

# The right of indigenous peoples to self-determination versus secession: One coin, two faces?

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## Summary

*The UN Declaration on the Rights of Indigenous Peoples of 13 September 2007 revisits the notion of 'self-determination' which has been the subject of great debate in international law over several decades and which still presents a quandary to international lawyers. As the representatives of indigenous peoples mentioned in a letter to the Working Group on Indigenous Populations in 1993, 'the right of self-determination is the heart and soul of the declaration'. Was the insertion of the right to self-determination in the Declaration intended to be understood in a broader sense as granting the right to indigenous peoples who fulfil certain conditions in the Declaration, to secede? In other words, is the right to 'self-determination', as contained in the Declaration, akin to a right to secession or is it akin to the right to 'self-determination' as contained in the United Nations Charter and in common article 1 of the two international Covenants? The notion of self-determination brings with it several issues for resolution. One such issue is the precise nature of self-determination in international law: Is it determinate or does it evolve over time? Can it be used for purposes of secession where the sovereign state*

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*does not guarantee such rights to indigenous people; or can it be used as justification for the secession of indigenous peoples where their right of self-determination within the state has been violated? It is argued in this article that the notion of 'self-determination' as used in the Declaration must be distinguished from 'self-determination' as used in the other international instruments, as a mere declaration cannot modify a norm of international law contained in international conventions and covenants. Since the Declaration does not provide sanctions for non-compliance, the author further argues that, where states do not conform, the sanction may well be the same as that for self-determination in general, amounting to what is much feared by states: the possible dismemberment of a state entity along indigenous lines. To arrive at this, the author analyses the notion of 'self-determination', on the one hand, and the ensuing development into the notion of the right to 'secession', on the other, before concluding that indigenous peoples who do not enjoy their indigenous rights within the state under the scope of internal self-determination, may exercise their right to external self-determination, and in the course of exercising their right to external self-determination, they may make claims to their right of 'secession'.*

## 1 Introduction

On 13 September 2007, the General Assembly of the United Nations (UN) adopted<sup>1</sup> the Declaration on the Rights of Indigenous Peoples (Declaration),<sup>2</sup> after over two decades of negotiations. This resolution failed to be adopted by consensus because of several reasons highlighted in the declarations of the countries that voted against as well as in the declarations of some of the countries that abstained from voting.

One issue that posed substantial problems during the negotiations and discussions was the implication of the insertion of the notion of 'self-determination' in the Declaration. The importance of the question of self-determination cannot be gainsaid. As the representatives of indigenous peoples mentioned in a letter to the Working Group on Indigenous Populations in 1993, '[t]he right of self-determination is the heart and soul of the Declaration'.<sup>3</sup> And they were not ready to 'consent to any language which limits or curtails the right of self-determination'.<sup>4</sup>

<sup>1</sup> The adoption was by a vote of 143 for, four against and 11 abstentions. The United States of America, New Zealand, Australia and Canada voted against the Declaration.

<sup>2</sup> UN Resolution A/RES/61/295 of 13 September 2007.

<sup>3</sup> Cited in S Pritchard 'Working group on Indigenous Populations: Mandate, standard-setting and future perspectives' in S Pritchard (ed) *Indigenous peoples, the United Nations and human rights* (1998) 46.

<sup>4</sup> Pritchard (n 3 above) 3.

Was the insertion of the right to self-determination in the Declaration intended to be understood in a broader sense as granting the right to indigenous peoples who fulfil certain conditions in the Declaration, to secede? In other words, is the right to 'self-determination' as contained in the Declaration akin to the right to 'self-determination' as contained in the UN Charter<sup>5</sup> and in common article 1<sup>6</sup> of the two international covenants? Is it akin to a right to 'secession' or does it have a separate meaning distinct from the above?

The final text of the Declaration seems to answer this question in the negative. Article 46(1) of the Declaration provides:

Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

I use the word 'seems' because this article, which was modified<sup>7</sup> at the behest of the African group, if read in isolation, may give the impression that the use of the expression 'self-determination' invariably would strive to protect territorial integrity and in no circumstance may amount to secession.

The notion of self-determination that reappears in this Declaration, like the mythical phoenix that rises from its ashes, brings with it several issues for resolution. One such issue is the precise nature of self-determination in international law: Is it determinate or does it evolve over time? Can it be used for purposes of secession where the sovereign state does not guarantee such rights to indigenous people, or can it be used as justification for the secession of indigenous peoples where their right of self-determination within the state has been violated?

I argue in this article that the notion of 'self-determination', as used in the Declaration, must be distinguished from 'self-determination' as

<sup>5</sup> The 1945 Charter.

<sup>6</sup> Art 1 of the International Covenant on Civil and Political Rights (General Assembly Resolution 2200A (XXI) of 16 December 1966) (CCPR) and art 1 of the International Covenant on Economic, Social and Cultural Rights (General Assembly Resolution 2200A (XXI) of 16 December 1966) (CESCR): '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, social 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 realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

<sup>7</sup> The initial draft reads: 'Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.'

used in other international instruments, as a mere declaration cannot modify a norm of international law contained in international conventions and covenants.

Since the Declaration does not provide sanctions for non-compliance, I further argue that where states do not conform, the sanction may well be the same as that for self-determination in general, which may amount to what is much feared by states, that is, the possible dismemberment of a state entity along indigenous lines. To arrive at this, I analyse the notion of 'self-determination', on the one hand, and its ensuing development into the notion of the right to 'secession', on the other, before concluding that indigenous peoples who do not enjoy their indigenous rights within the state under the scope of internal self-determination may exercise their right to external self-determination, and in the course of exercising their right to external self-determination, they may make claims to their right to 'secession'.

