 8th deliberation, delivered in Paris on 4th July 1992, in paragraph 4, held:’ The Arbitration Commission is therefore of the opinion: that the process of dissolution of SFRY referred to in opinion No 1 of 29 November 1991 is now complete and that the SFRY no longer exists.’[[712]](#footnote-712)

Alain Pallet a member of the UN law commission, considered a revival of self-determination.[[713]](#footnote-713) Yet people in Bosnia or elsewhere simply had no road-map to implement self-determination, as they stated in subsequent UN Security Council meetings. Therefore, the legal opinion of the Arbitral Commission is very relevant for several reasons.

First, the events in Kosovo in 1998-1999 took place seven years after the SFRY constitutionally-speaking ceased to exist, and still there was no organised state succession.[[714]](#footnote-714)

Second, the international community was on notice to act, and take preventive measures to avoid the consequences of the failure of constitutionalism and the rule of law.

Third, as early as 1989, Kosovo was already subjected to the arbitrary rule of law. Noel Malcolm observed that Tito elevated Albanian-dominated Kosovo and Vojvodina in 1974 to a new status. “[A] status equivalent in most ways to that of six republics themselves, with their own direct representation on the main federal Yugoslav bodies,” this made Kosovo “[The autonomous provinces equal status with the republics in most forms economic decision-making, and even in some areas of foreign policy.[[715]](#footnote-715)(…) furthermore Kosovo [C]ould issue their constitutions.[[716]](#footnote-716) Thus SFRY’a constituent states, including the Kosovo region,’ [T]hey were fully-fledged federal bodies.’[[717]](#footnote-717)This empowering constitution remained in effect until nullified on account of the dissolution of SFRY.[[718]](#footnote-718)

Security Council deliberations [[719]](#footnote-719) noted Serbia’s unilateral constitutional amendments in 1989’ [B]elgian imposing amendments to the Serbian constitution which would severely restrict Kosovo’s powers.’[[720]](#footnote-720) Serbia resumed direct management of Kosovo’s economy, social and educational organs of the regional government as well as the administration of justice and police forces. Serbian language as the official language of the region was reintroduced, as well as taking measure to alter the demography of the region.

Events were considered by the International Crisis Group where their reported attempts to stimulate greater awareness of a long-term settlement of the Kosovo Crisis, by proposing a comprehensive settlement,

(i) By opposing the Holbrook Plan and by taking the history of violence into account,

(ii) Kosovar’s had been subjected to forced removal in 1933 now referred to as ‘ethnic cleansing’. Between 300,000 and 400,000 Kosovars, were accepted by Turkey as new Turkish citizens to be followed by another group of 400,000 by late 1940s. Kosovars during the crisis were once more on the move and nearly 50,000 fled during 1998-99 inter-communal violence,

(iii) Serbian negated internal self-determination, by 1992, as the region came under the direct rule of the Serbian State,

(iv) Kosovo, was no longer subject to rule of law, but that of arbitrary rule of law. Non-Serbian Kosovars were discriminated against and the constitutional and administrative law protecting their fundamental freedoms was totally overlooked. The second report commissioned by the King of Sweden, from Judge Goldstone, attributed causes of the Kosovo Crisis to the rise of Serbian nationalism and ethnic cleansing and “[C] creation of apartheid-like society.[[721]](#footnote-721)

Two reports supported Kosovar’s claim for self-determination through succession because factual abuses and breaches of constitutional measures, and violence, removing diplomatic and constitutional resolution of the dispute by internal self-determination.

All the aspects of the hypothesis are supported by the reports. The claimants were legitimate, their claim was legitimate, the process of attaining was legitimate since all the conditional components, and determinants were met. Furthermore, the formal state-centric international political system had operated international diplomacy yet no constitutional solution was found except to accept a unilateral declaration of the independence of Kosovo. The hypothesis advanced, advocates that conditionality of the components, the claimant, the claim and the claim process, the respondents and determinants, moderation, goodwill and protection of international peace and security of international of the legal principle of self-determinations in FSIPS, does not negate its jural imperative, thus even UDI and secession can be legitimate in a given circumstances. Therefore, the Kosovo experience proves the hypothesis.

### 6.4.2 Failure of Constitutionalism in Quebec and Kosovo

The reasons for constitutional failure, and consequent negation of fundamental freedoms and the legal rights of the peoples of Kosovo or the dissolution of SFRY and loss of territory of the Republic of Serbia cannot be placed under the banner of nationalism.

Nor can one rationalise the wishes of the Quebecoise in view of their Constitutional experiences in fact and in law which was distinctive from the Kosovo’s.’

 Kosovars are the citizens of Kosovo: made-up of ethnic Albanians, Serbians, and Turks who were subjected to violence. In 1998 this was actually established and led to international prosecutions by the International Criminal Tribunal for the Former Yugoslavia. [[722]](#footnote-722) These crimes are associated with failed states, thus of the constitutional order and rule of law, along with legitimate political dialogue to resolve non-justiciable issues.

The breakdown of the rule of law, state oppression and arbitrary rule of law and extra-judicial killing and massacres and armed opposition, and terrorism manifest state negation of its R2P*.*  The crisis in Kosovo should also be viewed in the general context of the disintegration of SFRY.

Research evidence, suggests that institutional consistency, or autocracy or democracy, or one party system are determinants of political stability. [[723]](#footnote-723) Published findings propound that economic openness, infant mortality, militarisation, neighbourhood security are tell-tale indicators of violence:[[724]](#footnote-724),

The first edition of Peace and Conflict in 2001, documented the global decline in armed conflicts, from the peak in the early 1990s. We linked the decline to the ascendancy of democratic regimes and rising success of international efforts to contain and negotiate settlements to many serious armed conflicts, most of them civil wars.[[725]](#footnote-725)

The Badinter Arbitration Commission (1991-1992) opined that SFRY had disintegrated since constitutional order gave way to violent secessions, whereby four of the six component states declared their unitary independence. They applied for membership of the UN since their admission would constitute recognition by the international community. The remaining two states, Serbia and Montenegro, declared themselves as the successor state of the Federal Republic of Yugoslavia. The Badinter Arbitral Commission advised the EU members not to recognise Serbia and Montenegro as such since the Security Council already referred to them as former Yugoslav states. As a result, the UN refused them seats and thus did not consider them as a successor state.

When the Security Council adopted Resolution 1160 (1998), it established that Serbia was using excessive force against peaceful demonstrations. Furthermore, the disappearance of citizens engaged in civil rights movements started to take place. Assassinations and extra-judicial killings in no time led to massacres.

UNSCR 1160 (1998) imposed international law obligation on Serbia to adopt the recommendations of Contact Group 9[[726]](#footnote-726) and find political a solution to the problem, banned the sale of arms and suggested further measures will follow if it did not comply.

In 2001, The Goldstone report concurred with the view that from 1990 onwards the international community was aware that Kosovo was heading into crisis. Diplomatic initiatives overlooked the Kosovo crisis so much so that Kosovars were not even invited to attend the Dayton Negotiations in the USA, which leads to the Dayton accord. Until that time, Kosovars resisted peacefully, even by 1997 that is 7 years after the Dayton Accord, Kosovars armed resistance was minimal:

This armed conflict between KLA and FRY lasted from February 1998 to June 1999 although it escalated after March 1999 when NATO air campaign supervened. It can be characterised both as an armed insurgency and counter-insurgency, and as a war (against civilians) of ethnic cleansing.[[727]](#footnote-727)

Thus, Kosovo was subjected to constitutional failure twice: the first time when SFRY was deemed to have disintegrated in 1992 and the second time when Serbia commenced unilateral constitutional amendments for Kosovo. Serbia removed Kosovo’s regional autonomy, resorted to the arbitrary rule of law, and removed institutional democracy and political rights of the people. In short, Serbia presented a new constitutional order leaving no choice to Kosovars but to resort to self-defence.

**6.5 Regional Diplomatic Efforts during the Kosovo Crisis**

### 6.5.1 Efforts of Contact States Nine

The Office of High Representatives (OHR) was created by the 1995 Dayton-Paris Peace Agreement. The signatories were the high representatives of the Contact States, whose website introduces the OHR as’ [A]n ad hoc international institution responsible for overseeing implementation of (…).’[[728]](#footnote-728)Almost all the members sat in the Security Council.

One is justified in criticising international diplomatic processes rather than the international law when one notes the composition of the Contact Group. It was the steering Board of Peace Treaty Implementation Council, set to supervise Serbian affairs, with her former co-constituent Republics of former SFRY. How could this group experienced in this region fail to take injunctive measures, to prevent the Kosovo Crisis? The justification for this concern is based on several facts, and not on suppositions.

First, the Badinter Commission in 1991-1992 were partly composed of the same states that formed the Contact States in 1995 who also reported to the same organisations including the EU, NATO, the UN and the OSCE as well as sitting in the Security Council as permanent members in 1998. When in March 1998 the Security Council convened to discuss the crisis in Kosovo, as well as a draft UNSCR 1160, some speakers could not avoid reference to the crisis being in the making. Moreover, the Troika (Russia, EU and USA) had been engaged in diplomatic missions with the crisis within the former SFRY since 1991 and were now concerned as their mission was under threat.

Second, the SC resolutions in 1999 mandated the same groups to establish a civil administration and authority to deal with security issues, thus temporarily suspending Serbian sovereignty for Serbian unilateral suspension of Kosovo’s autonomy in 1989.

Thirdly from 1999 on, UNMIK empowered EU, NATO and OCSE with special tasks: the very nations that composed the Contact Group and sit in the Security Council.

The UNMIK demonstrate that injunctive and preventive measures by way of intervention are justifiable, as suggested by Cassese when the failed state suspends the rule of law and constitutional prerequisites for the protection of fundamental freedom fails and crimes against humanity are committed. After all, UNMIK resumed regional administration of Kosovo 1999 and when their mandate ended in 2008, the regional assembly of Kosovo declared unilateral independence.

 The ICJ, in 2010, ruled that such a unilateral declaration was not prohibited by international law. One cannot help but ask, how can delay in taking injunctive and preventive measures against violence and mayhem be justified, or be explained? After all, suspension of the constitutional order, and abandonment of the rule of law and fundamental freedoms and legal rights occur stage by stage, giving advance warning of pending violence.

The international community acted late and failed to implement legal provisions and processes already in place. In fact, R2P present itself and UN acted upon it even if it failed to stop the genocide in an area under UN soldiers control in Srebrenica.

Kosovars were not let down by the international law, but by the political system which implemented international law and processes, through the Contact States. They sat collectively as an ad hoc international institution ’[R]responsible for overseeing implementation of (...)’,[[729]](#footnote-729) as individual states with a legitimate interest and feared for peace and security in the region, as well as for ethnic nationals. Yet, they failed with no serious consequences to themselves, unlike the suffering of the multitudes over whose destiny they assumed responsibility.[[730]](#footnote-730)

Mr Tanc for the Republic of Turkey in the Security Council referred to these facts[[731]](#footnote-731). Had any one of the 5 permanent members out of 14, vetoed then S/RES 1166(1999) would have failed. Identical arguments were raised by Drew, Bowering and Clark and Chink in respect of East Timor in 1992.

This demonstrates and partially explains the precarious aspects of the UN processes on which supervision of self-determination may rely upon, usually ex-post facto, (after the event) in which humanitarian laws are violated with impunity.

### 6.5.2 Security Council and Resolution S/RES 1160 (1998)

The Security Council Resolution S/RES 1160 (1998) started with ’Noting with appreciation the statement of Foreign Ministers of France, Germany, Italy, The Russian Federation, the US, and the UK.’[[732]](#footnote-732) This resolution has several consequences.

First, the resolution legitimised regional efforts to avert the threat to regional and global peace and security.

Second, it marked the Security Council’s direct engagement with the Kosovo Crisis.

Third, events during 1998-2008 manifested state action (opinion iuris) in the context of post-colonial self-determination crisis-management, by way of pacific resolution and intervention, while upholding the political sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the Kosovo. Consequently, the Security Council’s engagement was not a departure from adherence of separation of functions determined by the Charter, but a legitimisation process by multilateral actions of the individual states acting in Congress. Furthermore, by doing so United Nations brought intervention under its auspices, thus the supervision and control of any possible unilateral armed intervention.

Third, the resolution legitimised the decision of the Permanent Council of the Organisation for Security Cooperation in Europe (OCSE), by ’welcoming’ its involvement. This was another regional organisation engaged with the Kosovo crisis constituted by states beyond the political boundaries of the EU that included Turkey, Russia, the US and Canada.

Fourth, the SC acknowledged the reliance of the UN Secretary-General in monitoring the events in the region on the Steering Board of Peace Treaty Implementation Council and the Contact States (9) through their Office of High Representative.

Fifth, the SC was acting under the UN Charter, Chapter VII[[733]](#footnote-733) and that it was agreeing with the negotiations instigated by the Contact Group (9), legitimising their efforts, in addition to the rights held under Regional Arrangements by the Charter, under Chapter VIII Regional Arrangements. Nonetheless, Article 52 of the Charter specifically prevents any regional arrangement to undermining the Security Council empowered under Articles 34 and 35 of Chapter VII.

Resolution in par. 9 asked its members to form verity of committees, and the states were invited to monitor aspects of the resolution, thus bringing all regional organisations under the United Nations co-ordinated efforts. Furthermore, paragraph 11 empowers the Secretary-General to assist under paragraph 9.

In paragraph 13 it formally invited the OSCE to assist the Secretary-General in his endeavours under paragraph 9. Paragraph 15 directs the Secretary-General to ensure cooperation from the regional organisations, the EU, the OCSE, the Contact Group, as well as allowing humanitarian aid to Kosovo. UN Human Rights Commissioners were directed to engage too. It is also noted that most of the permanent members of the Security Council, were engaged in the crisis in SFRY in the past, individually, which led to the Dayton process between Serbia and other conflicting parties.

The same approach was now being attempted with the Rambouillet Accord which ended on 18th March 1999 without Russia and Serbia signing it. This accord intended to place the Kosovo region into interim NATO administration because international community felt it their responsibility to protect. After several months of NATO bombing of the Serbian targets, the Security Council S/RES 1244(1999) in June 1999, introduced the mechanism, for interim UN administration with a regime identical to that which already rejected, the Rambouillet Accord.

The obligations and the rights created, under these arrangements, were nothing more than bilateral treaty arrangements, in accordance with international law.

Kosovo crisis invoked the implementation of internal self-determination and if it failed then the route to independence would be open. First, because internal-self-determination, invokes the international rule of law within the constitutional order. Second, internal self-determination invokes fundamental principles and the legal rights of the individuals and ethnic minorities, and liberty of their conscience as well as social-cultural and economic entitlements. Third, self-determination and invocation of the above are conditional to retention of state sovereignty and territorial integrity. Therefore, failure of internal self-determination justifies invocation of state succession or secession.

By the time the SC invoked threat to peace and security and addition to the legitimacy of multilateral intervention was expressly stated in the terms of S/RES 1244 (1999) June 1999 while NATO bombed Belgrade, internal self-determination failed, and independence of Kosovo was no longer a matter of international law but politics.

### 6.5.3 Diplomacy, Legitimacy of Intervention

S/RES 1203(1998)[[734]](#footnote-734) and 1239 (1999) [[735]](#footnote-735)were adopted on 10.6.1999, upon the failure multilateral diplomacy, to implement the Rambouillet Accord[[736]](#footnote-736)and upon commencement of the bombing of Serbian target by NATO on 24th March 1999.[[737]](#footnote-737) When S/RES 1244 (1999)[[738]](#footnote-738) was adopted on June 10th 1999 NATO bombing would continue until 10th July 1999 therefore retrospectively legitimising bombing, as Kosovo came under the temporary administration of the United Nation.

The S/RES 1203(1998) and 1239(1999) are significant for many reasons.

First, because of the UN relied on regional organisations the EU, Contact Group (9) and OSCE and NATO for the containment and possible resolution of the Kosovo crisis.

Second, the resolutions asserted their concern over the suffering of the refugees as a result of increasing violence and likelihood of humanitarian catastrophe and therefore the need for injunctive measures to implement the R2P.

Third, the resolution urged cessation to hostilities, *‘*Also to commence political dialogue to ’[R]reduce the risk of humanitarian catastrophe’[[739]](#footnote-739) and to stop state forces being used against the civilians. Furthermore, to ensure the security of the international diplomatic missions, and to secure free movement of aid agencies for the refugees, and the International Red Cross.[[740]](#footnote-740) Finally, the resolution urged progress to confidence-building measures, a halt to terrorism and prohibition of the sale of arms.

Therefore the critical political turning point in the ’[M]management of the Kosovo Crisis’[[741]](#footnote-741)was reached when the Rambouillet accord was not signed by Serbia and Russia, though signed by the Albanian Kosovars, and by NATO member states.

The Accord consisted of three phased objectives:

(I) introduce democratic self-government to the region,

(ii) Provide security for all the citizens R2P,

(iii) To institute a mechanism of final settlement

These issues are diplomatically remarkable since they expose the challenges of a deficit of moral and legal basis of diplomatic engagement.

First on 24th March 1999, NATO bombing started upon the commitment of massacres by Serbian state forces. Yet the S/RES/ 1239(1999) adopted in June did not refer to the failure of both sides to sign Rambouillet or condemn NATO bombing of Serbia.

Second, the S/R 1239(1999) reaffirmed,’ [T]he territorial integrity and sovereignty of all states in the region.’[[742]](#footnote-742) When in the past identical calls were made they called for the protection of SFRY sovereignty and her territorial integrity.

Third S/R 1239(1999) it referred to the peace proposals of the Foreign Secretaries, of Canada, France, Germany, Italy, Japan, USA, Russia, and GB-also known as the G7 and G8– met on 6th May 1999. Most of these states on March 18th, 1999 were a participant at the Rambouillet conference and in agreement over its terms and already the NATO had already started its bombing sorties. Rambouillet proposed the establishment of democratic self-government in the Kosovo as part of FRY, with security for everyone, and it was in total agreement with G7 proposals and that of UNGAR .1244 (1999).

All the above said diplomatic efforts inefficiently aimed for peace and security in the region, subject to the rule of law, and democracy, and constitutional order encompassing fundamental freedoms and legal rights of people and peoples. Kosovars were ethnic and national groupings, Albanians, Turks, and Serbians. Regrettably, Serbia adhered to the classic definition of sovereignty and deemed beyond intervention as it would breach Serbian sovereignty. Arguably, the Security Council Resolution of 10th June 1244 (1999) led to the de facto political severance of Kosovo from Serbia by legally suspending Serbian sovereignty over the territory and placing it under UNMIK by assuming the civil, and security administration of the territory. UNMIK was also helped by UNHCR and OCSE and NATO. Failure of a peaceful resolution of international disputes, in compliance with peremptory international legal norms and in view of repeated demands by the legitimately empowered international organisations, led to secession.

**6.6 S/Res 1244 (1999) and United Nations Mission in Kosovo (UNMIK)**

UN deliberations were the evidence of state’s view of international law while the terms of the resolution state action under R2P. Both sources of customary international law.

### 6.6.1 Deliberations in the Security Council

On the 10th June 1999, [[743]](#footnote-743)spokesmen for 29 states expressed their state’s view on the Kosovo crisis, in the belief to be supported by the contemporary international law (opino juris). The 16th Speaker was the Secretary-General while the USA and Netherland’s head of mission responded to Cuba’s head of mission and thus Cuba spoke three times. [[744]](#footnote-744) SC agenda headed by the previous SCR 1160(1998), 1199 (1998), 1230(1998), 1239 (1999), and a draft resolution. Another resolution was tabled earlier by China and the Russian Federation, to condemn NATO bombing of Serbian targets, without Security Council mandate, but the resolution was defeated by 12 votes to 3 votes.

Opinions were divided into three groups, (A, B. C) all believing that their views were in compliance with contemporary international law, as manifested by the United Nations Charter, and other sources of international law concerning political sovereignty, and territorial integrity, and states’ responsibility to their citizens’ to protect their constitutional fundamental freedoms and legal rights.

Group (A) of participants were parties to the dispute directly, or engaged in the diplomatic process, or affected by way of refugees or they had ethnic nationals living in Kosovo such as Albania, Serbia and Turkey, or Kosovars settled due to earlier forced migration. Serbia and Montenegro acted as Federal Republic Yugoslavia, Albanian, and Serbian Kosovars and Contact Group (9) which included neighbouring states, EU Council of Europe and NATO and Russian Federation and the USA.

Group (B) were divided into three sub-groups. The first sub-group (B.1) were those who expressly and actively supported armed intervention to secure stability, to resume political processes for a peaceful resolution to the Kosovo crisis. These were NATO members. The second sub-group (B.2) opposed armed intervention because they deemed intervention contrary to the strict interpretation of the United Nations provisions and included Serbia, Montenegro, Russian Federation, China. The third sub-group (B.3) were former members of the Socialist Federal Republic of Yugoslavia such Slovenia, Croatia, Macedonia.

Group (C) also consisted of three sub-groups (C1, C2, and C3). C1 were conscious of the ethnic nationality syndrome within their states and were keen to see a fair, just and lasting solution to the Kosovo Crisis. China was one such state who opposed what she called USA and NATO intervention as well as state oppression of ethnic grouping and attempts to create division among ethnic groups.

The second sub-group (C2) included Brazil[[745]](#footnote-745) who opposed NATO intervention, held Belgrade responsibly and rejected any military action without Security Council mandate. C3 was Cuba who opposed intervention and remained silent on ethnicity issues. Cuba was closest to the Serbian position.

Group (D) consisted of three sub-groups. D1 included states such as Namibia and Malaysia. D2 included Mexico and others who opposed intervention as well expressed abhorrence with ethnic violence and criticised the Security Council. Namibia was equally concerned with peace coming at such a price. Sub-group D3 included distant states, who felt strongly against ethno-religion based violence as well as very critical of Belgrade. Gabon, and Gambia, and Namibia fall into this group. These groupings are not on account of affiliation to an international group. Take the UK being regretful that NATO had to bomb, but blamed the autocratic leadership. So did Namibia and Gambia and Gabon. At times grouping is nothing more than a geographic division but then one has to face the difficulty of explaining USA and Canada involvement in Balkans.

### 6.6.2 Grouping of States According to their Perceived Role of International law

The frank exchanges between the diplomas of Cuba and the USA and the Netherland during the session[[746]](#footnote-746) manifested how dogmatic approaches to international legal principles exaggerate political differences. This is one statement where its reverse also holds true. Nonetheless, three schools-of-thought emerged with regards to the role of international legal norms and their supervision and what should be done in the event of non-compliance.

The first group includes Serbia, China, Russia and Cuba. The Serbian representative declared to be the victims of USA and NATO member’s aggression. Serbia had two declared missions, first to fend off the aggressors, and second to find a solution to the Kosovo crisis and protect Serbian territorial integrity. The legal basis for Serbian position is summed up as incidents of sovereignty and self-defense is known to customary international law (jus gentium) supported by the Charter’s purpose and principles and other norm-creating conventions.

There are three distinctive legal components to these arguments;

(I) Principles of inviolability of political unity and territorial integrity give rise to the principle of inviolability of states’ supremacy within its domestic jurisdiction as stipulated by the Charter,

(ii) Doctrine of sovereignty was not absolute in the Charter as indicated Article 2(4) and 2(7),

(c) Constitutional fundamental freedoms and legal rights of the individual has become a peremptory principle of international law.

Serbia maintained that the proposed resolution effectively suspended her sovereignty when all should respect her territorial integrity as she was prepared to grant full ’[H]highest level autonomy to Kosovo and Metohija, full equality for the members of the ethnic group in accordance with highest international standards.’[[747]](#footnote-747)Permanent representatives of China and Cuba and Russia agreed with her to some extent. China opposed ethnic discrimination for creating divisions and oppression.

Brazil rejected any justification for bombing along the lines that bombing was intended to save innocent civilian and displaced people and refugees, as suggested by Canada and the Netherlands. Cuba too felt that the argument was not morally justifiable. China and the Russian Federations and Cuba condemned NATO while China and Cuba accused the USA and NATO as being a joint aggressor along with other NATO members.

The second group of states supported the definition of state sovereignty, which included international norms, and processes based on customary, and international treaty law basis, also referred to peremptory international legal norms. The Netherlands in support of NATO intervention said that some members adhere to Charter provisions indifferent to another source of international law, as well as being indifferent to international legal development in the last 20 years, which has prohibited the states, to terrorise their citizen.[[748]](#footnote-748)

The third group supported armed intervention and argued that bombing was not contemplated until Belgrade frustrated every effort of international community made through the regional organisation to halt state-sponsored violence, ethnic cleansing acts of aggression, against the civilians as argued by USA and Canada[[749]](#footnote-749) , France , the Netherland and Gambia .

Representative of the Netherland pointed out that in the past, when absolute sovereignty meant total freedom for the global community of the states, to do as they pleased within their domestic jurisdiction, the international community, made the mistake of accepting this, and kept Cambodia’s seat for the Khmer Rouge, in the UN General Assembly[[750]](#footnote-750)for over a decade, but this is not the case today. In effect, this was also claimed by China. Gambia’s head of mission, who was also chairing the session of the Security Council, was most explicit in the allocation of fault:

The more resolutions and statements the Council adopted on this issue, the more Belgrade brazenly stepped up its repression and violence against the civilian population in Kosovo. Such violence and flagrant violation of human rights have shocked the collective conscience of mankind. The subsequent massive influx of refugees into neighbouring countries and their account of the atrocities inflicted on them and their families can leave no one indifferent.[[751]](#footnote-751)

There were other countries who argued that Belgrade brought this upon itself including the UK, Malaysia, and Bahrain. Gabon pointed out that the Contact Group (8) had made every effort including OCSE, and multilateral international will be amplified by UN resolutions, called FRY to start constructive dialogue with Kosovar Albanians:

Condemnation repeatedly expressed by the international community succeeded in curbing the violence in Kosovo (…) It is, therefore, understandable that regional powers have to restore to the means they deemed best suited to the situation.[[752]](#footnote-752)

### 6.6.3 Third View to Emerge from the Security Council Speeches 10th June 1999

The proceedings on the said date continued into the afternoon of the same day, and when China abstained from voting, instead of vetoing the resolution, SC Res. 1244 (1999) was adopted. Other members, who previously opposed intervention, now voted for UN civil administration and armed intervention in KOFOR, under direct line of command of NATO in Kosovo suspending FRY sovereignty.

The Resolution demanded cessation of violence by the responsible parties and’ (…)[T]o take immediate steps to address humanitarian situation and to avert impending humanitarian catastrophe.’[[753]](#footnote-753)UN civil authority on the ground had the effective military capability to carry out this mandate.

The third view that emerged during the restatements of purposes and principles of the modern international political order was that political solution based on political reality necessitated peace, to determine the future status of the region of Kosovo. This view supported the resolution’s purpose and principles, peaceful resolution to disputes within domestic jurisdiction. It supports the view that Serbian sovereignty over Kosovo was conditional on good governance with R2P the citizens. Had Serbia complied with international law, it could also rely on it, in defence of its territorial integrity.

Many participating states supported the resolution of 10th June 1999 when identical terms and resolutions have been adopted since 1998.

The Rambouillet Accord was rejected in Paris on 18th March 1999 by FRY and the Russian Federation, NATO bombing started a few days later. The Rambouillet Accord proposed temporary civil administration but failed since FRY refused to co-operate on security issues with the UN and OCSE. What was now accepted by all the parties at the Security Council in June 1999 was identical to what was rejected in March. What caused the change of heart? One can say greater awareness in international R2P. The fact that an earlier resolution to condemn NATO bombing of Serbian targets failed to be adopted, is very telling and may explain why China having pressed for the said resolution and failed, did not act capriciously and veto the Resolution 1244(1999). After all, at the time the International Criminal Tribunal for Yugoslavia was authorised to investigate massacres in Kosovo. NATO mission was unilateral and not lawful, but it was defensible since international processes and norms were rejected by the parties relying on force. Events and restatement of the contemporary international law showed that NATO action was legitimised by the adoption of S/RES 1244 (1999) retrospectively.

Perhaps they too recognised the failure of Belgrade to respond positively to what Gambian Chairman of the Sessions called the’ [V]iolence and flagrant violation of human rights have shocked the collective conscience of mankind.’[[754]](#footnote-754)

Many speakers agreed that S/RES1244 (1999) legalised retrospectively the role of UN action, furthermore, it affirmed the importance of Chapter VII and the duties of the Security Council to restate the existing and the emerging[[755]](#footnote-755) new international legal R2P.

**6.7 Declaration of Independence of Kosovo before ICJ 2010**

In 2008 the region of Kosovo was under the administration of the UN when Kosovar Council declared her independence. The General Assembly sought an Advisory Opinion of ICJ over the legitimacy of the declaration.

### 6.7.1 The Advisory Opinion of ICJ 2010[[756]](#footnote-756)

The ICJ opined that declaration was not in breach of international law.

The ICJ responded to three issue, having re-formulated a specifically worded request of the General Assembly:

First, the ICJ unanimously agreed that the matter was within its jurisdiction.

Second, it voted 9 voted in favour 5 against to providing an opinion.

The third matter concerned the legality of the declaration of independence of Kosovo on 17th February 2008 in international law.

10 Judges did not think it was illegal, while 4 judges did. At first, this voting seems a clear restatement of contemporary international law in the post-decolonisation era. This is an unsustainable view, because many who voted with the majority, clearly justified secession as a remedy. In the words of Judge Trindade ’[Y]et another long episode of timeless saga of the humankind in search of emancipation from tyranny and systematic oppression.’[[757]](#footnote-757)

Second, ICJ opined that the declaration of independence was not contrary to international law by 10-4 but there were 4 separate opinions and 1 declaration thus there were 5 judges in agreement over the legal basis of their decision while 5 other judges though agreed with their finding, held diverse reasons, while 4 judges dissented from the majority opinion.

Third, ICJ asserted its jurisdiction and rejected the argument, that the declaration of independence derived its legitimacy from domestic jurisdiction, having first agreed on it but then proceeded to adjudicate without reference to constitutional law and rely on international law only. `

Fourth on the issue of the legality of Unilateral Declaration of Independence (UDI) the majority opined with reference to the general international law (jus gentium) and special law based on the Charter and the S/RES 1244 (1999) (lex specialis) which created the UNMIK and transitional administration and self-governance.

The ICJ’s reasoning was founded on general international law, supported with and on historical legitimacy, born from the continuity of acceptance of independence by declaration since the 18th and 19th and 20th centuries[[758]](#footnote-758).

The ICJ recognised the legal decision of Security Council which created three exceptions; (i) the first in 1965 during the Rhodesia Crisis, (ii) During the declaration of independence by Turkish Republic of Northern Cyprus 1983, (iii) in 1992, against the Bosnian Serbians. On all occasions, the UN Security Council invalidated UDI by the said three political entities.

The ICJ focused on the legality of the declaration in the context of the lex specialis more particularly the (UNMIK) rules and transitional constitutional order. The ICJ deemed unilateral declaration,legal in the absence of any prohibition. This very notion was described by Judge Simma as being an anachronistic rule of Lotus. The legal basis of the judgment of the Permanent International Court of Justice in 1927 concerning a dispute between France and Turkey PICJ (1927) the res decis (legal principle) was that ’What is not strictly prohibited was legal’.

