

July 5, 1994

Greetings to everyone gathered in Alexandria for the 1994 National Self-Advocacy Conference.

Now is the time to act on our awareness that developmental disabilities are a natural part of the human experience. I stand with the self advocates of People First in promoting the integration of persons with disabilities into mainstream American society and in encouraging better public understanding of disability issues. Your movement's emphasis on "putting people first" mirrors my Administration's own commitment to putting people first. Our entire nation benefits when people are empowered to exercise their skills to the fullest, and I salute you for making this a daily occurrence for so many. When given the chance, each of us can achieve great things.

Your advocacy for health care reform is invaluable. The rights guaranteed through the Americans with Disabilities Act and the expansion of educational opportunities for our citizens will help Americans to lead richer, more productive lives. On behalf of those who have benefited from your fine work, I thank you for a job well done.

wishes for an enjoyable and productive conference.

Randerson

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JLN-21-1994 83189 THE ARC OF NORTHERN VA

The White House

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**People First of Northern Virginia**

at The Arc of Northern Virginia, 100 North Washington St, Suite 224, Falls Church, VA 22046 (703) 332-7417

June 6, 1994

Carol Rasco  
Domestic Policy Council  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Ms. Rasco:

Enclosed is a photocopy of a letter that People First of Northern Virginia sent to President Clinton. People First would like President Clinton to write an welcome statement for the 1994 National Self-Advocacy Conference which will be included in our conference program this July.

We would greatly appreciate any assistance you can provide to draft this letter. The self-advocates I know would be delighted to receive a personal greeting and message from the President. If you have any questions about this request, please contact our conference coordinator, Jeannie Cummins, at the address above.

Thank you for your cooperation.

Sincerely,

*Brian Clukey*

Brian Clukey  
Conference Chairperson

*Star Herr  
67028*

*Elaine Taylor*

*Gary --- healthcare  
Pres. ---  
Shak  
Ms. Core's office ---*

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10 minutes  
Alexander  
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JUN 21 1994  
pm



## People First of Northern Virginia

of The Arc of Northern Virginia, 100 North Washington St., Suite 234, Falls Church, VA 22046 (703) 532-7417

May 15, 1994

President Clinton  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear President Clinton:

My name is Brian Clukey. I am the President of People First of Northern Virginia. People First is a organization of citizens with developmental disabilities who are learning to advocate for their rights and become actively involved in their communities. People First is hosting the 1994 National Self-Advocacy Conference on July 14 - 17, in Alexandria, Virginia.

I had the honor of meeting you in person at the White House for a health care reform discussion on May 2, 1994. I have enclosed a picture so you will know who I am. Meeting you to talk about health care for people with disabilities is like having a dream come true. I am happy that you are willing to stand up for all Americans', with and without disabilities, basic right to healthy lives.

I know you are very busy and cannot speak at our July conference. However, I would like to ask you if you could give a brief written welcome statement in the 1994 conference program. In your message, you could show how your campaign theme of People First is similar to our name. We are people first, and our disabilities are only a small part of who we are and who we can be. We welcome an opportunity to hear your views on what "People First" means and how we can use our voices to affect important national choices.

Jeannie Cummins, our People First advisor, will call your office next week to provide any other information you need. People First hopes you can contribute your personal message, because it will make our conference an historical event that people with disabilities will never forget. Thank you for your support and cooperation.

Very truly yours,

*Brian Clukey*

Brian Clukey  
President, People First of Northern Virginia

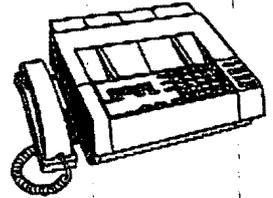
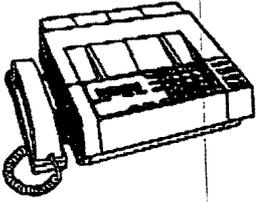
cc: Mike Lux, Office of Public Liaison  
Carol Rasco, Domestic Policy Council

# The Arc of Northern Virginia

100 North Washington Street, Suite 234

Falls Church, Virginia 22046

703-532-3214 / fax: 703-532-3398



## FACSIMILE TRANSMITTAL FORM

To: Stan Herr Company: \_\_\_\_\_

Re: Nat'l Self Advocacy Conference

From: Elaine Joyce Date: 1/1

Number Of Pages (incl Cover) 5 Time: \_\_\_\_\_

Comments Friday's Workshops

*Shawna*

*Spencer*



**SELF ADVOCACY:**  
***Voices for Choices***

**THE THIRD NATIONAL SELF ADVOCACY CONFERENCE**  
**JULY 14-17, 1994**  
**ALEXANDRIA, VIRGINIA**

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Hosted by: People First of Northern Virginia and Project PIE (Participation, Independence, and Empowerment of Youth through Leadership Development), a Project of National Significance funded by the Administration on Developmental Disabilities to The Arc of Northern Virginia.

# 1994 NATIONAL SELF-ADVOCACY CONFERENCE AGENDA

## THURSDAY, JULY 14, 1994

-  Registration ..... 10:00 am - 6:00 pm  
Lower Lobby
-  Self-Advocates Becoming Empowered Meeting ..... 9:00 am - 4:00 pm  
Room I & J
-  Sightseeing Trips around Washington D.C. .... 12:00 pm - 5:00 pm  
Lower Lobby
-  Opening Ceremonies ..... 7:00 pm - 9:00 pm  
Plaza Ballroom

Join People First of Northern Virginia, Project PIE, and hundreds of self-advocates from across the country as we kick off the third National Self-Advocacy Conference!

*Sedent Assoc.  
3-4 years*

*Advocacy  
brought  
bringing together -  
atracted a crowd*

**Guest Speakers:**  
Brian Clukey, Conference Chairperson  
Tony Coehlo, Chairman,  
President's Committee on Employment of People with Disabilities

## FRIDAY, JULY 15, 1994

-  Registration ..... 9:00 am - 12:00 pm  
Lower Lobby
-  Breakfast ..... 7:30 am - 8:30 am  
Plaza Ballroom

**Plenary Issue: Voices for Choices in Our Education and Schools**

**Guest Speaker: Judith Heumann, Assistant Secretary,  
Office of Special Education & Rehabilitation Services**

-  Self-Advocates Becoming Empowered National Report ..... 9:00 am - 10:00 am  
Plaza Ballroom

**FRIDAY, JULY 15, 1994 (continued)**

 Self-Advocates Becoming Empowered Meeting ..... 10:30 am - 12:00 pm  
Room G

 Workshop Session 1 ..... 10:30 am - 11:30 am

 Lunch ..... 12:00 pm - 1:00 pm  
Plaza Ballroom

**Plenary Issue: Voices for Choices in the Criminal Justice System**

**Guest Speaker: Robert Williams, Commissioner,  
Administration on Developmental Disabilities**

 Workshop Session 2 ..... 1:30 pm - 2:30 pm

 Regional Meetings ..... 3:00 pm - 4:30 pm  
Rooms B - N

 Plenary Session ..... 5:00 pm - 5:45 pm  
Plaza Ballroom

**Plenary Issue: Voices for Choices on National Issues**

**Guest Speaker: Rick Douglas, Executive Director,  
President's Committee on Employment of People with Disabilities**

 Dinner ..... 6:30 pm - 7:30 pm  
Plaza Ballroom

 Voices of America Variety Show ..... 8:00 pm - 10:00 pm  
Plaza Ballroom

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## SECESSIONARY SELF-DETERMINATION: A JEFFERSONIAN PERSPECTIVE

James E. Falkowski\*

Those who make peaceful revolution impossible will make violent revolution inevitable.

—John Fitzgerald Kennedy  
(March 12, 1962)\*\*

Self-determination has been a cardinal principle of the United Nations dating from the beginning of the world organization. With the end of traditional decolonization, it is arguable that the principle of "self-determination in its present incarnation. . . [has]. . . exhausted its mandate."<sup>1</sup> The United Nations does not recognize a right to secede based on the principle of self-determination, because that right would conflict with the territorial integrity of its member states.<sup>2</sup> Despite this state of the law, numerous claims to secessionary self-determination continue to be made.<sup>3</sup>

This paper reviews the historical development of the doctrine of self-determination from an American perspective, which has been profoundly influenced by Thomas Jefferson.<sup>4</sup> It focuses on the conflict between the human right of all peoples to self-determination, and the territorial integrity of

\* B.A. SUNY at Buffalo; J.D. UC Davis; LL.M. Essex.

\*\* JOHN BARLETT, *FAMILIAR QUOTATIONS* 1073 (14th ed. 1982).

<sup>1</sup> Rupert Emerson, *Self-Determination*, 60 *PROC. AM. SOC. INT'L L.* 135, 138 (1966).

<sup>2</sup> According to the International Commission of Jurists, "if a people or their representatives have once chosen to join with others within either a unitary or a federal state, that choice is a final exercise of their right to self-determination; they cannot afterwards claim the right to secede under the principle of the right to self-determination." It was on this principle, the jurists believed, that the claims of the American Confederacy in 1860 and more recently those of the Biafran secessionists had been resisted." LEE BUCHHEIT, *SECESSION, THE LEGITIMACY OF SELF-DETERMINATION* 95-96 (1978). See also *infra* note 19.

<sup>3</sup> Groups claiming the right to self-determination include the Koreans, Vietnamese, Ibos, South Sudanese, Taiwanese, Somalis, Kurds, Armenians, Germans of Rumania, Scots, Catalans, Basque, Bangalis, Northern Irish, French Canadians of Quebec, Welsh, Lebanese, Tibetan people, Bretons, Lapps, Sicilians, Corsicans, Frisians, Walloons, German-speaking inhabitants of Alsace-Lorraine, Croatians, and numerous Indian peoples throughout the Western Hemisphere, among others. See BUCHHEIT, *supra* note 2, at 139; Lung-Chu Chen, *Self-Determination as a Human Right*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 198, 205 (W.M. Reisman & Burns H. Weston eds., 1976).

<sup>4</sup> BENJAMIN F. WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW. A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 96-99 (1931).

states.<sup>5</sup> It asserts that the right of all peoples to self-determination should prevail, and proposes an expanded application of the doctrine within existing United Nations machinery.<sup>6</sup> This would provide for the peaceful resolution of such disputes through reliance on democratic principles, rather than the present state of the law which encourages the use of force.

### I. MEANING OF SELF-DETERMINATION

Recognizing that virtually every aspect of self-determination is highly controversial, it would be helpful to state some generally accepted rules regarding the meaning of self-determination. Self-determination is a somewhat unique human right, because it, like minority rights and freedom from genocide, is a collective human right.<sup>7</sup> Self-determination applies to a group of persons who constitute a "people." Although numerous definitions have been proposed,<sup>8</sup> a "people" in its broadest sense is a majority of persons within a geographic area who desire to change their status.<sup>9</sup> However, it is important to note that there are numerous existing states that contain more than one "people."<sup>10</sup> Self-determination is a critical human right because it

<sup>5</sup> "If self-determination refers to 'the freedom of a people to choose their own government and institutions and to control their own resources,' there seems to be a striking contradiction between the right of 'all peoples' to self-determination and the right of a state to its 'territorial integrity' the latter precluding secession." Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 326 (1972).

<sup>6</sup> *Id.* at 325-28.

<sup>7</sup> Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 105 (1976) (stating that the main difference between collective and individual human rights are that the former can only be exercised jointly).

<sup>8</sup> The International Commission of Jurists have proposed the following definition of a peoples: "(1) a common history; (2) racial or ethnic ties; (3) cultural or linguistic ties; (4) religious or ideological ties; (5) a common territory or geographical location; (6) a common economic base; and (7) a sufficient number of people." Secretariat of the International Commission of Jurists, *The Events in East Pakistan* 70 (Geneva 1972). See also, Dinstein, *supra* note 7, at 104. Although most definitions of a peoples run along ethnic lines, it is doubtful that the American colonists in 1776 were "peoples" within the meaning of an ethnic definition. See BUCHHEIT, *supra* note 2, at 11.