## 2 Justifications of the right of indigenous peoples to self-determination

One may ask the question: Why is it important to grant a right of self-determination specific to indigenous peoples? In other words, are the general human rights instruments not sufficient? What sense does it make to coin a new right to self-determination specific to indigenous peoples when the existing human rights instruments already afford them such rights? Is there no duplicity in such a provision? In the ensuing paragraphs, I highlight the insufficiency of treating the rights of indigenous peoples as general human rights and examine the justifications that have been advanced for the existence of a separate rights instrument for indigenous peoples.

The argument may be advanced that the Charter of the UN and common article 1 of the two international human rights Covenants make sufficient provision for the right to self-determination. The UN Charter provides *inter alia* in article 1 that the purpose of the UN shall be to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...',<sup>8</sup> and common article 1 of the two international Covenants<sup>9</sup> determines that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

These international instruments do not distinguish between the types of persons or peoples protected and may be deemed to be largely suf-

<sup>8</sup> Art 1(2) of the Charter of the United Nations.

<sup>9</sup> CCPR and CESCR.

ficient. Hence, the argument is that there is no necessity for another instrument specific to indigenous peoples.

The same question would have been asked as to the necessity of having specific instruments relating to the protection of the rights of children and minors<sup>10</sup> and the rights of women.<sup>11</sup> If those instruments were sufficient, then there would have been no need to over-belabour the point.

However, one argument that can be advanced is as to the specificity of the rights of indigenous peoples. Theirs cannot be treated merely as rights falling within the global ambit of human rights, as indigeneity<sup>12</sup> and the rights that go with it are specific.

The question of the rights of indigenous peoples is one of collective rights as opposed to individual rights. While the rights contained in the international Covenants may be actionable as individual rights under the international human rights system, the rights of indigenous peoples would be actionable as a collective right. Also, the various qualifications of the notion under UN practice did not extend it to cover minorities and indigenous peoples.

As to whether a communication can be brought before the Human Rights Committee for self-determination as a collective right, this possibility was eliminated by the Committee in the *Lubicon Lake Band* case.<sup>13</sup> In that case, the Committee opted for a restrictive interpretation of the Optional Protocol to the International Covenant on Civil and Political Rights (CCPR) with regard to complaints relating to the right of self-determination and held that:

While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive.

In the light of the foregoing, one may safely state that the Declaration serves as an instrument that would empower indigenous peoples with the appropriate tools to fight against such escape mechanisms in the protection of their rights. In fact, Amnesty International thinks that the

<sup>10</sup> Convention on the Rights of the Child (CRC).

<sup>11</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>12</sup> Some authors, such as Jeremy Waldron (*Indigeneity? First peoples and last occupancy* (2003)), prefer the use of the word 'indigeneity', while others, such as Patrick Thornberry (*Indigenous peoples and human rights* (2002)) prefer the word 'indigenesness'.

<sup>13</sup> *Lubicon Lake Band v Canada*, Communication No 167/1984, views adopted on 26 March 1990.

Declaration fills an important gap.<sup>14</sup> It addresses indigenous peoples' protection against discrimination and genocide. It reaffirms their right to maintain their unique cultural traditions and recognises their right of self-determination, including secure access to lands and resources essential for their survival and welfare. Though UN treaty bodies have repeatedly affirmed state obligations to protect indigenous peoples, the grave human rights violations they have experienced have continued unabated in every region of the world. 'Indigenous peoples are among the most marginalised and the most vulnerable.'<sup>15</sup>

### 3 The evolutionary nature of the theory of self-determination

The UN Declaration on Indigenous Peoples' Rights revisits a concept which is in constant evolution in international law. The difficulty in coining an overarching concept of self-determination has been present for a long time. The notion of self-determination may be seen as the chameleon of international law that changes its colour depending on circumstances and according to what kind of shrub it finds itself in. It is also very evasive in that it has been used to mean different things at different times.<sup>16</sup>

Hannum in his article 'Rethinking self-determination',<sup>17</sup> in presenting the difficulty inherent in coining a clear-cut scope and meaning for the concept of self-determination, states:

No contemporary norm of international law has been so vigorously promoted or widely accepted — at least in theory — as the right to self-determination. Yet the meaning of that right remains as vague and imprecise as when it was enunciated by President Woodrow Wilson and others at Versailles.

The evolutionary nature of the concept of self-determination is most aptly presented by Drew,<sup>18</sup> who states:

The right of self-determination is simply one of the most normatively confused and indeterminate principles in the canon of international legal doctrine ... beyond colonialism, the right of self-determination is played by an excess of indeterminacy both in terms of scope and content.

Building on this, one can clearly distinguish three periods in the evolution of the right to self-determination, namely, the use of the concept

<sup>14</sup> Amnesty International Index IOR 40/038/2006 (Public) News Service No 282 of 1 November 2006.

<sup>15</sup> As above.

<sup>16</sup> It was used during the League of Nations era to justify the creation of nation states in Europe; it was used for the purpose of decolonisation under the UN, and has been used after the decolonisation era for different purposes, including secession.

<sup>17</sup> (1993-1994) 34:1 *Virginia Journal of International Law* 2.

<sup>18</sup> C Drew 'The East Timor story: International law on trial' (2001) 12 *European Journal of International Law* 653.

before the decolonisation era, the use of the concept for the purpose of decolonisation and the evolution of the concept post-colonisation.

### 3.1 The period before decolonisation or the period before the United Nations

Brilmayer traces the origin of the concept back to the American Revolution and, in particular, to the text of the Declaration of Independence, and attributes its development to the French Revolution.<sup>19</sup> One may even argue that the wording of the American Declaration of Independence is itself clearly a case of colonial self-determination.

