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The “Belgian thesis” today.

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Abbreviations

AJIL	American Journal of International Law
Ed.	Editor
Edn.	Edition
Eds.	Editors
G.A.	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILO	International Labour Organisation
OSCE	Organisation for Security and Co-operation in Europe
Para.	Paragraph
Res.	Resolution
UN	United Nations
UP	University Press
VCLT	Vienna Convention on the Law of Treaties
vol.	volume
vs.	versus

1 Introduction

“If we are to recognize the inner dignity of the particular man, this obligation extends to all positive characteristics with which he connects his dignity; if we love a man we must love his nation, which he loves and from which he does not separate himself”.¹ But what does it mean to love a man’s nation? To this day there are no precise legal answers to this question. Worse, however, is the persistent and widespread refusal to merely recognize certain nations’ right to be loved. This deplorable situation is undoubtedly linked up with the lack of a definition of “love”, but is also caused by the narcissistic love and selfishness proper to most powerful nations.

Exactly half a century ago, Belgium developed the thesis that all indigenous peoples were to be loved. In the midst of the anti-colonial struggle, Belgian delegates at the UN, defended the idea that all States having indigenous peoples under their authority were under an obligation to develop self-government for these nations. The so-called “Belgian thesis” became legendary and developed into a banner of the indigenous peoples’ strife for independence. Even 50 years later some use it to make their battle-cries more sound.

How bizarre! How bizarre that a colonial power, like Belgium, would have preconized independence for all indigenous peoples. How bizarre that a divided society, harbouring two big linguistic communities, like Belgium, would have preached unreasonable love for all nations. Were the Belgians foolish? Or have they been misunderstood? And if so, how come and what did they really say? And if they said something else than what we were told they said, are the things they actually said still valuable today? Those are the questions I intend to answer in this little thesis of my own.

¹ V. Solovyev quoted in E. Kamenka, *Human Rights: Peoples’ Rights*, in J. Crawford (ed.), *The rights of peoples*, Oxford, Clarendon Press, 2001, p. 131.

2 The “Belgian thesis”.

“The United Nations has the interests of peoples at heart; territories are important only because of the people who live there and suffer.”²

2.1 The normative blueprint for “non-self-governing territories”.

2.1.1 The origin.

Chapter XI of the United Nations Charter, entitled “Declaration regarding non-self-governing territories”, encapsulates the normative blueprint for all territories “whose peoples have not yet attained a full measure of self-government”. “Members of the United Nations which have or assume responsibilities for the administration of [such] territories (...) recognize the principle that the interests of the inhabitants of these territories are paramount, and accept (...) to ensure (...) their political, economic, social and educational advancement, their just treatment, (...) [and] to develop self-government, ...”³

The Chapter grounds in the idea that “all political power which is set over men (...) ought to be some way or other exercised ultimately for their benefit”.⁴ Colonial rule, accordingly, must primarily benefit the colonised

² P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952 reproduced in *The Sacred Mission of Civilization: To which peoples should the benefits be extended? The Belgian Thesis*, Belgian Government Information Center, New York, 1953, p. 28.

³ Article 73 of the Charter of the United Nations.

⁴ E. Burke, Speech delivered before the House of Commons in 1783 in the course of a debate on a law concerning the Indies, quoted in F. van Langenhove, *The Question of the Aborigines before the United Nations: The Belgian Thesis*, Royal Colonial Institute of Belgium, Brussels, 1954, p. 60.

population. This thought was developed by the Spanish legal scholars and theologians of the sixteenth century, especially de las Casas and de Vitoria and later by Edmund Burke in his speech of 1783 relating to India.⁵ They theorized what became known as the “sacred trust of civilisation”⁶. “Advanced nations”⁷ were entrusted with the guardianship of so-called “backwards peoples”, like parents take care of their children.⁸ The idea was particularly taken to heart by the British colonial administration and was expressed on the international scene in several multipartite treaties during the nineteenth century.⁹ It was finally codified as the principle of trusteeship in article 22 of the Covenant of the League of Nations, instituting the system of mandates.¹⁰

Under this system, the entrusted powers had the duty to guide the administered peoples to independence, at least in the so-called A-mandated territories (Palestine, Syria and Lebanon, Trans-Jordan, and Iraq).¹¹ The system was limited to the dependent territories of Germany and the Ottoman Empire, the ex-enemy States of World War I. Dependent territories belonging to other Members of the League of Nations and, more precisely, the native inhabitants were only guaranteed “just treatment” under article 23