<sup>9</sup> This is all that is determined when a plebiscite is held. People are neither bound to vote along ethnic lines, nor are boundaries necessarily drawn along ethnic frontiers. See *infra* parts IV-V; see also ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 104 (1963) ("Self-determination refers to the right of a majority within a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and to permit political change within them.")

<sup>10</sup> "Of a total of 132 contemporary states, only 12 (9.1%) can be described as essentially homogeneous from an ethnic viewpoint. An additional 25 states (18.9% of the sample) contain an ethnic group accounting for more than 90 percent of the state's total population, and in still another 25 states the largest element accounts for between 75 and 89% of the population. But in 31 states (23.5% of the total), the largest ethnic element

"is widely regarded as an absolute prerequisite for the enjoyment of all individual human rights, be they civil or political or economic, social and cultural rights. . . ." <sup>11</sup> The two fundamental aspects of self-determination are economic and political. The economic aspect recognizes the right of all peoples to control their natural resources.<sup>12</sup> The political aspect recognizes the right of all peoples to determine their political status.<sup>13</sup> This right is generally exercised by a plebiscite,<sup>14</sup> which is an extension of the notion of popular sovereignty.<sup>15</sup> The people may choose between the "establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people. . . ." <sup>16</sup> Although most peoples to date have chosen to form independent states,<sup>17</sup> there are several cases where peoples have selected the other alternatives.<sup>18</sup> However, a "people" exercising the right

represents only 50% to 74% of the population. Moreover, this portrait of ethnic diversity becomes more vivid when the number of distinct ethnic groups within states is considered. In some instances, the number of groups within a state runs into the hundreds, and in 53 states (40.2% of the total), the population is divided into more than five significant groups." W. Connor, *Nation-Building or Nation-Destroying*, 24 WORLD POL. 319 (1972), cited in Chen, *supra* note 3, at 246 n.16. There are currently about 193 recognized countries, with about 175 countries recognized as U.N. member states.

<sup>11</sup> 2 M.E. TARDU, *HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM* pt. 2, ch. IV, at 15 (1980).

<sup>12</sup> The *International Covenant on Economic, Social and Cultural Rights* was adopted in G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, art. 1, para. 2, U.N. Doc. A/6316 (1967).

<sup>13</sup> *Id.* art 1, para. 1.

<sup>14</sup> Robert A. Friedlander, *The Evolution of the Right of Self-Determination: A Legal-Political Inquiry*, 1 DET. C.L. REV. 71, 90 (1975); Popular sovereignty may be defined as a concept of sovereign authority wherein power derives from an identifiable group, people, or nation and whereby the governing entity acts in a trusteeship capacity with the consent of the governed. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Jess Stein ed., unabridged ed. 1967) cited in Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS at 324 n.33 (Yonah Alexander & Robert A. Friedlander eds., 1980). Self-determination has also been called "a simple corollary of democracy." ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 114 (1969). See also Chen, *supra* note 3, at 229-35.

<sup>15</sup> A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 294 (1973).

<sup>16</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1971); cf. CHEN, *supra* note 3, at 259 n.211 (some believe independence is the only legitimate outcome of self-determination).

<sup>17</sup> Chen, *supra* note 3, at 237.

<sup>18</sup> Alaska and Hawaii, both former Non-Self-Governing Territories have become states of the United States. Puerto Rico is a commonwealth of the United States; See also

to self-determination may do so only once within a particular geographic area; with the emergence of a newly formed state, any further efforts of sub-groups to assert claims of self-determination will conflict with that new state's right to territorial integrity.<sup>19</sup> Under existing international law, all secessionary movements are ipso facto illegal.<sup>20</sup> Only after a successful civil war may such secessionary movements be recognized as giving rise to independent states.<sup>21</sup> But "[n]o serious champion of world public order denies that self-determination should be given effect without violence, for violence is inimical to the very notion of human dignity."<sup>22</sup>

## II. REVOLUTIONARY WAR AND THE DECLARATION OF INDEPENDENCE

Self-determination has been attributed to a number of origins. These have ranged from the Greek city-states, to the American and French Revolutions,<sup>23</sup> and from Lenin to Wilson.<sup>24</sup> While making no judgment on the merits of these views, some insights may be gained from an American perspective. The Declaration of Independence, written by Thomas Jefferson,<sup>25</sup> expressed many of the principles of self-determination:

When in the Course of human events, it becomes necessary for one people to dissolve the political bonds 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 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. We hold

Jose A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 FOREIGN POL'Y 66 (1978-79); Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858 (1980).

<sup>19</sup> "A significant number of international lawyers are of the opinion that the 'right' of self-determination can only be exercised *one time* by a particular people within a specific geographic area. Thus, if a unitary or federal state has come into being as a result of self-determination, that state cannot be further subdivided on the same basis. For example, the South in the American Civil War and Biafra in the Nigerian Civil War under this theory were *not* exercising a legal right to self-determination." Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C. L. REV. 71, 80 (1975). See also *supra* note 2.

<sup>20</sup> *Id.*

<sup>21</sup> Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 318 (Yonah Alexander & Robert A. Friedlander eds. 1980).

<sup>22</sup> Chen, *supra* note 3, at 235.

<sup>23</sup> Robert A. Friedlander, *supra* note 21, at 309.

<sup>24</sup> See VLADIMIR I. LENIN, THE RIGHT-OF NATIONS TO SELF-DETERMINATION (1947); John E. Murphy, *Self-Determination: United States Perspectives*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 43 (Yonah Alexander & Robert A. Friedlander eds., 1980).

<sup>25</sup> From a committee of five, Jefferson was chosen because of his "peculiar felicity of expression." FAWN BRODIE, THOMAS JEFFERSON AN INTIMATE HISTORY 121 (1974).

these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it; and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.<sup>26</sup>

The Declaration of Independence was based upon natural law theory,<sup>27</sup> which was a rejection of the Divine Right of Kings.<sup>28</sup> The people, and not the King, are the source of all legitimate governmental power.<sup>29</sup> The people as the source of sovereign authority institute governments to guarantee the

<sup>26</sup> Those interested in the evolution of the original text and the various drafts should consult 1 THE PAPERS OF THOMAS JEFFERSON, 413, 432 (Julian P. Boyd ed., 1950). Jefferson, who wrote the Declaration, stated in a letter to Henry Lee that he did not "feel it his duty to set out 'new principles. . . never before thought of,' but to 'place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take.'" JAMES M. BURNS & JACK W. PELTASON, GOVERNMENT BY THE PEOPLE 21 (8th ed., 1972).

<sup>27</sup> Jefferson said "[o]ur legislators are not sufficiently apprized of the rightful limits of their power; that their true office is to declare and enforce only our natural rights and duties, and to take none of them from us. . . . When the laws have declared and enforced all this, they have fulfilled their functions, and the idea is quite unfounded, that on entering into society we give up any natural right. Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), published in SAUL K. PADOVER, THOMAS JEFFERSON AND THE FOUNDATIONS OF AMERICAN FREEDOM 161 (1965).

<sup>28</sup> EDWARD DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 67, 72 (1950). Jefferson wrote "[e]very man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of nature." Opinion on Residence Bill, July 15, 1790, published in PADOVER, *supra* note 27, at 156. Observation of American Indian society led to the theories of inherent rights in all men. ABRAHAM S. EISENSTADT, AMERICAN HISTORY: RECENT INTERPRETATIONS 17-19 (1969).

<sup>29</sup> Eisenstadt, *supra* note 28, at 17-19.

protection of their right to life, liberty, and the pursuit of happiness.<sup>30</sup> The people reserve the right and have the duty to alter or abolish any form of government that becomes destructive of these ends.<sup>31</sup> Jefferson expanded upon his views in letters he wrote during Shay's Rebellion, a farmers' tax revolt:

I hold it that a little revolution now and then is a good thing, & as necessary in the political world as storms in the physical. . . . God forbid we should ever be 20 years without such a rebellion. . . . What country before ever existed a century and a half without a rebellion? And what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. . . . The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants.<sup>32</sup>

Constant vigilance is the price of freedom, and each generation must be prepared, if necessary, to fight for it. Jefferson believed that the world belongs to the living generation, and they should not be bound by rules they did not make.<sup>33</sup> Revolutions were one way "of affirming every generation's

<sup>30</sup> "The primary values - and the great ends of democratic America - are still best summed up in the Declaration's famous triad - 'life, liberty, and the pursuit of happiness.' By substituting 'pursuit of happiness' for 'property' in Locke's historic trio, Jefferson did not mean to eliminate property as an inalienable right. But he *did* mean to broaden the popular base of the commonwealth, to open, and to keep open, more doors for more men; and herein lies the 'revolution' involved in his political theory." NEAL RIEMER, *THE DEMOCRATIC EXPERIMENT* 102 (1967).

<sup>31</sup> "Rebellion to tyrants is obedience to God." Letter from Thomas Jefferson to Edward Everett (Feb. 24, 1823), reprinted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 920 (1980); See also Louis Henkin, *Economic-Social Rights as "Rights": A United States Perspective*, 2 *HUM. RTS. L.J.* 223 (1981).

<sup>32</sup> Letter from Thomas Jefferson to James Madison (Jan. 30, 1787); Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), in PADOVER, *supra* note 27, at 98-99.

<sup>33</sup> "In a letter to Madison, from Paris, Jefferson produces his startling theory that constitutions and laws are essentially contracts with the living citizens of a country and that when the contracting generation no longer exists, the constitution and laws are no longer binding. This famous letter, which is really an essay in political theory, is introduced with the query 'whether one generation of men has a right to bind another.'

The general form of the answer is contained in the powerful phrase, 'the earth belongs in usufruct to the living.' Since the Constitution is the fundamental law and only actual contract of society, the extremely short period allowed for its rightful operation gives tremendous weight to the need for periodic self criticism and revision of the Constitution. It is a literal expression of consent to the particular government each citizen must live by. Thus, Jefferson's treatment of contract is to be considered an attempt to give concrete value to the ideal 'inalienable rights' and sovereignty of the people postulated in the American Declaration. In this process of implementation the absolutist metaphysical character of natural rights and social compact disappear, and a more practical ideal is evolved, which conceives the basic right to self-government (the guarantor of the derivative rights of life, liberty, and pursuit of happiness) as a limited contract with the

right to be preserved from old models."<sup>34</sup> "But revolutions would be needed less often if all public contracts, all laws and constitutions declared on their face that they were to be void in a limited time. . . ."<sup>35</sup>

After the successful revolution from the colonial political system of Britain,<sup>36</sup> the thirteen independent states of America held a constitutional convention, and united under the Articles of Confederation. This form of government proved unworkable so another constitution was drawn up, and the present American Constitution came into effect.<sup>37</sup> To guarantee the rights of the people, the constitution provides for a republican [democratic] form of government.<sup>38</sup> In recognition of the right of the people to alter or abolish any form of government that becomes destructive of their rights, the constitution contains a method for peaceful change via constitutional con-

present members of society, formalized in a constitution." ADRIENNE KOCH, *THE PHILOSOPHY OF THOMAS JEFFERSON* 140-41 (1957) (letter to James Madison, Paris, Sept. 6, 1789).

<sup>34</sup> DANIEL BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 211 (1948); "A popular government in the precise materialist sense of the word had to represent the will of the living majority." *Id.* at 207; "Nothing is unchangeable but the inherent and unalienable rights of man, among which [Jefferson] counted the rights to rebellion and revolution." HANNAH ARENDT, *ON REVOLUTION* 236 (1963).

<sup>35</sup> BOORSTIN, *supra* note 34, at 210; In the words of Jefferson, "[s]ome men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. . . . I am certainly not an advocate for frequent and untried changes in laws and constitutions. . . . But . . . let us provide in our constitutions for its revision at stated periods." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), cited in PADOVER, *supra* note 32, at 160; cf. BUCHHEIT *supra* note 2, at 21-22.

<sup>36</sup> Some authors view the Revolutionary War as merely a colonial secession rather than a true revolution (restructuring of society). MARK N. HAGOPIAN, *THE PHENOMENON OF REVOLUTION* 34 (1975). However, it was a revolution in the sense that sovereignty was transferred from the King to the people.