The ICJ rejected the argument that UDI was ever in breach of international law since the 17th century[[759]](#footnote-759) Even if self-determination entitled non-self-ruling territories to become independent it did not develop a new prohibiting UDI in self-ruling territories.[[760]](#footnote-760)

The ICJ rejected the argument about UNSCR 216(1965) prohibited recognition of UDI in Rhodesia, and UNSCR 541(1985) UDI in Northern Cyprus and UNSCR 787(1992) in Serbia-Bosnia because of unlawful use of force which denied legitimacy to UDI[[761]](#footnote-761).

The ICJ rejected the argument that territorial integrity, thus titles to the territory implicitly prohibited UDI. First, because UDI was an internal (intra-state) and secondly international law concerned relations between states (interstates). After all, UDI was not between states, thus could not be prohibited.[[762]](#footnote-762)

In view of the extensive numerical opposition to the Court’s reasoning and being deemed unpersuasive, the specific aspects of the contentious opinions will be dealt in depth while referring to the dissenting views and separate opinions and declaration of Judge Simma in the following sections.

Two questions persisted after the opinion: (i) why an opportunity to elaborate on the post-decolonisation role of United Nations in the furtherance of internal and external self-determination was intentionally missed? (ii) Was the Court still relying on self-determination norms, to support decolonization in the post-colonial-era?

### 6.7.2 The Critique of the ICJ Opinion; Dissenting Views of Judge AG Koroma

Judge Koroma dissented because unilateral declaration was a breach of international law and also because the ICJ evaded the issues , adjusting the question , promoted secession encouraging ethnic, linguistic, or religious groups to declare independence and break away from territory of a state of which they form part outside the context of decolonization, creates a very dangerous precedent.’[[763]](#footnote-763) This gave a misleading message to otherwise peaceful ethnic-linguistic minorities, to claim an illegitimate right.

Hon. Judges’ views were opposable, had the ICJ acted differently, ICJ would overlook other peremptory international legal norms, which protect fundamental freedoms and legal rights and the minority rights. Subsequently, the ICJ would send a wrong message to the states with ethnic and linguistic groups in the throes of establishing new constitutional relations legitimising oppressive state measures.

Second, the opinion suggested a view, contrary to obligations and duties created by the Charter, and the customary law applicable to all states and UN organs, this being duty to protect international peace and security. Judge Koroma’s third criticism concerned the UN organ’s[[764]](#footnote-764) legitimate internal relations.

If the UN can take legitimate political actions to affirm incidence of the sovereignty of a state, then its other organs should not pose unnecessary obstacles with legal challenges. After all, the process of determining the final political future of Kosovo under the UNMIK and its transitional administration was meant to be determined by legitimate political solution found by the disputing parties, under the auspices of the Security Council, and not by one party unilaterally.

However, the legal regime created by the Charter and UN organs [[765]](#footnote-765)as pointed out, during the adoption of Security Council Resolution 124 (1999)[[766]](#footnote-766), was undeniably successful, yet one peremptory international legal norm cannot be sacrificed in the alteration of another general international law (lex generalis) which has to be applied to specific situations( lex specialis). As the Netherlands head of delegation pointed out: ’Charter is not the only source of international law*.*[[767]](#footnote-767)

Judge Koroma’s legal basis of concerns, over ICJ alteration of the General Assembly’s question, is persuasive. One notes the distinction between ICJ’s reading of the question, as posed by the General Assembly in paragraph 1. Yet the ordinary reading of the question suggests that it was well formulated, consisting of three distinctive aspects, in need of pronouncement:

(i) A request for pronouncement on the unilateral declaration of independence in general (UDI).

(ii) A request for a pronouncement on, ’Unilateral declaration by the Provisional Institution of self-government.’

(iii) A request for pronouncement on the legality of a unilateral declaration by a provisional institution multilaterally set up by the international community through UN and through Security Council.

The ICJ in par.51 defined the question as being narrow and specific, [[768]](#footnote-768) yet still, it re-formulated,’[I]t asks the Court’s opinion on whether or not the declaration of independence is in accordance with international law.’

The Court rephrased it as’ [A]ccordance with international law of unilateral declaration of independence in respect of Kosovo.’[[769]](#footnote-769)

Judge Koroma[[770]](#footnote-770) opined that the declaration violated the lex specialis-legal regime created under the UN on the basis of SC Res. 1244(1998)-which bound the participants to seek a political solution and protect the territorial integrity of KRY. Furthermore, UDI attempted to end international presence, thus violating the UNMIK mandate from the Security Council. Yet all these matters should be related to the background that Serbia and the KRY manifested little concern over possible consequences of general international community in their treatment of their citizens’ fundamental rights thus when abusing the peremptory norms of international law intended to protect all of them.

One could sum the judicial approach taken by Judge Koroma, as being focused on the undesired possibility that the ICJ could create its own jurisprudence of remedial secession, as a modern manifestation of self-determination in post-decolonisation as it did during South-West Africa cases 1949-1971.[[771]](#footnote-771)

### 6.7.3 Dissent of Judge Bennouna

Judge Bennounasuggested that the General Assembly was being frivolous by engaging ICJ in a matter in which the Security Council was engaged to attain a political solution thus endangered the integrity of the ICJ.

 Judge agreed with other judges that international security was threatened by the Kosovo Crisis and had taken, unprecedented measures, and in any event, the Article 12 of the Charter would have inhibited the General Assembly from doing anything additional based on the legal information she would have received from the ICJ. On the issue of rephrasing the Question, Judge Bennouna was in agreement with Judge Koroma, when he opined:

[T]hough, hasthe Court amended the question posed in a manner contrary to its object and purpose, which in this case are to the determine whether the decolonisation of independence of 17 February 2008 did or did not fall within the competence of the Provisional Institutions of Self-Government of Kosovo as indicated by the United Kingdom representative.[[772]](#footnote-772)

Concern over the cross-engagement or rather parallel-engagement - a termed used by Judge Scotnikov- occurred, among the UN organs, even though they were allocated diverse functions by Article 7 as 7(1)of the Charter. One also notes an excessive sense of separation of powers, and division of function and powers, behind such arguments, verging on being too dogmatic when the virtues of moderation have been propounded in the above sections. After all, UN organs are subservient, to the purpose and principles of the Charter and without implementation of the balance of power between the organs, the United Nations will become severally divided.

Judge Bennouna called the majority opinion being based on sophism[[773]](#footnote-773) in order to evade deliberation of a specific situation where a territory belonging to Serbia which was now under UN administration by her conditional consent subject to respect of her territorial integrity, that would lead to opposition to UDI.[[774]](#footnote-774)

Furthermore, the Ahtisaari report was prepared for the Security Council to assist them in determining a political settlement to Kosovo crisis. The report recommended independence but it was never approved.[[775]](#footnote-775) Nonetheless, it was acted upon by the interim UNMIK Assembly of Kosovo.

Judge Bennouna opined firstly that the Kosovo crisis was no longer, and never been intra-state dispute since the emergence of the Kingdom of Serbs and Slovaks in 1918. Secondly, the argument advanced by the Court as to the legitimacy of the declaration, was ’(…)[N]to bound by the Constitutional framework and that the declaration was not an act intended to take effect within the legal system put in place by the UN’ [[776]](#footnote-776)is not persuasive:

Expressing my personal view, I would be tempted to say that the result is that the Court’s assistance to the General assembly has emerged trivialised, and yet another reason why the Court should have exercised its discretion by the refrain from acceding to the request for an opinion.[[777]](#footnote-777)

### 6.7.4 Dissent of Judge Scotnikov and the Declaration of J. Simma

Judge Scotnikov had no doubt that Unilateral Declaration of Independence (UDI) -the term he used[[778]](#footnote-778)– was in breach of regime formed under UNSCR 1244 (1999),[[779]](#footnote-779) and the majority erred on the legality of UDI in the context of customary international law[[780]](#footnote-780) as well as in the context of lex specialis[[781]](#footnote-781). The Judge noted first that the court should have declined to give an opinion because of the irregular circumstances when the question was posed by one organ and the answer depended on the interpretation of another[[782]](#footnote-782), which concerned the political measures taken by other acting under Chapter VII[[783]](#footnote-783). Secondly, the court should have declined to give an opinion as it did in the Bosnia-related issues on the use of force case in 1993, 1996, 1999[[784]](#footnote-784) to avoid a negative impression[[785]](#footnote-785). Thirdly, the Security Council could have considered the Ahtisaari Report which recommended independence as a final status to bring peace when it did not nor adopt a new resolution nor sought opinion.[[786]](#footnote-786) Fourth, even if the Court could have given a correct interpretation to a political Security Council resolution 1244(1998) and declaration associated with it,- which it did not - the General Assembly could not have benefited since being barred by Article 12 of the Charter, to act in parallel while the Security Council declared itself seized with the matter. The Court should have prevented the case giving ’negative implications since it was dealing with organs acting in parallel, in which it had no jurisprudence or precedent.’[[787]](#footnote-787) The majority did not distinguish between the violations of the legal order and acting outside of it.

Judge Bruno Simma’s, separate opinions was critical while, he voted with the majority of the chamber while stating that the court’s interpretation of the General Assembly request very narrow and a missed opportunity because it: ’[E]xcludes from the Court’s analysis any consideration of the important question whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met.’[[788]](#footnote-788)

The fact that the court altered the question thus missed the opportunity to reflect whether or not modern international law prohibits or permit secession subject to certain conditions[[789]](#footnote-789). Instead, it chose to rely on the anachronistic[[790]](#footnote-790) Lotus maxim which purported that; what is not prohibited is deemed permissible. As a result, the court missed an opportunity to deliberate on neutrality, and silence and the concept of toleration.[[791]](#footnote-791)

Judge Simma was very right in criticising the majority view on the question of avoiding invocation of ’Self-determination [and] remedial secession’[[792]](#footnote-792)though pleaded by the parties, thus the court could have addressed these arguments on their merits; instead, with its restrictive understanding of the scope of the question foreclosed consideration[[793]](#footnote-793). This was a relevant issue since self-determination led to remedial secession in the Kosovo Crisis as he pointed out:

[N]obody has made any reference to the will of the people. (…) The declaration referred to right of external self-determination grounded in self-determination and remedial secession as a people (…) the treatment -or rather- non-treatment of these submissions by the Court, in my opinion, does not seem to be judicially sound, given the fact that the Court has not refused to give the opinion requested from it to the General Assembly.[[794]](#footnote-794)

In another paragraph he returns to the missed opportunity:

Include a deeper analysis of whatever the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession of certain peoples/territories. [[795]](#footnote-795)

The Judge concluded by saying that the ’Court could have delivered a more intellectually satisfying Opinion.’ [[796]](#footnote-796) In short, Judge Simma was critical of the ICJ for missed opportunities to discuss self-determination in a post-decolonisation context.

### 6.7.5 Separate Opinions of Judge Yusuf and Judge Sepulveda-Amor

Judge Yusuf gave a separate opinion while voting with the majority view because he had three reservations; First, the ICJ restricted and narrowed the meaning of the question which was asked by the UN General Assembly. Secondly, the ICJ avoided the fundamental issues that raised the veil of sovereignty and the heart of the matter of Kosovo’s dispute[[797]](#footnote-797). The third reservation was the assessment of the nature of the law and jurisdiction of the transitional administration UNMIK.

He opined that narrowing the scope and depth of the question’ [A]avoids much of its substance.’[[798]](#footnote-798) Since self-determination as a right was not’ [A] legal notion of merely historical interest.*’*[[799]](#footnote-799)Nevertheless very relevant in post-decolonisation era while the international community’ [T]his favours fragmentation of existing states (…)*,*’[[800]](#footnote-800)by way of secession. The Judge examined the right to internal self-determination for all the citizens of the state within its territorial boundaries as part of its jurisdiction necessitating’ [L]lifting the veil of sovereignty.’ [[801]](#footnote-801)And paying close attention to the acts involving violence atrocities, and persecution, discrimination and crimes committed against humanity within the country. He opined that internal self-determination[[802]](#footnote-802) allows all the citizens to enjoy political social and cultural and educational freedom and a degree of autonomy where appropriate. However, he disfavours secession and external self-determination, for those ethnically and racially and religiously identifiable cohesive groups, who are entitled to the right of self-determination without turning a blind eye[[803]](#footnote-803) to state abuses.[[804]](#footnote-804)

Judge Yusuf restated that, external self-determination[[805]](#footnote-805) in the post-decolonisation era had two prerequisites, people who would qualify as a recipient of the right, and the factual circumstances in which the recipient’s entitlements were irreversibly denied, abused, and negated by their own state. First, there had to be identifiable people. Second, unacceptable factual circumstances, as he cited Supreme Court[[806]](#footnote-806) of Canada’s decision on Quebec’s intention to seek secession. This dictum supports the hypothesis of conditionality of legitimising components and determinants of self-determination most convincingly.

Judge Yusuf pointed out that legitimacy of entitlement was conditional to the state’s breach of fundamental liberties and legal rights enshrined within state constitution as prescribed by international communities’ peremptory legal norms. Therefore being qualified as identifiable peoples, did not give the right to unilateral secession, alone but also due to denial of internal self-determination and thus in last resort.[[807]](#footnote-807)

Judge Yusuf expressed regrets because;

[U]nfortunately failed to seize this opportunity which would have allowed it to clarify the scope andnormative content of the right to external self-determination in its post-colonial conception and thus to contribute ,inter alia ,to the prevention of unjustified claims of independence which may lead instability and conflict in various pastes of the world.[[808]](#footnote-808)

Judge Sepulveda Amor, voted with the majority because there were no compelling reasons not to.[[809]](#footnote-809)He too divided his separate opinion into three parts.

First, it is ICJ’s duty to contribute to the purposes and principles of the Charter, and to international peace and security[[810]](#footnote-810).

Second, he criticised how the legal order of UNMIK lex specialis, was treated because the court was concerned too much with semantics[[811]](#footnote-811) and identification of the body declaring independence and unduly casting doubts over the legitimacy without persuasive[[812]](#footnote-812) arguments.

Third, he criticised the court for the missed opportunity by failing to take a broad perspective and dealt with the issues raised by the GA question.[[813]](#footnote-813)

The Judge was focussed on the role of judicature and on the lost opportunity to provide guidance to the organs of UN on so many legal issues arising from the Kosovo crisis[[814]](#footnote-814), after all, the court was not asked whether or not UDI was in accordance with international law but for advice on modern concept of self-determination: [[815]](#footnote-815)

The Scope of the right to self-determination the question of “remedial secession”, extend of the security council in relation to principle of territorial integrity, the continuation or derogation of an international civil and military administration establishing under Chapter VII of the Charter ,the relationship between UNMIK and the Provisional Institution of Self-Government and progressive diminution of UNMIK’ s authority and responsibility and finally effect of recognition or non-recognition of as state in the present case are all matter which should have been considered by the Court, providing an opinion in the exercise of its advisory function.[[816]](#footnote-816)

### 6.7.6 Separate Opinion of Judge Keith and General Reflections

Judge Keith voted against the first issue that the ICJ had jurisdiction to respond to the request. The Judge also voted against the second issue whether or not the ICJ ought to give an advisory opinion. On the third issue, he voted with the majority to the effect, that the declaration did not violate international law on the basis of his own reasoned and explained an opinion. [[817]](#footnote-817) He opined that ’The court’s, in my view, should have exercised its discretion to refuse to answer to question.’[[818]](#footnote-818) The court’s discretion implicit in its Statute but Article 68 and 65(1)[[819]](#footnote-819)has jurisprudence which also shows that court does not respond by ’beck and call’,[[820]](#footnote-820) thus the concept of discretion was developed for a reason primarily because the ICJ is a UN organ, as well judicial body.[[821]](#footnote-821) Furthermore, the ICJ has developed its own jurisprudence on the principle of discretion.[[822]](#footnote-822) The ICJ has an option of giving an opinion unless there is a compelling reason not to give an opinion, ‘[S]should not hamper the court’ to use its discretion.[[823]](#footnote-823) Furthermore, there are other factors to consider when exercising the said discretion, including the interest of the requesting body and relative interest of other UN organs.[[824]](#footnote-824)When one considered relative and absolute interest in requesting the opinion [[825]](#footnote-825)of the General Assembly in comparison with that of Security Council, one notes the level of relativity, and how further information of international law will assist the decision making of the requesting organ. If the question was raised by the Security Council, the Judge would not have come to the conclusion that the court should have exercised its discretion and declined to give an opinion. This was a determining point for Judge Keith for deciding that the Court should not have given an opinion. [[826]](#footnote-826) If the Security Council requested an opinion from the ICJ, it would have been justifiable because of the history of the Security Council involvement under Chapter, [[827]](#footnote-827)VII.

Furthermore, the Security Council being concerned with general peace and security, and peacekeeping, also introduced Criminal Tribunal to the Kosovo crisis, and then dealt with the humanitarian crisis and finally the prohibition of the sale of arms. While on the other hand, General Assembly interest in Kosovo was beyond human rights interest and laid in finance and budget. The Security Council’s interest in the Kosovo crisis commenced with the decision to take over civil administration as well as the security of the region with UNMIK and interim administration, [[828]](#footnote-828)all of which abundantly demonstrate the Judge’s reason for his view why the ICJ should have declined.

Judge Keith’s opinion deemed the Court’s engagement as the question was a waste of time. The General Assembly did not have sufficient material interest when the Security Council was deeply committed to the crisis taking unprecedented measures. Also, the General Assembly could do little with legal information provided by the Opinion while Security Council was engaged.

**6.8 The Separate Opinion Judge Cancando Trindade**

He placed self-determination most timely and appropriately in developmental perspective in the context of other legal principles.

### 6.8.1 General Basis of the Opinion; Progressive Humanism of International Law

Judge Trindade voted with the majority but gave a separate opinion by relying on the progressive development history of international human rights.

First, he engaged in a regressive historical tracing of the transition of the concept of the mandate system, to trusteeship, and to an international administration of territories and establishment of legitimacy with the concepts of people and populations beyond the title to the territory. Secondly, he focused on the facts of the Kosovo crisis as noted by the UN and the ICJ. Thirdly, he analysed the application legal principle of ex injuria jus non-obitur (no legal right can arise from the unlawful act).

Judge Trindade opined that the suffering and injuries received by the population of Kosovo are well documented,[[829]](#footnote-829) he concludes that NATO’s contribution to this mayhem was not legitimised by Resolution 1244 (1999) nor could the state derive benefit by wrongdoing. He poses a rhetoric question. ’[C]an state’s rights arise, or be preserved, by means of consistent pattern of grave violation of human rights and of international law?’[[830]](#footnote-830) The fourth step in the opinion of Judge Trindade was the primary purpose of the Security Council Resolution 1244 (1999) which alluded to the Rambouillet Accord recommending the establishment of regional autonomy. The UNMIK and interim administration and self-government effort were directed to that end. Therefore, did the UNMIK attempt supervised independence in view of the adoption of constitutional measures as proposed by the Special Representative Secretary General? Judge responds in the affirmative. Although the Secretary General in his early reports suggested that the relationship between the UNMIK and new Kosovar authority was strained, the UNMIK did not make any attempt to reverse the situation. In his following report 30.09.2009, para 3 the Secretary General informed that the gradual adjustment and reconfiguration of UNMIK has been ’successfully concluded’, paragraph 2 and its role was that of security and stability in Kosovo and in Balkans, paragraph 3 defusing tension and facilitating practical cooperation with all communities in Kosovo.

(…). In sum, there has been apparent acceptance by UNMIK of the new situation in Kosovo’s declaration of independence in view of its successive endeavours to adjust itself to the circumstances on the ground, so as to benefit the population concerned.[[831]](#footnote-831)

The honourable judge concludes that international legal personality also brings international responsibility, and supported the advisory opinion, in the hope that at least in the case of Kosovo it brought one struggle and a ’[S]earch of emancipation from tyranny and systematic oppression.’ What is remarkable about this separate opinion is its distinctiveness from the majority view and its proximity to Judge Yusuf’s legal conclusions, that remedial secession is justifiable, not as a right and not a modern manifestation of self-determination.

The Judge referred to marked changes in international law, explicable in terms of socio-political changes from empire building, to state building, very reminiscent of Emerson and Judges Brierly and Alvarez who were deemed utopian during the first half of the twentieth century.

When decolonisation gathered momentum the tendency to belittle the importance of the United Nations General Assembly as a norm-creating authority was noted in Sloan’s two informed articles written with a 40-year gap. This feeling found echoes in the Judge’s opinion. If one think of this opinion as lex ferenda thus an argument as the law it ought to be, rather than a lex lata, that is to say stating the law as it is practised one will be wrong. Judge Trinidade, exhibits the legal basis of his reasoning founded on lex lata, thus as the legal norms stand and, not as they ought to be.

His arguments were founded upon several peremptory international norms, prohibiting the state from oppressing their citizens and subjugating them to systematic discrimination, by denial of their fundamental freedoms and liberties. The next step involved legal ascertainment of the abuses that took place in Kosovo by the authorities. The fact that the Security Council engaged the International Criminal Tribunal for Yugoslavia, to look into crimes against humanity being perpetrated in Kosovo, is one such evidence of oppressive measures being implemented by Serbia, and by the terrorist organisations in the name of freedom and sovereignty.

### 6.8.2 How Conclusive was the Opinion?

One can make several defensible comments about the majority opinion, and about its critiques. First, it is evident that judges agreed on grounds in support of the majority opinion. The majority opinion was agreed on many grounds yet numbers disagreeing on the opinion were marginally fewer. Those Judges who gave an opinion in dissent were; Vice President Tomka, Judge, Koroma, Bennouna and Scotnikov, four in number. Though Judge Keith dissented twice but voted with the majority on the third issue. Table 1 shows the distribution of voting in a chamber of 14 Judges. The Court voted 10 in support of the legality of the declaration of independence while 4 voted otherwise.

Is the opinion that the declaration of independence of Kosovo adopted on 17th February 2008 did not violate international law?

*Table 1: Breakdown of Judges Voting Figures 10 for and 4 against on the Question:*

|  |  |  |  |
| --- | --- | --- | --- |
| Judges voting in Affirmative and in Agreement On the Same Grounds | Judges voting in Affirmative BUT Separate Opinion. | Total of Judges voting in Affirmative | Judges voting against the Majority Affirmation |
| 5 | 5 | 10 | 4 |

*Table 2 How judges concurred and differed .*

|  |  |  |  |
| --- | --- | --- | --- |
| Judges voting in Affirmative and in Agreement On the Same Grounds | Total of Judges holding different views on the question before them  | Total of Judges voting in Affirmative  |  |
| 5 | 9 | 10 |  |

The above two sets of figures demonstrate that the ICJ opinion could not have re-stated the current international law with numerical supremacy. Furthermore, though the issues rising there-within were decided, but not with sufficient overwhelming general agreement among the judges.

### 6.8.3 Legal Principles ex Injuria Jus Non Obitur in Kosovo

Judge Trindade justified the legitimacy of a unilateral secession, not only on the basis of developments in positive, codified conventions and on multilateral norm creating treaties aspired by the UN Charter but as well as on substantive international legal norms such as ex injuria jus non-obitur. It simply means that no state could derive legitimate benefit by breaching peremptory international legal norms. ’ [A] wrongful act cannot become a source of advantage, benefit, or else right for the wrongdoer.’[[832]](#footnote-832)Similarly, one has to counter this maxim ’ex factis jus oritur’[[833]](#footnote-833)wherein by legitimacy is fact based or rather as one understands ‘as it is’ and not ‘what ought to be.’[[834]](#footnote-834)The legal argument is based on the presumption that the ultimate aim of the state is to the good of the citizen and not their oppression.

Judge Trindade is pointing out that the people of Kosovo were engaged in a struggle for survival while being deprived of autonomy in 1989 until the ‘UN international administration of territory was established in 1999 by means of adoption of the aforementioned resolution 1244(1999) of the Security Council.’[[835]](#footnote-835)The Judge called it ’1970 UN, Declaration of Principles’ and cited Article 5(7) of the said resolution, manifesting conditionality of protection of territorial integrity, when dealing with self-determination norms within the domestic jurisdiction. This paragraph deals head-on with the conflict of interest between the domestic jurisdiction of the sovereign state and her international obligations, states will be protected when conducting themselves in compliance with the principles of equalrights and self-determination of the peoples as dealt in Chapter 3.2(ii) and 5.1.3) above. This paragraph as argued earlier, moderates absolute sovereignty of a state, in her treatment of her citizens, as well as moderating the international intrusion in dealing with domestic jurisdiction.

While in 1970 Resolution acknowledges states obligation to protect fundamental freedoms and legal rights of her citizens, without endangering political unity and territorial integrity it also acknowledges the conditionality of the inviolability of supremacy of the state within its domestic jurisdiction and its territorial integrity being subject to her compliance, to the peremptory legal norms of international law. This is the implication of the term, “conducting” in the above-mentioned paragraph of the UNGA Res 2624(XXV) to which Judge Trindade referred and opined that ’The Court could and should have given close attention.’[[836]](#footnote-836)

It is with regret that the people of Kosovo were deprived of their entitlements and were subjected’ [T]o systematic violation of human rights, state ceases to represent the people or population victimised.’[[837]](#footnote-837) Furthermore, the 1993 Conference on Human Rights, went beyond 1970 General Assembly Resolution, and deemed to apply to any kind [[838]](#footnote-838) of discrimination, thus enlarging the scope of the UN GAR 2625 (XXV) 1970 Friendly Relations.[[839]](#footnote-839)

In conclusion, the Judge clearly linked political philosophy and moral justification of state authority, and why people obey laws as well as rendering them conditional to fundamental freedoms and legal rights with state responsibility to protect the citizen being owed to the international authorities.

### 6.8.4 Reflections on Kosovo’s Supervised Independence

Judge Trindade referred to moral justification of state’s authority, and obligations of the citizens to obey, as being conditional to the state compliance to the peremptory international legal norms, which support fundamental freedoms and legal rights of the citizens. *[[840]](#footnote-840)*

First, Judge Trindade concluded that Kosovo was administered by an entity that lost its moral justification because it led to the crisis.

Secondly, the Judge criticised the court, for not taking facts of the Kosovo crisis even when discussing S/R1244 (1999), meant to deal with Kosovo crisis.

Third, the court did not go beyond the Resolution. It, ’[S]imply begs the question.’[[841]](#footnote-841) Furthermore by avoiding them, or even pronouncing upon them, in an ’incomplete way’ [[842]](#footnote-842) was telling.

Fourth, Kosovo crisis in brief and in passing without explaining the causes of the crisis, and what it consisted of [[843]](#footnote-843) lay at the heart of the question, that the court was asked. The court avoided them and arrived at a decision with which he could not agree and offered his own.[[844]](#footnote-844)

Fifth, the ICJ overlooked how the Security Council broadened its base of operation, by not limiting it to states, and by including non-state entities[[845]](#footnote-845). It also broadened its function, from mere peacekeeping, to conflict avoidance, to state building commenting that ’This is well-known phenomenon within the Law of the United Nations.*’*[[846]](#footnote-846)

Sixth, the ICJ not only did not looked beyond UNSCR 1244(1999) it did not take a broader view of related efforts to find a permanent and just and lasting resolution to the crisis, such as the Rambouillet Accord[[847]](#footnote-847) which advocated self-rule verging on secession. This accord though was not signed but formed the basis of UNMIK set under UNSCR1244 (1999).

Seventh, the ICJ did to take the UN Secretary-General’s Special Representatives report (the Ahtisaari Report) into account, which recommended secession as a political solution[[848]](#footnote-848).

Eighth, the court did not take into account events that led to the declaration of independence, though not prohibited by international law’ [B]ut their consequences and implications bring international law into the picture*.’* [[849]](#footnote-849)

Ninth, the court did not take events after the declaration, into account. When a new constitution was adopted after the declaration of independence, it incorporated those articles adopted by the Rambouillet Accord and those approved by the Ahtisaari findings and anti-discrimination international norms.[[850]](#footnote-850)

Tenth, the court noted the Secretary-Generals’ report soon after declaration mentioning the implementation of 1244 (1999) was difficult. Final reports to the Security Council suggested that Kosovo under UN supervision could achieve independence and it was progressing and had no cause to complain about the new state in emergence in statu nascendi[[851]](#footnote-851)’and gradual adjustment and configuration of the UNMIK had been successfully concluded.*‘*[[852]](#footnote-852)As mentioned already above pages:

In sum, there has been an apparent acceptance by UNMIK of the new situation, after Kosovo’s declaration of independence, in view of its successive endeavours to adjust itself to the circumstances on the grounds, so as to benefit the population concerned.[[853]](#footnote-853)

In conclusion, Judge Trindade summed it up when he said that the state exists for human beings, and not vice-versa;

State transformed into machine of oppression and destruction ceases to be a State in the eye of the victimised population”[[854]](#footnote-854) in the midst of lawlessness people sought refuge in international law in the case Law of the Unite Nations ICJ may confirm the closing chapter of yet another long episode of timeless saga of the humankind in search of emancipation from tyranny and systematic oppression.[[855]](#footnote-855)

# CHAPTER 7 THE CONCLUSION

## 7.1. Restatement of Current International Legal Norm of Self-determination

By way of restating the self-determination, one may recall that the recent diplomatic history of the state-centric international political system is roughly divided into three epochs;

(i) Traditional, (ii) informal, [[856]](#footnote-856)(iii) and formal eras.[[857]](#footnote-857)

During the traditional and informal eras, the term self-determination was not used, but it can be traced to mean some identifiable citizen’s right to participate in the existing modality of governance, [[858]](#footnote-858)freedom of conscience[[859]](#footnote-859)and worship of some religions and political states independence from extraterritorial religious orders. The purposes or “why” the concept has been evolving since 1648 as a Westphalian state system is to regulate interstate and intrastate relations. After all the European Empire States were, no longer regulated by a single theocratic order, but several. Constitutionalism allowed politics and freedom of conscience to people and to the states its sovereignty, its political unity and independence and territorial integrity. In time, these values became known as Public Law of Europe adhered to by nations sharing Romano-Germanic and Franco-Germanic traditions.

The League of Nations (1919-1946) [[860]](#footnote-860) FSTPS. The Covenant used the expression self-ruling territories in place of self-determination.[[861]](#footnote-861) The purposes of the Covenant[[862]](#footnote-862) were; (i) To reject the war as a political tool, (ii) To reject the annexation of territories and colonisation. These objectives were to be achieved with (i) The collective defence system under[[863]](#footnote-863) (ii) With the peaceful solution and not by the force of arms[[864]](#footnote-864) (iii) To replace colonisation with mandate system[[865]](#footnote-865) and sacred trust of civilisation and manifestation of the modality of responsibility to protect. Emphasis was not on laws of war but Humanitarian Laws since the war was prohibited.