⁵ D. Rauschnig, *Article 75*, in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Munich, C. H. Beck, 1994, p. 1099; F. van Langenhove, *The Question of the Aborigines...*, cit., p. 32 and pp. 60-62; G. C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de las Casas*, «Australian Year Book of International Law», vol. 13, 1992, p. 8, reproduced in S. J. Anaya (ed.), *International Law and Indigenous Peoples*, Dartmouth and Ashgate, Aldershot, 2003, p. 3. and D. Sanders, *The Re-emergence of Indigenous Questions in International Law*, «Canadian Human Rights Yearbook», vol. 3, 1983, p. 5, reproduced in S. J. Anaya (ed.), *International Law...*, p. 55.

⁶ Article 22, paragraph 1 of the Covenant of the League of Nations.

⁷ Article 22, paragraph 2 of the Covenant of the League of Nations.

⁸ F. van Langenhove, *The Question of the Aborigines...*, cit., p. 61.

⁹ J. L. Kunz, *Chapter XI of the United Nations Charter in Action*, in «AJIL», vol. 48, 1954, p. 103. See for example: article 6 of the Berlin Act of 1885. One should, however, not forget that often the worst crimes were committed under the banner of “civilization”. One can think of the atrocities committed under the authority of King Leopold II of Belgium in Congo. See R. A. Plumelle-Urbe, *La férocité blanche: des non-blancs aux non-aryens, génocides occultés de 1492 à nos jours*, Albin Michel, Paris, 2001, p. 96 et seq.

¹⁰ J. L. Kunz, *Ibidem*.

¹¹ K. Doehring, *Self-determination*, in B. Simma (ed.), *The Charter...*, cit., p. 51 and A. Eide, *In Search of Constructive Alternatives to Secession*, in C. Thomschhat, *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 150.

(b) of the Covenant.¹² They had no guarantee of self-government in any sense. Dependencies of ex-enemies, thus, had better prospects than all other dependent territories. This only makes sense if one knows that the system of “mandates” was the “accidental” compromise in a moral dilemma. On the one hand, there was a desire to deprive the defeated powers of their dependent territories and, on the other hand, there was a preoccupation to not counteract the earlier engagements abjuring territorial conquest.¹³ Rather than being directly annexed, fifteen Middle Eastern, African and Pacific Island territories thus ended up in a “Mandate system”.¹⁴ It was nice rhetoric and absolved the concerned of their conscious objections.

In the aftermath of World War II, the victorious powers faced the same moral conflict. The trusteeship system thus succeeded the mandate system. The Allies felt, however, that the *Zeitgeist* no longer allowed them to restrict the beneficial status to dependent territories of their ex-enemies, whilst excluding their own dependent territories, whose peoples had contributed to the victory.¹⁵ Thus, Chapters XII and XIII of the United Nations Charter, which lays down the international trusteeship system, provided the possibility to place non-ex-enemy territories by treaty (trusteeship agreement) under the system;¹⁶ moreover and more important, these Chapters were preceded by Chapter XI which was initially - during the

¹² Article 23 (b) of the Covenant of the League of Nations and D. Sanders, *ibidem*, p. 18.

¹³ F. van Langenhove, *Le Problème de la Protection des Populations Aborigènes aux Nations Unies*, in «Recueil des Cours», vol. 89, 1956, p. 401; See also R. Falk, *Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in W. Danspeckgruber (ed.), *The Self-Determination of Peoples: Community, nation, and state in an interdependent world*, Boulder, Lynne Rienner in association with the Liechtenstein Institute on Self-Determination, Princeton University, 2002, p. 40. See for example the French constitution of the third of September 1791 declaring the renunciation of wars of conquest.

¹⁴ J. Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in Alston, Ph. (ed.), *People's rights*, Oxford, Oxford University Press, 2001, p. 14. See also the list in J. Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979, pp. 426-428.

¹⁵ M. Bedjaoui, *Article 73*, in J-P. Cot, A. Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article*, Economica, Paris, 1991, 2^e édition revue et augmentée, pp. 1078-1079.