<sup>37</sup> MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* (1963). The Continental Congress in June of 1776 created a committee to draft a constitution. This committee submitted to Congress a plan for a "League of friendship and perpetual Union." After extensive debates by the Continental Congress, the Articles of Confederation were submitted to the 13 states for their approval. The Articles did not go into effect until they were approved by all 13 states in 1781. Article XIII "declared the Union to be perpetual and prohibited any alterations in the Articles unless agreed to by Congress and by every one of the state legislatures. . . ." J.M. BURNS & J.W. PELTASON, *GOVERNMENT BY THE PEOPLE* 24-36 (5th ed. 1963).

After the Articles of Confederation proved defective, the Congress convened a Constitutional convention, but "all the delegates were bound by the instructions from Congress merely to suggest amendments to the Articles of Confederation. . . ." The delegates exceeded their authority when Article XIII, *supra*, was ignored, and they "declared that the new constitution should go into effect for those states that approved as soon as ratified by conventions in nine states." Thus, the delegates acted *ultra vires* when they ignored both the express prohibition of the Articles of Confederation, and the delegation of power to them from Congress. *Id.* at 50-54.

<sup>38</sup> U.S. CONST. art. IV, § 4.

vention.<sup>39</sup> Jefferson said, "[h]appily for us, that when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set it to rights, while every other nation on earth must have recourse to arms."<sup>40</sup>

Jefferson was a states rights advocate.<sup>41</sup> He foresaw not only the possibility of the South seceding over the issue of slavery forty years before the Civil War,<sup>42</sup> but also the possibility that eventual reunification would occur:

[I]f the schism be pushed to separation, it will be for a short term only; two or three years' trial will bring them back, like quarreling lovers to renewed embraces, and increased affections. The experiment of separation would soon prove to both that they had mutually miscalculated their best interests. And even were the parties in Congress to secede in a passion the soberer people would call a convention and cement again the severance attempted by the insanity of their functionaries.<sup>43</sup>

### III. SOUTH CAROLINA'S DECLARATION OF THE CAUSES OF SECESSION AND THE CIVIL WAR

The issue of whether the Constitution created a voluntary federation of sovereign states or a perpetual union was "almost continuously debated from the birth of the Republic to the end of the Civil War."<sup>44</sup> Neither the North, nor the South "consistently supported one side or the other of this long constitutional debate; rather, each shifted its position when it was convenient to do so."<sup>45</sup> The states rights doctrine meant nothing independent of social, economic or political implications.<sup>46</sup>

When South Carolina seceded from the Union in 1860, it issued a Decla-

<sup>39</sup> U.S. CONST. art. V. See also Everett M. Dirksen, *Symposium on the Article V Convention Process: The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968).

<sup>40</sup> CHARLES A. BEARD, *AMERICAN GOVERNMENT AND POLITICS* 7 (10th ed. 1949).

<sup>41</sup> Jefferson wrote, "[i]f any State in the Union will declare that it prefers separation . . . to a continuance in union. . . I have no hesitation in saying, 'let us separate.'" Letter from Thomas Jefferson to W. Crawford (June 20, 1816), cited in BUCHHEIT, *supra* note 2, at 109 (1978).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 110 n.264.

<sup>44</sup> KENNETH STAMPP, *THE CAUSES OF THE CIVIL WAR* 37 (1965).

<sup>45</sup> *Id.*; See also DAVID M. POTTIER, *LINCOLN AND HIS PARTY IN THE SECESSION CRISIS 1-19* (1942).

<sup>46</sup> STAMPP, *supra* note 44, at 49. As expressed by Woodrow Wilson, "The question of the relation of the States to the federal government is the cardinal question of our constitutional system. . . . It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question." WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 173 (1911), cited in ALBERT SAYE & MERRITT POUND, *PRINCIPLES OF AMERICAN GOVERNMENT* 80 (4th ed. 1950).

ration of the Causes of Secession, that paralleled the language of the Declaration of Independence.<sup>47</sup> The South Carolina Declaration argued two main grounds for secession. First, the right of secession was not delegated to the federal government by the Constitution. Therefore, under the Tenth Amendment to the Constitution, it was a right reserved by the States.<sup>48</sup> Secondly, South Carolina argued that the Constitution was a contract between states which recognized existing property rights, i.e., slaves.<sup>49</sup> Because the North materially breached the contract by failing to recognize the property rights of the Southern states, the South was released from its contractual obligation.<sup>50</sup> Therefore, the South Carolina Declaration was just as valid as the Declaration of Independence was when the thirteen states of America revolted from Britain.<sup>51</sup>

Abraham Lincoln, after being elected President,<sup>52</sup> stated the North's argu-

<sup>47</sup> Woodrow Wilson admired the orderly process that the South followed in seceding from the Union, and setting up the Confederacy:

True to their theory of government, the southern States had returned to the political methods of 1788. Each State had, not by popular vote, but by sovereign convention, withdrawn from the Union, as she had acceded to it. The same conventions that had chosen the delegates sent to Montgomery ratified the constitution which they framed, and authorized the inauguration of the new Confederacy. It was a corporate action, taken with the initiative and promptness of men skilled alike in the theory and in the practice of constitutional action, as Mr. Calhoun and all southern statesmen expounded it. They assumed that, since each of their States had entered the Union of its own accord, as into a free partnership, and might have declined to enter it, it was clearly within its privilege to withdraw when just cause for withdrawal seemed to exist. It was an assumption the theory of which would hardly have been seriously questioned while the generation lived which made the Union; though that generation would have been as ready as any that followed it, no doubt, to make protest, it might be of arms, against actual secession.

<sup>48</sup> WOODROW WILSON, *A HISTORY OF THE AMERICAN PEOPLE* 200-01 (1901).

<sup>49</sup> STAMPP, *supra* note 44, at 41. This argument seems persuasive in view of there being no provision in the Constitution that paralleled the language of Article XIII of the Articles of Confederation. See *supra* note 37.

<sup>50</sup> It was well established at the time the Constitution was ratified that slaves were property. See Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969).

<sup>51</sup> STAMPP, *supra* note 44, at 41. James Madison is known as "The Father of the Constitution" because of his work during the Constitutional Convention and the journal he kept of the proceedings. SAYE & POUND, *supra* note 46, at 38. Madison, like the Southern States, believed that the states had the right to secede. 5 JAMES T. ADAMS, *DICTIONARY OF AMERICAN HISTORY* 50-51 (1940).

<sup>52</sup> See Panel: Problems of Self-Determination and Political Rights in the Developing Countries, *PROC. AM. SOC. INT'L L.* 129, 148-49 (1966) (comments of Prof. Hardy C. Dillard during panel question and answer session).

<sup>53</sup> Twelve years before Lincoln was elected President, he said:

Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right—a right, which we hope and believe, is to liberate the world. Nor is this right confined to cases in which the whole people of

ment in favor of a perpetual union: "Perpetuity is implied, if not expressed, in the fundamental law of all governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination."<sup>53</sup> Lincoln also argued that the federal government was an association of states in the nature of a contract, and that it would take the consent of all the states to rescind the contract.<sup>54</sup> The North used a further argument to refute the South's analogy to the Declaration of Independence: while a revolt against tyranny was justified, one against democracy was not because "the democratic process provided a viable alternative to the use of force. . . ."<sup>55</sup> Thus, the Northern majority had the right to impose their will on the Southern minority.<sup>56</sup>

The perpetual union/states rights debate is often viewed as having been "decided upon the battlefields of the American Civil War. . . ." in favor of the Union.<sup>57</sup> However, this view has come under increasing attack by historians:

There is a risk in referring any historic event to a single cause. . . [but] of the American Civil War it may safely be asserted that there was a single cause, slavery. . . . The question may be isolated by the incontrovertible statement that if the negro had never been brought to America, our Civil War could not have occurred. . . .<sup>58</sup>

an existing government, may choose to exercise it. Any portion of such people that can, may revolutionize, and make their own, of so much of the territory as they inhabit. More than this, a majority of any portion of such people may revolutionize, putting down a minority, intermingled with, or near about them, who may oppose their movement.

Speech in the U.S. House of Representatives: The War with Mexico (Jan. 12, 1848), 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 431, 438 (Roy P. Basler ed., 1953), in BUCHHEIT, *supra* note 2, at 111.

<sup>53</sup> STAMPP, *supra* note 44, at 44. Lincoln must have been aware of Article XIII of the Articles of Confederation providing for the termination of the Confederacy. See *supra* note 37.

<sup>54</sup> STAMPP, *supra* note 44, at 44.

<sup>55</sup> See Panel, *supra* note 51, at 149.

<sup>56</sup> Although Lincoln received a majority of the electoral votes (180 to 123 for his three opponents combined) he received a minority of the popular vote. Out of a total of 4,682,069 votes cast, Lincoln received 1,866,452 and his three opponents combined 2,815,617. The South viewed this as minority rule. WILSON, *supra* note 47, at 188-90. One author has suggested that "[o]ne way of viewing the Civil War, then, is as 'a complete breakdown of the democratic process.' Southern secessionists maintained that democracy failed because Northerners did not understand its true nature. They affirmed that rule by an absolute majority free to trample upon the rights of minorities is not democracy but tyranny. Northerners, on the other hand, argued that the South, in effect, demanded that a minority be given the right to dictate to the majority. To them Southern secession represented a refusal to abide by the results of a democratic election and a repudiation of a fundamental principle upon which democracy is based." STAMPP, *supra* note 44, at 153.

<sup>57</sup> BUCHHEIT, *supra* note 2, at 111.

<sup>58</sup> STAMPP, *supra* note 44, at 109-10.

The perpetual union/states rights argument was merely "invoked by the South to save slavery, and. . . the North upheld the Union because the fight for its preservation was the first step toward the abolition of negro servitude."<sup>59</sup>

So although the rhetoric of the Civil War was couched in terms of conflicting interpretations of the Constitution, the real cause was the moral issue of slavery. The sentiments of one Northern Representative are illustrative:

I will not compromise. . . because slavery is a sin, an outrage against humanity, and an insult to God. . . . With my consent, it shall never curse another foot of God's fair earth. . . . [If] war must come, let it come. Peace is not the first interest of a people. Better encounter war, with all its manifold horrors, than suffer the sense of justice and humanity to die out in the hearts of the people. War - fierce, bloody, and relentless war, is better than the perpetual war of despotism, which slowly but surely drags nations down to ruin. And gentlemen should know that the first blast of war will be the trumpet-signal of emancipation.<sup>60</sup>

Perhaps the Civil War might more correctly be interpreted as a case of intervention for humanitarian purposes, rather than a resolution of the theoretical question of whether the right to secede from a tyrannical government is reserved by the people.<sup>61</sup> The American Civil War was fought to abolish slavery, not to resolve a constitutional debate.<sup>62</sup>

#### IV. WORLD WAR ONE AND THE LEAGUE OF NATIONS SYSTEM FOR IMPLEMENTING SELF-DETERMINATION

The next important application of self-determination came after World War I. President Woodrow Wilson became a leading advocate of self-determination.<sup>63</sup> He said that "every people has a right to choose the sovereignty under which they shall live."<sup>64</sup> Further, "no peace can last, or ought to last,

<sup>59</sup> *Id.* at 110.

<sup>60</sup> *Id.* at 141-42. "[W]e of the North with a few disgraceful exceptions are all abolitionists at heart." Letter from Edward Wade to Mrs. C.K. Wade (Jan. 22, 1861), reprinted in STAMPP, *supra* note 44, at 141.

<sup>61</sup> This is a moral, rather than a legal argument. See also DWIGHT L. DUMOND, ANTISLAVERY ORIGINS OF THE CIVIL WAR IN THE UNITED STATES (1959).

<sup>62</sup> The Civil War amendments, which abolished slavery, were a direct result of the Civil War. See U.S. CONST. amends. XIII, XIV, and XV.