In 1945 The UN Charter referred to self-determination as one of its purposes in Article 1(2) and Art 55. Higgins argued that self-determination meant libation of the peoples from the enemy occupied territories after the WWII.[[866]](#footnote-866)Gromyko member of the politburo of USSR was at Dumbarton Oaks working on the Draft Charter representing Stalinist Russia and differs from Higgins, suggesting that decolonization, independence were not far from their minds during the drafting of the charter[[867]](#footnote-867).

The era of decolonisation[[868]](#footnote-868) extended the scope of the external of and the necessity to protect human rights from the authority of the state developed the internal concept of self-determination.[[869]](#footnote-869) Similar customary law values became positively identifiable humanitarian laws and crimes against humanity and greater state R2P[[870]](#footnote-870). Finally, if internal self-determination fails to prevent systematic commissioning of crimes against humanity then state succession and secession are likely to occur as a result of multilateral political reality rather than as legal certainty.[[871]](#footnote-871) Recent and ongoing cases, invoking self-determination will show that:

(i) The external self-determination emerged from the FSIPS to promote sovereignty and not the end the state through secession. Hence the Charter article 2(4) and 2(7) [[872]](#footnote-872) and 1970 Friendly Relations Resolution and Paragraph 5.[[873]](#footnote-873)

(ii) Article1 and Art.2 Art.5 and Art 16 of 1966 ICESCR[[874]](#footnote-874), directly refer to self-determination as right with obligations. One can argue that this constitutes a principle of conditionality.

(iii) Article 5(I) of 1966 ICCPR[[875]](#footnote-875) contextualise self-determination as right with other intentional legal principles.

(iv) State’s Sovereignty is not a license for the state, to commission crimes against humanity or cause a gross violation of human rights, and humanitarian laws without incurring consequences.

(v) Self-determination even as a specific or special law does not negate the general international law principles of state sovereignty, political unity and independence and territorial integrity because it is the conditional norm. Thus, self-determination in ICCPR is subject to Article 5(1) and cannot be implemented by violating other international legal norms such as changing the title to the territory, by threat and use of force.[[876]](#footnote-876)

Why the cases of Palestine, Eastern Ukraine and Crimea, and Syria? They many common aspects besides being concerned with the right to self-determination and manifest challenges of realising them due to failure of international due process:

(i) These regions have 500 years old, common ethnopolitical historical heritages,

(ii) These regions have been subject to two world wars and arbitrary territorially political changes brought about by religious and ideological conflicts,

(iii) In these geographies the title to the territory did not always coincide with the ethnocentric aspiration of some of the residents communities,

(iv) Frequently, the opposing claimants, enjoy legitimacy of claims of self-determination, but engage in breaches and violations of human rights and humanitarian laws and cause threat to international peace and security. Nonetheless, when the post-conflict negotiation of peace settlement phase arrives, the settlement has to be in compliance with international law.

This once more proves the hypothesis that jural imperative of self-determination is not negated even when self-determination is contentious, ill-defined and irregularly applied.

## 7.2. Delineating the scope of the thesis and the hypothesis and contextualising them with unresolved disputes; Palestine, Eastern Ukraine and the Crimea, Syria conflicts

### 7.2.1 Palestine the Occupied Territories

When the mandate for Palestine came to an end in 1947[[877]](#footnote-877) two independent states were set to be created, instead, one of three[[878]](#footnote-878)longest crisis in the history of modern era erupted. In December 2003 the UN General Assembly sought an Advisory Opinion from the ICJ, concerning the Legal Consequences of Construction of a Wall,- “a security fence [[879]](#footnote-879)-in Occupied Territories of Palestine.

The ICJ affirmed applicability of self-determination occupied territories by rejecting the Israel argument of the right to self-defence[[880]](#footnote-880). Israel claimed the right to external self-determination, attempting to justify oppressing Palestinian people by denying them internal and external self-determination. Second, ICJ acknowledged Palestinian Authority as a claimant of international legal personality thus entitled to external self-determination while being under occupation, deprived of human rights and political liberties, thus deprived of internal self-determination.

Third, the “Construction of the Wall” case, confirmed the application of internal self-determination, even when the territory in question is still under occupation. The Wall case clearly upholds non-annexation of territory for defensive and external self-determination reasons.

Fourth, the ICJ having identified relevant international rules and principles and facts, established the violation of the right to self-determination, and humanitarian laws by new settlements[[881]](#footnote-881) and the construction of a divisive wall in the Palestinian Occupied Territories.

Fifth, ICJ called for an end to violations, and to bring those responsible for trial[[882]](#footnote-882)and to commence restitution in compliance with international law.

Sixth, ICJ relied on East Timor ruling of 1996, which declared self-determination as a right erga omnes[[883]](#footnote-883) thus created an obligation on every state to avoid its violation by referring to the Charter, UNGAR 2625(XXV) and ICCPR, and ICESCR Article 1. [[884]](#footnote-884)

Seventh, the ICJ declared to be duty bound, to take the Construction of the Wall, and the subsequent violation, in the context of the whole of the dispute since ending of the mandate for Palestine in 1947 and:

“(…) United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.”[[885]](#footnote-885)

Eight, the ICJ reiterated the Namibia ruling that self-determination applied to all non-self-ruling territories[[886]](#footnote-886).

Finally, in 2016, the Wall is still standing in the Occupied Palestinian territories, since unlike Libya and Iraq, there are no Coalition-of-willing nations to take the Wall down, because there are no Security Council Resolution to mandate multilateral intervention because there several permanent members who would veto any mandatory resolution.

 Palestinian Wall Case, manifest the limitation of implementation of self-determination

### 7.2.2 Ukraine Crisis 2014

Ukrainians politics has been divided into two camps; the pro-Europeans[[887]](#footnote-887) and pro-Russian groups, since the break-up of USSR in 1991. The general elections in 2012 brought the pro-Russian parties to power, and closer association with EU and constitutional reforms in compliance with EU norms[[888]](#footnote-888) became a source of contention. Socio-politico and economic crisis[[889]](#footnote-889) came to head in November 2013 when the President-elect delayed signing the EU Association Agreement. After Anti-Protest-Laws of 16th, January 2014, the pro-European protesters met with greater oppressive measures. Violence among the protagonists escalated and 98 lives were lost. On 21st Feb.2014 the EU-Russian diplomats brokered an agreement between the government and three protesting groups on six points:

(i) To re-adopt the 2004 Constitution within 48 hours. National unity government to take power, in 10 days,

(ii) Constitutional balancing of presidential powers to be completed by September 2014,

(iii) The presidential elections to be held no later than December 2014 soon after the said amendments to the 2004 Constitution. New electoral laws to be adopted in keeping with OSCE and Venice Commission Rules.

(iv) Recent violence to be investigated by joint groups including investigators from the Council of Europe,

(v) Transitional authority will not declare a state of emergency and will declare amnesty, for all offence committees till 17th February 2014. Collect all the unlawful arms. Efforts to be made to normalise life, avail state offices for public service within 24 hours,

(vi) The Foreign Ministers of Poland France, Germany and Russian Federation are to witness this agreement.

On 22nd February 2014 the President-elect left his office, only to reappear next day in Moscow. On 25th February 2014 Ukraine Ministry of Foreign Affairs sent a letter to the President of the UN Security Council, calling for help, from the international community to protect Ukraine’s independence, territorial integrity, from threats from Russian. The letter denied the Russian Ministry of Foreign Affair assertion that Ukraine was sliding into civil war since the “Coup” brought in an oppressive regime determined to oppress minorities and religious and linguistic groups. The Ukraine’s letter to the Security Council denied Russia’s Statements that Neo-Nazi ideology has taken root in Ukraine. The letter called for the implementation of the guarantees for the protection of Ukraine’s sovereignty and territorial integrity under international law and under 1994 Budapest Memorandum.[[890]](#footnote-890)

On 28th February 2014 Security Council met in close-session. It was to meet more than 30 times in the course of 2014. On 13th March 2014, Security Council set and heard a report from political Under-Secretary-General for political affairs. He referred to the 6th meeting in 12 days, as a testament to the evasive nature of the solution to the crisis. US representative drew attention to Ukraine’s reconciliatory approach during the session in contradistinction to Russia’s aggressive stand[[891]](#footnote-891).

On 15th March 201, the Security Council met to halt the proposed referendum in Crimea to secede from Ukraine and join Russian Federation. A resolution sponsored by 41 states urged member states not to recognised the “(…)[T]he results of the referendum planned for 16th March in that country’s autonomous Crimean region or any alteration of its status.”[[892]](#footnote-892) Many speakers pointed out that the Resolution was supporting the UN Charter Article 2(4) the prohibiting use of force to acquire territory, thus defend territorial integrity. Russia was also bound by Budapest memorandum.

A veto by Russia was seen as a veto against the Charter and the Memorandum, since both protected independence and territorial integrity of the Ukraine[[893]](#footnote-893). France also pointed out that Russia sought the justification of protecting Russians, threatened in Crimea[[894]](#footnote-894) and that it has been part of the Soviets. France deemed this irrelevant by pointing that the “[The] peninsula has been under Turkish[[895]](#footnote-895) rule for three centuries. (…). The Council’s duty was to uphold the fragile barrier of law, and accepting the planned referendum would turn the Charter into a farce”.[[896]](#footnote-896)

On 27th March 2014, UN General Assembly met and adopted a resolution titled “Territorial Integrity of Ukraine, “[A] resolution calling upon states not to recognise changes in the status of Crimean Region”[[897]](#footnote-897). Earlier on 16th March 2014, the Crimean Autonomous Body held the said Referendum and attained 97% support to join Russian Federation. On 18th March 2014, President Putin signed a decree to incorporate Crimea into the Russian Federation[[898]](#footnote-898). The said UNGAR was adopted by 100 votes for, and 11 against and 58 abstentions. Speaking from the floor Mr Churkin for Russia said that “Russia could not refuse Crimean’s wish to support their right to self-determination in fulfilling their long-standing aspiration. Historical justice has been vindicated.”[[899]](#footnote-899) This view was not shared by 100 members. Many states felt that the Resolution even though “[N]ot binding”[[900]](#footnote-900) restated current international law on the situation:

(i) Territorial integrity of Ukraine,

(ii) Calling on states and international organisations and specialised agencies not to recognise any change to the status of Crimea and Town of Sevastopol,

(iii) To refrain from any action that might be interpreted as such,

(iv) Asked the states to desist and refrain from action aimed at disrupting Ukraine’s National Unity and territorial integrity including modifying its borders through the threat or use of force,

(v) Urging parties to pursue peaceful resolution of the dispute, direct political dialogue,

(vi) Refrain from unilateral action and inflammatory rhetoric that could raise tension,[[901]](#footnote-901)

Those States who spoke in support of the resolution acknowledged the violation of the Charter, the political unity and territorial integrity of Ukraine, by the separatists and by the Russia’s approach to self-determination. It was being suggested that legitimate claims for Self-determination laid in the context of international law and due process, unlike the way it was being pursued conducted since 1st March 2014.

The point was taken up by Liechtenstein who considered the annexation of Crimea unlawful, and a serious challenge to the rule of law and therefore null and void. Furthermore not only events violated the Constitution of Ukraine but also Charter article 2(4). The speaker expressed concern over the Russian veto in Security Council on 15th March, arguing that it was in contravention of Charter Article 27(3) which directs states not to vote when directly involved in the matter in question[[902]](#footnote-902). Ms Power for the US in SC said *inter alia*, that;-

 Self-determination is a value that all of us here today hail. We do so while recognising the critical, foundational importance of national and intentional law. Coercion cannot be the means by which to achieve self-determination. The chaos that would ensue is not a world that any of can afford it is a dangerous world.[[903]](#footnote-903)

Cuba’s representative referred to the unconstitutional developments in Ukraine and to the importance of people to determine their future, without interference from NATO and Western states, which are resorting to double standards.

A fair assessment of Cuba’s statement is necessary. It is self-evident that intentionally negotiated process are arduous and slow and R2P is executed most ineffectively, as seen in Rwanda and Srebrenica and in Libya and Iraq. Therefore, one is not criticising contextual application of the principle of self-determination, in international processes, but to the administrative difficulties of implementing them. Nonetheless, the Spokesman for EU said that referendum violated Ukraine’s Constitution and its annexation by Russia will not be recognised. Georgia saw an emerging pattern of Russian aggression including in Ossetia and Abkhazia and other territories which were formerly part of USSR now being repeated.[[904]](#footnote-904)

The Security Council set on 16th January 2016, re-affirmed territorial integrity and political unity of Ukraine and condemning violations over Crimea and the Eastern provinces. Nonetheless, any political process will not reverse the events but perhaps prevent secession with peaceful state succession.

In the absence of Security Council resolution to liberate Crimea, and in the absence of numerically overwhelming population, who wants to be liberated in Crimea, a paradox is created in which the principles of title to the territory is opposed by the principle of self-determination. First, this is the nature of the challenge that this thesis examined. Second, when the will of the people fail to follow legitimate processes, causes irregular application and self-determination lose its legitimacy.

In the matters of Crimea and Palestine, the international politics based on moral principles reverted to politics based on naked power. This reversion, brought politics guided by political morality into controversy resulting in Security Council impasse, inaction, and violation of Security Council’s obligation, to protect international peace and security. Third, departure from legal and moral administration processes, negates legitimacy and departure from due and legal international processes, prolongs the dispute and threat to international peace and security.

Ukraine and Crimea Crisis manifest the systematic failure of the Security Council’s voting System. One can argue that the states vetoing in their own case breach the fundamental legal principle, purporting that no one can be a judge in his own cause[[905]](#footnote-905).

### 7.2.3 Syrian Civil War 2011 FSIP and the hypothesis

Syrian Civil War continues to raise several concerns about the international communities’ capacity to administer self-determination with its identifiable challenges.[[906]](#footnote-906) Challenges are noted in the context of the thesis and hypothesis[[907]](#footnote-907)thus in terms of the legitimising components[[908]](#footnote-908)and determinants[[909]](#footnote-909)of self-determination.

The failure of the international community and UN organisations has been describing as a negation of their R2P in view of the human cost. Failure can be summed up under several headings.

(i) Failure of formal international response to the crisis and humanitarian violations,

(ii) Failure of formal fair response by the Security Council,

(iii) Failure to intervene effectively and justly by UN in general.

Once nature failure is identified, the next task is to identify the breaches legal and moral rules. International Criminal Responsibility, attributable to parties committing the acts of crimes of genocide, crimes against humanity, war crimes and crimes of aggression, should be separate from the responsibilities attributable to those who attempts to stop but fail as the UN soldiers in Bosnia Srebrenica. Similarly, the responsibility of the Security Council for failing to protect Syrians and Iraqis and Libyans or the victims arising from threats to international peace and security is moral and administrative rather than criminal.

In the Absence of regular formal invocation of R2P, one may be justified in searching a specific convention, covenant, a multilateral treaty, repeatedly adopted UNGA resolutions, repeated ICJ declarations referring to the legal basis of R2P. They are not being found to impute legal obligation. Occasions of political processes of invocation are plenty, so are the subsequent basis of moral obligation as the inherent aspect of rules of administration of international law and due process. Since UN has the international legal personality[[910]](#footnote-910) it can be legally held responsible for not functioning properly but not for failing to stop Syrian atrocities. Furthermore, in the current formal state-centric international political system international order can be achieved if the states feel the moral responsibility, to discharge their international obligations. Such response has to be fair and the process of intervention has to be effective and just. The UN Deputy Secretary-General Eliasson delivered a statement of the Secretary-General reminding these to the Security Council on 22nd May 2014 in no uncertain terms,

Since the outbreak of the war in Syria, I have persistently called for accountability for perpetrators of grave human rights violations, crimes’ against the humanity and war crimes since (…) The Security Council has an inescapable responsibility in that regard. States that are members of both the Security Council and the Human Rights Council have a particular duty to end the bloodshed and ensure justice for the victims of unspeakable crimes.[[911]](#footnote-911)

The R2P in this context is an administrative obligation, arising in the context of administrative powers granted by the UN Charter to the Security Council.[[912]](#footnote-912) Furthermore, in 1962 Ethiopia and Liberia were allowed to bring Action by the ICJ, against South Africa, over the future of South-West Africa,[[913]](#footnote-913) without material interest but on the grounds of legal interest. One can argue that all non-office-holder nations are also empowered by the Charter and stand responsible “to call to account those grave human rights violations, crimes’ against the humanity and war crimes.”[[914]](#footnote-914) Irrespective of the erga omens nature of the violations.

As a member argued in the Security Council, justice is essential to peace and no peace is possible without justice therefore since Security Council is a mandated “[P]rimay responsibility for the maintenance of international peace and security (…). [[915]](#footnote-915)SC was obliged to do so.

In the case of Syria, it is argued that international response process was initially unfair and ineffective and unjust. Two views emerged. First, supported the instant international intervention and regime change to save lives and political independence and territorial integrity. The second view was opposed regime change, as in Afghanistan, Iraq, Libya. Furthermore, this group wanted constitutional reforms and an instant halt to violence. These will be discussed in depth but very cursory look at the political history and theory of Syrian State in terms of its demographic and geographic aspects is inevitable. Mesopotamia and Levant, -historically correct names-renders such an analysis essential because the land had not been a terra nullius since 2,000 BC. Therefore, the application of some measure of the principle of uti possidetis ought to have taken place. This would have necessitated the conquering armies to take the existing administrative borders into account in their administration. This was not applied by the Victors in 1919 or in 1949. Therefore, fairness discourse compels analysis of state action, in non-Humanitarian violations, and consider breaches of customary rules of war and R2P rising under customary law. Such a fairness discourse cannot remove criminal responsibility and accountability for violations that took since the start of the civil war.

First, the Syrian Arab Republic occupies a territory with a very short history of a unitary, highly centralised, authoritarian state. This short history is marked with rebellions, coups, and wars. Secondly, this territory cannot be called terra nullius[[916]](#footnote-916) because this geography was ruled over by Empires[[917]](#footnote-917) for thousands of years.

In 1920, the French mandate included the Coastal regions known as Phoenicia and Levant except Jerusalem. It ended Ottoman regionalist (Millet) or political theory of integrated demography-geography, system existing since 1517. This system meant that the people ought to be governed by the administration of their own conscience and belief system. French mandate initially intended to implement the principle of Uti Possidetis in full, by creating a Christian state with a Northern Alleviate and Christian mixed and Southern Shiite state. Southeast of Beirut habituated by Druze. This meant keeping the Turkish Administrative Regional “Vilayet–Millet System, (Maps 1&2[[918]](#footnote-918)). Instead, France abandoned the said system and joined all three regions into one creating modern Lebanon. Continues rejection of the mandate system by the inhabitants led to oppressive French mandate administration of the distinctive administrative regions and peoples within recently drawn borders. This territory runs North-to-South along the Coast of the East Mediterranean, as North Beirut, Lebanon, and Southern Beirut District (VILAYETS) with Druze, Christian and Sunni Arab regions. Then there were Jewish-Arab-Christian settlements in the Sanjak of Jerusalem held by the British. Modern Lebanon was thus created by uniting all three sectors, and three communities with distinctive religions. Lebanon’s Civil wars are a testament to the ethnic-demography-geography determinant, persisting as destructive social fact every time authority vacuum became evident in the 1950s. The next strip of Territory run from North to South to the East of River Euphrates, is the Vilayet of Dar el-Zor, running from down to North Saudi Arabian peninsula (el Jazeera) boarder.

It is an administrative arrogance for powers to draws lines-in-the-sand in the service of their national interests and also hopes to create new states for others by mixing up administrative district separated along ethnocentric lines, for scores of centuries. That is how Trans-Jordan and Modern Syria and Iraq was created almost along Sykes- Picot[[919]](#footnote-919)agreement.[[920]](#footnote-920) One can see with dismay, how ISIS claims East of Vilayet of Dar al-Zor, (since 1946 became part of Syria and part of Iraq) all the way to the east and including the island of Cyprus and East of the Euphrates to Mesopotamia and West of Tigris and parts of Vilayet of Aleppo. Mixing Alawite, Sunni and Shea Muslims, and Christians Druze and Jews was not a problem for the European Powers, who did not have to live in that geography to be affected with the adverse consequences of their actions. In reality, the governance of Mesopotamia since 1517 was by balancing of principles of peoples and territory along ethnic-demographic geographic.

Late President Assad came to power in 1963, as a member of a coup by socialist Baath-party. It was after and failed attempted union with Egypt, failed experiments with democracy and coups attempts. With the coup, Communist expansion in the Eastern Mediterranean and in the Middle East was achieved. Yet, Syria’s experiment with socialism started with independence in 1946 but in earnest in the 1960s.

Two conventional wars with Israel destabilised Syria further since it was constituted by non-cohesive peoples, in a unitary state, held together by omnipotent and omnipresent socialist state. President Hafiz Assad took sole power for life in 1970. In 2000 he died and his son became president and managed to hold on to power and a unitary state broken down along ethno-demographic-geographic lines just like in Lebanon since 2011. Assad regime provided a degree of order in that geography.

Three distinctive groups are engaged in the Syrian Civil-War; first, the state fighting for its sovereignty, political unity and territorial integrity, the second group is the ethnocentric regions fighting for internal self-determination. The third group is fighting against all, for new state akin to pre-Sky-Picot 1916. Neighbouring Turkey keenly supports Turkmens, an ethnic Turkish population separated from the Modern Republic in 1932. Turkmens has been settled in that area since 1071 and denied total democratic entitlement by Syria since 1963. Christians of Syria and rest of the world are fighting to stop new Islamic State of Iraq and Syria. Sunni Arabs of Syria and that of Iraq also support ISIS, along with foreign fighters in their thousands, now deemed as a threat to international peace and security.[[921]](#footnote-921)

2.5million Syrians mostly Kurds but include Arabs and Christians, took refuge in Turkey while armed groups fight on. Iran supports the regime because it deeply opposes Sunni Arab dominance in the geography.

Constitutional Reforms to enfranchise ethnically non-Alawi Syrian Kurds and Turkmens were introduced in 2012. International diplomatic intervention in Syrian civil war[[922]](#footnote-922) to bring about a partial halt to violence has taken five years. Subsequent limited humanitarian aid and indirect talks commenced in March 2016[[923]](#footnote-923)in the hoped that it would lead to direct negotiations. Had appropriate Security Council resolutions been moderate, fair, and adopted earlier, more lives might have been saved and fewer people rendered refugee and displaced or drowned in the Aegean Sea or threatened international peace and security less[[924]](#footnote-924). On the other hand early unplanned intervention in Libya and Iraq and Afghanistan, caused more loss of lives and state succession or state building on unfamiliar models to the people, contributed discontentment and disorder. Furthermore, the distinction between regime change and state succession being political thus unjustifiable yet contrary to the Charter Article 2.4. Therefore, implementation of internal self-determination ought not to cost sovereignty political unity and territorial integrity of any state[[925]](#footnote-925) including Syria. These challenges of self-determination propounded in the thesis and hypothesis are notable in the Four Security Council meetings resolutions which were vetoed[[926]](#footnote-926).

During the said four Meetings of the Security Council, [[927]](#footnote-927)the members, irrespective of their position on the vetoed resolutions, demanded an end to violence, death, and destruction. All called for a stop to a violation of human rights, violation of humanitarian laws, and commissioning of crimes against humanity.

All the participating members called for a peaceful resolution to the dispute, and maintenance of sovereignty of Syrian Arab Republic and its unity and territorial integrity. Some of the supporting parties of the resolution felt that Current regime was responsible for the mayhem, failing to protect citizens from armed groups.

France and many other states held the authorities responsible for the safety of unarmed civilians, but since they failed, advocated the Criminal Proceedings. Consensus has formed that the Security Council has failed its responsibilities. First by not adopting resolutions to remove the threat to international peace and security. Secondly, for not instigating International Criminal Proceedings, has gained credibility.

Events in Syria damaged the legitimacy of the Syrian state, as well as the states mandated to protect international peace and security most vividly manifested and accepted by the Security Council.[[928]](#footnote-928) Furthermore, one cannot blame international law failing to protect the states and the citizens, when those who were directly obliged to protect, has failed.

Practical application of perceived and proven aspects of self-determination to unresolved disputes methodically in terms of system, “why” and “How “is simple and useful. Recent diplomatic history of the international political system is roughly divided into three; Traditional, informal[[929]](#footnote-929), and formal eras.[[930]](#footnote-930)

Self-determination during the traditional and informal eras was not used, but it can be traced to mean citizen’s right to participate in the modality of governance[[931]](#footnote-931), freedom of conscience and independence. They are implicit in the customary law meaning of self-determination. The purpose, or “why” were they evolved since Westphalia 1648 was to regulate interstate relations. The European Empire States were, no longer regulated by a single Theocratic Order but politics allowing freedom of conscience to people and the incidents of state’s sovereignty, it's political unity and independence and territorial integrity. As to how these values became adopted are best defined as Public Law of Europe sharing Romano-Germanic and Franco-Germanic traditions, comity, and custom. These were exclusive Eurocentric practices.

Formal state-centric era starts with the League of Nations 1919-1946[[932]](#footnote-932). Covenants used the expression, the self-ruling terrorise in place of self-determination.[[933]](#footnote-933) The purposes of the Covenant[[934]](#footnote-934) was to, (i) reject war as a political tool, (ii) rejection of annexation of territory and colonisation. These mentioned objectives were to be achieving with, (i) collective defence system (ii) and Settlement of disputes with the law and not by force of arms, (iii) replace colonisation with of mandate system[[935]](#footnote-935) and sacred trust of civilisation and manifestation of the modality of responsibility to protect, (vi) finally the laws of war were to be replaced with Humanitarian Laws since the war was prohibited.

The UN Charter in 1945 referred to self-determination as one of its purposes Article 1(2). Higgins thought that it meant libation of peoples from enemy occupied territories after the war[[936]](#footnote-936). Gromyko was at Dumbarton oaks and differs, suggesting that decolonization, independence were not far from their minds.

The era of decolonization[[937]](#footnote-937) brought external while human rights brought in internal self-determination[[938]](#footnote-938) and participatory governance and humanitarian laws and crimes against humanity and greater state R2P[[939]](#footnote-939). Finally, if internal self-determination fails to prevent systematic commissioning of crimes against humanity then state succession and secession are likely as a political reality rather than as legal certainty[[940]](#footnote-940).

Recent and ongoing cases of self-determination will show that;

(i) Since self-determination emerged from the formal state-centric international political system, promoting sovereignty and not the end of State. Hence the Charter article 2(4) and 2(7) [[941]](#footnote-941) and 1970 Friendly Relations Resolution paragraph 5.[[942]](#footnote-942)

(ii) Article 1 and Art.5 and Art 16 of 1966 ICESCR[[943]](#footnote-943), directly refer to self-determination as right with obligations and thus the principle of conditionality.

(iii) Article 5 of 1966 ICCPR[[944]](#footnote-944) refer to self-determination again conditionality of the right.

(iv) Sovereignty is not a license to commission crimes against humanity or cause gross violation of human rights and humanitarian laws without incurring consequences

Therefore, Self-determination as the specific law does not negate the general international law principles of state sovereignty, political unity and independence and territorial integrity. This is the thesis conditionality of components and determinants of self-determination do not negate its jural imperative.

The cases of Palestine, Eastern Ukraine and Crimea, Syria, and Gagauzia, Transnistria, Georgia-South Ossetia, Kara-bag Azerbaijan have common aspects. First, these regions they have common ethnopolitical historical heritages of 500 years old. Second, they have been going arbitrarily regional political changes for the second time. Third, title to the territory does not coincide with the ethnocentric aspiration of some of the residents communities. Finally, frequently the opposing claimants enjoy legitimacy but engage in breaches and violations of human rights and humanitarian laws and cause a threat to international peace and security. However when post-conflict phase arrives settlement has to be in compliance with international law thus proving the hypothesis that jural imperative of self-determination is not negated.

## 7.3 In Summing-up

This inquiry into the legal challenges of modern self-determination is assisted with a hypothesis. The hypothesis is that the conditionality of legitimating components and determinants of the international legal principle of self-determination, in the current Formal State-Centric International Political System (FSIPS), does not deprive its jural imperatives and having being proven, the hypothesis leads one to several defendable conclusions as below.

Throughout this research, it has been maintained that self-determination with all its modalities, legitimising components, and determinants, should be analysed, and subjected to constructive criticism and to be improved within the FSIPS. Therefore this work conducted its inquiry within the existing legal system and international rules.

One particular contribution of this inquiry, for the improvement of effective responsive state-centric international system, is its finding that this is possible due to intentionally really expressed norm:

(i) With the increased practice of good will,

(ii) Greater cooperation,

(iii) Increased awareness of states and people and peoples to the consequences of their actions and omissions and accountability, to the state and international community.

Conclusions reached by this work rely on primary documents concerning formal legal and political organs established in the domestic and international jurisdiction. The evidence advanced to prove the hypothesis, supports the suggestion that, current inherent challenges can only be overcome by moderation, cooperation, goodwill, friendly relations by the protection of international peace and security by the compliance of all actors to international law.

It has been noted that UN Charter proposed codification of customary and international treaty law which at times combined jural and moral imperatives on account of three factors:

(i) The acceptance of plurality and coexistence and diversity, subject to the rule of moderation,

(ii) Coexistence of the political state as legal person, and the individual as a real person under rule of law and democracy and legitimacy of state and its accountability, necessities moderation,

(iii) Coexistence of states, with diverse modality of governance, subject to rules, regulating inter and intra-state relations, can be reached with moderation and general consensus.

The findings of this inquiry support the political and jurisprudential moderation essential for the accommodation of multilateralism and communal pluralism democracy and minorities rights and individualism, in pursuance of common ends by unifying the diverse international community.

The hypothesis suggests the availability of a choice of orderly diversity, in place of chaotic international disorder.

The hypothesis supports positivist idealism and international order, in place of chaotic realism in international affairs. It has been proven that chaotic international order no longer holds true since 1919 with the establishment of formal state-centric international order. The hypothesis casts serious doubt on the expression, Chaotic Intentional Order since it implied order without central omnipotent authority. The state-centric international order is not may not be perfect. But nor international order based on world government destroying sovereign, equal states. Without state-centric international order, local and global harmonic states will also destroy sovereign, equal states.

It is the contention of this work that time has arrived to replace diplomatic euphemism for deviant state by demonstrating their culpability. States who agreed to be bound by their undertakings and norms should not be treated diplomatically but declared culpable of as such.

This work chose the concept and the legal precept of international legal principle of self-determination because it was possible to analyse it in three distinctive terms:

(i) Where constitutional and international legal and the real person is acknowledged along with states.

(ii) The compliant sovereign states to international norms are also accountable to a domestic political system built around the common prerequisite of the individual’s, personal safety, economic, social, political and spiritual wellbeing.

(iii) The general capacity to perceive, construct, and participate in a political system, in which life, liberty and property are inalienable and conditional to the protection of collective security, political independence of the state and its territorial integrity.