However, the International Committee of Jurists, established in 1920 to examine the question of whether the people of the Aaland Islands had a right to conduct a plebiscite on the issue of the territory's potential separation from Finland and amalgamation with Sweden, was of the view that, although self-determination was important in [modern] political thought, it was not incorporated into the Covenant of the League of Nations and, therefore, was not a part of the positive rule of the Law of Nations:<sup>20</sup>

Positive international law does not recognise the right of national groups, as such, to separate themselves from the state of which they form part by the simple expression of a wish, any more than it recognises the right of other states to claim such a separation.

The second body of experts, the Commission of Inquiry, described it as 'a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinions'.<sup>21</sup>

National self-determination became the paradigm for political organisation in the eighteenth and nineteenth centuries. The move was towards the creation of nation states with homogeneous populations based on language and culture. The nationalist argument was used to justify the wars that led to the disintegration of the Austro-Hungarian and Ottoman empires.

A more precise formulation of the concept is credited to President Woodrow Wilson, who coined the term even though he did not use it in his famous 'fourteen points' speech to the United States Congress on 8 January 1918 because of his belief that the principle was neither

<sup>19</sup> L Brilmayer 'Secession and self-determination: A territorial interpretation' (1991) 16 *Yale Journal of International Law* 177.

<sup>20</sup> Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aalands Question, Official Journal of the League of Nations (1920) Supplement No 3 5.

<sup>21</sup> The Aaland Islands Question 27, League of Nations Doc B7.21/68/106 (1921) (English version) (report submitted to the Council of the League of Nations by the Commission of Rapporteurs).

absolute nor universal. It was not until a month later that he addressed the question of self-determination directly in the following words:<sup>22</sup>

National aspirations must be respected; peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.

The League of Nations was to address the issue of self-determination after World War I through the system of mandates. In redrawing the map of Europe after the war, the victors tried to respect ethnic boundaries — at least with regard to the empire of the defeated nations.<sup>23</sup>

It was also to find some support in Marxism-Leninism. 'The principle of self-determination was used to encourage colonised peoples to throw off alien (and not, coincidentally, capitalist) domination.'<sup>24</sup> Thus, Russia supported self-determination for reasons of communism and quickly extended its power to the newly-freed nations.

### 3.2 Self-determination as a concept for decolonisation as used by the United Nations

One period when the purpose of self-determination was widely accepted was during the decolonisation era. It was used as a concept to relieve colonial peoples from the yoke of colonialism.

Though it was widely accepted, its content and format did not seem to be clear to international lawyers either. UN General Assembly Resolution 1514 (XV) of 14 December 1960 on the Declaration on Granting of Independence to Colonial Countries and Peoples provides in article 2 that '[a]ll 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'. Resolution 2625(XXV) of 24 October 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, in the section on the principle of equal rights and self-determination of peoples, states that '[e]very state has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter'. What is of cardinal importance here are the provisions of article 3 of General Assembly Resolution 1514 (XV) of 14 December 1960 on the Declaration on granting of independence to colonial countries and peoples, which provides unequivocally that 'inadequacy of political, economic,

<sup>22</sup> Woodrow Wilson 'War aims of Germany and Austria', Address of the President of the United States of America, delivered at a joint session of the two houses of Congress on 11 February 1918, para 5 <http://www12.dataformat.com/Document.aspx?doc=30724> (accessed 15 January 2009).

<sup>23</sup> Brilmayer (n 19 above).

<sup>24</sup> Brilmayer (n 19 above) 16.



social or educational preparedness should never serve as a pretext for delaying independence’.

These Resolutions did not delineate the format that self-determination was to take and who should qualify for self-determination in their application. There was therefore a debate as to whether it applied to ethnic groups, nation states or to any organised community. The criteria were fixed by two important UN documents by Hector Gros Espiell<sup>25</sup> and Aurelia Cristecu<sup>26</sup> to include a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance. However, this did not solve the problem. A people could have a common culture, language, boundary and will and capability to regain self-government and yet be spawn across two or more states. Furthermore, there could be a nation state where the people speak more than one language.

To ease things, a couple of tests were used that have all proved to be problematic today. The first was the principle *uti possidetis juris*<sup>27</sup> that was used to limit the boundaries to colonial boundaries. In as much as this had an advantage in that it limited the issue of determining the boundaries of the colonies in time, it had a major drawback in that those boundaries themselves, at the time they were drawn, did not take into consideration the geography of the area and the cultural constitution of the various peoples. In fact, the story is told of how a senior British official boasted about drawing a line with his blue pen to delimit the boundary between Nigeria and Cameroon (an area he had never been to) while sitting in his office in London:<sup>28</sup>

In those days we just took a blue pencil and a ruler, and we put it at Old Calabar, and drew that line to Yola ... I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.

<sup>25</sup> ‘The right to self-determination: Implementation of United Nations Resolutions. A study prepared by Hector Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ (E/CN4/Sub2/405/Rev1) 1980.

<sup>26</sup> Aurelia Cristecu (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) 1981 ‘The right to self-determination: Historical and current developments on the basis of United Nations instruments’ UN Document E/CN.4/Sub2/404/Rev1.

<sup>27</sup> A principle of international law that states that newly-formed states should have the same borders that they had before their independence.

<sup>28</sup> JC Anene *The international boundaries of Nigeria 1885-1960* (1970), cited by M Mutua in ‘Why redraw the map of Africa: A moral and legal inquiry’ (1994-1995) 16 *Michigan Journal of International Law* 1113. Little wonder, therefore, that several boundary disputes have occurred between Cameroon and Nigeria concerning the boundary in question, which culminated in the International Court of Justice ruling on the issue in October 2002 (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*).