<sup>63</sup> "While the idea of self-determination was not original with Wilson, he was doubtless attracted to it because it was so closely in harmony with American tradition as embodied in the Virginia Bill of Rights and the Declaration of Independence. It is also worth noting that Wilson was a Southerner, reared in war-ravaged Georgia, and the war fought by the South was one of the most perfect examples of self-determination in modern history." THOMAS A. BAILEY, WOODROW WILSON AND THE LOST PEACE 332 (1944).

<sup>64</sup> Michla Pomerance, *The United States and Self-Determination: Perspectives on the*

which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed. . . ."<sup>65</sup> Wilson, supplementing his famous Fourteen Points noted:

16. That peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited, of the balance of power; but that

17. Every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states; and

18. That all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.<sup>66</sup>

Thus, Wilson's view of self-determination was imbued with concepts of Jeffersonian democracy.<sup>67</sup>

After World War I, there were two manifestations of self-determination: First, the sacred trust of civilization (the mandate system and native inhabitants clause), and second, national self-determination (the redrawing of the boundaries of Europe along ethnic frontiers). There is no express reference to self-determination in the League of Nations Covenant, but it was implicit in the Mandate System and native inhabitants clause.<sup>68</sup> The Mandate System was applied to fourteen German and Turkish "colonies and territories."<sup>69</sup> No territories were formally placed under the native inhabitants provision because it contained no concrete obligations. The system was a

*Wilsonian Conception*, 70 AM. J. INT'L L. 1, 2. (1976); Wilson was a student at the University of Virginia, which was founded by Thomas Jefferson, 5 ADAMS, *supra* note 50, at 375.

<sup>65</sup> 5 ADAMS, *supra* note 50, at 411. Wilson's adoption of these views was "a negation of the doctrine of colonization by conquest." HENRI GRIMAL, *DECOLONIZATION, THE BRITISH, FRENCH, DUTCH, AND BELGIAN EMPIRES 1919-1963*, at 12. (1965).

<sup>66</sup> Address to Congress (Feb. 11, 1918), *cited in* BAILEY, *supra* note 63, at 335.

<sup>67</sup> See BAILEY, *supra* note 63.

<sup>68</sup> "There was one other fundamental assumption in the Peace Conference in 1919, namely, that the political and social system that had to be fostered in the mandated territories as fast and as far as it could be attained by primitive peoples was the democratic way of life as it had developed historically in the English speaking world and in France." HESSEL D. HALL, *MANDATES, DEPENDENCIES, AND TRUSTEESHIP 128* (1948).

<sup>69</sup> BAILEY, *supra* note 63, at 44. "While the Peace conference rejected any idea of the extension of the mandate system to the more than 118 dependencies in the world, and confined it to only 14 out of the score or so of ex-enemy territories, even this step meant launching the experiment on a very wide scale." *Id.*

recognition of international concern and responsibility for the treatment of native populations wherever they were situated.<sup>70</sup>

Although these provisions are largely of historical importance, some applications of these provisions are of present significance. In the Middle East, the principle of self-determination was supposed to be applied to the former Turkish territories placed under the Mandate System, but it was completely ignored.<sup>71</sup> Wilson's fourth draft of the Covenant listed Armenia and Kurdistan as former Turkish territories to be placed under Mandate.<sup>72</sup> Neither ever became a Mandate. The Armenian Mandate was rejected by the United States Senate, and then forgotten.<sup>73</sup> The rights of the Kurdish people were also forgotten, and Kurdistan was divided up between Turkey, and the Mandates of Iraq and Syria.<sup>74</sup> In a "sui generis" application of self-determination, Palestine was established for Jews who were then a minority.<sup>75</sup> In Africa, self-determination was applied in a very limited manner.<sup>76</sup> Boundary lines between such Mandates were occasionally redrawn along ethnic frontiers.<sup>77</sup>

In the application of national self-determination, "the new map of Europe was drawn in accordance with Wilson's idea of self-determination."<sup>78</sup> Unfortunately, "the principle of national self-determination was not applied equally to victors and vanquished. . . ."<sup>79</sup> "Only defeated states were credited with having subjugated their peoples. . . ."<sup>80</sup> In no case did the application of self-determination harm the Allies.<sup>81</sup> Although plebiscites

<sup>70</sup> See CHARMAIN TOUSSAINT, *THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS* 10 (1956).

<sup>71</sup> GRIMAL, *supra* note 65, at 15.

<sup>72</sup> HALL, *supra* note 68, at 37.

<sup>73</sup> "Wilson, though at first expressing some misgivings, gave unaccountably strong encouragement to the belief that the United States would assume a mandate over at least Armenia. That he should have done so, even to the extent of later recommending an Armenian mandate to Congress, is further evidence of his blindness to realities. American public opinion was virtually unanimous on one thing; it would have no mandates, especially outside this hemisphere. The trusteeship over Armenia would involve an estimated 50,000 troops and millions of dollars. The American people sympathized abstractly with the sufferings of the Armenians at the hands of the 'terrible Turk,' but they had no intention of going over there and suffering along with them." BAILEY, *supra* note 63, at 170-71.

<sup>74</sup> BUCHHEIT, *supra* note 2, at 153-62 (Kurdish people also occupy small portions of Iran and the Soviet Union).

<sup>75</sup> Pomerance, *supra* note 64, at 8.

<sup>76</sup> See *id.* note 64, at 4. In somewhat similar relocations, the United States set up Liberia and the British set up British Sierra Leone as homelands for freed slaves. HALL, *supra* note 68, at 99-100.

<sup>77</sup> See generally CAMPBELL UPTHEGROVE, *EMPIRE BY MANDATE* 62-71 (1954).

<sup>78</sup> P. HASTINGS, *BETWEEN THE WARS* 12 (1968).

<sup>79</sup> *Id.* at 16.

<sup>80</sup> Murphy, *supra* note 24, at 88.

<sup>81</sup> *Id.* at 87.

were used, compromises were often made between self-determination and economics, defensible borders or historical ties.<sup>82</sup> These compromises were a major factor in the failure to achieve a lasting peace.<sup>83</sup>

The most important exceptions to the application of self-determination were with respect to Germany's borders. In violation of the principle of self-determination, an "inalienable" independence was forced upon Austria, whose peoples at the time would have preferred to be incorporated into Germany.<sup>84</sup> Three million Austrian Germans were placed under Czech rule.<sup>85</sup> Over a million Germans were placed under the rule of the Polish.<sup>86</sup> The claims of numerous other groups to self-determination were ignored.<sup>87</sup>

Wilson has been criticized for applying a "double standard": Poles, Yugoslavs, and Czechs, were favored, while Germans, Austrians, and Irish were not.<sup>88</sup> Perhaps Wilson may be forgiven, because he did have an alternative, long-range solution to these problems. Wilson knew that compromises had to be made. In its first years, the League could neither be overburdened with too many Mandates, nor settle many other problems not directly before it, because of the pressing needs of peace.<sup>89</sup>

Wilson saw the League as the forum for the future discussion and peaceful settlement of the conflicts arising from claims to self-determination. His first draft of Article X of the Covenant coupled "the principle of territorial integ-

<sup>82</sup> Pomerance, *supra* note 64, at 7, 21-22. Recently the relevance of historical ties to self-determination has become increasingly important as a result of the Western Sahara Case, 1975 I.C.J. 12 (Oct. 16), at 12; see generally Malcolm Shaw, *The Western Sahara Case*, BRIT. Y.B. INT'L L. 119 (1978); Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 697-98 (1976); Chen, *supra* note 3, at 226.

<sup>83</sup> R.A.C. PARKER, EUROPE 1919-1945, at 4 (1967).

<sup>84</sup> Pomerance, *supra* note 64, at 4; HASTINGS, *supra* note 78, at 16.

<sup>85</sup> HASTINGS, *supra* note 78, at 16.

<sup>86</sup> "German opinion remained deeply shocked by the fact that over a million Germans were still to fall under Polish rule; to most Germans this seemed unnatural, however reasonable it might be for Germans to rule over Poles, for, as the German observations on the draft treaty put it, 'as regards economic, social and cultural importance the German population is far superior to the Polish and Cassubian population.'" PARKER, *supra* note 83, at 14. The redrawing of the boundaries of Europe reduced the number of minorities from 45 million to 17 million. HASTINGS, *supra* note 78, at 16.

<sup>87</sup> Pomerance, *supra* note 64, at 6. After WWI, minority protection was recognized as a necessary corollary to the recognition of majority rule. However, after the holocaust of WWII, the total inadequacy of minority protection was recognized. The shift in emphasis has been to the protection of minorities via the protection of individual human rights, with the one exception of the Covenant on Civil and Political Rights, Article 27. See Louis B. Sohn, *The Rights of Minorities, in THE INTERNATIONAL BILL OF RIGHTS 270* (Louis Henkin ed., 1981). See also Josef L. Kunz, *The Present Status of the International Law for the Protection of Minorities*, 48 AM. J. INT'L L. 282 (1954); Patrick Thornberry, *Is There a Phoenix in the Ashes? - International Law and Minority Rights*, 15 TEX. INT'L L.J. 421, 428 (1980).

<sup>88</sup> Pomerance, *supra* note 64, at 6.

<sup>89</sup> HALL, *supra* note 68, at 40.

ity. . . with the possibility of orderly international sanction for secessionist movements"<sup>90</sup>:

The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity, but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.<sup>91</sup>

Wilson, in harmony with American traditions as expressed in the Declaration of Independence, believed in the unalienable right of all peoples to self-determination.<sup>92</sup> Further, this right ought to be institutionally recognized as a universally accepted principle of international law.<sup>93</sup> Only by recognizing a way for peaceful territorial change would World War I be the war to end all wars.<sup>94</sup> Unfortunately, the question of political jurisdiction or boundaries was considered to be more important than the peace of the world. This provision recognizing the value of self-determination was changed, and finally dropped.<sup>95</sup>

The numerous inequities in the application of self-determination sowed the seeds for World War II. If given the choice, many Germans living under alien rule as a result of the misapplication of self-determination after World War I would have preferred to be a part of Germany. However, once the boundaries were drawn up by the Allies, and Wilson's proposal was rejected, there was no peaceful way to unite all German peoples under German rule. Hitler, therefore resolved, to unite these people by the use of force. "One of Hitler's principal aims was to bring all Germans under the protection of his

<sup>90</sup> Pomerance, *supra* note 64, at 22; See also GEORGE SCOTT, THE RISE AND FALL OF THE LEAGUE OF NATIONS (1973).

<sup>91</sup> 2 DAVID H. MILLER, THE DRAFTING OF THE COVENANT 12-13 (1928), cited in Pomerance, *supra* note 64, at 22-23. Article X was a highly controversial provision. Irish-American opposition to Article X was one of the reasons the United States failed to join the League: "Irish nationalists complained again and again. . . that Article X invited the use of American troops to help the British suppress the Sinn Fein in Ireland." J. BLUM, WOODROW WILSON AND THE POLITICS OF MORALITY 187 (1956).

<sup>92</sup> HASTINGS, *supra* note 78, at 8.

<sup>93</sup> Pomerance, *supra* note 64, at 23.

<sup>94</sup> HASTINGS, *supra* note 78, at 8.

<sup>95</sup> *Id.*

Third Reich. This eventually resulted in the seizure of Austria, Czechoslovakia, and Poland, and drew Europe into the holocaust of another war.<sup>96</sup>

There are a number of points that should be remembered about this first international experiment with self-determination. First, the sacred trust of civilization, although expressed as a moral principle of universal application, was applied in a very limited fashion. Second, the principle of self-determination was used to redraw the boundaries of Europe along ethnic frontiers. Third, Wilson's proposal that a method for peaceful territorial change should be institutionalized was rejected. Fourth, the misapplication of the principle of self-determination helped to cause World War II.

#### V. WORLD WAR II AND THE UNITED NATIONS SYSTEM FOR IMPLEMENTING SELF-DETERMINATION

After World War II, the validity of the principle of self-determination was recognized in the Atlantic Charter which "proclaimed that the signers desired to see no territorial changes not in accord with the freely expressed wishes of the people concerned."<sup>97</sup> There were only minor territorial changes in the boundaries of Europe. Under the United Nations, the dramatic shift in emphasis was to the application of self-determination in a decolonization context.