The defensible conclusions supported by the hypotheses are several:

(i) International rules and processes of self-determination empower international community to be more responsive for the protection of political unity and territorial integrity of the state and fundamental freedoms of the citizens and the minorities,

(ii) The international legal system and the political order actually attempts to represent, engage, serve states, and peoples of the international community while being accountable to the states who participate in its deliberative processes, executive and adjudicative functions,

(iii) The transformation from informal to formal international order provided the means of codification, and an active source of international law through multilateral treaties and conventions and legal processes,

(iv) The international legal principle of self-determination in a state-centric political system, by the virtue of being codified and positive, and imprecise, led to the growth in its scope and irregular application, inconsistent supervision and enforcement by the rule-based international organs.

The corollaries of the hypothesis are numerous too. First, the emergent international order after 1945, stopped short of being world government -civitas maxima- by being state-centric. The UN General Assembly became the focal point of the state-centric system and the international political system, created by the states, managed by the states and checked by the states. The Security Council retained aspects of power based informal order aspects and Euro-centricity and representing the victorious powers of WWII, charged with the supervision and maintenance of international peace and security.

Second, the concept, the policy and the legal precept of self-determination, by challenging the existing international rules and processes became a reforming determinant. Internal self-determination, contributed to the transition of Laws of Nations, to International Law by enlarging the scope of international jurisdiction from regulating interstate relations to the inclusion of intranational relations. As the ICJ proceedings showed, the self-determination process was contentious and states were not easily persuaded to accept their consequences willingly. Furthermore contentious positions often led to violence, crimes against humanity, and irreparable disruption to lives of millions of people.

Third, the self-determination externally protected the political unity and territorial integrity and attributes of state sovereignty. Internal self-determination, brought supervision of international community into the relations between the state and its citizens, therefore into the state’s constitutional order. What was once considered an inalienable right of the state within its domestic jurisdiction, it became subject to international supervision and interest and conformity to objective international values, in short self-determination transformed doctrinal aspects of the international law to pragmatic principles of international, intra-national interests.

Fourth, the resolution of administrative complexities created by the doctrinal approach to sovereignty received impetuous due to several reasons.

(I) Nations had to acknowledge the magnitude of disasters confronting humanity, due to conflict of national interests.

(II) Jural acceptance of advantages of peace and security and cooperation to resolve common, economic, social problems under the UN Charter.

(III) A state indifferent to international legal principles of self-determination and objective friendly relations, cooperation, moderation, normative goodwill, could not seek the protection from the international law and international community against state succession and secession.

Fifth, self-determination does not seek unaccountable, omnipotent international order but to oppose internal oppression and alien subjugation and support the permeation of political accountability. The informal international political system operating balance of power has failed with grave consequences identified by the preambles of Covenant and the Charter. The international legal principle of external self-determination prohibits annexation, aggression, and subjugation of a nation by another nation. Internal self-determination prohibits violation of fundamental freedoms and human rights and humanitarian laws and crimes against humanity and oppression of the people and peoples. State succession and secession means an end to an existing regime. The former means a new constitutional order without alteration to the citizenship of the citizens and or international territory of the state. The later means new political order and citizenship and international territories. Succession and secession often occur because external and internal self-determination fail and the failed state becomes a politically and legally and diplomatically uncontainable, and a threat to international peace and security.

Sixth, the findings of the inquiry defended several aspects of self-determination,

(i) The general and broad definition of self-determination in view of the tasks allocated to it by the state-centric international political system, and by its inherent challenges.

(ii) It supported irregular application and compliance because of the task and limitation imposed by the state-centric political system and order demanded by the states.

(iii) The hypothesis supported the interdependence of national and international jurisdiction hence the principle of conditionality of components and determinants of modalities without negation of jural imperative inclusive of moral imperatives.

Seventh, the hypothesis accepted the relevant importance of interests of the international community and that of nations and the individuals. The protection of these interests by the legal principle of self-determination is noted and state legitimacy has been established with reference to them.

Eighth, the international legal principle of self-determination is conditional and subject to legitimising components and determinants as an important legal principle with a jural imperative since it has been affirmed by the International Court of Justice and International Criminal Court.

Ninth, the history has shown that international legal principle of self-determination has emerged as a legal principle because formal state-centric system willed it so. This would not have been possible without the existence of formal and legitimate international political system operated by the states.

Tenth and finally, the states could be indifferent to an international political system and international values and be expected cooperate with other states and maintain legitimacy. Compliance with the international legal principle of external and internal self-determination under the supervision of international community protects the political unity and territorial integrity of the state from other states and fundamental freedoms of the citizen from its own state. Such a proposition was unheard of until stage by stage developments took place with the arrival of the era of League of Nations and United Nations Charter and subsequent development of international responsibility to protect in the first decade of the 21st century.

One can argue that the future of international legal principle of R2P will endure the challenges that decolonization suffered in the past as the “R2P” becomes a peremptory international legal principle and erga omnes. This means repeated support of “R2P” in UN GA resolutions with overwhelming majorities, and repeated articulation of the developments by ICJ showing diversifying and challenging nature of the international legal principle of self-determination otherwise will remain an unfinished project.

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1. The title is exactly produced including the grammatical oddity [↑](#footnote-ref-1)
2. The term modern is used above in the context of epoch of international law and its implicit international political system. Modern epoch started with Formal State-centric Intentional Political System (hereinafter referred to as FSIPS) in 1920. It followed the traditional era marked with the American war of independence 1776 and the French Revolution, 1793 and followed the philosophic era marked with the emergence of Westphalian State system in 1648 also the modern state system. Here modernity is used in another context, for temporal division of political eras. It replaced classic ages of Theocracy poly-theism and monotheism. See introductions by Wheaton, Oppenheim, Grewe, to International Law. [↑](#footnote-ref-2)
3. Hewitt (eds.), Peace and Conflict 2008 (UMP 2008)35. Quinn, “Self-determination Movements and Their Outcome” See also Hewitt (eds.) Peace and Conflict 2012 (UMP 2012) 25 reiterates the same statistical evidence and in Figure 3.1 on 26. [↑](#footnote-ref-3)
4. Evans, *Blackstone’s International Law of Documents* (OUP 2005) 8, UN Charter Article 1,’The Purposes of the United Nations are:. [↑](#footnote-ref-4)
5. Ante, foot note 1 refer to FSIPS. [↑](#footnote-ref-5)
6. Challenges of self-determination determine the limitations and they are synonymous unless specified here within. Furthermore, they are constantly challenged and dynamic and evolving, solution of one may create another. [↑](#footnote-ref-6)
7. The term intervention is inherent and implicit realisation of the aspect of international law regulating interstate and intrastate relations. Both manifest the physical aspects international law, while intervention is it’s metaphysical aspect Therefore intervention can be consent based, and in compliance with international law and processes where consent is implied. [↑](#footnote-ref-7)
8. Oarford, *International Authority, and Responsibility to Protect* (CUP 2011). Author is critical because she considers evolution by executive action. This overlooks that all legal principles are compelled by R2P, just look at the preambles of the s and The Charter. Many UNGA Resolutions has been supporting the obligation as a new concept because states over looked their presence since 1919. [↑](#footnote-ref-8)
9. Evans, *Blackstone’s (…).* 1 The Covenant of League of Nations. [↑](#footnote-ref-9)
10. Ibid, Charter of UN. The preamble and Article 1,’The Purposes of the United Nations are: To maintain international peace and security. [↑](#footnote-ref-10)
11. South-West Africa ICJ Reports (1950) 154. [↑](#footnote-ref-11)
12. Ibid, Evans, *Blackstone’s (…).*129,134. [↑](#footnote-ref-12)
13. Hewitt (eds.), *Peace and Conflict* 2012, (UMP 2012) 34. [↑](#footnote-ref-13)
14. Chapter 4, South-West Africa Cases, and the Western Sahara. [↑](#footnote-ref-14)
15. UNGAR 43/26 Situation in Namibia resulting from the illegal occupation of the Territory by South Africa. [↑](#footnote-ref-15)
16. Infra, thesis Chapter 5.8. [↑](#footnote-ref-16)
17. International Norms are inclusive of legal and moral principles. While jural aspect is substantive legal principle, legitimate international political processes are constitutive processes of international norm necessary for the realisation of the jural imperative. Higgins postulate that international law is not rules oriented alone mainly constituted by “obligatory “, conduct “(…) violation of which carries a price “p1 and where she says she remains “committed …that international as process (…). See Higgins *Problems and processes* OUP 2004)1 [↑](#footnote-ref-17)
18. Bin Cheng, Schwarzenberger, Lautterpacht, Keeton lead the field on general principles of law but author’s brief focus is on Cheng’s 1953-post 1948 SICJ Article 38,- updated edition of 1994 *General principles of Law as applied by International Courts and Tribunals* (CUP 2004) examines the principles it two groups;-(i) Self-preservation territorially and extra territorially, (ii) principle of Good faith now also included in 1969 Vienna Convention on the Law of Treaties, I, Article 26, Pacta Sunt Servanda. Evans, *Blackstone’s International Law of Documents* (OUP 2005)134. (iii) General principles of law in the concept of responsibility, generally and in terms of individual, the principle fault, integral reparation and principle of proximate causality. In administrative aspect of judicial processes (i) Jurisdiction, where court will not adjudicate unless empowered. (ii) Question of competence and capacity to enquire the said competence. (iii) SS Virginia ruling where a party ought not to sit on judgment in one’s case. (iv) Equality of parties before the due processes (v) Court knows the law, while facts are ascertainable and challengeable alone. (vi)The word of the Court is the law and binding on the parties. [↑](#footnote-ref-18)
19. Evans, *Blackstone’s International Law of Documents* (OUP 2005) 32, Statue of ICJ. Article38. See Cheng. Ibid *General principles (…).*  (CUP 2004) xii. [↑](#footnote-ref-19)
20. The Challenges and limitations of self-determination will be elaborated throughout thesis deemed synonymous unless specially said that it does not. [↑](#footnote-ref-20)
21. R2P is fundamental to General Principle of Law as well specific law of Self-determination. Cheng’s first principle is self-protection and self-defence. Every real and legal person is endowed with this right. The state authority is morally justified because it assumes powers form the individual to exercise collective protection of individual’s life, liberty, property, thus distinguish state of nature from civil society. [↑](#footnote-ref-21)
22. UN Charter, Chapter VIII Regional Arrangements. Art. 52-54. [↑](#footnote-ref-22)
23. Supra FN 17 Evans, p32, Statue of ICJ. Article38. [↑](#footnote-ref-23)
24. Charter Chapter VIII Regional arrangements Articles 52-54 welcome regional engagement. Article (1) *“[P]rovided that such arrangements or agencies and their activities are consistent with Purposes and Principles of the United Nations*” Art 52(1). Article 52(4) removes any doubt of SC supervision and obligation Article 35 impose on member states oblige to comply with SC decisions. Articles 53 and 54 ensure SC authority in protection of international peace and security. [↑](#footnote-ref-24)
25. Charter notes the relevance of Regional Organisations as it’s extend organizations. The Inter-American System and its own inherent duplicated mechanisms. See Brownlie, *Principles of Public International Law* (5th ed. OUP 2002) 579 referring to Inter-American System being “[C]omplex (…). due “[T]wo different overlapping mechanism with differing diplomatic starting points”

African and European Systems of HR protection with specific emphasis on specific issue of HR protection resembles of orchestral variation on the same tune. If Regional Variants are identical as the UN international system of protection then the need for regionalism ought to be limited for administrative functions rather then norm creation. Creation of distinctive HR norms to the UN defeats the natural meaning of Human and Humanity and universal meaning. African HR system in contrast to its detailed nature of HR it is very lacking in supervisory and adjudication functions. Universality of human values means its exactness all over the world with identical administrative mechanism, negated by culture of regionalism and possible local value systems. Dealing with centralism and regionalism is beyond the limits of this work [↑](#footnote-ref-25)
26. So extreme form that it is justifiable to doubt if secession is a form self-determination and not a consequential result. [↑](#footnote-ref-26)
27. Rome Statute of the International Criminal Court, (1998). Articles 6-8, respectively. [↑](#footnote-ref-27)
28. The legal consequences of ICCPR have been examined by Legal Consequences of Constructing Wall in Occupied Palestinian Territories by ICJ in 2004 (infra thesis Chapter 7) as an appropriate justiciable source of international law. The separation of criminal political violation are contentious, ill defined and pone to irregular application on account of Security Council Rules supported by powerful hegemons . [↑](#footnote-ref-28)
29. Evans, *Blackstone’s (…)* (OUP 2005) 32, SICJ, Article 38 specifies sources of law known to ICJ, thus identifying them in most express and codified manner.

Evans, 24 Charter Article 103 renders domestic law subject to the supremacy of Charter Law. [↑](#footnote-ref-29)
30. Ibid, Evans, *Blackstone’s (…)* 8, Charter Article 1(I). Imposes legal imperative, on states and international community, to take international action is to halt existing breaches, as well take preventive action to avoid breaches that may occur in near future . [↑](#footnote-ref-30)
31. Author’s argument is that failing of a system though ill administration does not discredit purposes and principles forming the conceptual, substantive component of the system. [↑](#footnote-ref-31)
32. Infra, South-West Africa Case ICJ Reports (1950), thesis Chapter [↑](#footnote-ref-32)
33. Cutler, *Self Determination in the New World Order* (CEIP 1992). Cutler, referred to four forms of self-determination; (i) termination of dictatorial ship, (ii) transition from Federal to Unitary State, (iii)Autonomy (iv) Greater Self-rule and separate states for identifiable cohesive group. [↑](#footnote-ref-33)
34. Rauschning, (Eds.) *Key Resolutions of the UN Assembly 1946-1996*(CUP 1997)106-107,”.UNGAR 1541(XV) Principles which Should Guide Members in Determining whether or not obligation Exists to Transmit Information Called for Under Article 73 e of the Charter, Annex Principle VI”. [↑](#footnote-ref-34)
35. Ibid 106. [↑](#footnote-ref-35)
36. Burkina Faso vs. Republic of Mali, ICJ, Report (1986), Judge Luchairi, 652-54. [↑](#footnote-ref-36)
37. Supra, fn. 1. [↑](#footnote-ref-37)
38. When the Soviet System collapsed in 1989, and the former Soviet Republic Successfully declared their own unitary states, Aphasia in Georgia, and Chechnya and Dagestan have been denied their self-determination, while other former Republics of USSR received it. [↑](#footnote-ref-38)
39. Graham (eds.), *Penguin Dictionary of International Relations* (PG 1998) 84. [↑](#footnote-ref-39)
40. Hannum, *Autonomy, Sovereignty and Self-determination* (UPPP1996) 27. Meron (ed.), *Human Rights in International Law: Legal and Political Issues* (OCP 2 Vol. 1984) 193. Ratner, “Drawing a Better Line uti possidetis and New Borders of new States” ASIL Vol. 90 (1996) 590.

It is epistemologically accepted that, socio-political cohesion is necessary for the creation of an order through which laws may emerges. Similarly this cohesion cannot be maintained orderly, justly impartially, equitably thus justly without laws. [↑](#footnote-ref-40)
41. Ratner Slaughter, “Symposium on Method of International Law; No 2”, AJIL Vol. 93 April (1999). Having consider international law schools of thought, “In conclusion, this symposium demonstrated that as a discipline, we are better off with multiplicity of methods. As individual scholars, we are better off understanding how to choose between them.” [↑](#footnote-ref-41)
42. Supreme Court of Canada, Court, Ref; re. Secession of Quebec 1998 (2) SCR 217. [↑](#footnote-ref-42)
43. The UN Charter ‘Article 1 The Purposes of the United Nations are ;- 1.(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’. [↑](#footnote-ref-43)
44. Evans, *Blackstone’s* (OUP. 2005)8, The UN Charter,’ Article 2.The Organization and its Members, in pursuit of the Purposes states in Article 1, shall act in accordance with the following Principles’.

Article 2(4). All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any states, or in any other manner inconsistent with the Purposes of the United Nations.’ [↑](#footnote-ref-44)
45. UNGAR 2625 (VVX) 1970. Always cited as Friendly Relations hereinafter; Par. 5(7). [↑](#footnote-ref-45)
46. UNGAR/56/83 (12.12.2001), DIST 25th January 2002, Annex pp3-13. [↑](#footnote-ref-46)
47. UNGA/R, 60/1/2005. Para.16. [↑](#footnote-ref-47)
48. Hewitt (ed.), *Peace and Conflict 2008*, (UMP 2008), Pete “Trends in Democratisation A focus on Instability in Anocracies” 27. [↑](#footnote-ref-48)
49. Ibid, “Self-determination Movements and Their Outcome” 35. [↑](#footnote-ref-49)
50. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ. Reports (2010) 622, par10. [↑](#footnote-ref-50)
51. S-G Report to GA 12.01.2009 (A/63/677) 5, para. 5. [↑](#footnote-ref-51)
52. Ibid. [↑](#footnote-ref-52)
53. 2005 World Summit Outcome, UN General Assembly Resolution A/RES/60/1, Introduction 2. [↑](#footnote-ref-53)
54. Ibid. [↑](#footnote-ref-54)
55. UNSCR (1674/2006), UNSCR (1706/2006), UNSCR (1244/1999) on Kosovo [↑](#footnote-ref-55)
56. SG report of the A/66/874, (S/2012/578)1, part1, par 2. [↑](#footnote-ref-56)
57. Ibid, para. 5(7). [↑](#footnote-ref-57)
58. Franck, *Fairness in international Law and Institutions* (OUP 2002)149-51. [↑](#footnote-ref-58)
59. Western Sahara ICJ Reports (1975) 122, Separate Opinion of Judge Dillard. [↑](#footnote-ref-59)
60. Brownlie*, Principles* (…).600, the author wrote that “Western jurists now generally admit that self-determination is a legal principle “ a very cautious presumption is that he is referring to “now” being the time of his publication 2000 and post Namibia decision 1971 and Western Sahara 1975 . [↑](#footnote-ref-60)
61. See part 1.1.1 ante [↑](#footnote-ref-61)
62. Ghali, Agenda for Peace, Report (SC 31.01.1992). See, Kofi Annan, “Two concepts of sovereignty”. (The Economist, 18th September 1999 He called for timely multilateral intervention since sovereignty is being “ redefined –not least by the forces of globalisation and international cooperation “ [↑](#footnote-ref-62)
63. UN G A Resolution 2625 (VVX) 1970.” Friendly Relations (…). ” [↑](#footnote-ref-63)
64. Ibid. [↑](#footnote-ref-64)
65. Ibid. para. (5.7). [↑](#footnote-ref-65)
66. Evans, *Blackstone’s International Law of Documents* (OUP. 2005) 116. [↑](#footnote-ref-66)
67. Simma (ed*.) Charter of UN a Commentary* (OUP 2000)599, referred to the principles of self-determination not as a juristic speculation or hortatory but normative legal precepts. [↑](#footnote-ref-67)
68. Infra, Chapter 4.3.1, 4.4.1 deals with Namibia and Western Sahara cases before ICJ respectively. [↑](#footnote-ref-68)
69. Infra, Chapter 5.8 [↑](#footnote-ref-69)
70. Emerson, *From Empire to Nation* (BPB 1970). Harris Op. Cit. Cases and Materials on International Law (SMl 1998)113, describes decolonisation as a policy “Under UN Charter, it became the cornerstone of the General Assembly’s decolonisation p policy of 1960. [↑](#footnote-ref-70)
71. Supra, Simma, (ed.), *Charter of UN a Commentary* (OUP 2000). [↑](#footnote-ref-71)
72. Ibid. [↑](#footnote-ref-72)
73. Jessup,”Palma Island Arbitration”22 AJIL (1928)735. [↑](#footnote-ref-73)
74. Oppenheim, “The science of international law its task and method”. 2 AJIL 1909, p344 “For even the great authorities make mistakes, are influenced by their political fancies, take usages for custom, take future for the present, confound their own opinion with what is generally recognised(…)”

Oppenheim, International law Treatise Vol. 1 ( Longman 1912) 82 Where Oppenheim notes the clash of Legal school and Diplomacy school former presuming codification of international law along domestic law while the later looks prefers law “... to be rather a body of elastic principles than of firm and precise rules.” [↑](#footnote-ref-74)
75. Evans, *Blackstone’s International Law of Documents*, (OUP 2005)14, Statute of International Court of Justice Article 38 paragraph (d). [↑](#footnote-ref-75)
76. Grewe, *The Epochs of International Law* (De Gruyter 2000). In his introduction he suggests that he was in agreement with the method chosen by Sir Geoffrey Butler and Simon Maccoby, and settled to follow a historical methodology of looking at 8 (FSIPS) functional institutional aspects;-(i) Historicism of structures of international law,(ii) constitutional modality of governance, (iii) the basis interstate relations, (iv) harmonisation and regularisation of these inter-entity relations,(v) (FSIPS) sources of laws of nations, (vi) conflict resolution processes, (vii) enforcement related issues, (viii) territorial issues on land and sea. [↑](#footnote-ref-76)
77. Kennedy.” A new Stream of International Law Scholarship” 7 Wisconsin ILJ 1 (1988-1989 ) [↑](#footnote-ref-77)
78. See Emerson, *From Empire to Nation* (BPB1970),4,296-297. Emerson, suggests that decolonisation was nothing short of secessionism even though not perceived as such and not even as a right but as a principle in 1945.p301. [↑](#footnote-ref-78)
79. Ibid 45. [↑](#footnote-ref-79)
80. Ibid 45. [↑](#footnote-ref-80)
81. Ibid 297,Emeson refers to the statements made by US President Woodrow Wilson cited by R S Baker (eds.), The Public Papers of Woodrow Wilson (6 vols. Harper 1925) 543. . [↑](#footnote-ref-81)
82. See Doehring, “Self-determination”, Simma (ed.) ( …) *Commentary* (OUP 1995)58. [↑](#footnote-ref-82)
83. Wade’s introduction to Dicey’s *An Introduction to the Study of the Constitution* (McMillan 1967) xcvii. Wade refers to second world being fought against dictatorship and self-determination of people as also declared in the Atlantic Charter. [↑](#footnote-ref-83)
84. Bowering, *The degradation of International law*,(Rutledge and Francis 2008 ) [↑](#footnote-ref-84)
85. Carty, *Decay of International Law* (MUP1989). [↑](#footnote-ref-85)
86. Higgins, *Problems and Process International law* (1994 OUP) 3. Foot notes omitted [↑](#footnote-ref-86)
87. Ibid. [↑](#footnote-ref-87)
88. Verzijl, *International law in historical perspective* , ( vol.1Sijthoff 1968) 321 [↑](#footnote-ref-88)
89. Ibid [↑](#footnote-ref-89)
90. See Danspeckgruber and Watts, *Self-determination and Self-administration* (LR 1997) 26.

Supra, Thesis 1.1.1 . [↑](#footnote-ref-90)
91. Ibid. [↑](#footnote-ref-91)
92. See Danspeckgruber and Watts, *Self-determination and Self-administration* (LR 1997) 26. [↑](#footnote-ref-92)
93. Charter Article 73 (b) “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; “. [↑](#footnote-ref-93)
94. Franck*, Fairness in international law* (OUP 2002)146. [↑](#footnote-ref-94)
95. Ibid 140-168. Author in Chapter 5, deconstruct the problem in view of global popularity of power sharing of cohesive social units, within the state leading to post-modern tribalism, running to the restraints of the uti possidetis. [↑](#footnote-ref-95)
96. Hewitt, (ed.) *Peace and Conflict 2008*. 54 [↑](#footnote-ref-96)
97. Ibid. [↑](#footnote-ref-97)
98. Cassese, *Self-determination of peoples; A legal Reappraisal*, (CUP 1995) [↑](#footnote-ref-98)
99. Brownlie*, Principles of Public International law* (OUP. 2002) p 600 [↑](#footnote-ref-99)
100. Higgins, Problems (…) 128. [↑](#footnote-ref-100)
101. Higgins, Problems (…) 120. [↑](#footnote-ref-101)
102. Brownlie, *Principles of* (…) (OUP2002) 582-83. The author provides examples how since Helsinki Final act 1972, UNGAR 3452 (XXX) 1975 aimed for the protection of all persons from being subjected Torture and Other Cruel Acts and to other Cruel, Inhuman or Degrading Treatment or Punishment that lead to the ‘[D]octrine of the rights of peoples (…) [A] fairly typical prospectus (...) [W]ill include right to food, the right to decent environment, the right to development and right to peace. They are commonly referred to as ’Third generation’ human rights as opposed to first two generations consisting of civil and political rights and is commonly suggested ,or assumed that they are not part of the existing law but are ‘emerging.’ [↑](#footnote-ref-102)
103. The term modernity in the context of epochs of international law referring to formal era of state centric international political system starting with 1920 of League of Nations and it use in Article 22 [↑](#footnote-ref-103)
104. Tyne, *A History of Founding of American Republic*, (Vol.1 1922)1, refers to a letter of John Adams written in 1818,John Adam Works v 429, where he asserted that the history of American Revolution ought to be divided into four periods form 1620 to 1787, ’The revolution was effected before the war commenced.(…). The revolution was in minds and hearts of the people (…) [T]he principal feeling which led the American to rebel (…) [O]ught to be traced the country from first plantation in America. [↑](#footnote-ref-104)
105. The French Revolution represented an era of rapid transformation of socio-political and economic regime from feudalism perpetuated by the centralised monarchy, and the Church, into democratic age. In contrast, identical change occurred in England gradually by evolutionary process. When the changes were resisted a civil war ensued leading to the formation of constitutional monarchy.

See Cooper, *Talleyrand,* (Phoenix 1988), Accounts of the revolution and how the monarch having noted bankruptcy of the government in 1789 summon the State General equivalent to British parliament. The state general had not met since 1614 and anyone born, as Talleyrand was, in 1754, must gave grown up in the belief that they would never meet again “demonstrating the degree of deficit of democratic principals in the governances of the realm in an age fife with calls for democratic institutions.

A Cobban, *History of Modern France Vol.1 1715-1799,* (Penguin 1969).

Thompson, *Europe Since Napoleon,*(Pelican 1975). [↑](#footnote-ref-105)
106. Modern here refers to Modern State system generally accepted to start with peace of Westphalia 1648 and Westphalian state system. [↑](#footnote-ref-106)
107. 13 States discontentment emanated from taxation and British Parliament’s indifference to colonial economy. [↑](#footnote-ref-107)
108. US Library of Congress. Webpage ,

<http://memory.loc.gov/ammem/help/constRedir.html>. ‘In Congress, July 4 1776, a declaration by representatives of the United States Of America, in General Congress assembled.’ Printed by John Dunlap 1776 single page, broadsheet LC NO 20003576546, Broadside collection [↑](#footnote-ref-108)
109. Morison, Source and Documents Illustrating American Revolution 1764-1788 (1985) James Otis, “Rights of the British Colonies (1764). John Adams, “Declaration of causes of taking up arms Nova Angelus” (No VII 1775). See Gordon Wood, Creation of American Republic 1776-1787 (Norton & Co 1993). [↑](#footnote-ref-109)
110. Finer, *Comparative Government* (Penguin 1982) 62. [↑](#footnote-ref-110)
111. Palmer, *The age of the Democratic Revolution, A political history of Europe* 1760-1800. (PUP 1959) also Cites Alexis de Tocqueville, ‘The French revolution had no territory of its own: indeed, it effect was to efface, in a way, all older frontiers. It brought men together, or divided men, in spite of laws, traditions, character and language, turning enemies sometime into compatriots, and kinsmen into strangers; or rather, it formed above all particular nationalities, an intellectual common country of which man all of nations might become citizens.’ Foot notes omitted. [↑](#footnote-ref-111)
112. [Http://www.yale.edu/Lawweb/avalon/ rights of](http://www.yale.edu/Lawweb/avalon/%20rights%20of) man. See Finer, Five Constitutions Contrast and Comparison. (Penguin Books Ltd. 1979) p.269 presents different translation conveying the same meaning. [↑](#footnote-ref-112)
113. Article 13(1) Charter Codification became possible with the emergence of formal source of international law as acknowledged by Article 38 of the Statue of ICJ in UN based international political system. [↑](#footnote-ref-113)
114. Halperin (eds.), *Self-determination In the New World Order* (CEIP 1992)16 (fn) 12 refers to ‘Fathers of American Revolution often Cited Holland’s successful rebellion against Spain in late 16th Century as an inspiration to their own revolt”. Presumably deriving some form legitimacy in terms of contemporary international law. [↑](#footnote-ref-114)
115. See Doehring, “Self-determination”, Simma (ed.) *Charter of UN A Commentary* (OUP 1995) 58 . [↑](#footnote-ref-115)
116. Ibid. [↑](#footnote-ref-116)
117. Adopted on 28th April 1919. [↑](#footnote-ref-117)
118. Palmer, *The age of the Democratic Revolution, A political history of Europe* (…) 185-206 [↑](#footnote-ref-118)
119. Merlin de’ Douai Encyclopaedia Britannica (1754-1838). French politician and lawyer. Responsible for most of the revolutionary legislations and ending the reign of terror. One of few surviving revolutionaries who had little to do with the rise of Napoleon [↑](#footnote-ref-119)
120. Langer, E*ncyclopaedia(...)* 582. [↑](#footnote-ref-120)
121. Cassese, *Self-determination of Peoples* (CUP 1996)12. [↑](#footnote-ref-121)
122. Palmer, *The Age of the Revolution a Political history of Europe and America* 1760-1800 (New Jersey Princeton University Press 1958) 5-6 ‘Revolution broke out in Ireland in 1798. Dutch historians speak of revolution in Netherlands in 1795 when the Batavian Republic was founded and more a radical movement of 1798. The Swiss feel that they were revolutionised in the Helvetic Republic of 1798. Italian writes speaks of revolutions in Milan in 1796 and in Rome in 1797 at Naples 1789. Cisalpine Roman and Partheonopean Republics were the outcome.’ [↑](#footnote-ref-122)
123. Lansing, *The Peace Negotiations A personal Narrative* (1921 Forgotten Books 2012) 17 ‘Meanwhile in anticipation of the final triumph in the spring of 1917 (…) [T]his commission of Inquiry (…).’ [↑](#footnote-ref-123)
124. Ibid. [↑](#footnote-ref-124)
125. *Address of the President of USA delivered at a joint session of Two Houses of Congress January 8th 1918 Washington* (1918 USA Government Printing Office) 5 [↑](#footnote-ref-125)
126. US Library of Congress, www:<http://memory.loc.gov/ammem/help/constRedir.html>. ‘In Congress July 4.1776, a declaration by representatives of the United States of America, in General Congress assembled. (…).’ Printed by Dunlap 1776 single page, broadsheet LC NO 20003576546 Broadside Collection. [↑](#footnote-ref-126)
127. www: //http US Library of Congress. Webpage.

 Ibid pp 3-8. [↑](#footnote-ref-127)
128. [↑](#footnote-ref-128)
129. Scott, *President Wilson’s Foreign Policy: Messages, Addresses and papers*. (OUP 1918), 235-244. “We have no quarrel with the German people. We have no feeling towards them but one of sympathy and friendship (…).”