Most of the borders of African states were drawn as a result of colonial conquests and states or entities with a long history of antagonism were crammed together into one state with more powerful tribes put under the control of weaker tribes with imperial support and supervision,<sup>29</sup> and 'it mattered little even when pre-colonial societies met the criteria for statehood, as many did'.<sup>30</sup> This could only serve as a recipe for future problems and disputes. Little wonder, therefore, that today there is a large cry for self-determination *cum* secession coming from most of these states.<sup>31</sup>

Another solution that was devised for self-determination during the colonial period was the 'salt water test'. By this test, the colony to qualify for self-determination had to be separated by the ocean from the colonial state. Put laconically, 'the 'salt water' test prescribed that the colony be 'external' to the 'mother country'.<sup>32</sup> This test could well have worked during the American Declaration of Independence (1776), as the 13 American colonies were separated by salt water from the colonial masters. However, such a test was based on the premise that colonialism only existed where the colonial power is on another continent and did not take into consideration colonialism on the same continent. The international understanding was that<sup>33</sup>

[a]part from colonies and other similar non-self-governing territories, the right to self-determination is extended only to territories under occupation ... and to majorities subjugated to institutionalised racism (segregation, apartheid) but not to minorities that are victims of similar policies.

The other test was the 'pigmentation test'.<sup>34</sup> This limited self-determination to black freedom from white rule. As Mazrui<sup>35</sup> puts it:

For many nationalists in Africa and Asia the right to sovereignty was not merely for the nation states recognisable as such in a Western sense but for 'peoples' recognisable as such in a racial sense, particularly where differences of colour were manifest.

This was the most ridiculous of all the tests, as it only looked at colonialism on the African continent and saw it as a racial issue. It did not

<sup>29</sup> CW Hobley in his book *Ethnology of the A-Kamba and other East Africa tribes* (1910) 43-48 tells how the 'Akamba, Kikuyu and the mAsai, three groups which fought each other from time to time, were all bunched into the new state of Kenya', cited in Mutua (n 28 above).

<sup>30</sup> Mutua (n 28 above) 1125-1126.

<sup>31</sup> Eritrea, Biafra, Katanga, Southern Cameroons, and such.

<sup>32</sup> JS Ward 'The Mi'kmaq and the right to self-determination' (2004) 1 *Célanen: A journal of indigenous governance* 1 [http://web.uvic.ca/igov/research/journal/articles\\_ward\\_p.htm](http://web.uvic.ca/igov/research/journal/articles_ward_p.htm) (accessed 10 April 2009).

<sup>33</sup> Ward (n 32 above) para 32.

<sup>34</sup> W Ofuathey-Kodjoe *The principle of self-determination in international law* (1997) 129-147.

<sup>35</sup> AA Mazrui *Towards a pax Africana: A study of ideology and ambition* (1967), cited in OS Kamanu 'Secession and self-determination: An OAU dilemma' (1974) 12 *Journal of Modern African Studies* 356.

take into consideration colonialism practised by persons of the same colour on peoples of the same colour. I doubt if such a test was applied to the American colonies it would have had the same effect.

One issue that was not very clear was whether these three tests had to be applied together or whether one could be applied to the exclusion of the others, or whether a combination of any two would have been satisfactory. My guess is that the first test was indispensable, that is, the justification of a boundary in conformity with the principle of *uti possidetis juris*, coupled with a culture and language of the peoples. The other two could be applied in any form and in fact could even have been dispensed with in certain cases. However, it is worth mentioning that *uti possidetis juris* is the only test that mattered in the decolonisation era, save for exceptional cases such as Namibia and Western Sahara.

It has also not been very straightforward for international lawyers to agree on the notion of 'people' or 'peoples' for the purpose of self-determination. What enables a group or people to claim the right to self-determination? According to Hannum,<sup>36</sup> the definition would normally include subjective and objective components:

At a minimum it is necessary for members of the group concerned to think of themselves as a distinct group. It is also necessary for the group to have certain objectively determinable common characteristics, eg ethnicity, language, history, or religion.

Friedlander provides a more straightforward set of criteria: 'A people consists of a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory.'<sup>37</sup>

### 3.3 Self-determination in the post-decolonisation era

The argument of self-determination has been used even after the colonial period and out of the colonial context. It would be illogical to limit the question of self-determination to dealing with colonial issues. It is not right for any people to be subjected to alien subjugation.

The cases of self-determination cited above constitute what I refer to as 'positive' self-determination. That is, where people exercise the right by choosing to associate in an entity organised to rule itself. But there may also be cases of 'negative' or 'reverse' self-determination. This would be the case where a people decide to break away from an existing entity and form their own state. Buchheit<sup>38</sup> refers to this situation as 'remedial secession':<sup>39</sup>

<sup>36</sup> H Hannum 'Rethinking self-determination' (1993-1994) 34:1 *Virginia Journal of International Law* 35.

<sup>37</sup> RA Friedlander 'Proposed criteria for testing the validity of self-determination as it applies to dissatisfied minorities' (1997) 25 *Chitty's Law Journal* 335 336.

<sup>38</sup> L Buchheit *Secession: The legitimacy of self-determination* (1978).

<sup>39</sup> Buchheit (n 38 above) 222 para 2.

Remedial secession envisions a scheme by which corresponding to the various degrees of oppression inflicted upon a particular group by its governing state, international law recognises a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the ultimate remedy.

However, this has been accepted only after long and devastating wars or where the sovereign state consents to self-determination of part of its territory. The cases of the secession by Eritrea from Ethiopia and Bangladesh from Pakistan are examples of cases where the right may be exercised after long and bloody wars. The self-determination of the countries of the former Soviet Union was only achieved with the consent of Russia. Kohen states:<sup>40</sup>

When a new state is formed from part of the territory of another state with its consent, it is a situation of 'devolution' .... This presupposes an agreement between the two states and, as such, is not a source of conflict, at least with regard to the existence of the new state itself.