It would be naive to suggest that the expanded application of the decolonization provisions by the colonial powers was entirely gratuitous, or merely a recognition of the immorality of colonialism.<sup>98</sup> International organizations have never been the exclusive way that peoples have won their independence, although most peaceful changes have occurred through international organizations.<sup>99</sup> Rather, the growing application of the decolonization provisions should be viewed as signalling the inevitable growth of nascent nationalistic movements in these territories, and the politically expedient transfer of power to them through the application of the decolonization provisions.<sup>100</sup>

<sup>96</sup> *Id.* at 17.

<sup>97</sup> Murphy, *supra* note 24, at 88. See also Chen, *supra* note 3, at 250-51 n.67.

<sup>98</sup> Some considered the Mandate system "to be a 'whimsical American ideal' holding that the acquisition of territories by conquest was neither shameful nor immoral and there was no need to behave as though it were." GRIMAL, *supra* note 65, at 15.

<sup>99</sup> "The paths to independence are of course, many and varied. Some yearn for independence, some fight for it, and some have it thrust upon them." And the United Nations has, at most, accelerated, not initiated the process by acting as a 'barometer of world opinion'. . . . But Algeria and Indo-China apart, what is so astonishing is that the massive decolonization process of the last 10 years has been relatively bloodless. This is the kind of peaceful change the League sought but never found. The United Nations can claim at least some of the credit for this little-recognized achievement." G. BUNTING & M. LEE, *THE EVOLUTION OF THE UNITED NATIONS* 40 (1964).

<sup>100</sup> The preamble of the *Declaration on the Granting of Independence to Colonial Countries and Peoples* states: "Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism

Ireland, for example, was colonized by the British over 750 years earlier,<sup>101</sup> and was considered to be an integral part of the United Kingdom for 120 years.<sup>102</sup> In 1921 the Irish, after a long period of struggle for liberation, won their independence, except in the North. In a compromise with the Irish, the British divided the "colonial unit" of Ireland to protect the "settler" Protestant majority in the North from becoming a minority.<sup>103</sup>

As a result of this historical development, self-determination has a prominent position in the United Nations Charter. The Charter contains the principle of self-determination implicitly in Chapters XI, XII, and XIII, and expressly in Articles 1 and 55. The Trusteeship System, the direct successor of the League Mandate System, is contained in Chapters XII and XIII.<sup>104</sup> The Trusteeship System was intended to cover three categories of territories: "a. territories now held under mandate; b. territories which may be detached from enemy states as a result of the Second World War; and c. territories voluntarily placed under the system by states responsible for their administration."<sup>105</sup> A territory comes under the Trusteeship system only after the administering power enters into a trust agreement.<sup>106</sup> The Trusteeship System won only limited success. It has been applied to only eleven territories in the first two categories.<sup>107</sup>

The Non-Self-Governing Territories (hereinafter referred to as NSGT) provision is contained in Chapter XI.<sup>108</sup> The NSGT provision is the direct successor of the League's native inhabitants clause, with the important difference that states have an obligation to transmit information on such territories upon the acceptance of membership.<sup>109</sup> The NSGT provision, which was merely a restatement of the sacred trust of civilization, was intended to

and all practices of segregation and discrimination associated therewith. . . ." G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

<sup>101</sup> "Ireland's significance lies in its having waged the earliest and, as we have seen, one of the most successful, of the twentieth-century 'wars of liberation,' or of 'national self-determination.' The significance of these wars, in turn, lies precisely in the fact that they have been so rare. Since 1900, in fact, only 14 nations have achieved independence by force, compared with over 60 that have done so by peaceful means." PETER CALVERT, *REVOLUTION* 99 (1970).

<sup>102</sup> Murphy, *supra* note 24, at 109.

<sup>103</sup> This is tacit recognition of the total inadequacy of minority protection, even at a time when it was in vogue. See *supra* note 87.

<sup>104</sup> See HALL, *supra* note 68.

<sup>105</sup> U.N. CHARTER art. 77, ¶ 1.

<sup>106</sup> *Id.* art. 77, ¶ 2.

<sup>107</sup> DAVID A. KAY, *THE NEW NATIONS IN THE UNITED NATIONS 1960-67*, at 148 (1970). All of the mandates that had not become independent states were placed under the Trusteeship System, except for South West Africa (Namibia); Somaliland was the only territory in category b, and no territories have ever been placed in category c. See HALL, *supra* note 68, at 295.

<sup>108</sup> U.N. CHARTER arts. 73-74.

<sup>109</sup> TOUSSAINT, *supra* note 70, at 229.

apply automatically to all "territories whose peoples have not yet attained a full measure of self-government. . . ."<sup>110</sup>

In practice, the reluctance of members to accept the obligations undertaken by them under this provision led to the drafting of principles to guide members to the fulfillment of their obligations.<sup>111</sup> By including among these the idea that territories must be "geographically separate", the application of the NSGT provision was effectively limited to 74 "overseas colonial countries and peoples ruled by alien whites."<sup>112</sup> Since the colonial powers failed to execute trust agreements for these territories, the General Assembly incorporated the NSGT provision into the Trusteeship System with the passage of Resolution 1514.<sup>113</sup> This has had the effect of gaining independence for those territories already within the scope of the NSGT provision, but has discouraged extension of this provision to additional territories.

In the overwhelming majority of cases, the United Nations has not applied the international trust provisions to "peoples," but has applied it to "colonial units."<sup>114</sup> The one major exception to this rule is Micronesia, the last trust territory, and the only strategic territory.<sup>115</sup> Micronesia, administered by the United States, consists of the Marshall, Caroline, and Marianna Islands (except for Guam).<sup>116</sup> In 1975, a plebiscite was held that gave the people of Micronesia a choice between preserving the status quo or acquiring com-

<sup>110</sup> U.N. CHARTER art. 73; see also HALL, *supra* note 68, at 285; TOUSSAINT, *supra* note 70, at 223-28.

<sup>111</sup> G.A. Res. 1514, *supra* note 100, at 66; See also *Study of the Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For in Article 73e of the Charter of the United Nations*, U.N. GAOR, Special Committee of Six on the Transmission of Information (Non-Self-Governing Territories), 1st Sess., 1st-14th mtgs., U.N. Doc. A/AC.100/SR.1-14 (1960). 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, reprinted in SUREDA, *supra* note 15, at 367-70; See also SADY, *THE UNITED NATIONS AND DEPENDENT PEOPLES* 89-96 (1956).

<sup>112</sup> Emerson, *supra* note 1. According to the "geographically separate" requirement, "[i]nternational law is thus asked to perceive a distinction between the historical subjugation of an alien population living in a different part of the globe and the historical subjugation of a population living on a piece of land abutting that of its oppressors. The former can apparently never be legitimated by the mere passage of time, whereas the latter is eventually transformed into a protected status quo." BUCHHEIT, *supra* note 2, at 18. "It is an error to consider colonization as a purely overseas development. Some of the most important colonial enterprises have been in contiguous territories." The Colonial Problem, Report, The Royal Institute of International Affairs, 21 (1937).

<sup>113</sup> Josef L. Kunz, *Chapter XI of the United Nations Charter in Action*, 48 AM. J. INT'L L. 103, 106-07.

<sup>114</sup> See Friedlander, *supra* note 19, at 81 n.53.

<sup>115</sup> Murphy, *supra* note 24, at 51.

<sup>116</sup> *Id.*

monwealth status, but not whether they wished to be independent.<sup>117</sup> The people chose the commonwealth arrangement.<sup>118</sup>

When the territory-wide Congress of Micronesia began to consider the possibility of independence, the United States began separate negotiations with the Marianna Islands.<sup>119</sup> Present indications are that Micronesia will become four separate entities.<sup>120</sup> The position of the United States is "essentially that while the principle of territorial integrity is an important one, it must of course give way to the freely expressed wishes of the people concerned (another important goal of the Charter) and to the realities of the situation."<sup>121</sup> The United States' Permanent Representative to the United Nations recently said:

The United States regrets that the exercise of full self-determination by the peoples of the Territory has led to the decision to divide the Territory into more than one entity. However, both the United States and the Trusteeship Council are in agreement that it is ultimately for the Micronesians themselves to decide upon their future political relations with one another. To take any other position, for example, that unity should be imposed upon the people of the Trust Territory, would make a mockery of the concept of self-determination as democratically conceived. . . .<sup>122</sup>

## VI. THE UNITED NATIONS CHARTER AND ITS AUTHORITATIVE INTERPRETATIONS

Self-determination is also expressly mentioned in the United Nations Charter in articles 1 and 55.<sup>123</sup> The Charter links the principle of self-determination of peoples with equal rights. This language implies that all peoples are entitled to their right of self-determination equally, regardless of the status of the territory in which they are situated.<sup>124</sup> The territorial integrity

<sup>117</sup> *Id.* at 52.

<sup>118</sup> Pub. L. No. 94-241, 90 Stat. 263 (1976).

<sup>119</sup> Murphy, *supra* note 24, at 52.

<sup>120</sup> Roger S. Clark, *Self-Determination and Free Association - Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 7 (1980).

<sup>121</sup> *Id.* at 81.

<sup>122</sup> *Id.*

<sup>123</sup> U.N. CHARTER art. 1 states that among the purposes of the U.N. Charter are "[t]o maintain international peace and security, and to that end . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ."; Art. 55 states: "With 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 . . . universal respect for, and observance of, human rights and fundamental freedoms for all. . . ."

<sup>124</sup> See *infra* note 141.

provision supports this position.<sup>125</sup> Article 2(4) prevents only member states from the threat or use of force against the territorial integrity of any state, but does not deny the right of peoples within the territorial limits of a state from asserting their right to self-determination.<sup>126</sup>

Although all of the following instruments may not yet be binding rules of international law, they are at least authoritative interpretations of the Charter.<sup>127</sup> These instruments generally are interpreted not to recognize a right of secession,<sup>128</sup> although they are susceptible to such an interpretation.

The Universal Declaration of Human Rights does not expressly mention self-determination, but it does implicitly recognize the natural law principle upon which self-determination is based. Article 21 states that "[e]veryone has the right to take part in the government of his country . . ." and "[t]he will of the people shall be the basis of the authority of government . . . expressed in periodic and genuine elections. . . ."<sup>129</sup> By this language, the Universal Declaration recognizes that the consent of the governed forms the basis of all just government. The preamble also implies the idea expressed in the Declaration of Independence—that the people reserve the inalienable right to alter or abolish any government that does not recognize this right: "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression; that human rights should be protected by the rule of law."<sup>130</sup>

The Declaration on the Granting of Independence to Colonial Countries and Peoples contains the first express definition of self-determination:

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.

\* \* \*

6. Any attempt aimed at the partial or total disruption of the national

<sup>125</sup> U.N. CHARTER art. 2, ¶ 4 states that "[a]ll 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."

<sup>126</sup> *Id.*

<sup>127</sup> See Friedlander, *supra* note 19, at 81 n.55; ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

<sup>128</sup> "No state within the United Nations has supported a right to secession, and few states would extend a right of self-determination to minority secessionist movements." Johnson, *Self-Determination, Western European Perspectives*, in Alexander & Friedlander *supra* note 14, at 86.

<sup>129</sup> Universal Declaration of Human Rights, G.A. Res. 217, 3rd Sess., pt. 1, Supp. No. 2, art. 21, ¶¶ 1, 3, U.N. Doc. A/555 (1948); See also M.G. Kalandharan Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 321, 342-43 (1975).

<sup>130</sup> G.A. Res. 217, *supra* note 129, at Preamble, ¶ 3.

unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.<sup>131</sup>

At first reading, there seems to be an unresolved conflict between the territorial integrity of a state and the territorial integrity of all peoples. However, the preamble resolves this conflict. It states that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory. . . ."<sup>132</sup> Therefore, the territorial integrity of a state must be subordinate to the right of all peoples to their territorial integrity, since the latter is inalienable.