Hoover. *The Ordeal of Woodrow Wilson* (John Hopkins University Press 1992), 18-19 “The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. “[B]ut the right is more precious than peace, and we shall fight for the things which we have always carried nearest our hearts -- for democracy, for the right of those who submit to authority to have a voice in their own governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free.” [↑](#footnote-ref-129)
130. Lansing “Saturday Evening Post 9 April 1921”, para 6-7. This can be seen from Lansing’s book The Peace Negotiations A personal Narrative p1-4. This shows how the opinion of people directly involved in Paris Peace conference was divided over the issue of self-determination. [↑](#footnote-ref-130)
131. Nicolson, *Peace-making* (Simon pub.1991) 70. Nicholson was critical no so much of the concept of self-determination since he supported universal application of it, but that of Wilson for ‘not fighting his corner. ‘Paris was something different form Delphi when pressed to explain himself our Oracle ended all too frequently by explaining himself away.’

Keynes, *The Economic Consequences of The Peace*. (Unknown Pub. 1919), 36-50. Keynes too blamed the man rather than his policies when he accounted self-determination being described as idealist notion on account of W. [↑](#footnote-ref-131)
132. *Lenin’s Collected Work Volume* 18 pp 582-85 “Titled The Historical Destiny of the Doctrine of Karl Marx” Pravda No 50 March 1st .1913 He saw the Marxist revolution in three phases, the rise of the middle class and the rise of the working class and those colonies which would not attain their independence through revolution. [↑](#footnote-ref-132)
133. Stalin. *A collection of Articles and Speeches*. (London 1941), Marxism and National Question (1913) and in, Marxism and the national and colonial question, 3-67. [↑](#footnote-ref-133)
134. Mayer, *Wilson vs. Lenin: Political Origins of new Diplomacy* 1917-1918, (Cleveland and New York 1964) 298. [↑](#footnote-ref-134)
135. Pomerance, “United States and Self-determination perspective on the Wilsonian Conception “70 AJIL 1976 p1-2, (n5) refers to Mayer75 “The Bolshevik slogan was’ Peace without annexation and indemnities on the basis of the self-determination of peoples.’ The first official statement of war aim to employ the term ‘self-determination ‘was made by the Russian Provisional Government on April 9th 1917, apparently as result of Soviet pressure” foot notes omitted. [↑](#footnote-ref-135)
136. Ibid. [↑](#footnote-ref-136)
137. Evans *Blackstone’s (…)* 1, The Preamble of the Covenant” (…) In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments (…) Agree (…).’ [↑](#footnote-ref-137)
138. Ibid Evans 1-2. [↑](#footnote-ref-138)
139. Ibid Evans, *Blackstone* (…).2-4. [↑](#footnote-ref-139)
140. Ibid 6-7. [↑](#footnote-ref-140)
141. Evans *Blackstone’*s (…) (OUP 2005)1, Covenant’s Preamble. [↑](#footnote-ref-141)
142. Article 21 of the Covenant ’Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.’ [↑](#footnote-ref-142)
143. Miller*, Drafting of the Covenant Vol. II* (Reprint Count Inc1998.), Doc.7, p 65 Miller wrote a paper to the President imploring the inclusion of Monroe Doctrine due to the importance the policy acquired in the regional Latin American States. Possibly upon insistence of Miller to the President Wilson and when President introduced it in the person, it received some misgivings from other members of the committee during framing the Covenant. [↑](#footnote-ref-143)
144. Evans, *Blackstone’s (…)* 6, Covenant of League of Nations. Article 22 of the Covenant of League of Nations. [↑](#footnote-ref-144)
145. Nicolson, *Peace-making 1919* (Simon Publication 2001)202. [↑](#footnote-ref-145)
146. Evans *Blackstone’s (…)* 6, Article 22. [↑](#footnote-ref-146)
147. Wharton, *A Digest of International Law of USA* (Vol1-3 GPO 1887) V 1. [↑](#footnote-ref-147)
148. Westlake, *International Law Part 1 Peace* (CUP. 1904) 107. [↑](#footnote-ref-148)
149. Ibid 107. [↑](#footnote-ref-149)
150. Ibid 107. [↑](#footnote-ref-150)
151. Westlake, *Chapters on the Principles of International Law*. (CUP, 1894) 140. [↑](#footnote-ref-151)
152. Hall, *A Treaties on International Law* (OCP 1884). [↑](#footnote-ref-152)
153. International Status South-West Africa ICJ Report (1950) pp 28-133. [↑](#footnote-ref-153)
154. See McNair, *Law of Treaties* (OCP 1961) 256. [↑](#footnote-ref-154)
155. Ibid. [↑](#footnote-ref-155)
156. Ibid. [↑](#footnote-ref-156)
157. Ibid. [↑](#footnote-ref-157)
158. Brownlie, *Principles of Public International Law* (5th edn, OUP 2002) 514. [↑](#footnote-ref-158)
159. Ibid. [↑](#footnote-ref-159)
160. 2nd Phase of South-West Africa ICJ Report (1966). [↑](#footnote-ref-160)
161. Evans. *Blackstone’s. (…)* 7 League of Nations Covenant, Article 22(1). [↑](#footnote-ref-161)
162. Obligation to monitoring Article 4 of the Covenant. [↑](#footnote-ref-162)
163. By dynamism it is meant setting up of terms, which would become operational, conditional to attainment of certain conditions. Without these the treaty would be oppressive and unfair. [↑](#footnote-ref-163)
164. Ibid. [↑](#footnote-ref-164)
165. Ibid League of Nations Covenant, Article 22(1). [↑](#footnote-ref-165)
166. UN era of decolonisation is the clearest evidence of colonisation which was brought about under the Trust system. [↑](#footnote-ref-166)
167. Ibid. [↑](#footnote-ref-167)
168. Ibid. [↑](#footnote-ref-168)
169. 1971 Namibia Case made this point clearly. [↑](#footnote-ref-169)
170. Evens *Blackstone’s (…..)*7 Covenant, Article 22. [↑](#footnote-ref-170)
171. Ibid. [↑](#footnote-ref-171)
172. Ibid. [↑](#footnote-ref-172)
173. Ibid 7, Articles 23. [↑](#footnote-ref-173)
174. Brownlie, *Principles of Public International law* (OUP 2002) 600, in another context used the same phraseology. The passage was from South-West Africa case ICJ (1962) 319. See Brownlie p 600 (n) 177 on in another context though the reasoning appropriate in the context cited above. [↑](#footnote-ref-174)
175. Permanent International Court of Justice PICJ (1923) Series B No. 6 (1 W. C R, 208). [↑](#footnote-ref-175)
176. PCIJ (1923) Series A No .2 (1 W. C R ,294) [↑](#footnote-ref-176)
177. PCIJ (1923) Series A No. 17 (1 W. C R, 646). [↑](#footnote-ref-177)
178. Advisory Opinion On Minority Schools in Albania (Series A/B No 64)18 referred to in Oppenheim’s International Law 713 ( 2) ‘ [W]here the court, as in some former cases, laid stress on principle that the equality of treatment postulated in the Treaty must be both in fact and in law,18-20.’ [↑](#footnote-ref-178)
179. Franck*, Fairness in international Law and Institutions* (OUP 2002) 94. [↑](#footnote-ref-179)
180. Ibid. [↑](#footnote-ref-180)
181. Miller, *Drafting of the Covenant,* (1998 Reprint Count Inc.), Vol. II (Doc.7) 65. [↑](#footnote-ref-181)
182. Ibid, Document 7. 91. [↑](#footnote-ref-182)
183. HWV Temperly, *History of Paris Peace Conference* V5 (OUP 1921) p112. Ed. (0UP 1969)113. [↑](#footnote-ref-183)
184. Ibid. [↑](#footnote-ref-184)
185. Ibid Temperly Vol. v (OUP 1921)231. [↑](#footnote-ref-185)
186. Ibid Volume V. 226. [↑](#footnote-ref-186)
187. Fair *A Scholar and Romaic in Public Realm* (Univ. Delaware 1992) 303. This was a study on Temperly. [↑](#footnote-ref-187)
188. Barsh “The United Nations and protection of Minorities 58 N J I L (1989)188. [↑](#footnote-ref-188)
189. 33rd Stockholm Conference ILA (1924)527 530. [↑](#footnote-ref-189)
190. Ibid. [↑](#footnote-ref-190)
191. Temperly *History of Paris Peace Conference* *Volume V* (OUP1921) 116. [↑](#footnote-ref-191)
192. Verzijl, *International Law in Historical Perspective, vol. V* (Sijthoff-Leyden 1972)190 applied to some states with diverse measures. See p201 selective imposition on the defeated states but evading victorious states even Germany. [↑](#footnote-ref-192)
193. Ibid. [↑](#footnote-ref-193)
194. Thornberry, “Self-determination, Minorities, Human Rights; A Review of International Instruments “38 ICLQ (1989) 867. [↑](#footnote-ref-194)
195. Ibid. [↑](#footnote-ref-195)
196. Tempely, *History of Paris Peace Conference* *Volume V* (OUP1921) 178. [↑](#footnote-ref-196)
197. Shaw, “Peoples, Territorialism and Boundaries”, EJIL V 8 No 3 (1997) 2. [↑](#footnote-ref-197)
198. Heyking “The Imperative Consolidation of the Minorities Rights A Critical Survey “delivered at 33rd Stockholm Conference International Lawyers Association 1924, during which he propose adoption of resolution by the conference that Minority Treaties and declarations applied to all members of League so that peoples of three dismantled empires, Germany Austria and Ottoman Empire could benefit from it not the people of the Victors only. (Sweat& Maxwell 1925) 51. [↑](#footnote-ref-198)
199. Verzijl , *International Law in Historical Perspective, vol. V* (Sijthoff-Leyden 1972) 193 suggests that to blame boarder arrangements to minority issues would be ‘ (…) [S]hort-sighed, publically biased or misleading’. [↑](#footnote-ref-199)
200. Temperly, *History of Paris Peace Conference* *Volume V* (OUP 1921) 69. [↑](#footnote-ref-200)
201. Ibid preface. [↑](#footnote-ref-201)
202. Ibid 72. [↑](#footnote-ref-202)
203. German treaty had no minority provision; the Polish Treaty did not have international guarantor provision initially. St. Germaine Art 69, Treaty of Tranion Article 60, Lausanne Article 44 had guarantors provisions, [↑](#footnote-ref-203)
204. Evans, “Protection of Minorities “4 BYBIL. (1923-24)124. [↑](#footnote-ref-204)
205. It was signed on the 28th June 1919, [↑](#footnote-ref-205)
206. Lauterpacht, 33rd Report at 33rd Stockholm Conference International Lawyers Association (1924)503-530. [↑](#footnote-ref-206)
207. See Temperly *Volume V* (OUP1921) 116. [↑](#footnote-ref-207)
208. 28 June 1919, The Treaty of Versailles was concluded between German and the Great Powers. Text from Yale University www.yale.edu/lawweb/avalon/imt/menu.htm - 3k. [↑](#footnote-ref-208)
209. Ibid. [↑](#footnote-ref-209)
210. The Allies and Republic of Poland Little Versailles Treaty 39 Minorities Treaty (June 28, 1919). [↑](#footnote-ref-210)
211. Ibid. [↑](#footnote-ref-211)
212. The Treaty of St. Germaine Text used from Yale University Avalon project collection.

 www.yale.edu/lawweb/avalon/imt/menu.htm - 3k [↑](#footnote-ref-212)
213. Miller, *Drafting of the Covenant*, Vol. II Doc.5, 25. [↑](#footnote-ref-213)
214. Ibid. [↑](#footnote-ref-214)
215. See Treaty of St. Germaine. [↑](#footnote-ref-215)
216. Ibid Article 47. [↑](#footnote-ref-216)
217. Ibid Article 48. [↑](#footnote-ref-217)
218. Macmillan, *Peacemakers* (JM 2003) 262. [↑](#footnote-ref-218)
219. See The Treaty of St. Germaine, [↑](#footnote-ref-219)
220. Ibid. Article 68. [↑](#footnote-ref-220)
221. Langer, *Encyclopaedia of World History* (Boston 1968) 953. [↑](#footnote-ref-221)
222. Wilson, *War and Peace Volume II* (Pub. in New York and London 1927)244. [↑](#footnote-ref-222)
223. Cassese, Self-determination of peoples (CUP 199) 26. [↑](#footnote-ref-223)
224. Heyking 33rd Report Op cit. at 33rd Stockholm Conference International Lawyers Association (1924)514. [↑](#footnote-ref-224)
225. See Nicholson, *Peace Conference* (…). Author was aware of the consequences of boarded changes as he worked with the British delegation. 269. [↑](#footnote-ref-225)
226. Franck, *Fairness in international Law and Institutions* (OUP 2002 93. [↑](#footnote-ref-226)
227. Ibid 94. [↑](#footnote-ref-227)
228. Verzijl *International law in historical perspective Volume* 1 ( AW Sijthoff -Leiden 1968) [↑](#footnote-ref-228)
229. Ibid 205. [↑](#footnote-ref-229)
230. Ibid 202. [↑](#footnote-ref-230)
231. Heyking, *Association of International lawyers proceedings of (1924)514.* [↑](#footnote-ref-231)
232. Ibid 205. [↑](#footnote-ref-232)
233. See Heyking 503. [↑](#footnote-ref-233)
234. Verzijl, *International law in historical perspective Volume* 1 (AW Sijthoff -Leiden 1968) 35. [↑](#footnote-ref-234)
235. League Nations Official Journal 9.10.1922. [↑](#footnote-ref-235)
236. See LN Res 21.9.1922 above (n) 237, LNOJ September (1921) 697. [↑](#footnote-ref-236)
237. See Franck, Fairness. (…) 94. [↑](#footnote-ref-237)
238. See Verzijl, International law (…) Vol. (V) 201. [↑](#footnote-ref-238)
239. Hurst (ed.) *Key Treaties for the Great Powers Vol1 1814-1870* (David and Charles 1972) p 317 Paris Treaty 1856. [↑](#footnote-ref-239)
240. Report of International Committee of Jurists, League of Nations Official Journal (October 1920 Issue No 3)14. [↑](#footnote-ref-240)
241. League of Nations Official Journal (1920 October Issue No 3) 3. [↑](#footnote-ref-241)
242. Ibid. [↑](#footnote-ref-242)
243. Ibid, LNOJ (3 October Iss. no 1920) 9. [↑](#footnote-ref-243)
244. Ibid. [↑](#footnote-ref-244)
245. Ibid LNOJ, page12. [↑](#footnote-ref-245)
246. Ibid. [↑](#footnote-ref-246)
247. LNOJ September 1921, 697. See Minutes of the 13th Session of CLN Vol III June 13th to June 28 1921 of LNOJ. [↑](#footnote-ref-247)
248. See Ministry of Foreign Affairs of Finland. Official web site 2013-09-15. This Finish resolution coincides with CLN resolution 1933 see LNOJ spec. sup nr. 114 October (1933), which was minorities related resolution adopted in view of Nazi Attack on Jews. See Ministry of Foreign Affairs of Finland. Official web site 2013-09-15.See Verzijl *International Law in Historical Perspective Vol .V* (Sijhoff 1972) 194. [↑](#footnote-ref-248)
249. One cannot disagree with Nicolson’s observation in The Congress of Vienna (Grove Press 1946) ii Toynbee describing them as “Egocentric illusion”. [↑](#footnote-ref-249)
250. See Article 10 of Treaty of Utrecht 1711-14.

See Address of President Monroe to Joint Congress in 1824,

see Article 21 of the Covenant referring to the Monroe Doctrine directly. [↑](#footnote-ref-250)
251. See admission of France to Congress of Vienna 1815 even though, France was defeated. [↑](#footnote-ref-251)
252. Walsum speaking on behalf of Netherlands during 4011th Meeting of Security Council Doc SC 2014l. [↑](#footnote-ref-252)
253. Higgins “Policy Considerations and the International Judicial Process“1968 17 (ICLQ) 58-9.

See Higgins Problems (…). [↑](#footnote-ref-253)
254. Schachter, “The Quasi-judicial role of the Security Council and the G. Assembly” AJIL Vol.58 (1964)964. See O Schachter, ‘’ UN Law’’, AJIL Vol. 88 (1994) 1. [↑](#footnote-ref-254)
255. Blaine Sloan,”Binding Force of a “Recommendation of the General Assembly of the United Nations BYBI.L (1948). See, Blaine Sloane. “General Assembly Resolutions Revisited Forty Years After” BYBIL1987.

 Schachter, “The Quasi-judicial role of the Security Council and the General Assembly” 58 AJIL (1964). [↑](#footnote-ref-255)
256. Hall, *A Treaties on International Law* (OCP 1884)9. [↑](#footnote-ref-256)
257. See Evans. *Blackstone (…)* Statute of International Court of Justice.32. [↑](#footnote-ref-257)
258. Wheaton, *Element of International Law.*  (Philadelphia1836) 36-39. Wheaton like Lord Phillimore supports Natural Law school and consent of the nations as the source of international law and they are not atheist, ‘e rule of conduct prescribed by him for his rational creatures and revealed by the light of reason or the sacred scriptures. ’ See p 36)

Wheaton on p48, divides positive law into three, ‘Voluntary, conventional, customary, conventional being formed expressly, while being stated in treaties and other international compacts’. [↑](#footnote-ref-258)
259. Wheaton, *Element of International Law* (Phil 1836*)*40. [↑](#footnote-ref-259)
260. Ibid. [↑](#footnote-ref-260)
261. Ibid. [↑](#footnote-ref-261)
262. Austin, *The Province of Jurisprudence Determined* (London 1832). [↑](#footnote-ref-262)
263. Phillimore, *Commentaries upon International Law*. (Philadelphia Johnson Law Booksellers 1854) v. [↑](#footnote-ref-263)
264. Austin, *The Province …* (1832 Prometheus2000). [↑](#footnote-ref-264)
265. Hall, *A Treaties on International Law*. 1 -2 [↑](#footnote-ref-265)
266. Ibid sate practice [↑](#footnote-ref-266)
267. Austin *The Province*,(…) (Prometheus 2000)139. [↑](#footnote-ref-267)
268. Higgins, *Problems (…).* The principal postulate is that International laws are not rules but rules in a normative system, pp1-.2 while referring to her article “Policy Considerations an international judicial process” (1968) p17 ICLQ 58 at pp58-9 “I remain committed to the analysis of international law as process rather than rules,” It will be totally unfair to call Higgins Austinian, because while she shares the view that international law is normative thus moral principle based as Austin does, but unlike Austin who does not apply his mind to International law as Westlake suggested in 1894 op cit above, Higgins examines international law and demonstrates that it is a law but a normative one along with processes. This is defensible since domestic law also has moral basis. [↑](#footnote-ref-268)
269. Westlake*, Chapters on the Principles of International Law.* (CUP 1894)p1 Chapt1 “International law is the body of rules prevailing between states .It may be described as body of rules governing the relations to all outside it” First sentence expressly refers to interstate relations. The second sentence refers to relations all outside it which includes expressly stated states and other implicitly being polities, communities and the individual.” [↑](#footnote-ref-269)
270. Westlake, *International Law Part 1 Peace,* (CUP 1904) p7 sect. Law, National and International advances the argument that is built on Plato-Aristotelian argument that individuals are sociable animals, and live collectively in city (polis) and order, so Westlake also state that it is a social fact also postulated by Emile Durkheim, that individuals form societies with moral and legal rules to regulate their behaviour. Westlake takes this social fact and applies to the collective of states. [↑](#footnote-ref-270)
271. Brierley, *The Law of the Nations*, (OCP 1954)41. [↑](#footnote-ref-271)
272. See Higgins. *Problems (…)* 111. [↑](#footnote-ref-272)
273. Gromyko, *Memories from Stalin to Gorbachev*, (GG Harper &Co 1989) p 153. “Apart from these session, (Dumbarton Oaks), there were meetings of the three, the USA USSR and Britain, and more frequently meetings between only USA and USSR, when a greater degree of understanding was usually reached. One such meeting between myself-and Stettinius (USA Rep) when a debate and the fate of the colonial territories were in full swing.” on p 155 “The USSR was in favour of giving these countries their independence Washington tended to view colonial empires as an anachronism and made no secret that it would shed no tears were they to be dismantled.” [↑](#footnote-ref-273)
274. D’Amato, “Contemporary International Law; A re-formulation 4th International Theory 1-“6 ASIL Proceedings 1998

D’Amato “Review of Meyers & McDougal Studies in world Politics”75 Harvard Review (1961).

D’Amato “Trashing Customary International law” A J IL 81 (1987) 101. [↑](#footnote-ref-274)
275. Higgins, *Problems, (*...) (CPO 2004) 111. [↑](#footnote-ref-275)
276. Evans, *Blackstone’s (…)* 20, United Nations Charter, 76 Article 76(B). [↑](#footnote-ref-276)
277. Ibid.17 UN Charter. [↑](#footnote-ref-277)
278. Ibid 17. [↑](#footnote-ref-278)
279. Ibid. [↑](#footnote-ref-279)
280. Evans, *Blackstone’s* (OUP 2005) pp164-69. Declaration on principles of International Law Concerning Friendly relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970. UNGAR 2626(XXV) 1970. [↑](#footnote-ref-280)
281. Author coined the phrase stemming from the question “two covenants or one”- raised by McGoldric- being resolved with two identical ones with minor variations to satisfy both camps of the Cold War in 1950-51 instead of one. SeeMcGoldric, *The Human Rights Committee,* (2001 Clarendon Press Oxford) 4, See part on *Drafting History* and see *One covenant or two* 11. McGoldric suggests that the controversy and fear that ICESR would impede the progress of ICCPR had there been one. Most implicit in Charter, Article 2(1) [S]overeign equality of all its members. [↑](#footnote-ref-281)
282. UNGA 1496th Plenary Meeting, 16th December 1966 Adopted Resolution A 2200(XXI) with two Covenants and an “Additional Protocol” upon report of the III Committee. International Covenant on Economic, and Social and Cultural Rights (1966) UNGAR 2200 (XXI) Articles 1-31p49-52 and International Covenant on Civil and Political Rights (1966) p 52-58 with Additional Protocol p59-60 UN Records. Never-the-less [www.ohchr.org](http://www.ohchr.org) refer to Additional Protocol of the said resolution as “Optional Protocol” causing drafting inconsistency easily avoidable,

For Drafting and Diplomatic history see Article by Erik and Forkel” Optional Protocol to the International Covenant on Civil and Political Rights” (1966), Santa Clara Law Review V21, No: 1 (1981), gives a good account of controversy of its adoption as a separate protocol with 41 votes for, 39 Against and 16 Abstention and concluded that it was ” [D]one in a haste(…)”, p276. [↑](#footnote-ref-282)
283. Legality of the Threat or use of Nuclear Weapons, ICJ, Advisory Opinion Reports(1996)p226, p239, para 24, p243 para 34. [↑](#footnote-ref-283)
284. Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion Reports (2004) p2 .The wall Para 102-140. [↑](#footnote-ref-284)
285. Ibid. [↑](#footnote-ref-285)
286. Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion Reports (2004) p2 .The wall Para 102-140. [↑](#footnote-ref-286)
287. Ibid, para. 105. [↑](#footnote-ref-287)
288. Ibid, para. 108. [↑](#footnote-ref-288)
289. Ibid, para. 112. [↑](#footnote-ref-289)
290. Ibid. [↑](#footnote-ref-290)
291. Ibid, apra.112. [↑](#footnote-ref-291)
292. Ibid, Evans, *Blackstone’s* (…).102-109UNGAR 2201(XXI) (A-C). [↑](#footnote-ref-292)
293. Novak UN Covenant on Civil and Political Rights Commentary (NP Engel pub. 1993) 15-18. [↑](#footnote-ref-293)
294. Hannum, *Autonomy, Sovereignty and self-determination* (University of Pennsylvania Press 1996) 44. [↑](#footnote-ref-294)
295. Evans, *Blackstone* (…) UNGAR 2201(XXI) (A-C) International covenant on Economic Social and Cultural rights (1966) 102, Article 5.

Ibid .International Covenant on Civil and Political Rights (1966). UNGAR 2200(XXI) A. 109, Article 5. [↑](#footnote-ref-295)
296. See Hannum *Autonomy,* (…) 44, refers to Views of Human Rights Commission see 198 UN Doc CCPR/C/SR03 (1984) 32. [↑](#footnote-ref-296)
297. Walls reference [↑](#footnote-ref-297)
298. See Evans, p 164 UNGAR 2625 (XXV) 1970, Friendly Relations (…)5. [↑](#footnote-ref-298)
299. Ibid. [↑](#footnote-ref-299)
300. Ibid. [↑](#footnote-ref-300)
301. Rauschning, (eds.) *Key Resolutions of the UN Assembly 1946-1996* (CUP 1997)108 Declaration on the Granting of Independence to Colonial Countries and People. [↑](#footnote-ref-301)
302. See above fn 270, and passage below. [↑](#footnote-ref-302)
303. Ibid 164. . [↑](#footnote-ref-303)
304. Ibid Evans, p39. Statute of ICJ 1945’Article 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.’ [↑](#footnote-ref-304)
305. Crawford, “The General Assembly, the International Court and self–determination.” Lowe and Fitzmaurice, *Fifty Years of International the Court of Justice* (CUP1996) 586, expressly states that ‘(…) [T]he work of Court in the field of self-determination and decolonisation has not been merely the occasion for international law on other topics, it has been a positive source of the law itself.’ [↑](#footnote-ref-305)
306. Evans. *Blackstone (…)* Statute of International Court of Justice, Art 38(d) 34. [↑](#footnote-ref-306)
307. Ibid. [↑](#footnote-ref-307)
308. Ibid. [↑](#footnote-ref-308)
309. Evans, *Blackstone’s (…).* 165, UNGAR 2525 (XXV) 1970, Friendly Relations (…). [↑](#footnote-ref-309)
310. Haibronner and Klein, On Article 12. Page 289. Simma (ed.) the Charter of the United Nations a Commentary (2nd Ed OUP2002). [↑](#footnote-ref-310)
311. Hewitt, *Peace and Conflict 2008*, (UMP 2008)34. [↑](#footnote-ref-311)
312. UN Charter, Article 2(4).

ICJ in AO on Threat or Use of Nuclear Weapons, Reports (1996) p4, p21, para.34, p23, and para.38, considered the Article 2(4) of the Charter said article as applicable law. [↑](#footnote-ref-312)
313. Schwarzenberger, *Frontiers of International Law*. (S&S 1970) Schwarzenberger consistently maintains in this work as well in his other works, also argued by Brown and Keeton and Brierley held that there is a Global Society. Schwarzenberger placed international law into three branches of social sciences, Sociology, History, and Ethics, “International community is not a static concept it involves making decisions by a multitude of nations, on infinite number of questions and in greatly varying circumstances”.

Falk, “On the quasi-legislative competence of General Assembly”60 AJIL (1966) 782 wrote “The process of law-creation international society have never been very clearly understood by international lawyers. It has been traditional to associate the creation of international law with “the source of international law “contained in article 38 of the statue of international law”. One can see that he is drawing a comparison between sociological powers, policy oriented determinants and “rule based” Anglicized approach which Higgins in her work, mentioned above, also recognises in p 60 of the incomplete footnote foot notes omitted. [↑](#footnote-ref-313)
314. Brierley, “The Shortcomings of International law”Vol.5. BYBIL (1924) 8, Brierley refers to Pond’s legal order “as Professor Pound has recently written “(…) [M]ust be flexible as well as stable (. .) It must be overhauled continually and refitted continually to the changes in actual life which it is govern. (.) If we seek principles, we must seek principles of change no less that the principles of stability.” One can see where the term social engineering is derived from.’ Brierley in this article attacks positivism for damaging capacity of customary law, which aims to provide compatible legal system to the changing world order. Brierley belongs to sociological school of thought. Footnotes omitted. [↑](#footnote-ref-314)
315. Term refers to peremptory international legal norm applicable to everyone in the world, and states are not able to derogate from the rule. [↑](#footnote-ref-315)
316. Ibid. [↑](#footnote-ref-316)
317. Fry, *Guide to international relations and diplomacy* (Continuum 2002).Identifies informal meetings of the European Empires to deal with international crisis. Authors called them Congress and Concert of Europe 1814-1830. First was Congress of Vienna 1814-15. Congress of Aix-la Chappelle 1818 Congress of Troppau, Laibach 1820-1821 Congress of Verona 1822 Conference of London 1830. They provide contrast with formal League of Nations formed in 1919. [↑](#footnote-ref-317)
318. Treaty of Paris 1856 Enlargement of Council of Europe following Crimean War which was fought in defence of Ottoman Empire, with GB and France against Russian expansion on Ottoman territory and was threatening special relations Anglo Turkish arrangements. 1856 marks the Paris Peace talks in which Ottoman Empire was admitted for the first time to the Council of Europe. [↑](#footnote-ref-318)
319. Webster. *The Art and Practice of Diplomacy*. (Chatto and Windus) 1961, p 55,“(…)Europe had a Council of Europe, if only an intermittent and imperfect one, from the Congress of Vienna to the outbreak of the First World War.” [↑](#footnote-ref-319)
320. Marston, “Termination of Trusteeship “ICLQ (1969) 1. [↑](#footnote-ref-320)
321. Hackworth, *Digest of International law Volume 1 of V* (US Government 1940) refers to diplomatic exchanges between USA and Britain at the time of formation of the Mandates since USA was not member of the League of Nations. Undertakings were sought by USA and given by GB in 1920 to the effect that “No valid or effective disposition of overseas possessions of Germany without the assent of USA as one of the participants in the Victory”, p109. [↑](#footnote-ref-321)
322. International legal status South-West Africa, Advisory Opinion, ICJ Reports (1950). [↑](#footnote-ref-322)
323. Evans, *Blackstone’s International Law of Documents* (OUP 2005) Covenant, Article 22. See Mandate instrument for South Africa, par (7) In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge. (8) The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council. (9) A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatory and to advise the Council on all matters relating to the observance of the mandates. [↑](#footnote-ref-323)
324. Wharton, *Digest of International law of USA* (Washington 1887) [↑](#footnote-ref-324)
325. Langer, *Encyclopaedia of World History* ( Houghton Mifflin 1968), 603 Langer says that the Treaties of Holly Alliance Document , was drawn by the Tsar and expected to be signed by all Christian Europe except King of England, Pope and the Sultan of Turkey. [↑](#footnote-ref-325)
326. Nicolson, *Congress of Vienna* (Grove press 1946) i, ‘Some members of the Alliance sought to exploit their power by extending their former frontiers or establishing fresh and alarming zones of influence.’ Notion was abhorrent to Woodrow Wilson thus his first of fourteen point’s starts with the banishment of the practice form diplomatic practice. [↑](#footnote-ref-326)
327. Webster, *Art and Practice of diplomacy,* (Pub. by Chatto & Windus 1961)55. [↑](#footnote-ref-327)
328. Evans, *Blackstone’s (…)* 9 Art 4, para.1. [↑](#footnote-ref-328)
329. Evans (eds), *Penguin dictionary of International relations*. (1998) 90-91 suggests that all three eras had the common moral sense of duty to keep international order. [↑](#footnote-ref-329)
330. Evans *Blackstone’s (…)*. 12. Charter Art 23. [↑](#footnote-ref-330)
331. Crawford, “The General Assembly, the International Court and self–determination.” Lowe, *Fifty Years of (…)* 586 expressly states that ‘(…) [T]the work of Court in the field of self-determination and decolonisation has not been merely the occasion for international law on other topics, it has been a positive source of the law itself.” [↑](#footnote-ref-331)
332. South West-Africa Case ICJ Reports (1950). [↑](#footnote-ref-332)
333. Already, Wharton and Westlake has been referred to in earlier sections that the concept of sacred trust has customary law basis by the time of Berlin Conference on Africa framed the Berlin Final Act Article 34 and 35 , in 1878. [↑](#footnote-ref-333)
334. See below. Foot note. [↑](#footnote-ref-334)
335. Namibia ICJ Reports (1971)31 para.52 reads as follows’[F]urthermore, the subsequent development of international law in regards to non-self-governing territories ,as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them (…).” [↑](#footnote-ref-335)
336. Brownlie*, Principles of Public International Law* (OUP 2000) jus cogens, according Brownlie’s Glossary means” Peremptory norms of general international law”, see also p511.