There is a lot of inconsistency in the practice outside the colonial context as the UN has been seen to admit certain countries that acquired self-determination in violation of the principle of states sovereignty (Eritrea from Ethiopia and Bangladesh from Pakistan), while they opposed the self-determination of Biafra from Nigeria and in fact sent UN forces to quell the Katangese rebellion for self-determination from the Congo. In as much as this has no immediate bearing on the admission policy of the UN, it seems rather that the issue of fanning state sovereignty in deciding issues of self-determination is governed by the recognition policies of great powers.

The only international instrument that apparently extends the right of self-determination beyond the colonial context is the Helsinki Final Act of the Conference on Security and Co-operation in Europe (CSCE) of 1975. It provides in Principle VIII:<sup>41</sup>

The participating states will respect the equal rights of peoples and their right to self-determination. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

<sup>40</sup> MG Kohen 'Creation d'Etats en droit international contemporain' (2002) 6 *Bancaja Euromediterranean Courses of International Law* 573.

<sup>41</sup> This article of the Helsinki Final Act also carries the popular *caveat* on the limitation of the right to secession. It states that the right has to be exercised 'in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states'.

### 3.4 Self-determination under the African Charter on Human and Peoples' Rights

Other than the two international covenants already mentioned, prominent among human rights treaties are the provisions of the African Charter on Human and Peoples' Rights (African Charter)<sup>42</sup> on self-determination. The African Charter insists on the equality of peoples in article 19 and hammers on the fact that there can be no justification for the domination of a people by another: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Article 20 sets forth the right of self-determination:

- 1 All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- 2 Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
- 3 All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

In great contrast to the beautiful phraseology contained in the African Charter, most African states have adopted a very limited interpretation of the concept outside the post-colonial context of independence.<sup>43</sup>

Because of the extreme ethnic heterogeneity of most African states and the resulting difficulty in developing a sense of statehood in the post-independence period, the principles of territorial integrity and national unity have been widely felt to be more fundamental than that of self-determination.

## 4 The right of indigenous peoples to self-determination

### 4.1 The right under the United Nations Declaration

The right of indigenous peoples to self-determination under the UN Declaration<sup>44</sup> was not achieved without much debate. In fact, it was an issue of controversy and underwent numerous modifications before the final Declaration. In this section, I will examine the right under the

<sup>42</sup> Adopted on 27 June 1981 [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) (accessed 21 January 2009).

<sup>43</sup> H Hannum *Autonomy, sovereignty and self-determination: The accommodation of conflicting rights* (1990) 46-47

<sup>44</sup> UN Resolution A/RES/61/295 of 13 September 2007.

Declaration alongside the different formulations that were presented before its final adoption.

Preambular paragraph 16 of the UN Declaration states the principle of self-determination in blanket terms:

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3 goes a little further and states that '[i]ndigenous 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.'

It has not been easy to justify the insertion of this article, which is culled *verbatim* from the Charter of the UN and common article 1<sup>45</sup> to the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, in the Declaration.

Article 4 goes further to state:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

What is the purport of this addition if the intention is not to grant a separate right of self-determination to indigenous peoples distinct from that in the international Covenants?

In order to arrive at the formulation in articles 3 and 4, the Declaration saw several proposals on the issue of self-determination which the indigenous caucus<sup>46</sup> held was primordial for the protection of the rights of indigenous peoples. The draft proposals of the representatives of indigenous peoples to the Working Group on Indigenous Populations (WGIP) followed the following formulations: The representatives of indigenous peoples submitted a draft to the 4th session in 1985 with the following formulation:

All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference.

<sup>45</sup> 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

<sup>46</sup> A Working Group on Indigenous Populations was formed at the level of the UN that monitored the negotiations and in fact drafted the article on self-determination without which they thought the whole exercise would have been futile.

At the 8th session in 1990, the formulation was as follows:

Indigenous peoples have the right of self-determination, by virtue of which they may freely determine their political status and institutions and pursue their own economic, social, religious and cultural development.

During the 1991 session of the WGIP, what appears to be the Preamble and articles 3 and 4 of the Declaration today were presented as one article, namely:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the states in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

The UN Meeting of Experts to Review the Experiences of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Populations in 1991, presented the following formulation:

Indigenous peoples have the right of self-determination as provided for in the international covenants on human rights and public international law and as a consequence of their continued existence as distinct peoples. This right will be implemented with due consideration to other basic principles of international law. An integral part of this is the inherent and fundamental right of autonomy and self-government.

The evolution of these drafts clearly shows an inherent fear in the WGIP not to venture onto controversial issues that may hamper the adoption of the Declaration when it is finally tabled, such as the fear that the interpretation of self-determination may grant a right of secession. Their fears were founded.

The four countries that voted against the Declaration had various reasons for doing so. The issue of self-determination was central to the hesitation of three of the four countries (the United States, Australia and New Zealand), as they felt that this could lead to some misconception and misinterpretation in the course of the application of the Declaration. Such fears are not wholly unfounded.

The representative of the United States<sup>47</sup> questioned the insertion of the concept on the grounds that it 'risked endless conflicting interpretations and debate about its application'. To him, 'under existing common article 1 legal obligations, indigenous peoples generally are not entitled to independence nor any right of self-government within the nation state'. That it was not the mandate '... to qualify, limit, or expand the scope of the existing legal obligations set forth in common article 1', but that the mandate was 'to articulate a new concept' of 'self government within a nation state'. Furthermore, he finds 'such an

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<sup>47</sup> USUN Press Release of 13 September 2007: Explanation of vote by Robert Hagen, US Advisor on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly.

approach on a topic that involves the foundation of international law ... likely to result in confusion and disputes<sup>7</sup>.

Australia, for its part, contended that:<sup>48</sup>

Self-determination applies to situations of decolonisation and the break-up of states into smaller states with clearly defined population groups. It also applies where a particular group with a defined territory is disenfranchised and is denied political or civil rights. It is not a right which attaches to an undefined subgroup of a population seeking to obtain political independence.