Paragraph six can be read in harmony with this interpretation in one of two ways. First, as the reference to Article 2(4) of the Charter suggests, only other states are forbidden from "attempting to disrupt the national unity and territorial integrity of a country."<sup>133</sup> Alternatively, an attempt by a "peoples" to secure their right to self-determination does not disrupt the "national unity and territorial integrity of a country."<sup>134</sup> (emphasis added)

The General Assembly decided to include a provision on self-determination in the two 1966 Covenants on Human Rights. "This was deemed necessary because of the conviction that violations of the right of self-determination. . . had led to wars in the past, and in the present, must be seen as a constant threat to peace."<sup>135</sup> The importance of the right of self-determination is indicated by its preferred position as the first article of both

<sup>131</sup> G.A. Res. 1514, *supra* note 100.

<sup>132</sup> *Id.* at 66.

<sup>133</sup> See *supra* note 127.

<sup>134</sup> Either the phrase "national unity" or "territorial integrity of a country" should be given a special meaning. This is required so that the language—phrased in the conjunctive—is not interpreted as being redundant. The famous statement of Tanzania's President Nyerere about Biafra suggests a special meaning for the phrase "national unity": "[I]t is foolish for Africans to stand by idly while millions of Africans are being killed by other Africans in the name of 'territorial integrity' . . . You cannot kill thousands of people and keep on killing more in the name of 'unity.' There is no unity between the dead and those who killed them, and there is no unity in slavery and those who dominate them." Murphy, *supra* note 24, at 230. Alternatively, the word "country," as opposed to the usual "state" or "nation," could be given a special meaning. Only a "state" that recognized the right of all of its peoples to self-determination would be a "country" entitled to its territorial integrity. See Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 842 (1975).

<sup>135</sup> Boris Meissner, *The Right of Self-Determination After Helsinki and its Significance for the Baltic Nations*, 13 CASE W. RES. J. INT'L L. 375, 376 (1981).

covenants, and by the identity of the language.<sup>136</sup> However, since there are variations in the language of other relevant provisions, the two Covenants will be analyzed separately.<sup>137</sup>

#### A. *The International Covenant on Civil and Political Rights*

Article 1 of the International Covenant on Civil and Political Rights states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>138</sup>

Article 1 is in the present tense: "All Peoples *have* the right of self-determination." (emphasis added). This means that self-determination is a permanent, continuing right,<sup>139</sup> and not a human right that can only be exercised once.<sup>140</sup> Section 3 implicitly recognizes the predominance of self-determination over territorial integrity. All States Parties to the present Covenant, and not only those states with Non-Self-Governing and Trust Territories, have the obligation to promote the realization of the right of all peoples to self-determination.<sup>141</sup> If territorial integrity predominated over

<sup>136</sup> See *id.* at 392 n.129.

<sup>137</sup> See discussion *infra* note 152.

<sup>138</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, art. 1, ¶¶ 1, 2, 3, U.N. Doc. A/36316 (1966).

<sup>139</sup> "[T]he original text of the Article contained the words 'all peoples shall have the right to self-determination': the text which was finally agreed upon provides that 'all peoples *have* the right to self-determination.' In presenting the final draft, the spokesman pointed out that the tense of the verb had been changed 'from the future to the present, to emphasize the fact that the right referred to was a permanent one.'" Antonio Cassese, *The Self-Determination of Peoples*, in Henkin, *supra* note 87, at 98.

<sup>140</sup> See discussion *supra* note 19; *cf.* Conference on Security and Co-Operation in Europe, Aug. 1, 1975, art. 8, ¶ 2, 14 I.L.M. 1292 ("all peoples always have the right" to self-determination); see also Jack Donnelly, *Human Rights as Natural Rights*, 4 HUMAN RIGHTS Q. 391, 397-98 (1982).

<sup>141</sup> "All peoples" is interpreted literally: "The ordinary meaning of the term 'all,' in the context of the right of all peoples to self-determination, is that of entirety: each and every people is covered by the expression, irrespective of geographic or other

self-determination, only states with Non-Self-Governing and Trust Territories would have such an obligation.<sup>142</sup>

Derogations are permitted but only "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . ." <sup>143</sup> Since Article 1 is derogable,<sup>144</sup> the right to self-determination could be temporarily suspended.<sup>145</sup> Because an interpretation of this provision allowing a permanent derogation would destroy the right, Article 5 prohibits such an interpretation.<sup>146</sup> Moreover, Article 5 precludes an interpretation of self-determination that does not recognize the right to secede from an independent state.<sup>147</sup> If a right to secede from an independent state is not recognized, once all states become independent, the right to self-determination would no longer exist. Therefore, the right of self-determination must be interpreted to recognize the right to secede from an independent state.<sup>148</sup>

Under Article 2, "[e]ach State Party to the present Covenant undertakes to . . . adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."<sup>149</sup> States could fulfill their obligations under this provision by adopting domestic legislation that recognizes the right to secede, such as the express provision contained in the Soviet Constitution.<sup>150</sup> Alternatively, states could implement an

consideration." Yoram Dinstein, *Self-Determination and the Middle East Conflict*, in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS *supra* note 21, at 248; *supra* note 120, at 248.

<sup>142</sup> Ms. Roosevelt made the following statement in the Seventh Plenary Session of the General Assembly in 1952:

According to the present text of that paragraph, the right of self-determination should be exercised only by the peoples of Non-Self-Governing and Trust Territories. This is a restriction on the right of self-determination which, in the view of my delegation, falls so far short of the concept expressed in the Charter that we should not endorse it. If a right is valid for one group of peoples, it is equally valid for all peoples.

*Id.* at 249. See also SUREDA, *supra* note 15, at 106 n.35; Chen, *supra* note 3, at 216.

<sup>143</sup> International Covenant on Civil and Political Rights, *supra* note 138, art. 4, ¶ 1.

<sup>144</sup> See *id.* art. 1.

<sup>145</sup> Some writers have "conclusively demonstrated" that "self-determination has become a peremptory norm of international law (jus cogens) . . . . A treaty conflicting with the principle, therefore, is void." See Cassese, *supra* note 87, at 111, and authorities cited therein.

<sup>146</sup> See International Covenant on Civil and Political Rights, *supra* note 138, art. 5.

<sup>147</sup> See *id.* art. 5.

<sup>148</sup> See Universal Declaration of Human Rights, *supra* note 129.

<sup>149</sup> International Covenant on Civil and Political Rights, *supra* note 138, art. 2, ¶ 2.

<sup>150</sup> See SAMUEL E. FINER, FIVE CONSTITUTIONS 165 (1979). ("Each Union Republic shall retain the right freely to secede from the U.S.S.R.") KONST. RSFSR art. 72. In the words of Lenin: "Why should we Great Russians, who have been oppressing more nations than any other people, deny the right to secession for Poland, Ukraine, or Finland?" Lekov, *Self-Determination in Soviet Politics*, cited in Alexander and

expanded application of self-determination through existing United Nations machinery.<sup>151</sup>

B. *The International Covenant on Economic, Social and Cultural Rights*

The provisions contained in the International Covenant on Economic, Social and Cultural Rights are quite similar in most respects to the International Covenant on Civil and Political Rights.<sup>152</sup> The former does not permit derogation, although limitations are allowed.<sup>153</sup> For example, limitations upon the right of self-determination may be undertaken "only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."<sup>154</sup> The territorial integrity of a state cannot predominate over the right of all peoples to self-determination, because this ordering is not compatible with the nature of the right.<sup>155</sup> Further, it would destroy the right. This interpretation is forbidden by Article 5.<sup>156</sup>

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations deals exclusively with self-determination.<sup>157</sup> According to this Declaration, every state has two duties: (1) to respect the right of all peoples to self-determination,<sup>158</sup> and (2) to refrain from any forcible action

Friedländer, *supra* note 21, at 133. Although this Soviet Constitutional provision satisfies the requirement of having a "law on the books," it does not satisfy the requirement to provide effective remedies to put the law into practice. See Oscar Schacter, *The Obligation to Implement the Covenant in Domestic Law*, in Henkin, *supra* note 87, at 320-21.

<sup>151</sup> See text accompanying notes 181-206 *infra*.

<sup>152</sup> However, it is important to note the difference in the nature of the obligations assumed under the two Human Rights Covenants. "[T]he Covenant on Civil and Political Rights creates a binding obligation on each ratifying state to respect and ensure the individual rights enumerated and to take forthwith the necessary steps for their implementation by legislative or other measures." Cassese, in: *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 87. The International Covenant on Economic, Social and Cultural Rights, on the other hand, imposes a lesser obligation: "Each State Party to the present Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 2, ¶ 1, U.N. Doc. A/6316 (1966).

<sup>153</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 152, art. 4.

<sup>154</sup> *Id.*

<sup>155</sup> See Boyd, *supra* note 26; and Dinstein, *supra* note 141.

<sup>156</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 152, art. 5.

<sup>157</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

<sup>158</sup> See *id.* at 123-24.

which deprives a peoples of their right to self-determination.<sup>159</sup> The Declaration also confronts the conflict between self-determination and territorial integrity:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples *as described above* and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.<sup>160</sup> (emphasis added)

Thus, the territorial integrity provision is subordinate to the duty that every state has to respect the right of all peoples to self-determination regardless of geographic location. All peoples—those in Non-Self-Governing Territories, Trust Territories, and within independent states—have a right to self-determination.<sup>161</sup> All peoples have a right to more than just being a minority group within a state, if they are a majority in a given area and wish to change their status.<sup>162</sup> Only by doing so will a government represent the whole people belonging to the territory.<sup>163</sup> The concluding paragraph of the Declaration states:

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.<sup>164</sup>

Once again, this paragraph, like Article 2(4) of the Charter, only forbids other states from interfering with the territorial integrity of another state. It

<sup>159</sup> See *id.* at 124.

<sup>160</sup> *Id.*

<sup>161</sup> International Covenant on Civil and Political Rights, *supra* note 138, art. 1, ¶ 1.

<sup>162</sup> "The Wilsonian era assumed that the characteristics of the population involved were the controlling factor; new nations would be composed of peoples sharing objectively identifiable traits of language, culture, religion, and ethnicity. The anticolonialist phase, ironically, accepted the old colonial boundaries as legitimate and unalterable, regardless of the incongruous mix of peoples within the political unit. Both concepts of self-determination are inadequate, however, insofar as they ignore the basic principle underlying that right: that the freely expressed will of the people should govern." Note, *The Logic of Secession*, 89 YALE L.J. 804-05 (1980). See also HIGGINS, *supra* note 9; Cobban, *supra* note 14; *contra* Emerson, *supra* note 1, at 136 ("[A]ll people do not have the right of self-determination: they have never had it, and they never will have it.").

<sup>163</sup> Most writers tend to ignore the language "as described above and thus" See, e.g., Ved P. Nanda, *Self-Determination under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

<sup>164</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, *supra* note 157, at 124.

does not forbid actions taken by a peoples within a state to secure their right to self-determination.

#### VII. RECENT DEVELOPMENTS: NEXUS BETWEEN DENYING THE LEGALITY OF SECESSIONARY SELF-DETERMINATION AND GENOCIDE

Although the foregoing human rights instruments are susceptible of being interpreted as subordinating the territorial integrity of states to the human right of all peoples to self-determination, the United Nations is unequivocally opposed to the disruption of the territorial integrity of any of its members. One example is the action taken by the United Nations in the Congo.<sup>165</sup> Shortly after the Congo became independent, Katanga province declared its independence from the rest of the Congo.<sup>166</sup> United Nations troops entered the Congo. After the death of Secretary-General Dag Hammarskjold the Security Council passed a resolution reaffirming that one of the purposes of the United Nations' operation was "[t]o maintain the territorial integrity and political independence of the Republic of the Congo."<sup>167</sup> The Council completely rejected the claim that Katanga is a "sovereign independent nation." With the aid of the United Nations forces, the secession attempt ended. It was at this time that U Thant, Secretary-General of the United Nations, said "the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State."<sup>168</sup>

Since Katanga, two major civil wars have been fought to preserve the territorial integrity of a state. These were Biafra against Nigeria,<sup>169</sup> and Bangladesh against Pakistan.<sup>170</sup> Denying the legality of all secessionary movements has resulted in genocide. Biafra lost its struggle against Nigeria, but only

<sup>165</sup> See generally BUCHHEIT, *supra* note 2, at 141-53.