 Cassese, *International Law*.” (OUP 2005) p 199, refers to jus cogens formed by custom in similar terms.

Harris, *Cases and Materials on International law* (SM 1998), 118, Harris refers to both Brownlie and Cassese to consider self-determination as a jus cogens while Crawford did not share the same view. [↑](#footnote-ref-336)
337. Ibid para. 53’ [T]that is why, viewing the institutions of 1919 the Court must take into consideration the changes which have occurred in the supervening half-century and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of United Nations and by way of the customary law (...)’ [↑](#footnote-ref-337)
338. Sloan, “Binding Force of a Recommendation of the General Assembly of the United Nations” BYBIL (1948)1. This contemporary article clearly sets out to argue the legal effects of the Charter and Resolutions. However it has only three years’ experience as evidence to rely on. It seems at the time, legal effect was matter of fact rather than matter of law, thus some articles of the Charter and some of the resolutions of the General Assembly had legal effect. [↑](#footnote-ref-338)
339. Grant was made to Great Britain, by the Principal Allied and Associated Powers, since South Africa was a self-ruling Dominion of British Empire on 17th December 1920. [↑](#footnote-ref-339)
340. , Supplementary 13 AJIL (1919) 151Treaty of Versailles signed on 28 June 1919.

‘Article118. In territory outside her European frontiers as fixed by the present Treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers. Germany hereby undertakes to recognise and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect. In particular Germany declares her acceptance of the following Articles relating to certain special subjects. ‘‘Article 119. Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions.’ [↑](#footnote-ref-340)
341. International Status South-West Africa, ICJ Reports (1950) p193. Historical evidence examined by Judge Jessup suggested that the grant of the mandates led to the Italian permanent delegate’s complaint thus did not involve discussions even among all of the members of the Grantors. There was no signed document; no drafts were discussed by representative assemblies of the grantors or by the grantees. [↑](#footnote-ref-341)
342. Supra, Evans, *Blackstone’s (…).*6, The Covenant .Article 22, contextualising, para. 5. Presented in full See above (n) 325, Treaty of Versailles Signed on 28 June 1919. [↑](#footnote-ref-342)
343. Marston, “Termination of Trusteeship” ICLQ (1969). In p1 he expressly stated that the Mandate system was set to determine the future of the German Colonies and the Ottoman Territories. [↑](#footnote-ref-343)
344. Tanaka, the Second Phase of South-West Africa Case ICJ Report (1966). In his Separate Dissenting Opinion in page 251 used the term sui generis. [↑](#footnote-ref-344)
345. South-West Africa ICJ Report (1950) in p 132 “(…) [M]andante regulated by international rules far exceeds…” See page 142 ’The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration as embodied in article 22 (…).’ [↑](#footnote-ref-345)
346. Supra, McNair, ICJ Reports (1950) p150. He supported the decision of the Court though not with all its reasoning thus chose to give separate opinion. [↑](#footnote-ref-346)
347. Ibid. [↑](#footnote-ref-347)
348. South-West Africa ICJ Reports (1950) as stated in the Assembly set in Geneva between 6th, 18th April 1946 and adopted the said resolution on its last session to dissolve itself. [↑](#footnote-ref-348)
349. Rausshning (eds.) *Key Resolutions of the United nations General Assembly 1946- 1996* (CUP 1997) 4. UNGAOR 2145 (XXI) Question of South-West Africa (Committee voting 114 -2 -3). Decides that Mandate conferred upon his Britannic Majesty to exercise on his behalf by the Government of the Union of South Africa is therefore terminated ,that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations:‘8. Calls the attention of the Security Council to the present resolution.’ [↑](#footnote-ref-349)
350. The term” agreement “was not cited in the Mandate instrument. Academics also argue that treaty does not have to be written or signed as in the case of Ihlen Declaration. Legal Status of Eastern Greenland Judgment April 5th 1933 PICJ Reports Series A/B. (1933) “Ihlen declaration” was described on page 18 of the report. It seems that when Danish Foreign Minister called upon Norwegian Minster Mr Ihlen on 14th July 1919 to refer to Denmark’s claim of sovereignty Mr Ihlen’s response was recorded in minutes as affirmative response by Norway. [↑](#footnote-ref-350)
351. South-West Africa Advisory Opinion ICJ Reports (1950) 132, The Court, expressly rejects any drawing of analogies between municipal contractual doctrines and international law of obligation created by Article 22 of the Covenant of League of Nations, “The object of Mandate regulated by international rules far exceeds that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory and humanity in general, as an international institution with an international object –a sacred trust of civilisation. It is therefore not possible to draw any conclusion by analogy from notions of mandate in national law from any other legal conception of that law.” [↑](#footnote-ref-351)
352. 1945 The statute ICJ. Article 37 whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice”. [↑](#footnote-ref-352)
353. South-West Africa ICJ Reports (1950)132, ‘On the Other hand ,the Mandatory was to observe a number of obligations , and the Council of the League of nations was to supervise the administration and to see to it that these obligations were fulfilled .” The language of the decision suggestive a legal imperative.

On Page 133 ‘These international obligations, assumed by the Union of South Africa, were two kinds. One kind was directly related to the administration of the Territory and corresponded to sacred trust of civilisation referred to in Article 22 of the Covenant the other related to the machinery for implementation, and was closely linked to the’ supervision for the control of the League. It corresponded to the securities for the performance of this trust’ referred to in the same article.’ [↑](#footnote-ref-353)
354. Ibid ,5 [↑](#footnote-ref-354)
355. Fitzmaurice, “The law and procedure of the International Court of justice. Treaty interpretation and certain other treaty points.” 28 BYBIL 7. (1951)8, Fitzmaurice wrote “According to the teleological principle a treaty must be interpreted –and not only interpreted ,but as it were assisted or supplemented –by reference to its objects ,principles and purposes as declared ,known or to be presumed.” None-the-less he does agree that this holds true only in extreme cases and the Courts are engaged in such activity with great sensitivity and awareness not to be legislative body in normal course of adjudication. [↑](#footnote-ref-355)
356. Woodrow Wilson, Marshal Smuts and Venizelos and French Premier participated in the drafting The list of documents included drafting of the Covenant of the League of Nations, more than 5 Peace Treaties which incorporated the Covent in its entirety, and the grant of the mandates and Minority Treaties . [↑](#footnote-ref-356)
357. ICJ Reports 1950) 132. [↑](#footnote-ref-357)
358. Fitzmaurice, “The Law and procedure of International Court of Justice, international organisations and tribunals”, 29 BYBIL 5 1952. On p7 he posed the question” (c) Powers of dissolution: does the inherent powers of an international organisation include a power to dissolve itself and do this through a resolution of its assembly?” Fitzmaurice thought that Judge Read stated in affirmative in South West Africa. What is more on page 8, he consider implied succession of international organizations to be supported by the judgment subject to certain qualifying conditions. [↑](#footnote-ref-358)
359. Supra, McNair. ICJ Reports 1950,p156, in his separate opinion held, ”[T]he Mandate transferred to the Mandatory, or created and recognised in the hands of the Mandatory, certain rights of possession and government what are valid in rem –erga omnes-that is against the whole world,( ...).” [↑](#footnote-ref-359)
360. Ibid, McNair. South-West Africa ICJ Report (195) 154. See also p 156 “(…)[S]tatus -valid in rem – supplies the element of permanence which would enable the legal condition of the territory to survived the disappearance of the League even if there were no surviving personal obligations between the Union and other former Members of the League.”. Real” rights created by an international agreement have a greater degree of permanence than a personal right, because these rights acquire an objective existence which is more resistant than are personal rights to the dislocating effects of international events.”

 See, Brownlie, *Principals (…).* p. xiviii erga omnes meant “opposable to, valid against ‘all the world’ i e all other legal persons irrespective of consent on the part of those thus affected applicable to all as of right with effect in the world( ).“ [↑](#footnote-ref-360)
361. South-West Africa Reports ICJ (1950) 136, “It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical supervisory functions.” [↑](#footnote-ref-361)
362. Ibid 156. [↑](#footnote-ref-362)
363. Two out of 15 mandates were left as Mandate since their creation in 1920 other 13 either became independent state or came under the U.N. Trusteeship System. [↑](#footnote-ref-363)
364. See ICJ Reports (1950) 141. [↑](#footnote-ref-364)
365. Fitzmaurice, The law and procedure of the international Court of justice. Treaty interpretation and certain other treaty points.28 BYBIL7 (1951) 7 states that, there are two major doctrine of interpretation. One called Doctrine of textual ( ) interpretation based on presumption that the text reflects “[V]iew the intentions of the framers of the treaty, as they emerged from discussions or negotiations proceedings it conclusions must be presumed to have been expressed in the treaty itself, and are therefore to be sought primarily in the actual text and not in any extraneous source. “ [↑](#footnote-ref-365)
366. U.N Charter Article 80 (2) “Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiations and conclusion of agreements for placing mandate and other territories under the trusteeship system as provided for Article 77.” [↑](#footnote-ref-366)
367. Evans, *Blackstone’s International Law of Documents*, (OUP 2005) pp 98-26 UN. Charter Article 1. Purpose and Principles.

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. [↑](#footnote-ref-367)
368. Falk, “On quasi legislative competence of the General Assembly”, 60 AJIL (1966) p 786 referred to the United Nations as being given ‘[L]imited legislative capacity’.

See Higgins, 64ASIL Proceedings (1970)42.comments on truism of UN limited legislative capacity’ [T]here are few reminders so constantly given about UN.’

Higgins ibid (64ASIL 1970) p 38 propounded that the states through their practice, formed customary law and UN General Assembly is one such political forum, suitable for the purpose.

See Higgins. The development of International law through Political organs of UN.( OUP1963) while discussing law making capacity of states that though UN resolutions are not binding directly but repetitive adoption with overwhelming majority the Customary law is formed.

See Higgins, Problems and Processes (…). (Clarendon press in Oxford 2004) p23 and p64 refers to her article. “The United Nations and Law making: The political organs.” 64 AJIL 3 (Sept 1970), wrote 21 years later saying that “What is required is examination of whatever resolutions with similar content, repeated through time, voted for by overwhelming majorities, give rise to general opinio juris have created norm in question “In short Higgins is saying that jurist created the norms due to repetition of resolutions by the UN general assembly.

See Emerson, “Self-determination.” 65 AJIL (197) .in p 460 also refers to Higgins’s said proposition. [↑](#footnote-ref-368)
369. Brierley,“The Shortcomings of International Law”. 5 BYBIL (1924) p 6 wrote “This division of matters which concern the interest of more than one State into two kinds those which are regulated by international law and those which belong to a ‘reserve domain’ is doubtless not new; under different terminology it has long been familiar as the basis of the distinction between justiciable and non-justiciable disputes and common reservation in arbitration treaties…” [↑](#footnote-ref-369)
370. G Fitzmaurice, “The Law and procedure of International Court of Justice, International organisations and tribunals.” 29 BYBIL (1952)5 he refers res judicature of Injuries ICJ Reports 1948 that UN has inherent powers to implement its policies effectively. [↑](#footnote-ref-370)
371. Indonesia was the 60th Member to join the UN as an independent state. The founding members in 1945 were 45 States. Higgins, “The United Nations and Law making: The political organs.” 64 AJIL 3 (Sept 1970 ), wrote 21 years later wrote in p64 “What is required is examination of whatever resolutions with similar content ,repeated through time, voted for by overwhelming majorities ,give rise to general opinio juris have created norm in question”. [↑](#footnote-ref-371)
372. Sloan. “Binding Force of a Recommendation of the General Assembly of the United Nations.” BYBIL (1948). Almost in total agreement with Schechter in 1964s and Falk in 1970s.

O Schechter, the Quasi-Judicial Role of the Security Council and the General Assembly 58 AJIL (1964) p 966. Schechter wrote 8 years alter. He did not consider the Charter to contain significant legal effect as such but influence yielding the identical result as legal effect, “The Charter of the United Nations says little about violation of the obligations it imposes “also “In part, it reflects the traditional view of the auto-interpretation by the states their international obligation and their reluctances to confer superior authority on collective organs.” [↑](#footnote-ref-372)
373. Emerson, “Self-determination”, .65 AJIL (1971). p 463 “ twice self-determination” became acceptable principle in international relations with limited application “…In the first, at the close of the World War I, Woodrow Wilson and others proclaimed the right of self-determination in universal terms, but for practical purpose with a concentration on the European territorial settlements following the war.” [↑](#footnote-ref-373)
374. Hoover*. Ordeal of Woodrow Wilson,* (JHU 1992)36. Hoover referred to a meeting of Swiss legation in the White House with the President Wilson on 14th October 1918 bringing the German Response to the President’s 14 Point, where by President Wilson made it known that he was opposed to dealing with undemocratic government and this was a precondition to negotiations. President Hoover on page 39 refers to the President Wilson’s letter dated 20.10,1918 to German Foreign secretary in which President was very emphatic that, unless German Monarchy was replaced with a Democratic Government there would be no peace negotiations, but that the fight would continue, until Germany unconditionally surrendered.

See Whelan, “Wilsonian Self-determination and Versailles Settlement.” 43 I L C Q (1994) p99 “The Wilsonian principle of self-determination has historical roots in number of ideas which evolved over the centuries to shape the modern world. One is that the legitimacy of rule is dependent upon consent of the governed.”

See Sumner “The Rhetoric and practice of self-determination a right of all peoples or political institutions”, 73 Nordic Journal of International Law (2004) 325-363 is very critical of the Wilsonian ideas.

See Pomerance,”The United States and Self-determination Perspectives on the Wilsonian Conception.” 70 AJIL (1976), it is one of very few very critical article, written in retrospective. [↑](#footnote-ref-374)
375. See Hoover, Ordeal of (…) 20. President Wilson’s 14 Points address of 8th January 1918 ‘Point V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.’ Although the words self-determination is not used the concept is implicit in Point V. [↑](#footnote-ref-375)
376. Rauschning (eds), *Key Resolutions (…).* (CUP1997)p122, UNGAR 65(1) Adopted on 14.12.1946’Therefore General Assembly therefore, is unable to accede to the incorporation of the territory of SW Africa in Union of South Africa’ Number of Member States in 1946 were 55 when founding 51 members in 1945 were joined by Afghanistan, Iceland Sweden and Thailand. [↑](#footnote-ref-376)
377. Ibid. [↑](#footnote-ref-377)
378. Sloan, “Binding Force of a Recommendation of the General Assembly of the United Nations” BYBIL (1948) 26 ‘In the general discussions in the Fourth Committee at least twenty states expressed the view that there was legal obligation whereas eleven states could not agree with this position … A thorough analysis of the Assembly discussions indicates that the question concerning the legal effect of recommendation was left unresolved.’ [↑](#footnote-ref-378)
379. Sloan Ibid, on p 26 (n) 2 wrote, “Resolution 65(I) in which the General Assembly recommendations that South –West Africa be placed under trusteeship was maintained in subsequent adopted on 1st November 1947 (Res 141(II)) and 26 November 1948 (Resolution 227 (III). In its last resolution the General Assembly noted with regret that it’s previous recommendations had not been carried out. “ [↑](#footnote-ref-379)
380. In 1970 what was predicted by Slone in 1948. The General Assembly adopted Ordinary Resolution 2145 (XXI) on 27 October 1966 with Votes in favour 114 2 Against and 3 Abstention thus brought the matter to the attention of Security Council which in turn referred the matter to ICJ and sought Advisory Opinion about the legal consequences of continued presence of South Africa, with the Security Council Passed Resolution 276(1970). To some extend Sloan’s Article to this date retains a credibility which stood test of time for the last 59 years. [↑](#footnote-ref-380)
381. Eagleton (Board of AJIL Editor) “Self-determination in the United Nations ”47 AJIL(1953).pp88-93 he emphasised the need for better legal definition of self-determination, because ‘The problem now developing around this term, may be of wider importance than the cold war. The rising tide of nationalism has brought along an almost frantic revival of the concept of “self-determination” made famous by President Wilson and now by some very strange meanings are being given to it.’ Eagleton also points out that the delegates that support the notion on the floor of the General Assembly, are not matched with the actual supporting actions of their States. [↑](#footnote-ref-381)
382. Stone, “Non-Liquet and the function of Law in the International Community” 35 BYIL (1959)124, Stone distinguishes between Non-Liquate and non-justiciability doctrines. “The non-liquet is sometimes placed under a widely extend notion of non-justiciability. From the present point it should be certainly be examined apart. ( …)[N]on-justiciability in the more precise sense is concerned with the overriding assertion of certain State interest even when they may be contra or least extra-legem. Non-liquet comes into argument rather when applicable rules of appropriate content and precision are simply not available for adjusting the particular clash of interest.” [↑](#footnote-ref-382)
383. Kelsen, “The Old and The New League the Covenant and the Dumbarton Oaks Proposals” .39 AJIL (1945) p45. The title is sufficient to demonstrate how a continuum was perceived even though on p83 Kelsen pointed out distinctions between the two drafts most obvious on issues concerning “Disarmament Mandates and guarantee of status quo, it seems that the Charter of the new League is not to be burdened with guarantee of the territorial status quo.’ [↑](#footnote-ref-383)
384. Finch, 39th Meeting of ASIL Proceedings (1945). The Editor of AJIL during compared the League of Nations with UN most extensively, echoing the primacy of international security and removal of dangers to global peace as a fundamental issue.

See Higgins, *Problems* (…) 111 ” In 1946 the focus was on the rights and obligations of the sovereign member states ’The common assumption that the UN Charter underwrites self-determination in the current sense of the term is in fact a retrospective rewriting of history. “ See p113 ‘ (…) [N]ot withstanding the cautious way in which self-determination is referred to in the Charter, there began in the 1950s to be a moral stand taken on the issued by the General Assembly. And, with the increase in Afro-Asian membership in the 1960 self-determination became increasingly invoked as right of dependant people.”

Emerson. *From Empire to Nation The rise of Self-assertion of Asian and African Peoples*, (Boston 1970). 195, Chap. XVI starts with comparison of reaction to self-determination at the end of the First and Second World Wars. ‘The experience of the Second World War and its aftermath is in many respects the reverse. Although the Atlantic Charter paid appropriate homage to self-determination in a somewhat indirect fashion, the Allies , leaving aside the restoration of the People overrun by the Axis were not only divide as to the application of self-determination but has also largely lost their enthusiasm for it as anything approaching a panacea. “ [↑](#footnote-ref-384)
385. Brierley, “The Shortcomings of International Law”, 5 BYBIL (1924). Brierley supports pacific resolution of international disputes as a way forward as well as development of customary law. He referred to Alvarez view on the issue in support. The Brierley suggesting codification fossilise norms instead of emerging through as a process. The very notion is agreed by Higgins See “Problems…).

Brierley, “Vital Interest and Law “ 21 BYBIL (1944)56, returned to the same subject and argued during the war that it was wrong to suggest that International law was a failure because it failed to do what the states asked of it “ the real trouble is that they have not asked very much of it…” He also pointed out that “In their normal relations most states do not bludgeon their way through opposition; they use the process of law…” Brierley as in 1924 once more opposed Kelsen’s legalistic normative approach in preference to international process. By simple deduction once more Brierley is supporting a forum in which member states could affirm their views on specific issues develop custom and when all are in agreement to be bound by conventions. [↑](#footnote-ref-385)
386. See Emerson From Empire to Nation (…) 195. [↑](#footnote-ref-386)
387. Franck, Fairness in international Law and Institutions, (Pub OUP 2002)147 Frank’s criticism of doctrine of uti possidetis in Europe where self-determination was arrested, “ The Disintegration of Spanish imperialism in America produced the norm of uti-possidetis. The end of the German and Austrian and Ottoman empires gave rise to self-determination. In the post 1945 era uti-possidetis and self-determination were redefined and synthesized into a doctrine of decolonisation. Since the end of the communism, however, this synthesis has become unstable and new norms are required which are developed by conflict but by fairness discourse“ See 149-151 Franck uses the term “Confined by uti possidetis and Self-determination”. [↑](#footnote-ref-387)
388. Evan, *Blackstone (…)* p11UN Charter Art 1. [↑](#footnote-ref-388)
389. South-West Africa Voting Procedures, Advisory Opinion of June 7th 1955 ICJ Reports (1955)67. [↑](#footnote-ref-389)
390. Ibid 23. [↑](#footnote-ref-390)
391. ICJ 71. [↑](#footnote-ref-391)
392. South-West Africa Cases (Ethiopia v South Africa: Liberia v. South Africa) Preliminary Objections, Judgment of 21st December 1962 ICJ Reports (1962) 316. [↑](#footnote-ref-392)
393. Until 1961 the Court circulars spelt South-West Africa with dash between South and West but not in 1962. [↑](#footnote-ref-393)
394. Infra [↑](#footnote-ref-394)
395. Ibid, ICJ Reports (1950)133. [↑](#footnote-ref-395)
396. Ibid. [↑](#footnote-ref-396)
397. South-West Africa ‘Preliminary Objections’ ICJ Reports (1962). P347’The Court concluded that Article 7 of the Mandate is a treaty or a convention still in force within the meaning of Article 37 of the statute of the Court and that the dispute is one which envisaged in the said Article 7 and cannot be settled by negotiation Consequently the Court is competent to her the dispute on the merits. For that reason the Court by eight votes to seven fined that it has jurisdiction to adjudicate upon the merits of the dispute.’ [↑](#footnote-ref-397)
398. Ibid 349-86. [↑](#footnote-ref-398)
399. Changes refer to dissolution of the League of Nations in 1946 and commencement of United Nations in 1945. [↑](#footnote-ref-399)
400. Merits ICJ Reports (1962) 456- 543. [↑](#footnote-ref-400)
401. The accuracy of a dissenting opinion in dissenting judgement is paradoxical and creates dichotomy [↑](#footnote-ref-401)
402. South-West Africa ICJ Reports (1962) 465. [↑](#footnote-ref-402)
403. Ibid 468. [↑](#footnote-ref-403)
404. Ibid. [↑](#footnote-ref-404)
405. Ibid. [↑](#footnote-ref-405)
406. The above said two applications were joined on 20th May 1961. [↑](#footnote-ref-406)
407. South-West Africa Cases (Ethiopia v. South Africa)-(Liberia v. South Africa) The Second Phase. ICJ Reports (1966)1-51 Para. 1-100. [↑](#footnote-ref-407)
408. Ibid.269 J Tanaka “If the Courts findings in 1950 and decisions of the Court in 1962 established any res judicata the examination de novo of this issued would become a whole or partially impermissible or at least superfluous.” [↑](#footnote-ref-408)
409. Ibid. Second phase ICJ Reports (1966) 1 -55 par 1-100. See p10 para 7. [↑](#footnote-ref-409)
410. Ibid 20 par 10. [↑](#footnote-ref-410)
411. Ibid 20, para 11The Court distinguished obligations created “[T]he substantive provisions may be regarded as falling in to two main categories. On the one hand powers and obligations in respect of the inhabitants of the territory and towards the league and its organs (…) Conduct of the mandate simply conduct provisions, the other, were granting rights on the directly upon the members or their national. Many of these rights were commercial found in treaties and navigations and movement rights in general.’ [↑](#footnote-ref-411)
412. Ibid 51-100 para.20 rejected 21 years of work. [↑](#footnote-ref-412)
413. Ibid 36, Para. 59. [↑](#footnote-ref-413)
414. Ibid 32, Para. 44. [↑](#footnote-ref-414)
415. Supra, As since it was not proven on 20 occasion, implicitly or expressly par 22

par 24,25,28,33,35,42,44,54,54,56, 61,63,71,72,73,76.77,78,79,80. [↑](#footnote-ref-415)
416. Ibid. par 67-68. [↑](#footnote-ref-416)
417. Ibid. 4, par 88” actio populris.” [↑](#footnote-ref-417)
418. Ibid 325-42, Judge Jessup’s dissenting Opinion runs into 117 page under 11 sections including the Introduction in which he finds the Court, ‘ [W]with faulty judgment in law in fact and in law . He also considers the casting vote of the President to form majority consensus based judgment to still have the title of “Court and moral and juristic authority in its decision.’ [↑](#footnote-ref-418)
419. Ibid 325. [↑](#footnote-ref-419)
420. SICJ ‘Art. 60 The Judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe upon request of any party.’ [↑](#footnote-ref-420)
421. See Evans, *Blackstone’s (…).*23, UN Charter ‘Art 94(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. Art 94(2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.’ [↑](#footnote-ref-421)
422. See, Brownlie, *Principles (…)* (OUP 2000) 600, states that self-determination is now international legal norms written long after the 1966 judgment. The contextual reference to “after 1962”, is raises degree of hesitation, because even if 1966 judgment did not over rule the issues decided earlier safe assumption on the authority of 1962 judgment is not reached before Namibia Decision and its affirmation by the Western Sahara in 1975. [↑](#footnote-ref-422)
423. Ibid. [↑](#footnote-ref-423)
424. Friedman and Higgins in two different articles remark about Judges. Friedman spoke reflecting different philosophies while Higgins devotes considerable part of 1968 article ICLQ 1968 Vol.17 p58-84, Polarisation of the Anglo -American perception of international law, one preferring rule based approach (page 59) and the latter policy approach (60) while Lauterpacht in Higgins’ footnote on page 59 was excluded from British main stream presumably because deemed to be class of his own. Judge Dillard in Western Sahara -ICJ Reports (1975) 122, also referred to Emerson’s article who also touched upon on polarisation. Crawford considered less polarization but drew distinction on the grounds of “coherence. [↑](#footnote-ref-424)
425. See Higgins, “The International Court and South West Africa The impact of the Judgment Affairs, Vol. 42 No 4(1966) The Court and the Judgment ‘(…) [H]have both attracted much public interest to the Court and excited much comment form laymen no less than lawyers. [↑](#footnote-ref-425)
426. Lowe (eds.), *50 years (….).* 585, Crawford, “The General Assembly, (…).” [↑](#footnote-ref-426)
427. Friedman, Op Cit. “Jurisprudential implications of the South West Africa” Case 1967 Vol. 6 Columbia Journal of International Law, called the judgements lot opportunity “…is not primarily due to intrinsic importance of the judgments” 1. [↑](#footnote-ref-427)
428. Brown, “The 1971 ICJ Advisory Opinion on South West Africa (Namibia)” .5 Vand, J Transnational Law 1972 .213 was a council engaged with the case. “(…) The Opinion does raise important question (…), but also regarding the Court’s role in the development of international law.’ [↑](#footnote-ref-428)
429. Formality, refers to the UN Charter since it has agreed purposes and principles and created administrative obligations on the states and state-like-entities. Look at ‘Article 13(1) The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, an assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Art. 13(2) The further responsibilities, functions and powers of the General with respect to matters mentioned in paragraph) above are set forth in Chapters IX and X’ [↑](#footnote-ref-429)
430. Grewe, *The Epochs*(…) 649, one may suggest that this identical principle laid behind the European Congress and Concert system known as the doctrine of Balance of power now third world nations rising to the occasion. [↑](#footnote-ref-430)
431. South-West Africa, Merits phase ICJ Reports (1962). [↑](#footnote-ref-431)
432. Brierley, “The Shortcomings of International law “Vol. 5. BYBIL (1924) [↑](#footnote-ref-432)
433. Friedman,” Jurisprudential implications of the South West Africa Case “Vol.6 Columbia Journal of International Law (1967).Freidman considered the decision as a lost opportunity and dissentions as investment in progress in future. International law. [↑](#footnote-ref-433)
434. Crawford’s “The General Assembly…) (, 1996)72. [↑](#footnote-ref-434)
435. Evans, *Dictionary,* 90. It is purported that this notion has historical heritage accordingly. Thus the said policy had mutis mutandis a historical legitimacy as it was practised during the European era of Congress and Conference of Europe and during League of Nations ( the Council of League )and now under the UN Charter (the Security Council) .