New Zealand<sup>49</sup> challenged the Declaration on grounds that it conflicted with the Treaty of Waitangi<sup>50</sup> and various dispositions of its Constitution.

Canada<sup>51</sup> thought that the issue ought to have been seen in terms of self-government and the question of self-determination under Canadian jurisprudence should be subject to negotiations.

Though the United Kingdom voted for the Declaration, it mentioned that it understood that the Declaration did not apply to UK overseas territories. One may wonder, therefore, if the broad concept of self-determination, as used for the decolonisation of colonial peoples, should not apply to the so-called UK overseas territories.

During the negotiations, the African group<sup>52</sup> made observations on the insertion of the notion of self-determination in the Declaration in a rather contradictory manner. On the one hand, the group observed:

The principle of self-determination only applies to peoples under colonial and/or foreign occupation, that is people residing in territories or areas which fall within the jurisdiction of the UN trusteeship system, as enumerated in article 77 of the United Nations Charter as well as those non-self-governing peoples within the purview of article 3 of the UN Charter. Implicitly recognising the rights of indigenous peoples to self-determination in ... the Declaration can be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity and the territorial integrity of any country.

It must be precised that the recognition of the right to self-determination was not implicit (as the African group claimed), but express. The preoccupation of the African working group here echoes the fear of

<sup>48</sup> Explanation of vote by Hon Robert Hill, Ambassador and Permanent Representative of Australia to the UN, 13 September 2007.

<sup>49</sup> Explanation of vote by New Zealand Permanent Representative to the UN, HE Ms Rosemary Banks, 13 September 2007.

<sup>50</sup> 1840.

<sup>51</sup> Statement by Ambassador John McNee, Permanent Representative of Canada to the UN, regarding the UN Declaration on Indigenous Peoples' Rights of 13 September 2007.

<sup>52</sup> *Aide Memoire* of 9 November 2006.



the so-called dismemberment of a state as a result of the exercise of the right to self-determination. That is, the question of secession.<sup>53</sup>

On the other hand, the African group, overwhelmed by the fear of secession, loses sight of the objective of the issue of self-determination in the Declaration. They argue that the Declaration may be misunderstood as embracing and promoting self-determination within nation states. For all intents and purposes, the Declaration is actually intended to promote self-determination, at the least within nation states. That is, internal self-determination.

These misapprehensions were rectified by the African Commission on Human and Peoples' Rights (African Commission) in its Advisory Opinion of May 2007, in which it argued that

the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompassing a series of rights relative to the full participation in national affairs.

The African Commission also echoes its preference for internal self-determination as opposed to external self-determination in the following words: 'It is ... a collection of variations in the exercise of the right of self-determination, which are entirely compatible with the unity, and territorial integrity of state parties.'

It is therefore clear that the African Commission, even though it differs with the views of the African group, merely quelled the fears of the group on issues of external self-determination and draws from its jurisprudence to state that self-determination of indigenous peoples is compatible with the African Charter, provided it is 'exercised within the national inviolable borders of a state, by taking due account of the sovereignty of the nation state'.<sup>54</sup>

The argument of the African Commission is a double-edged sword. If the argument was used to create nation states in Europe, why can it not be used to create nation states in Africa? Furthermore, it is my humble opinion that Eritrea would beg to differ with such a view as that would be incompatible with the process that was used to arrive at the creation of an independent Eritrea.

#### **4.2 Can one found a theory of secession from a breach of the right of indigenous peoples to self-determination?**

Secession may be seen as the extreme side of self-determination since it leads to the complete dismantling of the state. According to Buchanan,<sup>55</sup> the notion of secession is premised on two types of normative theories: Remedial Right Only theories and Primary Right theories. According to the Remedial Right Only theories, the right to

<sup>53</sup> This is the subject of discussion of the next section.

<sup>54</sup> n 46 above.

<sup>55</sup> A Buchanan 'Theories of secession' (1997) 26 *Philosophy and Public Affairs* 35.

secede is analogous to the right to revolution, understanding it as a right that a group comes to have only as a result of violations of other rights. On this view, secession is justified only as a remedy of last resort for persistent and serious injustices. Examples of Remedial Right Only cases of secession would include secession on grounds of (a) large-scale and persistent violations of basic human rights; (b) unjust taking of the territory of a legitimate state; and (c) in certain cases, the state's persisting violation of agreements to accord a minority group limited self-government within the state.<sup>56</sup> It goes without saying, therefore, that, based on the Remedial Right Only theory, where indigenous peoples have been deprived of the minimum right of self-determination within the state, they may seek to exercise their right to secede.

The other right is what Buchanan refers to as 'Primary Right theories' to secede. By this right, a group can have a right to secede not only on remedial grounds, but the right to secede can exist even when the group has not been subject to any injustice. This second type of theory thus holds that there is a right to unilateral secession over and above whatever remedial and hence derivative right there may be. Primary Right theories are of two types: Ascriptivist theories and Associative Group theories. The former hold that certain groups whose memberships are defined by what are sometimes called ascriptive characteristics, simply by virtue of being those sorts of groups, have a unilateral right to secede. 'Ascriptive characteristics are those that are ascribed to individuals independently of their choice and include being of the same nation or being a "distinct people".'<sup>57</sup> The most common form of Ascriptivist theory holds that nations as such have a right to self-determination that includes the right to secede in order to have their own state.