<sup>166</sup> *Id.* at 144.

<sup>167</sup> U.N. SCOR, 16th Sess., Supp. Oct.-Dec. 1961, at 148, U.N. Doc. S/5002 (1961), in BUCHHEIT, *supra* note 2, at 150.

<sup>168</sup> Article, *Secretary-General's Press Conferences*, 7 U.N. MONTHLY CHRON. 34, 36 (1970).

<sup>169</sup> "Despite 'the passionate aspiration of a whole people,' Biafra fell to the Nigerian territorial elites who invoked and applied the 'Katanga precedent.'" Suzuki, *supra* note 134, at 804-05.

<sup>170</sup> "[S]ome of the most destructive and genocidal conflicts have been waged precisely in the repression of claims for greater autonomy or for independence by large, distinctive, regionally separate peoples. And one has to ask whether the slaughter of millions in Bangladesh, Biafra, the Sudan, and now in Eritrea can possibly be justified by the interests of the Territorial State in the relatively unrestrained exercise of its internal sovereignty and in the preservation of the domains it has conquered or inherited? Or is there a need for the United Nations to abandon a dehumanized scale of values which effectively condones the sacrifice of human victims to the Territorial State?" LEO KUPER, GENOCIDE 183 (1981).

after mass starvation and the death of one Million Ibos.<sup>171</sup> Bangladesh, with the armed intervention of India, won their "illegal" war of independence against Pakistan, but only after three Million Bengalis died.<sup>172</sup> One author has noted a fatal nexus between repressing the claims of peoples to self-determination and genocide:

[T]he sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against peoples under its rule, and that the United Nations for all practical purposes, defends this right. To be sure no state *explicitly* claims the right to commit genocide—this would not be morally acceptable even in international circles—but the right is exercised under other more acceptable rubrics, notably the duty to maintain law and order, or the seemingly sacred mission to preserve the territorial integrity of the state.<sup>173</sup>

#### VIII. RECOMMENDATIONS FOR AN EXPANDED APPLICATION OF SELF-DETERMINATION WITHIN THE UNITED NATIONS

Natural law theory demonstrates how the dilemma between the human right of all peoples to self-determination and the territorial integrity of states should be resolved. The question reduces itself to whether one believes in the divine right of kings, which supposedly went out in the 18th century, or whether the people are the source of all legitimate governmental authority.<sup>174</sup> If the people are sovereign, and the people wish to alter or abolish any form of government, they have that right.<sup>175</sup> When a government no longer

<sup>171</sup> *Id.* at 75. A "genocidal massacre was a major cause of the secession of the Ibo. . . there was incredulity that as many as 1,000,000 people might have to die so as to safeguard the unity of an artificially created colonial conglomerate of peoples. . . . Many Ibo believed that the choice before them was between secession or genocide." *Id.* at 75-76. See also Rene Lemarchand, *The Limits of Self-Determination: The Case of the Katanga Secession*, 56 AM. POL. SCI. REV. 404 (1962). During the Nigerian Constitutional Convention a provision recognizing the right to secede was discussed. See BUCHHEIT, *supra* note 2, at 166.

<sup>172</sup> KUPER, *supra* note 170, at 79.

<sup>173</sup> *Id.* at 161.

<sup>174</sup> "'Man is born free and everywhere he is in chains. . . . What can make it legitimate?' An answer to Rousseau's question involves an analysis of the nature of political authority. What is law? Does it represent reason and justice, or is it merely a manifestation of the will of those in power? . . . James I of England expounded a theory of the divine right of kings. John Locke, whose writings had much influence in America, advanced a social contract theory. Men in a state of nature formed a contract whereby government was set up to protect property and to advance the public good. When government violated this contract, a right of revolution arose. . . . There have always been those who insist that political authority, or law, is based upon power, or force, and represents nothing more than the will of those in control of the government." SAYE & POUND, *supra* note 46, at 6.

<sup>175</sup> See text accompanying note 26.

represents the will of a majority of its people, it no longer has any legitimate authority over them.<sup>176</sup> Since self-determination is an "absolute prerequisite for the enjoyment of all individual human rights," only by building a world order based upon democratic principles can the world be made safe for human rights.<sup>177</sup>

The foregoing review of the application of self-determination demonstrates that the principle has not exhausted itself. Other than Europe, it has only been applied to overseas colonies ruled by alien whites.<sup>178</sup> All other peoples are conclusively presumed to have exhausted their right to self-determination.<sup>179</sup> Anyone with even a superficial knowledge of history knows that this simply is not true.<sup>180</sup>

The United Nations provisions have not even exhausted the application of self-determination in a colonial context because of the two major limitations that have been placed on their implementation. First, the salt water barrier placed on the application of the NSGT provision is "discriminatory and arbitrary."<sup>181</sup> The requirement that a territory be "geographically separate" has transformed what is essentially a question of economic and political domination into a question of geography.<sup>182</sup> The salt water barrier has confined the "universal" application of the international trust system almost exclusively to Africa, Asia, the Middle East, and islands in the Caribbean and Pacific.<sup>183</sup>

The obligations imposed under the League of Nations version of the sacred trust of civilization was broader than the United Nations' "universal" application. Under the League, all native inhabitants, wherever they were geographically located were protected. Under the United Nations current

<sup>176</sup> See Letter from Jefferson to Madison, *supra* note 33. In the words of Thomas Paine, the "authority of the people" is "the only authority on which government has a right to exist in any country." See Friedlander, *supra* note 14, at 16.

<sup>177</sup> "The republican [democratic] is the only form of government which is not eternally at open or secret war with the rights of mankind." Letter from Thomas Jefferson to William Hunter (March 11, 1790), in JOHN BARTLETT, FAMILIAR QUOTATIONS, 471 (14th ed. 1982).

<sup>178</sup> See *supra* note 112.

<sup>179</sup> *Id.*

<sup>180</sup> One example is the Kurds: "The salient feature of the last three thousand years of Kurdish history is that, despite their numbers, continuous occupation of a homeland, and distinct culture and language, the Kurds have never enjoyed any lasting measure of self-government. They have found themselves alternately subsumed within the empires of the Assyrians, Persians, Greeks, Romans, Arabs, Mongols, and Turks. It is therefore perhaps even more surprising that throughout this long history the Kurds have tenaciously clung to their cultural individuality—often acting the part of a rebellious minority defending its national identity against an imperial governor." BUCHHEIT, *supra* note 2, at 153.

<sup>181</sup> Kunz, *supra* note 113, at 109.

<sup>182</sup> See *supra* text accompanying note 112.

<sup>183</sup> LINCOLN P. BLOOMFIELD, THE UNITED NATIONS AND U.S. FOREIGN POLICY 202 (1967).

interpretation of this obligation, the native inhabitants of the entire Western Hemisphere have been excluded from international protection.<sup>184</sup>

One example is the Indian nations who have treaties with the United States.<sup>185</sup> The United States considers Indians to be wards incapable of self-government.<sup>186</sup> The United States as "trustee" governs Indians by "acts of Congress" and not on the basis of consent.<sup>187</sup> Therefore, these Indians occupy territories that are not self-governing. Since they are not "geographically separate" from the United States, they are not considered to be Non-Self-Governing Territories. This limitation has effectively excluded one race of the world's peoples from representation in the United Nations. The intimate relationship between denying the right of Indian peoples to self-determination and genocide has repeatedly been demonstrated.<sup>188</sup> As a beginning, at least one Indian nation or confederacy should be recognized as an essential spokesperson so that these crimes are exposed to world opinion and effectively dealt with.<sup>189</sup>

<sup>184</sup> "The Belgian thesis has been assessed as an attempt to give Chapter XI the same scope as Article 23(b) of the Covenant. J.L. Kunz writes in this respect that 'The Belgian thesis reminds us of the strict obligation under Article 23(b) of the League of Nations Covenant, under which Members were bound 'to secure just treatment of the native inhabitants of territories under their control', an obligation which, in view of the current practice with regard to Chapter XI has no equivalent in the United Nations Charter.'" A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION, 103-04, n. 31 (1973).

<sup>185</sup> See Judith L. Andress and James E. Falkowski, *Self-Determination: Indians and the United Nations—The Anomalous Status of America's "Domestic Dependent Nations,"* 8 AM. INDIAN L. REV. 97 (1980).

<sup>186</sup> *Id.* at 100-02.

<sup>187</sup> *Id.* at 103. See also Symposium, *The Human Rights of Indigenous Peoples*, 36 COLUM. J. INT'L AFFAIRS 1-161 (1982); Mr. Ryckmans, a Belgian delegate said:

he had a great deal of documentation to prove that a number of States were administering within their own borders territories which were not governed by the ordinary law; territories within well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. Those populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word. Some of them were still unconquered. Entry into many of those territories was prohibited by law. He could not see how anyone could claim that the States administering such territories were not what the Charter called States which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government.

SUREDA, *supra* note 184, at 103; see also GORDON BENNET, ABORIGINAL RIGHTS IN INTERNATIONAL LAW 50-55 (1978); "Indians not taxed" are still excluded from protection under the United States' constitution. See U.S. CONST. art. 1 § 2, cl. 3.

<sup>188</sup> KUPER, *supra* note 170, at 133-34, 140-41.

<sup>189</sup> E. RHOODIE, DISCRIMINATION IN THE CONSTITUTIONS OF THE WORLD 94 (1984); Rennard Strickland, *Genocide at Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986); *Genocide in North America: The Violation of the Land and Human Rights of Native Peoples, Report to the UN*

The second major limitation that has been placed on the implementation of self-determination is that it generally has been applied to "colonial units" and not to "peoples."<sup>190</sup> In Africa, the colonial boundaries were drawn up for the economic and military interests of the colonial powers, and in total disregard of the interests of the peoples involved.<sup>191</sup> This policy has resulted in a number of tragic situations. One example is the Somalia/Ethiopia dispute:

The dispute over Western Somaliland, a grazing area between the Ethiopian highlands and the arid plains of the Somali Republic, involves a confrontation between Ethiopian claims to territorial integrity and Somali claims for self-determination. Although Ethiopia currently exercises jurisdiction over the area, it is inhabited almost exclusively by Somali people. Since 1897 the area has been the focus of varying border agreements and attempts at boundary demarcation between Italy, Britain, France, and Ethiopia. The present conflict, rooted in a dispute over the 1954 Anglo-Ethiopian Agreement, has been marked by continuing outbreaks of war and a deadly minuet between the superpowers, who have exacerbated the confusion by switching allegiances. . . . The recurrent warfare indicates the intensity and commitment of the Somali desire for unification and suggests that a solution short of secession may

*Commission on Human Rights by the International Indian Treaty Council*, International NGO Conference on Indigenous Peoples and the Land 15-18 September 1981, Geneva, cited in *Indigenous Peoples*, 7 HUM. RTS. INTERNET REP. no. 2, 258, 260 (1981). See also *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-Fourth Session*, Geneva, 17 August - 11 September 1981, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 34th Sess., U.N. Doc. E/CN.4/1512 (1981).

<sup>190</sup> "[T]he United Nations has adopted the questionable position that though all peoples have the right of self-determination, only colonial countries are peoples." HUMPHREY, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW* 103 (M. Bos ed., 1973) quoted in Friedlander, *supra* note 19 at 81 n.53; See also Emerson, *supra* note 1, at 301; Prakash Sinha, *Is Self-Determination Passe?*, 12 COLUM. J. TRANSNAT'L L. 260, 269-270 (1973).