Langer*, Encyclopaedia (…),* Langer traces the concept to Belgian Congo King Leopold and to 1878 with the founding of International Association for exploration and civilisation of Central Africa. [↑](#footnote-ref-435)
436. The General Assembly took steps to circulate questionnaire as how to reform ICJ. [↑](#footnote-ref-436)
437. Higgins*. Problems (…)* (fn) 13. [↑](#footnote-ref-437)
438. Ibid intro para. 2. [↑](#footnote-ref-438)
439. Ibid intro para. 4. [↑](#footnote-ref-439)
440. Legal Consequences for States of the Continued Presences of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion ICJ Reports (1971) 17. [↑](#footnote-ref-440)
441. Ibid Namibia. [↑](#footnote-ref-441)
442. Ibid Namibia ICJ Reports (1971) p21-27 para.19-41. [↑](#footnote-ref-442)
443. Ibid Namibia para. 43-51 ICJ Report (1971) Namibia upheld the ruling of ICJ 1950 on pp 131 132 that the legal obligation were created on the Mandatory under the Mandates and the Covenant Article 22 43-51. [↑](#footnote-ref-443)
444. Ibid para.75 referred to recognition of Court judgment in ICJ 1950 para 135 that South Africa recognised continuation of her obligations to be discharged to UN. [↑](#footnote-ref-444)
445. Ibid Namibia ICJ Reports (1970) 50, para 104, page 45 para 83. Page 28 para 43 of the Court referred to its previous findings no less than 25 times, 16 times to the 1950 ruling once to 1955 and 4 times to 1956 and 5 times to 1962 rulings and referring to repeated affirmations of its findings. This is what is meant by “practice” by Lauterpacht, *The Development of International law by International Court* (Stevens & Sons Ltd 1958)9. [↑](#footnote-ref-445)
446. Ibid, Namibia, 32, para 55 refers to the findings of the ICJ (1950) 133. [↑](#footnote-ref-446)
447. South-West Africa ICJ Reports (1950), as well as decision 1955 and of 1956 and of 1962. [↑](#footnote-ref-447)
448. Ibid. Para 56-58, Steps were taken by the Chapter, para. 58 detail of Article 80(1) to replace Article 22 of the Covenants an preservation of existing rights under mandate system as recognised by the ICJ (1950)137, as upheld in (1956) 27 .Para, 60 interpretation of Article 80(1) as a “replacement” of article . [↑](#footnote-ref-448)
449. Namibia, ICJ Report (1971) Para. 91. [↑](#footnote-ref-449)
450. Ibid Para. 92. [↑](#footnote-ref-450)
451. South-West Africa ICJ Reports (1950)131. [↑](#footnote-ref-451)
452. Namibia ICJ report (1971)31 para. 52.’Subsequent development international law in regards to non-self-governing territories as enshrined in the Charter of the Unite nations, made the principle of self-determination applicable to all of them. The concept of secret trust was confirmed and expanded to “all territories whose people have not principles and principle of Self-Government.’ (Article73). Thus it clearly embraces territories under a colonial regime.’ [↑](#footnote-ref-452)
453. Namibia, ICJ Reports (1971)31. [↑](#footnote-ref-453)
454. Ibid. [↑](#footnote-ref-454)
455. Namibia is the name given to South-West Africa during 1966-1968 but definitely before 1970. It is used in as such UN documents in 1970. [↑](#footnote-ref-455)
456. Ibid ruling in Namibia affirmed this. [↑](#footnote-ref-456)
457. Brownlie*, Principles (…).* 600. [↑](#footnote-ref-457)
458. Ibid. [↑](#footnote-ref-458)
459. Ibid. [↑](#footnote-ref-459)
460. Crawford, “The General Assembly, the International Court and Self–determination”. Argued with supporting evidence that the work of Court in the field of self-determination and decolonisation has not been merely the occasion for international law but also been the positive source of the law itself. [↑](#footnote-ref-460)
461. Sloan see supra 3 note 6, supra p 10 note 41, p 11-12 and (FN) 47 &48. [↑](#footnote-ref-461)
462. Schechter, “The Quasi-Judicial Role of the Security Council and the General Assembly“58 AJIL (1964) 966, reiterates Sloan’s view of non binding nature but effective influence of General Assembly Resolutions , identical to Higgins’s suggestion that UNGA has custom forming capacity. [↑](#footnote-ref-462)
463. Falk, 9. [↑](#footnote-ref-463)
464. Emerson *Empire to Nation* (…). [↑](#footnote-ref-464)
465. Higgins *Problems (…)* fn. 37, and the fn. 40. Higgins referred to Schachter article” The Quasi-Judicial Role of the Security Council and the General Assembly” 58 AJIL (1964) 966. [↑](#footnote-ref-465)
466. Vienna Convention on the Law of Treaties (1969) Article 53 offers a minimal positive recognition of peremptory norms, also known as jus cogent with non-derogative nature, because its importance is recognised by the world community. So is the prohibition of none-annexation, aggression in Covenant and Charter (Article 2(4) ) and Article 5(b) of 1998 Rome Statute of International Criminal Court also naming 5(a) Genocide 5(c) Wart Crimes ,5(c) Crime of Aggression, to be to be ius cogenst according.

 Cherif Bassiouni, “Law and Contemporary Problems” Vol. 59: No 4, p 65, *“Formal adoption of principle of prohibition of aggression and war as state policy became ius cogent (compelling law) thus non derogative. Furthermore since this prohibited aggression against everyone, it became erga omnes*. States that “International crimes that rise to the level of *jus cogent* constitute *obligation* *erga omnes* which are inderogable. (…) Thus these two concepts are different from each other. “On part IV Obligatio erga omnes, p72, “[T]he *erga omnes* and *jus cogent* are often presented as two sides of the same coin”

ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crimes of Genocide ICJ Reports (1951)* p 23 gave an indirect account what an ius cogent may entail; (i) moral value that can be imposed on states by the states; (ii) if divorce of national interest in preference to direct interest of humanity, universality of value not to be compromised by reservations, and for the benefit of “[P]urely humanitarian and civilising purpose.

Barcelona Traction, Light and Power, Company LTD ICJ Reports (1970) was about states general responsibility to their actions in general. However it also refers directly to the term erga omnes in para 33 but in para 34 it referred to *Reservation to the Genocide Prevention (…) ICJ Reports (1951)* case suggests that certain interest legal or material places states under obligation to exercise supervision and implementation of that right without entitlement to damage if no material interest is involved. [↑](#footnote-ref-466)
467. Supra 1998 Rome Statute. Art 53 [↑](#footnote-ref-467)
468. Ibid Cherif Bassiouni [↑](#footnote-ref-468)
469. Drawing attention to development of R2P and history of decolonisation is not same as engaging argument over lex lata and lex ferenda but bridging of the gap between them. [↑](#footnote-ref-469)
470. Schechter, “The Quasi-Judicial Role of the Security Council and the General Assembly“58 AJIL (1964) 966, [↑](#footnote-ref-470)
471. Brownlie, *Principles (…)* (OUP 2002) 600, and ‘Western jurists now generally admit that self-determination is a legal principle’ this is a very cautious acceptance. “ [↑](#footnote-ref-471)
472. Western Sahara an Advisory Opinion of ICJ reports (1975). [↑](#footnote-ref-472)
473. Franck,” The Stealing of the Sahara”70 AJIL (1976) p 695 citing Times Newspaper reports suggests that 60,000 people out of a population 77,000 had been displaced. [↑](#footnote-ref-473)
474. Chapter 2(2.2) (i) above Wharton Westlake and Berlin Final Act 1878 Art 34-35. [↑](#footnote-ref-474)
475. Franck, Stealing Sahara (…) . [↑](#footnote-ref-475)
476. Resolution 3292(XXIV) was adopted on 13th December 1974. [↑](#footnote-ref-476)
477. Higgins *Problems and Processes*(…)115 reflects that the reason why this was simple question of sovereignty over it was established by any of the two or one of the two concerned, parties then the issue of self-determination would not have risen by relying on last paragraph of the judgment 162. [↑](#footnote-ref-477)
478. Western Sahara Case, ICJ Reports (1975) 29 Para 49. [↑](#footnote-ref-478)
479. Ibid. Para 50. [↑](#footnote-ref-479)
480. Western Sahara ICJ Reports (1975)14. Resolution 3292(XXIX) par 3 “(...)[U]ntil the general Assembly decides on the policy to be followed in order to accelerated the decolonisation process in the territory ,in accordance with resolution 1514(XV )in the best possible conditions, in the light of the advisory opinion to be given by the International Court of Justice.’

See Franck “The Stealing of the Sahara”70 AJIL(1976)707, referred to the resolution which achieved three aims (1) It stopped referendum,(2) It send special fact finding mission.(3) Brought the matter to the Court. [↑](#footnote-ref-480)
481. Western Sahara, ICJ Report (1975) 33.

See Higgins. Problems and Processes p 119 referred ‘the opportunity to express choice has not always been given International Court of Justice recognised this’. [↑](#footnote-ref-481)
482. Ibid 68. [↑](#footnote-ref-482)
483. Western Sahara, ICJ (Reports 1975) 48para 162. [↑](#footnote-ref-483)
484. Ibid. [↑](#footnote-ref-484)
485. Ibid 2. [↑](#footnote-ref-485)
486. Rauschning (eds.) Key *Resolutions of the UN Assembly 1946-1996*(CUP 1997) 108. [↑](#footnote-ref-486)
487. Western Sahara ICJ (1975) 14. Para.3. UNGAR. 3292(XXIX). [↑](#footnote-ref-487)
488. Evans, *Blackstone’s (…).* (OUP 2005) 8 -17 of UN Charter. [↑](#footnote-ref-488)
489. Evans *Blackstone’s (…)* 10-11’ UN Charter Article 103. In the event of a conflict (…) Charter shall prevail.’ [↑](#footnote-ref-489)
490. Namibia ICJ Report (197)31 Para 52. [↑](#footnote-ref-490)
491. Rauschning, *Key Resolutions. (…)*108. [↑](#footnote-ref-491)
492. Ibid. Namibia ICJ Reports (1971) 31, para.57. [↑](#footnote-ref-492)
493. Ibid. [↑](#footnote-ref-493)
494. Ibid, [↑](#footnote-ref-494)
495. Ibid Namibia, ICJ Reports (1971). [↑](#footnote-ref-495)
496. Ibid. [↑](#footnote-ref-496)
497. Western Sahara ICJ Reports (1975) p33, para 56. [↑](#footnote-ref-497)
498. Namibia ICJ Reports (1971) 31. ICJ Reports (1950) on p 156. Judge McNair opined that Mandate had given the Mandatory certain “administrative and legislative rights to be in rem erga omnes”... Thus these were conditional to paragraph 6-9 of Article 22 of the Covenant and the Mandate instrument 5-7, which necessitated the submission of annual reports and petitions from the territory of international supervision. Therefore Conditionality of the mandates and the international obligations emanating from thereof in rem, received judicial approval. [↑](#footnote-ref-498)
499. Namibia ICJ Reports (1971) p 31 para. 52. [↑](#footnote-ref-499)
500. Ibid Namibia. ICJ Reports (1971)51. [↑](#footnote-ref-500)
501. Harris, *Cases and materials* (…). p118. [↑](#footnote-ref-501)
502. Ibid. [↑](#footnote-ref-502)
503. Brownlie Principles of International Law (OUP2002) ius cogens , Glossary meaning ‘Peremptory norms of general international law.’ [↑](#footnote-ref-503)
504. Ibid p 511 Incidents refers to State actions. [↑](#footnote-ref-504)
505. Ibid. [↑](#footnote-ref-505)
506. Brownlie, *Principles (…)* 513. [↑](#footnote-ref-506)
507. Ibid. [↑](#footnote-ref-507)
508. Ibid. [↑](#footnote-ref-508)
509. Ibid. [↑](#footnote-ref-509)
510. Brownlie, *Principles* (…) 515. [↑](#footnote-ref-510)
511. Ibid. [↑](#footnote-ref-511)
512. Cassese, *Self-determination of Peoples*, (CUP .1996)133. [↑](#footnote-ref-512)
513. Cassese, *International Law,* (OUP 2nd ed. 2005)199. [↑](#footnote-ref-513)
514. Ibid. [↑](#footnote-ref-514)
515. Ibid. [↑](#footnote-ref-515)
516. Rauschning (eds). *Key Resolutions* (…) UNGAR 1541 (XV) 1960, 108 “Principles which should guide members in determining whether or not an obligation exists to transmit the information called for in article 73 (e) of the Charter of the United Nations.” [↑](#footnote-ref-516)
517. D’Amato and Onnuf argument is at personal level in American Journal of International Law see 59 AJIL 1965 321-24 . [↑](#footnote-ref-517)
518. Crawford, *The Creation of States in International Law*, (2007 CPO) 135. [↑](#footnote-ref-518)
519. Franck, “The Stealing of the Sahara“70 AJIL (1976) 694. [↑](#footnote-ref-519)
520. Ibid. [↑](#footnote-ref-520)
521. Ibid 695. [↑](#footnote-ref-521)
522. Ibid. [↑](#footnote-ref-522)
523. Ibid. 721. [↑](#footnote-ref-523)
524. Ibid. [↑](#footnote-ref-524)
525. Shaw, “Peoples Territories and Boundaries”1993 EJIL Volume 8 (Number 3) 478. [↑](#footnote-ref-525)
526. Ibid. [↑](#footnote-ref-526)
527. Ibid 479. [↑](#footnote-ref-527)
528. Ibid. [↑](#footnote-ref-528)
529. Ibid. [↑](#footnote-ref-529)
530. Ibid.480. [↑](#footnote-ref-530)
531. Western Sahara ICJ Reports (1975) 122, Separate Opinion of Judge Dillard. [↑](#footnote-ref-531)
532. Permanent Court of Arbitration, the Island of Palmas Case .USA vs. The Netherlands Arbt. Huber The Hague (4th April 1928) 752. [↑](#footnote-ref-532)
533. Jessup, “The Palmas Island Arbitration” 22 AJIL 735 (1928) 752. [↑](#footnote-ref-533)
534. If one compares the 1815 Treaty of Vienna to which France was admitted on the grounds of the principle of legitimacy and how France was allowed to keep pre-Napoleonic borders, with that of Paris peace conference of 1918 which led to borders being dawn, one notes the wisdom displayed in the former. [↑](#footnote-ref-534)
535. Ibid Crawford fn. 489 above. [↑](#footnote-ref-535)
536. One could call this descriptive certitude, because it is based on description of circumstances [↑](#footnote-ref-536)
537. Natural Justice not same as Laws of Nature but meaning justice by due process, fair and legitimate. [↑](#footnote-ref-537)
538. Hobbes, *Leviathan* 1651(Fontana1972) 161, calls distributive justice- giving what is due to one, only after emergence of cohesive community -a civil society after entering the social covenant- establishing a government, capable of enforcing laws. [↑](#footnote-ref-538)
539. Statistical evidence in 2007 showing that self-determination was not synonymous to decolonisation since long after post-colonisation era commenced 74% of the states were involved with claims for self-determination. [↑](#footnote-ref-539)
540. Max Huber, Arbitrator in the Island of Palmas case. Supra p144 fn. 407,408. The Judge Huber’s ruling suggests that the title of the territory should be renewed according the law of the day thus creation of “contradiction of “suggesting that doctrines “of title acquisition are historical interest only now.752. [↑](#footnote-ref-540)
541. Jessup, “The Palmas Islands Arbitration” 2 Am. J Int’l Law (1928)752. [↑](#footnote-ref-541)
542. Rausschning (eds*.) Key resolutions (…)* (CUP 1997) 106

Ibid. . UNGAR 1541(XV) 1960, identified the claimants in the context of non-self-ruling territories [↑](#footnote-ref-542)
543. Lansing, *Peace Negotiations, a Personal Narrative* (Houghton Mifflin Company 1923)55. [↑](#footnote-ref-543)
544. Ibid. [↑](#footnote-ref-544)
545. Ibid. [↑](#footnote-ref-545)
546. Ibid 99. [↑](#footnote-ref-546)
547. Ibid 100. [↑](#footnote-ref-547)
548. Verzijl, International *Law in Historical Perspective, vol.1* (Leyden 1968) 321. [↑](#footnote-ref-548)
549. Oppenheim, International *law Treatise Vol*. 1(Longman 1912). [↑](#footnote-ref-549)
550. Evans *Blackstone’s (…)* Documents” (OUP.2005)38, Stature of ICJ (1945) ‘Article 38 (d). Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’ [↑](#footnote-ref-550)
551. Ibid Verzijl, 321 para. (d). [↑](#footnote-ref-551)
552. Ibid. [↑](#footnote-ref-552)
553. Ibid. [↑](#footnote-ref-553)
554. Verzijl, *International Law* (…) 22. [↑](#footnote-ref-554)
555. Verzijl, *International Law* (…) 325. [↑](#footnote-ref-555)
556. Lansing, *Peace Conference,* (Boston 1920. Guttenberg 2003) 61. [↑](#footnote-ref-556)
557. See Hewitt, (Eds.). *Peace and Conflict 2008*.54 [↑](#footnote-ref-557)
558. Hannum *Autonomy, Sovereignty and self-determination; (…)*.

 Danspeckgruber with Sir Watts, Self-*determination and Self-administration* (Reiner 1997) 26. [↑](#footnote-ref-558)
559. Hewitt, (Eds*.). Peace and Conflict 2008.*54 [↑](#footnote-ref-559)
560. <http://data.unhcr.org> Syrian refugees/regional. Adjustment of these figures is necessary since hundreds cross into Turkey as the fighting intensify. Furthermore world press woke the world conscience with the pictures of little Aylan’s dead body carried by a soldier from the beach having drowned in Aegean Sea on the night of 2nd September 2015. He was one of six children to drown that night on the way to Canada via EU out of two and half million refugees living in Turkey as EU struggles with what to do with 200,000 refugees from Levant. [↑](#footnote-ref-560)
561. Pomerance [↑](#footnote-ref-561)
562. Danspeckgruber and Watts, *Self-determination and Self-administration* (Lynne Reiner (1997) 26. [↑](#footnote-ref-562)
563. Higgins, *Problems (*…). (CPO 2004). [↑](#footnote-ref-563)
564. Crawford *Creation of State (s….)* (ClPO 2007). [↑](#footnote-ref-564)
565. Schwazenberger, *International Law Volume, 1 International Constitutional Law*,(S & S 1976). [↑](#footnote-ref-565)
566. Cassese, (Ed), *Realising Utopia*: Future of International Law Part 12 “Towards a Global Community of Human Rights “introduction”. [↑](#footnote-ref-566)
567. Cassese resided over International Criminal Tribunal for the former Yugoslavia (ICTY), from 1993 to 1997, and 1997-2000 as a Tribunal Judge. [↑](#footnote-ref-567)
568. Schwarzenberger, *International Law. Volume 1.* (S&S1957)16. [↑](#footnote-ref-568)
569. Ibid. [↑](#footnote-ref-569)
570. Ibid. [↑](#footnote-ref-570)
571. International Status of South–West Africa ICJ (1950)175 part III. [↑](#footnote-ref-571)
572. Reparation for injuries suffered in the service of United Nations, Advisory Opinion, ICJ (Reports 1949)

 174-79. [↑](#footnote-ref-572)
573. Ibid. 179. [↑](#footnote-ref-573)
574. Ibid. [↑](#footnote-ref-574)
575. Wade’s essay in the Dicey’s *An introduction to the Study of the Constitution* (McMillan 1967) p xcvii. [↑](#footnote-ref-575)
576. UNGAR 2625(XXV) 24.10.1970 - Friendly Relations. Para 4. [↑](#footnote-ref-576)
577. Evans, *Blackstone’s (*…) (OUP. 7th ed. 2005) 8 UN Charter Art 1. [↑](#footnote-ref-577)
578. Higgins, *Themes and Theories*. (Vol.1 2 OUP 2009) Vol1, page 141. [↑](#footnote-ref-578)
579. Ibid. [↑](#footnote-ref-579)
580. Secretary–General report to Security Council S2004/616 23/8/2004. [↑](#footnote-ref-580)
581. G A 2006/25 27/7/2006. [↑](#footnote-ref-581)
582. UNGAR 61/39, 8/12/2006. [↑](#footnote-ref-582)
583. General Assembly A/64/298 17/8/2009, para 97. [↑](#footnote-ref-583)
584. Verzijl, *International Law in Historical Perspective, vol.*1 (Sijthoff-Leyden 1968) 222. . [↑](#footnote-ref-584)
585. Higgins, *Problems and Process, International law and how we use it*, (CPO 2004) 111. [↑](#footnote-ref-585)
586. See, Verzijl, *International Law (…) Vol. 1* chapter 5. [↑](#footnote-ref-586)
587. See, Higgins, *Problems (…).* 111. [↑](#footnote-ref-587)
588. Ibid. [↑](#footnote-ref-588)
589. Ibid. [↑](#footnote-ref-589)
590. See Crawford, *The creation of States in international law* (CPO 2007) 115. [↑](#footnote-ref-590)
591. Cassese *Self-determination of Peoples a legal reappraisal* (CUP 1996) 43. [↑](#footnote-ref-591)
592. Doehring, “Self-determination” Simma (ed.) *Charter of UN; A Commentary* (OUP 1995) 48-49. [↑](#footnote-ref-592)
593. Ibid. [↑](#footnote-ref-593)
594. Ibid. [↑](#footnote-ref-594)
595. Whiteman, Digest of International Law Vol. 5 ( 15 vols. State department in June 1965 ) 49 [↑](#footnote-ref-595)
596. Ibid. 58. [↑](#footnote-ref-596)
597. Ibid. [↑](#footnote-ref-597)
598. Ibid. [↑](#footnote-ref-598)
599. Ibid 63. [↑](#footnote-ref-599)
600. Ibid 41-42. [↑](#footnote-ref-600)
601. Ibid 45. [↑](#footnote-ref-601)
602. Rights and duties of States was listed and discussed by UNGA on 11th December 1946 and unanimity was reported, but no record of the proceedings or resolution is in public domain, http://reserch un.org/ ga/quick/regular/1. [↑](#footnote-ref-602)
603. Evans, *Blackstone’s (*…) (OUP. 7th ed. 2005) 8 UN Charter Art. [↑](#footnote-ref-603)
604. Franck, Head of the New York Law School and• Louise Sohn Head of the Harvard law faculty for 35 years will be hard to oppose to the effect that they do not qualify under Statute of ICJ 1945 Article 38 (d). [↑](#footnote-ref-604)
605. See Brownlie. *Principles (…)* 558. [↑](#footnote-ref-605)
606. Corfu, Canal Case Judgment of December 15th 1949, ICJ Report (1949) 244. [↑](#footnote-ref-606)
607. Ibid. 33. [↑](#footnote-ref-607)
608. Ibid. [↑](#footnote-ref-608)
609. Ibid. 33. [↑](#footnote-ref-609)
610. Two eminent legal teachers of law within the manning of Article 38 (d) of Statute of ICJ [↑](#footnote-ref-610)
611. Franck,” Who killed article 2(4)? Or changing norms governing the use of force by state.” 809.

 64 Am. J .Int’l L. 1970. [↑](#footnote-ref-611)
612. Ibid 810. [↑](#footnote-ref-612)
613. Editorial Henkin. “The Reports of Death of Article 2(4) Are Greatly Exaggerated. “

65 AJIL (1971) 544 -46. [↑](#footnote-ref-613)
614. Ibid, 544. [↑](#footnote-ref-614)
615. Ibid. [↑](#footnote-ref-615)
616. Ibid. [↑](#footnote-ref-616)
617. Ibid 545. [↑](#footnote-ref-617)
618. Ibid. [↑](#footnote-ref-618)
619. Ibid 546. [↑](#footnote-ref-619)
620. UN Documents archives. The Charter of the United Nations, Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation Secretary of State in 1945. [↑](#footnote-ref-620)
621. Ibid 125. [↑](#footnote-ref-621)
622. Evans *Blackstone’s (…)* (OUP. 7th ed. 2007.)10 [↑](#footnote-ref-622)
623. Ibid Article 73 (a). [↑](#footnote-ref-623)
624. Ibid (b). [↑](#footnote-ref-624)
625. Ibid, (e). [↑](#footnote-ref-625)
626. Ibid. [↑](#footnote-ref-626)
627. See Judge Dillard section 4.3.5 above. [↑](#footnote-ref-627)
628. 7th International Conferences of American States Final Act 28 AJIL Sup 75(1934)pp 75-78 Convention on Rights and Duties of States (Montevideo Convention) 26.12.1933 [↑](#footnote-ref-628)
629. Ibid p75. [↑](#footnote-ref-629)
630. Evans, *Blackstone’s (*…) (OUP. 7th ed. 2005) 8 UN Charter Art 2 [↑](#footnote-ref-630)
631. Ibid, Frank with Henkin in 1970-71 and Riesman and Schechter 1984 in AJIL [↑](#footnote-ref-631)
632. Ibid Evans, *Blackstone’s (*…) 8. [↑](#footnote-ref-632)
633. Evans *Blackstone’s International Law of Documents* (OUP.2005) t p,109 , International on Civil and Political Rights UNGAR 2200(XXI) 1966 [↑](#footnote-ref-633)
634. [↑](#footnote-ref-634)
635. Wharton. *A Digest of International Law (*Washington 1887) 69. [↑](#footnote-ref-635)
636. Moor, *A Digest of International Law* (Washington 1909). [↑](#footnote-ref-636)
637. Hackworth, *Digest of International law USA (*vol.1, Washington 1944)733. [↑](#footnote-ref-637)
638. Franck, *Fairness in international law and institution,* (OUP 2002) p 147. Franck clearly deems it to be inappropriate beyond Spanish Colonies in Americas“[H]owever, this synthesis has become unstable and new norms are required which are developed by conflict but by fairness doctrine”. [↑](#footnote-ref-638)
639. Reisman, Editorial comment “Coercion and Self-determination construing Charter Article 2(4) 78 AJIL (1984) 642 [↑](#footnote-ref-639)
640. Ibid 645. [↑](#footnote-ref-640)
641. Charter Article 75. “The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories, as may be placed hereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.” [↑](#footnote-ref-641)
642. Ibid. [↑](#footnote-ref-642)
643. See Schwarzenberger, *International Law* V*olume, International Constitutional Law*, V 3(S& S1976).Introduction [↑](#footnote-ref-643)
644. Canadian Supreme Constitutional Court Ref; re Secession of Quebec 1998(2) SCR 217, para33. [↑](#footnote-ref-644)
645. Franck “The Stealing of the Sahara” 70 AJIL (1976). [↑](#footnote-ref-645)
646. Franck Ibid “Stealing Sahara”…… [↑](#footnote-ref-646)
647. .Catholic Institute of International Relations and International Platform of Jurists for East Timor ET1995 International Law and Question of East Timor. Chinkin, “ Australia and East Timor in International Law “ p269 [↑](#footnote-ref-647)
648. Ibid p243 [↑](#footnote-ref-648)
649. Prof Catriona Drew at SOAS. [↑](#footnote-ref-649)
650. Drew “The East Timor Popular Consultation; Self-determination denied” Nottingham University Human Rights Volume 4 Number 2July 1999 .Referred to as the Art 1.

And “The East Timor Story: International law on Trial “EJIL (2001) Vol12 No.4, pp, 641-684 Ref as ART 2nd pup. [↑](#footnote-ref-650)
651. Ibid 2nd pub. [↑](#footnote-ref-651)
652. International Law and Question of East Timor, Op. Cit. p164. [↑](#footnote-ref-652)
653. Ibid 1st pub.p1 [↑](#footnote-ref-653)
654. Ibid 1st article [↑](#footnote-ref-654)
655. Ibid Drew’s use of term misleading is from Emerson’s article “Self-determination” 65 AJIL (1971). [↑](#footnote-ref-655)
656. Rousting (eds.) *Key Resolutions (…) (CUP1997)* 108 UNGAR 1514(XV) 1960, [↑](#footnote-ref-656)
657. Ibid [↑](#footnote-ref-657)
658. UNAMET was mandate d by Security Council to hold referendum on30.8.1999 Question asked population and those abroad to express their view on autonomy within Indonesian Republic 21.5% favoured it while 75.5% opposed it. UN sources total of 344 580 people cast their votes.

According the figures of Bishopric dioceses of Dili 220 314 Catholics Protestant 2,550 Confucian 5,660, Muslim 135. and 460,112 Pagan lived in 1974 in view of mass killing and migration in view of pagan votes expressed preference to remain in Muslim Indonesia being mere 21.5 % is rational and explicable [↑](#footnote-ref-658)
659. Democracies also had Soviet allies [↑](#footnote-ref-659)
660. Berman “European Nationalism and modernist revival of international law” 106 Harvard. L Rev 1992-1993, p 1794 [↑](#footnote-ref-660)
661. Pomerance, “United States and Self-determination perspective on the Wilsonian Conception “70 AJIL 1976 1. [↑](#footnote-ref-661)
662. Franck “Emerging right to democratic governance “89 AJIL 1992. [↑](#footnote-ref-662)
663. L Brilmayer, “Secession and Self-determination, A territorial Interpretation “16 Yale JIL (1991) 177. [↑](#footnote-ref-663)
664. L Brilmayer, Ibid. 191. [↑](#footnote-ref-664)
665. Anthony Giddens (Ed) *Durkheim Selected Writings* CUP 2nd Print 1974) .