The Associative Group theories or Plebiscitary theories<sup>58</sup> in contrast hold that a unilateral moral claim-right to secede exists if a majority residing in a portion of the state chooses to have their own state there, regardless of whether or not they have any common characteristics, ascriptive or otherwise, other than the desire for independence. They need not be co-nationals or members of a distinct society.<sup>59</sup>

What the two types of Primary Right theories have in common is that they do not require injustice as a necessary condition for the existence of a right to secede. They are *Primary* Right theories because they do not make the right to secede derivative upon the violation of other, more basic rights, as the Remedial Right Only theories do.

On the strength of the foregoing, one may argue that indigenous peoples, either in the exercise of their Remedial Right, where that may

<sup>56</sup> *Stanford encyclopedia of philosophy*.

<sup>57</sup> Buchanan (n 55 above) 38.

<sup>58</sup> A Buchanan 'Self-determination, secession and the rule of international law' in D Copp (ed) *International law and morality in the theory of secession* (1998).

<sup>59</sup> n 56 above.

be the case where their right to self-determination within the state is violated, or in a broader sense, in the simple exercise of their right under the Associative Group theories, may choose to secede from the existing state in application of their right to self-determination under the Declaration on Indigenous Peoples' Rights.

One of the fears clearly established in all the arguments advanced against the insertion of self-determination in the UN Declaration is that it may lead to an open interpretation that may in turn lead to claims of secession. Be these arguments as they may, they all implicitly betray support for the provision to be used to justify secessionist tendencies if they are carried out by indigenous peoples, especially so where their rights to internal self-determination have been violated.

The revisiting of the notion of self-determination is living proof that the question of self-determination is very much alive and still presents a quandary in international law. It is dynamic and denies being limited to decolonisation. It presents itself as an amorphous object that changes its structure over time and in different conditions. It has been used to justify rebellion of the governed against their rulers during the American War of Independence and the French Revolution; it was used by President Woodrow Wilson to justify the creation of nation states in Europe after World War I, based on the respect of ethnic boundaries; and it was used during the League of Nations mandate system to justify the creation of trust territories.<sup>60</sup> It has been used by the UN for the purpose of decolonisation and it has even been used after the decolonisation era. The cases are akin to cases of secession and secessionist groups are using the notion for the same purpose.

International law neither forbids nor encourages secession. If one were to apply the popular legal adage that what is not forbidden by the law is permissible, then one may argue that secession is permitted under international law. International law has often treated secession as a matter of fact. 'If the secessionist forces were able to impose the existence of a new state, then the international legal system was to record the fact of the existence of this new entity.'<sup>61</sup>

Article 46 of the Declaration<sup>62</sup> smacks of *déjà vu*. It was used more or less *expressis verbis* in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation<sup>63</sup> on the principle of equal rights and self-determination of peoples:

<sup>60</sup> Art 22 of the Covenant of the League of Nations.

<sup>61</sup> MG Kohen (ed) *Secession: International law perspectives* (2006) 5.

<sup>62</sup> 'Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.'

<sup>63</sup> General Assembly Resolution 2625 (XXV) of 24 October 1970.

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent 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.

Also, the UN Declaration, on the granting of independence to colonial peoples,<sup>64</sup> provides in its article 6:

Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

This seems a rather curious statement in a resolution on decolonisation. One may wonder if the purport of the provision was to limit the application of the principle of self-determination to colonial peoples. If that was the case, then the purpose would have been defeated.

The question of self-determination has and shall always remain the Janus<sup>65</sup> of international law. Whenever it is mentioned, there is no doubt it shall always have two faces: one looking in front, at what is intended to be understood, and the other looking backwards, at what may be implied, that is, secession. That is why, whenever it is used, an extra effort is made to qualify and contain the interpretations that may be given to it by the insertion of the so-called 'safeguard clauses'.

The insertion of the 'safeguard clause' on the notion of self-determination in the Declaration comes with little surprise to the international lawyer, as it has been the practice of existing states to frown at the dismemberment of the territory of one of its members. The use of the word 'secession' even sounds like a taboo in international law discourse. Various forms of euphemisms have been used to describe cases that otherwise would have qualified as clear cases of secession, such as 'separation [of parts of a state], devolution and dissolution'.<sup>66</sup> Of course, the Vienna Convention on Succession of States in respect of Treaties of 12 August 1978 also carries the most celebrated *caveat* in limiting the right to secede.<sup>67</sup>

The present Convention applies only to the effects of a succession of states occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

What then is the significance of the incorporation of the beautiful phraseology of self-determination in the Declaration? I am of the opinion that the provision should be given effect to and where indigenous

<sup>64</sup> General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>65</sup> In Roman mythology, Janus (or Ianus) was the two-faced god of gates, doors, doorways, beginnings and endings.

<sup>66</sup> Vienna Convention on Succession of States in respect of Treaties, 23 August 1978.

<sup>67</sup> Art 6.

peoples are not given the possibility to exercise their right of self-determination within the nation state, they should be allowed to exercise their right of external self-determination or secession. As a matter of fact, as Tomuschat argues, '[t]here are not two different rights to self-determination, one internal and the other external, but two aspects of a single right'.<sup>68</sup> This solution is not without its own difficulties and one would have to resolve the problem that, as a question of positive law, when is the self-determination of an indigenous group sufficiently frustrated that they must turn outwards and secede? Is this a purely negative concept of self-determination, or can the right to external self-determination kick in when states fail to provide indigenous peoples with affirmative rights protection?

Buchanan<sup>69</sup> finds two compelling justifications for secession, namely, 'rectificatory justice' and 'discriminatory redistribution'. The argument as to rectificatory justice is premised on the 'assumption that secession is simply the re-appropriation, by the legitimate owners, of stolen property'. The discriminatory redistribution argument is for the 'secessionists to show that they are victims of "discriminatory redistribution" at the hands of the state'. This argument seems to be the one advanced by most secessionist groups<sup>70</sup> and may be well-founded if indigenous peoples in the exercise of their right to self-determination could prove discriminatory redistribution.