<sup>191</sup> "Attention has been drawn to the manner in which the European imperialists decided among themselves the boundaries of their various colonies without reference to the actual ethnic similarity or difference between the African peoples who make up the population. . . . In the delimitation of boundaries, little attention was paid to natural frontiers such as rivers or mountains—and none at all to the wishes of the Africans involved in the transfer of territory." S. EASTON, *THE RISE AND FALL OF WESTERN COLONIALISM* 105 (1964); "The retention of those boundaries 'at all costs' exposes the weakness of African leadership and enables the excolonialists to keep their commercial [sic] interests intact, indeed, to control the economic resources of Africa as in the old days." MOJEKWU, *Self-Determination: The African Perspective*, Alexander & Friedlander, *supra* note 14, at 231; cf. Suzuki, *supra* note 134, at 839 ("[T]he first All-African Conference of 1958 adopted resolutions which denounced the existing, arbitrarily drawn territorial boundaries to the extent that they cut across ethnic groups, and called for their speedy adjustment or abolition.")

be infeasible. Moreover, a government based on the will of the people could help to restore internal stability to the region. . . . Thus, the Ogaden illuminates the fallacy of simply equating territorial integrity with stability, and self-determination with disruptive change; in this instance, adherence to territorial integrity has promoted disorder whereas a right of secession could well occasion future stability and peace.<sup>192</sup>

A long list of other peoples are demanding a right to self-determination.<sup>193</sup> Rather than lump all terrorist activities and liberation struggles together, the validity of such claims could be determined by holding plebiscites.<sup>194</sup> The legitimacy of a claim to self-determination ought to be based upon the will of the people and not the military power of a state to preserve itself.<sup>195</sup> Self-determination is a revolutionary principle.<sup>196</sup> It states that all just government is based on the consent of the governed, and not on the power of a

<sup>192</sup> *The Logic of Secession*, *supra* note 162, at 820, 824. The constitution of the Republic of Somalia in article 6 promised that the Somali Republic shall promote by legal and peaceful means the union of Somali territories. BUCHHEIT *supra* note 2, at 181.

<sup>193</sup> BUCHHEIT *supra* note 2.

<sup>194</sup> "Ideally, issues of national allegiance and group identification would be settled directly through plebiscites. The use of voting, however, assumes both an international authority willing to supervise, interpret, and enforce the plebiscite and a state willing to submit itself to such a procedure." *The Logic of Secession*, *supra* note 162, at 813. See also Robert A. Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?*, 13 CASE W. RES. J. INT'L L. 281 (1981); "Rebellion cannot exist without the feeling that somewhere, in some way you are justified." ALBERT CAMUS, *THE STRANGER* 19 (Anthony Bower trans., 1951).

<sup>195</sup> Jefferson's "defense of revolutions, so frequently misinterpreted as literal advice to nourish the tree of liberty with bloodshed every twenty years, is really part of his desire to provide a framework of freedom and liberty for social changes. He evidently was convinced that it was not humanly possible to excommunicate revolutions or to be so wise that they would forever be rendered unnecessary. Society will have its revolutions. Why not build society, then, in a manner which would encourage only those political revolutions which are in accord with consent—the people's consent, majority revolutions? Jefferson took very deep pleasure in 'bloodless revolutions' hailing those profound changes in society which are engineered by reason and persuasion instead of the 'blind' machines of force. Quite clearly the ideal is 'that of changing our form of government under the authority of reason only, without bloodshed. . . . It may seem that reason and persuasion are too slow. Let us grant, said Jefferson; that they require patience; but 'the ground of liberty is to be gained by inches. . . . we must be contented to secure what we can get; from time to time, and eternally press forward for what is yet to get. It takes time to persuade men to do even what is for their own good.'" KOCH, *supra* note 33, at 187-88.

<sup>196</sup> John A. Collins, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 147 (1980) ("Self-Determination is a revolutionary idea—but in a positive sense. Unlike the nationalism of the nineteenth century, modern self-determination actually promotes peace.")

state, or group of states, to preserve its privileges by force.<sup>197</sup> Self-determination can be either a peaceful or a violent phenomena.<sup>198</sup> People will revolt against unjust governments by force if they have no peaceful alternative.<sup>199</sup> The United Nations either can continue to cloak its members with a veil of legality in denying the human rights of some peoples to self-determination, or it can recognize a peaceful method for the resolution of such disputes based on democratic principles.<sup>200</sup>

Implementing an expanded application of self-determination, beyond the willingness of states to respect the human rights of their peoples, is not a problem. Any territory can be brought within Article 77(c) of the United Nations Charter.<sup>201</sup> Although this would be voluntary, in practice the entire decolonization process has been voluntary.<sup>202</sup> A more positive approach would be to recognize the evolution of international law to reinterpret the NSGT provision beyond its present limited scope. This could be done in two ways. First, the artificial requirement of geographic separateness could be removed.<sup>203</sup> Second, a peoples who have not exercised their right to self-determination could be considered, under Article 73 of the U.N. Charter, to be peoples who "have not yet attained a full measure of self-government."<sup>204</sup> Some experts often erroneously assume that self-determination cannot be applied "universally, integrally, forcefully and scientifically."<sup>205</sup> If the

<sup>197</sup> PADOVER *supra* note 27.

<sup>198</sup> BUNTING & LEE *supra* note 99; *See also* CALVERT note 101.

<sup>199</sup> "The use of force alone is but *temporary*. It may subdue for a moment; but it does not remove the necessity of subduing again: and a nation is not governed which is perpetually to be conquered." Edmund Burke, Second Speech in Conciliation with America, The Thirteen Resolutions (Mar. 22, 1775) in JOHN BARTLETT, FAMILIAR QUOTATIONS 452 (14th ed., 1982).

<sup>200</sup> "Too often, international crimes have been committed and perpetuated under the cloak of 'territorial integrity.'" Chen, *supra* note 3, at 242.

<sup>201</sup> *See supra* text accompanying note 105.

<sup>202</sup> "While the trend of past decisions indicate that the United Nations, in dealing with issues relating to self-determination, stresses the basic distinction of colonial and noncolonial issues, this distinction need not be conclusive. . . . The essence of self-determination is human dignity and human rights. Underlying the concept of human dignity is the insistent demand of the individual to form groups and identify with groups that can best promote and maximize his pursuit of values both in individual and aggregate terms. The formation and reformation of groups are ongoing processes." Chen, *supra* note 3, at 242.

<sup>203</sup> *See supra* note 112.

<sup>204</sup> U.N. CHARTER arts. 73-74.

<sup>205</sup> Pomerance, *supra* note 64, at 3; "There is no tidy formula for determining what is to be done in a secession situation. . . . But it may be safely predicted that if the international community evolves toward a rule of law, the principle which it will increasingly seek to have applied through arbitration in secession disputes will be that of consent of the governed, not the present implicit doctrine: no secession at any price anywhere." N.Y. TIMES, Dec. 30, 1971, at 25, *cited in* Chen, *supra* note 3, at 199.

United Nations would commit itself to democratic principles, the only remaining issue would be demographics.<sup>206</sup>

## IX. CONCLUSION

Through a pattern of repeated warfare to adjust territorial boundaries,<sup>207</sup> history demonstrates that denying, not granting, self-determination to peoples is a major cause of wars and revolutions.<sup>208</sup> The advent of the nuclear age demonstrates the need to break out of this historic cycle.<sup>209</sup> Unless the United Nations recognizes and accepts the predominance of self-determination over territorial integrity, history will continue to repeat itself.<sup>210</sup> Absent

<sup>206</sup> "Frequently, the designation of the geographic boundaries of a region (which may be based on arbitrary yardsticks) predetermines the demographic question as to which people form a majority in it. The Ukrainians, for instance, are a distinct majority in the Ukraine, but a minority in the USSR as a whole." Dinstein, *supra* note 7, at 109.

<sup>207</sup> "[T]he presupposition of strife between nations is not itself a consequence of the principle of self-determination but the reflection of a desire to resist it; in other words, if the states involved are prepared to accept a result based on self-determination, then there is no reason to presuppose violence will ensue, no more than it did over the Saar in 1955, or the British-administered Togoland in 1956, or the Camerouns in 1961. Indeed, there is evidence to suggest that resistance to a plea for self-determination, especially in the form of a demand for secession, will often lead the state into a situation of continuing internal strife in the form of 'liberation movements' and that this is ultimately as harmful and costly, in economic terms, as any international strife. The experience of colonial Powers indeed suggests, further, that in the long run it is usually impossible to win this kind of armed contest against a determined, indigenous population." D.W. Bowett, *Self-Determination and Political Rights in the Developing Countries*, 1966 PROC. AM. SOC. INT'L L. 129, 130; *cf.* Emerson, *supra* note 1, at 139.

<sup>208</sup> "World Wars I and II serve as a constant reminder of a basic reason for international acceptance of the right of self determination: survival. Thus, while the *raison d'être* of self-determination may be couched in the belief that all people must be allowed to freely determine their political, economic and cultural status, an underlying rationale is survival. 'Survival' is not used in the Darwinian sense but rather as a means of emphasizing the peace-promoting aspects of self-determination. 'World' wars are now a reality. Allowing a people to freely self-determine their status may promote peace and ensure survival by lessening the chance that a Third World War—a true 'war to end all wars'—will occur. Beliefs in basic democratic principles have thus joined hands with the practical realities of modern life." Collins, *supra* note 196, at 166.

<sup>209</sup> In the words of President Kennedy, "[f]or in the development of this organization [the United Nations] rests the only true alternative to war, and war appeals no longer as a rational alternative. Unconditional war can no longer lead to unconditional victory. It can no longer serve to settle disputes. It can no longer be of concern to great powers alone. For a nuclear disaster, spread by winds and waters and fear, could well engulf the great and the small, the rich and the poor, the committed and the uncommitted alike. Mankind must put an end to war or war will put an end to mankind. So let us resolve that Dag Hammarskjöld did not live, or die, in vain. Let us call a truce to terror." JOHN BARTLETT, FAMILIAR QUOTATIONS 1073 (14th ed. 1982).

<sup>210</sup> *See supra* notes 96-103 and accompanying text.

a new incarnation of self-determination, the failure of the United Nations to truly universalize the principle can be viewed as one of its greatest failures in promoting human rights.<sup>211</sup> If the United Nations will not learn from the lessons of history, perhaps the next World Organization will.

<sup>211</sup> "So long as mankind continues to give deference to human dignity and human rights—at least in rhetoric—self-determination will continue to be invoked and reinvoled. For . . . the principle of self-determination is deeply rooted in the notion of human dignity and human rights." Chen, *supra* note 3, at 199.

## THE JAPANESE RESPONSE TO AIDS

Stephan M. Salzberg\*

### I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) cast a pall across the 1980s. Respecting neither national boundaries nor racial, class or sexual distinctions, the disease has exacted a tremendous human and financial toll throughout the world. It has spread rapidly, burdening the health care systems of many nations and spawning a number of difficult political, economic and moral problems.

In making critical decisions with respect to AIDS and its containment, governments have had to contend, in pointed fashion, with the tension inherent in all public health measures between the rights of individuals and those of society at large. Insofar as those decisions may entail attempts to control or influence the sexual behavior of individuals and the populace at large, governmental responses to AIDS cannot fail to involve state intervention to one degree or another in the most private of individual activities.

This article describes and examines the Japanese public, administrative and legislative response to the AIDS crisis, viewed in light of the particular circumstances surrounding AIDS in Japan. It also looks at the ways in which the Japanese government has tried to strike its own balance between the competing demands of individual autonomy and public necessity, while attempting to put in place an efficacious scheme to contain the spread of AIDS, a scheme which will promote the voluntary cooperation of people who may be infected.

After examining the evolution of the Japanese response to AIDS, with particular emphasis upon public reaction and problems posed by the prostitution industry and the large-scale infection of hemophiliacs through tainted blood products, the article analyzes Japan's AIDS Prevention Law. It concludes that Japanese law and policy are fraught, perhaps by design, with ambivalence and ambiguity.

Although granting less in the way of formal coercive power than many American statutes, the Japanese AIDS Prevention Law could, particularly as regards questioning and contact tracing, become the basis of a more intrusive and forceful coercive regime, should the actual situation surrounding or

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