 Durkheim, Rules of Social Methodology (Solovay Trans. First Free Press 1964) 13 “social fact is acting, fixed or not capable of exercising on the individual an external constraint”. Giddens expounded on Durkeim‘s anomie with a reference demise of moral restraint. To Giddens anomie is a descriptive end, what happens when that moral equilibrium breaks and social discord follow 14,15,42. [↑](#footnote-ref-665)
666. Kohen, (Ed.), *Secession, International law perspective* (CUP 2006)8, Christian Tomuschat “Secession and Self-determination.” [↑](#footnote-ref-666)
667. Evans, *Blackstone’s (…)* (OUP2005) 8 UN Charter Articel1 (1). [↑](#footnote-ref-667)
668. Evans, *Blackstone’s (….)* 101-108. [↑](#footnote-ref-668)
669. Ibid 108. [↑](#footnote-ref-669)
670. Canadian Supreme Constitutional Court, ref re secession of Quebec 1998(2) Scr. [217]146. [↑](#footnote-ref-670)
671. Ibid, 143. However US spokesman in UN Security Council specifically stated that she was recognising Kosovo’s independence as a sovereign act. 19 Feb 2008. [↑](#footnote-ref-671)
672. Jennings, *The Acquisition of Territory in International law* (Manchester 1963).and support the view that title to the territory cannot suffer retrospectively as acquisition may change in time. [↑](#footnote-ref-672)
673. Langer, *Encyclopedia of World History* (1968. Houghton Mifflin) 792. [↑](#footnote-ref-673)
674. Ibid. [↑](#footnote-ref-674)
675. Hogg *Constitutional Law of Canada* (Thomson and Caswell 5th ed. 2008), 33Hogg Referred to Durham Report “ I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state : I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.” [↑](#footnote-ref-675)
676. Ibid. Hogg 33“Settlement an conquest were not the only way in which English and French were received in British North America. Adoption was the third way”. [↑](#footnote-ref-676)
677. Ibid. [↑](#footnote-ref-677)
678. Ibid. [↑](#footnote-ref-678)
679. In paragraph 1.22 and 2.2 the opinion is based on the presupposition that independence is attained nonetheless. [↑](#footnote-ref-679)
680. See. Quebec’s National Assembly Bill 150 and Commission on Independence QNA Opinion 1996. [↑](#footnote-ref-680)
681. QNA com. Opinion Par 3.03. [↑](#footnote-ref-681)
682. Ibid. Par 3.04. [↑](#footnote-ref-682)
683. In Chapter 2.1.1 (i) Verzijl clearly saw cohesive identifiable communities as being peoples within political connotation attached to “peoples “used in the context of self-determination. This is also in keeping with UNGAR 1541(XV) Annex Principle V. [↑](#footnote-ref-683)
684. UNGAR 1541(XV) 15th December 1960. Titled “Principles which Should Guide Members in determining whether or not an Obligation exists to transmit the information called Article 73 e of the Charter. Adopted 4th Committee with overwhelming majority 69 in favour 2 opposed and 21 abstained. [↑](#footnote-ref-684)
685. Ibid. [↑](#footnote-ref-685)
686. Ibid Principle VI. [↑](#footnote-ref-686)
687. Ibid, Principle VII. [↑](#footnote-ref-687)
688. Repatriation of Constitution is an expression a political slogan. It suggests that Federal Parliament has total supremacy to amend the Imperial 1867 Act still forming the principal single document as Federal constitution. [↑](#footnote-ref-688)
689. UNGA R 1514 (XV). Declaration on the granting of independence to colonial countries and peoples discussed in previous sections. [↑](#footnote-ref-689)
690. Colonial powers referred to are France and Great Britain. [↑](#footnote-ref-690)
691. Governor-in–Council selected by the Canadian appointed by the Her Majesty Queen of England referred the matter of Secessionist ambitions of Quebec on 30th September 1996 in compliance with Section 53 of the Supreme Court RSC 1985 c S26. [↑](#footnote-ref-691)
692. Ibid Para.86. [↑](#footnote-ref-692)
693. Ibid Para. .84. [↑](#footnote-ref-693)
694. Ibid Para.106. [↑](#footnote-ref-694)
695. Ibid Para.145-146. [↑](#footnote-ref-695)
696. The Supreme Court of Canada, in re Secession of Quebec [1998] 2 S.C.R 217. The Court naturally referred to her previous constitutional cases, and authorities listed in 156, but also in full in its introduction p 6 at the end of the Heading 4. It expounded on question 3 under the heading “Cases Cited. It referred to eminent authors such as Prof Wade on para 142 on the issue of affectivity, since it is unsettled, international law hypothesis, on the State Recognition. Court referred to Crawford extensively on the subject. CSC referred to R.Y Jennings para 112 in the context of importance attached by International law “to territorial integrity of national state and, by and large leaves the creation of a new state to be determined by domestic law of the existing state of which the seeding entity presently forms a part.” R.Y Jennings; Acquisition of territory in international law (1963) pp8-9. Referred to amicus curiae on par 4, - 12. Indian Supreme Court 12, Supreme Courts of USA, English Court of Appeal, par 14. European National Courts of Germany, France, Italy, Spain, Portugal, Belgium 14 on the matter of capacity to give advisory opinion. Court justified her inherent powers to do so by reference to other Democratic states legal systems. Ref to D Smith referred to on 144, 401 Cassese on para .129 in relation to applicability of secession to failure of internal self-determination processes. Doehring and Simma on 114. [↑](#footnote-ref-696)
697. Ibid para. 131 “Colonial and oppressed people (…)”. [↑](#footnote-ref-697)
698. Ibid para.134 “A number of commentators (…)”. [↑](#footnote-ref-698)
699. Ibid para.142. [↑](#footnote-ref-699)
700. Ibid para.143. [↑](#footnote-ref-700)
701. Ibid. [↑](#footnote-ref-701)
702. Ibid 135 refers to findings of amicus curia referred in full in para 15 16 of the judgment. [↑](#footnote-ref-702)
703. Ibid 136 “Population of Quebec cannot plausibly be said to be denied of access to government (…) [I]n Canada”. [↑](#footnote-ref-703)
704. Ibid. [↑](#footnote-ref-704)
705. Clarity Act Assented on 29th June 2009. Preamble, para. 4. [↑](#footnote-ref-705)
706. Ibid s/sus 3(2). [↑](#footnote-ref-706)
707. Security Council Adopted Resolution 1160 (1998) under Chapter VII. Action with respect to threats to peace breaches of peace, and acts of aggression, of the Charter. [↑](#footnote-ref-707)
708. UN S/R 1244 1999. [↑](#footnote-ref-708)
709. Badinter, Arbitration was named after the Chairman and the President of the French Constitutional Council, With Presidents of the German, Italian, Belgian, and Spanish Constitutional Court. [↑](#footnote-ref-709)
710. Pallet “The Opinion of the Arbitration Committee: A Second Breath for the Self-determination of Peoples” 3 EJIL (1992)178. Appendix of the 1st opinion, 182. [↑](#footnote-ref-710)
711. Peace conference on Yugoslavia and Russia convened 27th August 1997. [↑](#footnote-ref-711)
712. Badinter, Arbitration Opinion 8(4th July 1992). [↑](#footnote-ref-712)
713. See above no 48 Pallet (…), [↑](#footnote-ref-713)
714. Badinter, Arbitration No 8 clearly gave three reasons why Federal Republic of Yugoslavia was not a successor state. First, constituent members no declared their own state and took their seat in United Nations General Assembly. Second, UN declined to give the former seat of SFRY to FRY. Thirdly, Security Council in its. [↑](#footnote-ref-714)
715. Malcolm, *Kosovo A Short History* (Paperback 1998) 327. [↑](#footnote-ref-715)
716. Ibid. [↑](#footnote-ref-716)
717. Ibid. [↑](#footnote-ref-717)
718. See Badinter No 8. [↑](#footnote-ref-718)
719. Security Council 3868th meeting (31.3.1998 3.30 hrs) New York, 21 Member of Security Council. Head of Turkey’s Permanent Delegation. Mr Tanc. [↑](#footnote-ref-719)
720. Ibid. [↑](#footnote-ref-720)
721. Goldstone Report 1999-2001. [↑](#footnote-ref-721)
722. Set by United Nations Security Council Resolution 827 (1993). [↑](#footnote-ref-722)
723. Maryland University Centre for International Development and Conflict Management. Uppsala University in Finland also has an international reputation in peace and security issues. [↑](#footnote-ref-723)
724. Hewitt (Eds.) *Peace and Conflict 2008*(…). [↑](#footnote-ref-724)
725. Hewitt, (Ed.); *Peace and Conflict 2010.* 1 Introduction by joint editors. [↑](#footnote-ref-725)
726. Office of High Representatives www. Statement by Contact Group on Kosovo-Bonn 25.3.1998 supported the London Conference of 3rd March 1998 and the agreement reached between West and Serbia; Commencement of unconditional Political dialogue with Albanian Kosovars at Federal and Republican levels of Government Disengagement and withdrawal of all armed forces to barracks and militia (Kosovar). Verifiable monitoring of secession of violence. Implement drastic measures to improve human rights issues, demand on timetable of action and meeting in a month’s time to assess the situation. [↑](#footnote-ref-726)
727. Goldstone report - Independent International Commission on Kosovo (IICK) p 1. It was a commission established by [Prime Minister](http://en.wikipedia.org/wiki/Prime_Minister_of_Sweden) [Göran Persson](http://en.wikipedia.org/wiki/G%C3%B6ran_Persson).in August 1999. [↑](#footnote-ref-727)
728. Www Contact States. [↑](#footnote-ref-728)
729. See above foot note 68 official website of Contact States , [↑](#footnote-ref-729)
730. See section .5.9.2 and 5.9.3 above. [↑](#footnote-ref-730)
731. Security Council 3868 Meeting 53rd Year Record Session (31st of March 1998) 21. [↑](#footnote-ref-731)
732. S/RES 1160 (1998) WWW UN. [↑](#footnote-ref-732)
733. Complete title “Chapter VII Chapter VII Action with respect to threat to the peace and breaches of the peace and acts of aggression”. [↑](#footnote-ref-733)
734. Of 24th October 1998. [↑](#footnote-ref-734)
735. 14th May 1999. [↑](#footnote-ref-735)
736. On 3rd March 1999. [↑](#footnote-ref-736)
737. The bombing was to last until 10th July 1999, a month after passing resolution S/RES 1244(1999). [↑](#footnote-ref-737)
738. Distr. Gen. S/RES1244 (1999) on 10th June 1999. [↑](#footnote-ref-738)
739. Ibid. [↑](#footnote-ref-739)
740. Red Crescent is an equivalent of Red Cross and they worked together. [↑](#footnote-ref-740)
741. S/R 1244 (1999) Expression used in Security Council on 10th June 1999. [↑](#footnote-ref-741)
742. Ibid. [↑](#footnote-ref-742)
743. Document S/PV.4011 UN Security Council 4011th Meeting Monday 10th June 1999 12.15 p.m. [↑](#footnote-ref-743)
744. Ibid 18-19. [↑](#footnote-ref-744)
745. DS/PV.4011 UN Security Council 4011th Meeting, (10th June 1999) 17. [↑](#footnote-ref-745)
746. Ibid 18-19. [↑](#footnote-ref-746)
747. Ibid. [↑](#footnote-ref-747)
748. Document S/PV.5839 UN Security Council 5839th Meeting (18.2.1999) 12. [↑](#footnote-ref-748)
749. Ibid.13 [↑](#footnote-ref-749)
750. Ibid. [↑](#footnote-ref-750)
751. Ibid s. 20. [↑](#footnote-ref-751)
752. Ibid. [↑](#footnote-ref-752)
753. Ibid. [↑](#footnote-ref-753)
754. UN S/R 1244 (1999). [↑](#footnote-ref-754)
755. Emerging new international legal norm is same as what Watts called it “half exception to the prohibition on the use force of force “Michael Byers, (ed.) Role of Law in International Politics” Watts “Importance of International Law “11. [↑](#footnote-ref-755)
756. Official citation “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ. Reports (2010)”. 403 [↑](#footnote-ref-756)
757. Ibid. [↑](#footnote-ref-757)
758. Kosovo AO ICJ 2010 Op Cit. Paras. 79-84. [↑](#footnote-ref-758)
759. Ibid para 79. [↑](#footnote-ref-759)
760. Ibid para 80. [↑](#footnote-ref-760)
761. Ibid para 81. [↑](#footnote-ref-761)
762. Ibid 80. [↑](#footnote-ref-762)
763. Kosovo, ICJ Report (2010) Dissenting Opinion of judge Korma para.4. [↑](#footnote-ref-763)
764. Organs here are those known to Chapter III Article 7 General Assembly, Security Council, Economic and Social Council, Trusteeship Council now defunct. International Court of Justice, the Secretariat. And those formed under Article 7(2) of the Charter. [↑](#footnote-ref-764)
765. Ibid. [↑](#footnote-ref-765)
766. S Doc. Session 4011 (10th June 1999) 12, proposals for resolution 1244 (1999) were discussed during its. Representative of Netherland Mr. van Walsum, “We sincerely hope that the few delegations which have maintained that the NATO air strikes were violation of the UN Charter will one day begin to realise that the Charter is not the only source of international law.” [↑](#footnote-ref-766)
767. Ibid. [↑](#footnote-ref-767)
768. Official citation, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ. Reports (2010) 403, para. 51. [↑](#footnote-ref-768)
769. Ibid, Kosovo, ICJ. Reports, (2010). [↑](#footnote-ref-769)
770. Ibid, Koroma dissent 467. [↑](#footnote-ref-770)
771. Discussed in the previous Chapters. [↑](#footnote-ref-771)
772. Ibid, Kosovo AO Dissenting Opinion of Judge, Bennouna, 507, Paragraph 34. [↑](#footnote-ref-772)
773. Ibid 508, para,40 [↑](#footnote-ref-773)
774. Ibid UDI, is short for Unilateral Declaration of Independence. [↑](#footnote-ref-774)
775. Ibid Kosovo ICJ Report (2010) 509 .para,43 [↑](#footnote-ref-775)
776. Ibid 513 para.64. [↑](#footnote-ref-776)
777. Ibid 513 para.67. [↑](#footnote-ref-777)
778. Ibid 15 para.1. [↑](#footnote-ref-778)
779. Ibid. [↑](#footnote-ref-779)
780. Ibid. [↑](#footnote-ref-780)
781. Ibid 515 para.1 [↑](#footnote-ref-781)
782. Ibid. [↑](#footnote-ref-782)
783. Ibid 518 para.10. [↑](#footnote-ref-783)
784. Ibid 519 para.11. [↑](#footnote-ref-784)
785. Ibid. [↑](#footnote-ref-785)
786. Ibid. [↑](#footnote-ref-786)
787. Ibid para.1.3. [↑](#footnote-ref-787)
788. See Kosovo ICJ, P478 Declaration of Judge Simma, para 1. [↑](#footnote-ref-788)
789. Ibid 2. [↑](#footnote-ref-789)
790. Ibid para. 3. [↑](#footnote-ref-790)
791. Ibid. [↑](#footnote-ref-791)
792. Ibid 479-480 para. 6. [↑](#footnote-ref-792)
793. Ibid. [↑](#footnote-ref-793)
794. Ibid 6. [↑](#footnote-ref-794)
795. Ibid 480, par 7. [↑](#footnote-ref-795)
796. Ibid. [↑](#footnote-ref-796)
797. Judge Simma and Judge Yusuf Concurred on the issue most implicitly. [↑](#footnote-ref-797)
798. Op Cit. Kosovo ICJ p 819 Separate Opinion of Judge Yusuf. para 3 [↑](#footnote-ref-798)
799. Ibid 621 para.7. [↑](#footnote-ref-799)
800. Ibid 819 para. 2. [↑](#footnote-ref-800)
801. Ibid 621 para. 7. Once more, Judge Simma and Judge Yusuf Concurred on the issue most

Implicitly. [↑](#footnote-ref-801)
802. Ibid 621 para.9. [↑](#footnote-ref-802)
803. Ibid 622 para. 11. [↑](#footnote-ref-803)
804. Ibid. [↑](#footnote-ref-804)
805. Ibid.622 para.10. [↑](#footnote-ref-805)
806. Dealt in some depth in the previous sections of the Chapter 4. [↑](#footnote-ref-806)
807. Ibid 21, para. 9. Most expressly refer to international communities resolve to tackle oppression of the state. See page 620, para 7. [↑](#footnote-ref-807)
808. Kosovo, ICJ Reports (2010) 624, para 17. [↑](#footnote-ref-808)
809. Ibid 491, para. 1. Separate Opinion of Judge Sepulveda Amore. [↑](#footnote-ref-809)
810. Ibid 493, para.10. [↑](#footnote-ref-810)
811. Ibid 498, para. 32. [↑](#footnote-ref-811)
812. Ibid 24. [↑](#footnote-ref-812)
813. Ibid 498, para. 32. [↑](#footnote-ref-813)
814. Ibid 499 para. 35. [↑](#footnote-ref-814)
815. Ibid 498 para. 34. [↑](#footnote-ref-815)
816. Ibid 499.para 35. [↑](#footnote-ref-816)
817. Kosovo ICJ Reports (2010) 489 para. 19. Separate opinion of Judge Kenneth Keith referring to Statute of International Court Justice (1945). [↑](#footnote-ref-817)
818. Ibid 482, para. 1. [↑](#footnote-ref-818)
819. Ibid 482, para. 3. [↑](#footnote-ref-819)
820. Ibid. [↑](#footnote-ref-820)
821. Ibid. [↑](#footnote-ref-821)
822. Ibid 482 para. 2. [↑](#footnote-ref-822)
823. Ibid 483 para.5. [↑](#footnote-ref-823)
824. Ibid 488 para.14. [↑](#footnote-ref-824)
825. Ibid. [↑](#footnote-ref-825)
826. Ibid 483 para.6. [↑](#footnote-ref-826)
827. Ibid 527 para.7. [↑](#footnote-ref-827)
828. Ibid 531 para.18. [↑](#footnote-ref-828)
829. Ibid 560, para. 97-102. [↑](#footnote-ref-829)
830. Ibid 577, para. 136. [↑](#footnote-ref-830)
831. Ibid 616, para. 238. [↑](#footnote-ref-831)
832. Ibid. Judge Trindade, para.132 he cites P Guggenheim. [↑](#footnote-ref-832)
833. Ibid, para. 136. [↑](#footnote-ref-833)
834. Philosophic distinction between what it is and what it ought to be is often generalised as being the distinction between empirical and moral facts. Principle distinction between Hobbes and David Hume and realist and idealists. [↑](#footnote-ref-834)
835. See above fn.806, 807 Trindade, para. 138. [↑](#footnote-ref-835)
836. Ibid para. 179. [↑](#footnote-ref-836)
837. Ibid para. 180. [↑](#footnote-ref-837)
838. Ibid para. 181. [↑](#footnote-ref-838)
839. Ibid. [↑](#footnote-ref-839)
840. Ibid. Trindade, Section XV of the Separate opinion, para.218-240. [↑](#footnote-ref-840)
841. Ibid para. 218. [↑](#footnote-ref-841)
842. Ibid para. 219. [↑](#footnote-ref-842)
843. Ibid para. 220. [↑](#footnote-ref-843)
844. Ibid para. 221. [↑](#footnote-ref-844)
845. Ibid para. 222. [↑](#footnote-ref-845)
846. Ibid para. 223. [↑](#footnote-ref-846)
847. Ibid para.227. [↑](#footnote-ref-847)
848. Ibid para.232. [↑](#footnote-ref-848)
849. Ibid para.227. [↑](#footnote-ref-849)
850. Ibid para 228. [↑](#footnote-ref-850)
851. Ibid para 238. [↑](#footnote-ref-851)
852. Ibid para 238. [↑](#footnote-ref-852)
853. Ibid. [↑](#footnote-ref-853)
854. Ibid. para 240. [↑](#footnote-ref-854)
855. Ibid. [↑](#footnote-ref-855)
856. Supra Chapter 2.1. [↑](#footnote-ref-856)
857. Supra Chapter 3. [↑](#footnote-ref-857)
858. Supra Chapter 2.1.2 See French Revolution. [↑](#footnote-ref-858)
859. Principle purpose of Westphalia was to formalised religious toleration among Protestants and Catholics in the modality of governance. [↑](#footnote-ref-859)
860. Supra, Section 2.2. [↑](#footnote-ref-860)
861. Supra. Thesis Chapter 2.1.3. Ref to President W Wilson who included self-determination in draft covenant. See above Chapter 5.2.1. [↑](#footnote-ref-861)
862. Ibid. [↑](#footnote-ref-862)
863. Supra, The Covenant of League of Nations Articles 10 and 11. [↑](#footnote-ref-863)
864. See, UN Charter Art. 2(3) and 2(4). Art. 13 [↑](#footnote-ref-864)
865. See Covenant Article 22 and Supra, Thesis Chapter 2.3 Mandate System. Supra, Chapter, 5.5.2 p 179, the discussion on the matter. [↑](#footnote-ref-865)
866. Supra, Higgins discussed in Chapter 3.1.2 p97. [↑](#footnote-ref-866)
867. Gromyko, *Memories,* (Arrow Books 1989) pp 153-55 on National Liberation. [↑](#footnote-ref-867)
868. Supra, Chapter 4. [↑](#footnote-ref-868)
869. Supra Chapter 1.2.1 [↑](#footnote-ref-869)
870. R2P is rightly seen as an unfinished project because it is. At this stage it is referred to as state responsibility, UN GA and SC Reports and Resolutions yet to be placed into a consolidating international convention. [↑](#footnote-ref-870)
871. Is state creation a legal fact or political? Politics provide order and state manage I with law while the end of a state is also a political fact. [↑](#footnote-ref-871)
872. Supra, Thesis Chapter 5.5. ICJ in its Advisory Opinion Legality of Threat or Use of Nuclear Weapons Report (1996) clearly deemed as such. [↑](#footnote-ref-872)
873. Supra, Chapter 3.2.2. [↑](#footnote-ref-873)
874. Ibid. [↑](#footnote-ref-874)
875. Evans *Blackstone’s International Law Documents* (2006 OUP) p109. ICJ in its Advisory Opinion Legality of Threat or Use of Nuclear Weapons Report (1996) clearly deemed 1966 ICCPR as Applicable Law. In Legal Consequence of the Construction of a wall in the occupied Palestinian Territory ICJ Reports (2004) also considered it as An applicable law as well others including the Charter and the UNGAR 2625(XXV)p2. [↑](#footnote-ref-875)
876. Supra, Charter 2(4) and GA Res 68/262 “Territorial Integrity of Ukraine “ adopted by 100 for 11 against 58 abstention see speech of American rep A/68.P.V.80 p5/27 . Infra. [↑](#footnote-ref-876)
877. Legal Consequences of the Construction of a wall in the occupied Palestinian Territory, ICJ Report (2004), p33, para.70. [↑](#footnote-ref-877)
878. UN has been engaged with Kashmir, Palestine and Cyprus upon its establishment, [↑](#footnote-ref-878)
879. Supra, (…) [C]onstruction of wall, ICJ Report (2004) para.80, refers to cabinet when taking the decision described as *security fence*. ICJ rejected this argument, directed punishment of responsible parties, para.145 p64 ” Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.” [↑](#footnote-ref-879)
880. Ibid, Argument rejected by the ICJ. [↑](#footnote-ref-880)
881. Construction of Wall, (…) ICJ Reports, (2004) para. 87. [↑](#footnote-ref-881)
882. Construction of the Wall, (…) ICJ Report, (2004) p 64, para. 145. [↑](#footnote-ref-882)
883. Ibid, Legal consequences of Construction (…) ICJ Reports (2004) para. 88, p40. “Court indeed made it clear that the right of peoples to self-determination is today a right erga omnes (see East Timor (Portugal v. Australia), Judgment, ICJ Reports (1995), p. 102, Para. 29)”. [↑](#footnote-ref-883)
884. Ibid, para. 88. [↑](#footnote-ref-884)
885. Legal Consequences of the Construction (…), ICJ Report (2004) p 68. Para.160” Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.” [↑](#footnote-ref-885)
886. Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) not withstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ ,Reports (1971)p. 31, para. 52. [↑](#footnote-ref-886)
887. Ukraine concluded a Partnership and Cooperation Agreement (PAC) with EU on 26th January 1998 in the hope of dealing with the challenges of transitions. EU offered support Ukraine. Decision 98/149/EC of 26 January 1998 in effect as of 1st March 1998 OJ L049 of 19.2.2008. [↑](#footnote-ref-887)
888. During 1995-2014 Venice Commission of EU was engaged with Ukraine’s Constitutional reform efforts on 71 specific occasions. http:www.venice.coe.int, *Democracy through Law*. The aims of Cooperation Agreement partnership included; (i) to provide a suitable framework for political dialogue, (ii) to support the efforts made by the countries to strengthen their democracies and develop their economies (iii) accompany their transition to a market economy, (iv) To encourage trade and investment. Divided into joint PCA objectives and specific PCA objectives. Russia considered this an encroachment on her security. [↑](#footnote-ref-888)
889. S/2014/132, (Annex II) Letter dated 25.2.2014 Sent to the President of the Security Council by Ukrainian ministry calling for help opening paragraphs. [↑](#footnote-ref-889)
890. 1994 Budapest Memorandum included security assurances from signatory states, US. Russian Federation, and GB, even if France and China signed a separate and less robust undertaking. [↑](#footnote-ref-890)
891. President Putin sought and received powers, from the Federal Parliament to use force to Russian Interests , [↑](#footnote-ref-891)
892. SC/11319 session ½ 7138 Meeting. [↑](#footnote-ref-892)
893. Ibid, Gerard Araud for France. [↑](#footnote-ref-893)
894. On 1st of March 2014 President Putin Sought and received powers to deploy troupes for in defence of Russian interests. [↑](#footnote-ref-894)
895. Turkey’s President flew to Moscow and sought assurances on the citizenship rights of the Tatar Turks of Crimea. Turkey raised the same matter on during adoption of GA resoltuion68/262 see below. [↑](#footnote-ref-895)
896. ISC/11319 session 7138, Speech by France. [↑](#footnote-ref-896)
897. A/68.PV.80. Draft Resolution A /68/L.39. “Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution.” [↑](#footnote-ref-897)
898. Draft resolution A/68/L.39 later upon adoption GA Res.68/262. [↑](#footnote-ref-898)
899. Ibid A/68PV.80 , 14.27868 .P 3/27, [↑](#footnote-ref-899)
900. UN document 27.3.2014 GA/11493 UN press release.p1 [↑](#footnote-ref-900)
901. GA/11493, the Gist of the Resolution (A Res68/262). [↑](#footnote-ref-901)
902. Cheng, *General Principles of law as Applied by International Courts and Tribunals* (1953 CUP 2006) p279. Refers “Nemo Debet Esse Judex in Propria Sua Causa” meaning, one cannot sit in judgment in one’s own case, being relied upon by Earl Granville when refusing to sit in on the arbitration over *The Virginius Incident* (1873). Furthermore the impartiality of national judges received attention in the Report of the Advisory Committee o Jurist 1920 at the time of forming the Permanent Court of International Justice, favourably p285. [↑](#footnote-ref-902)
903. A 68/PV.80 6/27p. Ms. Power speaking for US. [↑](#footnote-ref-903)
904. Ibid. [↑](#footnote-ref-904)
905. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (CUP 2006) pp279-280, Nemo Debet Judex in Propria,Sua Caua, “well known rule that no one can be a judge in his own suit holds good “.Last upheld in Mosul Case 1925,PCIJ, B12, p32. [↑](#footnote-ref-905)
906. Ante 1.1.1 p17. [↑](#footnote-ref-906)
907. Ante 1.1.1 p20. [↑](#footnote-ref-907)
908. Ibid. [↑](#footnote-ref-908)
909. Ante 1.1.1p17. [↑](#footnote-ref-909)
910. Reparation for Injuries Suffered in the service of United Nations -Advisory Opinion- ICJ Reports 1949 p147. [↑](#footnote-ref-910)
911. S/PV7180 session of 22.05.2014 doc14-40706 p2/18. [↑](#footnote-ref-911)
912. R2P has general and specific meaning depending on specific or general obligation being placed on the carrier of the responsibility, See Security Council 6,711th Meeting held on 4.2,2012, Rep for Portugal stating that SC by failing to adopt a resolution has failed its mandatory duty Under the Charter to protect international peace and security. In 11,407 Session 22, May 2014 Secretary-General Ban says that The Hour is grave and international Community has a Collective Responsibility to the Syrian People and again through his Dep. S-G Eliasson pointed out that the” Right of the Syrian people to justice has to be defended by the Security Council .“ Supra. [↑](#footnote-ref-912)
913. See ante 2.4.2. [↑](#footnote-ref-913)
914. Ibid UN S-G message. [↑](#footnote-ref-914)
915. UN Charter Chapter V, Article 24. [↑](#footnote-ref-915)
916. The principle of Terra nullius was central in Western Sahara Case ICJ (Reports) See above Ch.4.4. ICJ‘s 2nd point of determination, p48 para.162. [↑](#footnote-ref-916)
917. Adams, Briquebec, Kramer, *Illustrated Atlas of the World History* (Kingfisher 1991) Ur, Susa, Babylon, Gaza, Jericho Damascus Mari Nineveh, Behisun, Echbatana, Haran, Tarsus, known as Fertile Crescent and is neighbourhood has organised life 8,000 BC p15. In 2,350 BC Acadian Empire was formed. In, 1,792-1,750BC Babylonian was dominant power, and in 721-705 BC Assyrians, in 538BC Cyrus II of Persia. p13. See De Lange, *Atlas of the Jewish World* (1984 Phaidon Press) See maps; Persian p29, Assyrians and Romans p30. 900AD Saffafi Caliphate, Abbasid, Tuklunide, Byzantine, Showing Three Religions in the p38. 1200 AD Abbasid, Ayyubid Sultanate, p40 [↑](#footnote-ref-917)
918. Map 1 reconstructed by the author was dawn by Mathew-Northrop of Buffofalo, NY Circa 1889 with copy right 1903 for Dodd, Mead & Company. Map 2 diagrammatic and dates from 1885. The Map 1 shows that the administrative boarders respected settlements, and their positions were determined by geography, Mountains Rivers and access and defence. Demography-Geography are evidence of practice, unlike the new maps drawn after 1916-21. Uti possidetis is evidenced between 1517 1916 but abandoned after 1920 in preference to Mandate system and national interests of the Victors over the vanquished. It is regrettable that even the modern writers on the post WW1 political affairs of the region when drawing maps over look this unique demography-geography. See Frompkin, *Peace to and all Peace*, (Phoenix 2000)*.* J Barr, *A Line in the Sand* (2011 Simon Schuser). Rogan, *The fall of the Ottomans,*(2015 Allen Lane). T Segev, *One Palestine Complete*, (2000 Abacus). The map on page viii is exception, though not detailed enough. McMeekin, *The Berlin-Baghdad Express* (2010 Penguin) p208.  [↑](#footnote-ref-918)
919. The Secret Agreement Nov.1915-March 1916 authored by officers Sykes(Brit) and Picot(Fr) and signed by Foreign Secretaries Gray and Cambon, determined how GB and France would divide the Ottoman Empire in the East. See Frompkin, *Peace to and all Peace,* (Phoenix 2000) pp15-45*.* J. Barr, *A Line in the Sand* (2011 Simon Schuser).Part One, pp1-78. [↑](#footnote-ref-919)
920. Ibid Barr, *A line in the sand,* p64. Ibid, Frompkin, agreed as narrated by Toynbee, Lloyd George by October in 1918 felt impeded by the Agreement and thus boarders were redrawn along the petrol pipe running from Kirkuk (Now Northern Iraq then under British influence) to the Mediterranean Sea at Haifa in the Sancak of Jerusalem. [↑](#footnote-ref-920)
921. SCR2139 (2014) adopted 22.2.014, the para. 14 condemns terrorism and reaffirmed Syrian civil-war to have paused threat to international peace. [↑](#footnote-ref-921)
922. Conference in Geneva 30.7.2012 SC Res 2118(2012) marks the start of correct legal and legitimate approach to self-determination based dispute. Yet the States and armed groups directly or indirectly involved, did not complied with the political and legal process they instigated. This is proven by cease fire of March 2016 and SC Res 2268(2016). [↑](#footnote-ref-922)
923. SC Res 2268(2016) endorsing the political transition process which started in March 2016 also endorsing. SC Resolution 2254(2015) which reconfirmed its endorsement of Geneva Communiqué 30 7 2012 also endorsed by SC Res 2118(2012)., Requested Secretary General to use its good offices and through its special representative and SISG and parties in the conflict to commence negotiations on political transition process and acknowledged Syria International Support Group and recommended diplomatic process [↑](#footnote-ref-923)
924. Turkish-Russian war was just averted in November 2015 over Syria straining relations with US. [↑](#footnote-ref-924)
925. ICCPR Article 5(1). Having declared sovereign equality above thus illegitimacy of interference among equals. In Art 5(1) prohibits threat and use of force in international relations. [↑](#footnote-ref-925)
926. (i) 6627Meeting 4.2.2011 (ii) 6711Meeting 4.2.2013, (iii) 6810 Meeting ,19.7.2012, (iv)7180 Meeting 22.05.2014 [↑](#footnote-ref-926)
927. Ibid. [↑](#footnote-ref-927)
928. SCR 2139(2014) adopted 22.2.014. Para. 14, and previous resolutions as Res.2254 (2015) adopted during 7588 Meeting 18.12.2015, 3rd paragraph, declared the Syrian civil, constituting a threat to international peace and security. [↑](#footnote-ref-928)
929. Se above Chapter 2.1. [↑](#footnote-ref-929)
930. See above Chapter 3. [↑](#footnote-ref-930)
931. See above French Revolution [↑](#footnote-ref-931)
932. See above Section 2.2 [↑](#footnote-ref-932)
933. See section dealing with Woodrow Wilson 2.1.3 when he included self-determination in draft covenant. See above Chapter 5.2.1 [↑](#footnote-ref-933)
934. Ibid [↑](#footnote-ref-934)
935. See above Chapter 2.3 [↑](#footnote-ref-935)
936. See Higgins in Chapter 3.1.2 p97 [↑](#footnote-ref-936)
937. See Chapter 4 [↑](#footnote-ref-937)
938. See above 1.2.1 [↑](#footnote-ref-938)
939. R2P is rightly seen as an unfinished project because it is. At this stage it is referred to as state responsibility, UN GA and SC Reports and Resolutions yet to be placed into a convention. [↑](#footnote-ref-939)
940. Is state creation a legal fact or political? Politics provide order and state manage I with law while the end of a state is also a political fact. [↑](#footnote-ref-940)
941. Gromyko memories (Arrow Books 1989) see page 153,155 on national liberation. [↑](#footnote-ref-941)
942. See above Chapter 3.2.2 [↑](#footnote-ref-942)
943. [↑](#footnote-ref-943)
944. [↑](#footnote-ref-944)