## 5 The implications of non-respect of the right to internal self-determination or violation of human rights of indigenous peoples

### 5.1 Implications on justiciability

How is the UN Declaration on Indigenous Peoples' Rights, not being a binding instrument, intended to be justiciable? Is the right justiciable as an economic, social or cultural right or a civil and political right? The Declaration carries no mechanism for its enforcement. Is it meant to be a tool for indigenous peoples to pile declarations on their right to self-determination?

The issues of justiciability that arose in the *Mikmaq* case<sup>71</sup> can still be raised in the case of the justiciability of the rights of indigenous peoples to self-determination. In that case, a communication was brought by a representative of the Mikmaq tribal society who claimed that the Mikmaq peoples' right of self-determination had been violated by Canada.

<sup>68</sup> C Tomuschat 'Secession and self-determination' in Kohen (n 61 above) 23-45.

<sup>69</sup> A Buchanan *Self determination and the right to secede* (2001).

<sup>70</sup> The Basque secessionists in Spain, Biafra in Nigeria, Katanga in Congo.

<sup>71</sup> *The Mikmaq Tribal Society v Canada*, Communication No 78/1980 (30 September 1980), UN Doc Supp No 40 (A/39/40) 200 (1984).

The Committee failed to pronounce itself on the substance of the communication, but instead decided that the complaint was inadmissible on the basis of lack of *locus standi* of the tribe's representative — in light of the failure of the Grand Council, as its legal entity, to authorise the author.

There ought to have been a clear mechanism where, if the rights of indigenous peoples were violated, they can make them actionable before the courts. In the absence of this, the fear is that the Declaration may as well remain a toothless bulldog.

Even though the Declaration is not a binding instrument, inspiration can be drawn from some common law jurisdictions that have made aboriginal rights justiciable. McHugh<sup>72</sup> sees it in the light of public interest litigation. In his article, he examines a certain number of cases decided by courts in common law countries<sup>73</sup> and states that those cases projected the specter of aboriginal rights. The aboriginals became active members rather than passive objects of the mainstream legal system. He advocates for the use of 'breakthrough rights' to accomplish this purpose. That is, the use of 'soft law' adaptation (litigation, negotiation and administration) to achieve rights recognition and hence an erosion of the concepts of non-justiciable 'political trusts' (New Zealand) and '*terra nullius*' (Australia). He distinguishes between three types of aboriginal rights, namely, jurisdictional, procedural and proprietary, of which the jurisdictional and procedural rights will contribute directly to the achievement of the goal of justiciability. Jurisdictional-type rights is the acceptance by the legal system of the inherent authority of the tribe over its own people and territory, and procedural-type rights is the right to participate in decision making with the support of the courts.

## 5.2 Legal secession as an alternative?

Recognising the right of indigenous peoples to self-determination is one thing and implementing such rights is another. Where all attempts at internal self-determination have failed, can indigenous peoples exercise their right to external self-determination by the use of legal means notably the courts? In order for this to be possible, the indigenous peoples must be capable of constituting themselves into a state. According to Hannum,<sup>74</sup> a state must possess the following characteristics: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. Where there is a total failure to allow indigenous peoples to

<sup>72</sup> P McHugh 'New dawn to cold light: Courts and common law Aboriginal rights' in R Bigwood (ed) *Public interest litigation: New Zealand experience in international perspective* (2006) 25-68.

<sup>73</sup> The *Coulder* case in Canada; the *Martinez* case by the US Supreme Court; the *Mauri Council* case in New Zealand; and the *Mabo* case in Australia.

<sup>74</sup> Hannum (n 36 above).

exercise their right of internal self-determination as provided by the Declaration and in the absence of any clear mechanism for their justiciability domestically, can the indigenous community exercise their right of external self-determination?

That possibility does not seem to have been rejected by the Canadian Supreme Court in *Reference re Secession of Quebec*<sup>75</sup> and the African Commission in *Katanga v Zaire*.<sup>76</sup> In the former case, the Canadian Supreme Court held:<sup>77</sup>

Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

In the latter case, the African Commission was of the opinion that the people of Katanga could secede if they could show the violation of their human rights.<sup>78</sup>

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

The Helsinki Final Act, which recognises the notion of self-determination outside the colonial context, is also a powerful instrument in this context:

The participating states will respect the equal rights of peoples and their right to self-determination ... By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

<sup>75</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217, in the matter of sec 53 of the Supreme Court Act, RSC, 1985, c S-26.

<sup>76</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

<sup>77</sup> n 75 above, 85 para 155.

<sup>78</sup> Para 6.

## 6 Conclusion

The insertion of the notion of self-determination in the UN Declaration on the Rights of Indigenous Peoples of 13 September 2007, like the mythical phoenix that rises from the ashes of the old, has rekindled the debate on an issue which is not quite settled in international law.

Its constant mutation can well play into the court of secessionists. Despite all the *caveats*, such as article 46 excluding the possible dismemberment of states, it is difficult to exclude the possibility of secession in the absence of proper self-determination of indigenous peoples. After all, can one not argue that, as the law of divorce has evolved from justifying 'irretrievable breakdown of marriage' by proving one of five facts (ranging from adultery to five years' separation), to no-fault divorce, so too, where the marriage of peoples within a nation state is no longer a going concern, can they not be allowed to separate regardless of the name given to such separation, be it self-determination or secession? Or should the international community prefer the present 'buckets of blood'<sup>79</sup> solution, as witnessed in the cases of Eritrea, Biafra, Bangladesh and Katanga?

Secession ultimately appears to be one side, albeit the hidden side, of the self-determination coin.

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<sup>79</sup> AA Mazrui 'The African state as a political refugee: Institutional collapse and human displacement' (1995) 7 *International Journal of Refugee Law* 23.