¹⁶ Article 77 (c) of the United Nations Charter.

drafting process - conceived as a Chapter on “general policy” in regard all dependent territories of all Members of the United Nations.¹⁷

2.1.2 The content.

Chapter XI consists of articles 73 and 74. The legal obligations which Members of the United Nations assume upon ratification of the Charter¹⁸, are “distinctly less” than those which administering States have for their trust territories.¹⁹ For example, the parties accept to ensure, in compliance with article 73 (a) the “just treatment” and the “protection against abuses” of the inhabitants of the non-self-governing territories, whereas under article 76 (c) the trusteeship system pursues the aim of encouraging “respect for human rights and for fundamental freedoms” without any distinction. The resulting trusteeship agreements provided for a guarantee of fundamental freedoms.²⁰ There are more examples of such inequalities²¹, but the main difference lays in that article 73 (b) solely provides for the development of self-government, whilst article 76 (b) stipulates independence as an additional goal of the trusteeship administration. Whether self-government excludes independence depends upon its interpretation. Unfortunately, this is but one occasion, where Chapter XI “suffers (...) from vague formulations, both as to obligations and as to basic definitions”.²² Recourse to the *travaux préparatoires* is thus necessary to clarify what was intended with self-government.

Reaching consensus on the policy for non-self-governing territories was not an easy task. It was a hot potato that only got on the table in San Francisco

¹⁷ M. Bedjaoui, *ibidem*, p. 1079 and F. van Langenhove, *Le Problème de la Protection...*, cit., p. 403. See also R. B. Russel, J. E. Muther, *A history of the United Nations Charter: the role of the United States 1940-1945*, Brookings Institution, Washington, D.C., 1958, p.814.

¹⁸ J. L. Kunz, *Ibidem*, p. 103. See also U. Fastenrath, *Chapter XI. Declaration Regarding Non-self-governing Territories*, in B. Simma (ed.), *The Charter...*, cit., p. 1091 on the legal significance of the word “declaration”.

¹⁹ U. Fastenrath, *ibidem*, p. 1090.

²⁰ U. Fastenrath, *Ibidem*.

²¹ See U. Fastenrath, *Ibidem*.

itself²³, where a *sui generis* procedure was followed for handling it.²⁴ To grasp how sensitive the topic was at that time, one can consider the comment made by Churchill in 1942 according to which he had not become British prime minister “in order to preside over the liquidation of the British Empire”²⁵ No doubt, one understands that serious diplomacy was needed. In *A history of the United Nations Charter: the role of the United States 1940-1945*, R.B. Russell gives an account of how things developed.²⁶ At several stages in the negotiations, controversy arose in regard the objective of “self-government” for dependent territories. It was the United Kingdom, who favoured *ab initio* the term “self-government”. France argued for some form of federal unity between the dependent peoples and the metropolitan country, but disliked the term “self-government” in part for not translating well. China and the Soviet Union, however, wanted to add “independence”, as a goal of the policy. They got support for this demand of Iraq, the Philippines and Egypt, in later phases of the drafting procedure. The colonial powers, however, argued that granting independence, would lead to an undesirable and confusing multiplication of States, might also result in the reluctance of administering powers to continue investing their own resources into those territories and could be against the will of the peoples living in those places. China replied that no people ought to be deprived of the prospect of achieving independence, but added “as may be appropriate to the particular circumstances of each territory and its people” in order to solve the divergent opinions. The genius of the United States diplomacy then perceived that the term “self-government” in fact contained the Chinese compromise, since independence is but one form of “self-government”, it argued. After some more bargaining and a resulting understanding regarding the statement on the aims of the trusteeship system²⁷, all parties finally

²² J. L. Kunz, *Ibidem*, p. 104.

²³ Other issues in the United Nations Charter had been dealt with long before in the Dumbarton Oak Conversations.

²⁴ See R. B. Russel, J. E. Muther, *ibidem*, pp. 808-810.

²⁵ *The Times*, Nov. 11, 1942 quoted by U. Fastenrath, *ibidem*, p. 1090, footnote 8.

²⁶ See R. B. Russel, J. E. Muther, *ibidem*, pp. 813-824. My account of the events is entirely based upon theirs.

²⁷ The understanding was that Chapters XII-XIII would take note of the various views on independence, human rights and the wishes of the peoples concerned. Aside R. B. Russel,

agreed upon the term “self-government” as not excluding “independence” in appropriate circumstances.²⁸ It is in that particular sense that “self-government” formed an essential part of the normative blueprint.

As important, if not even more so, was paragraph (e) of article 73 which instituted some sort of international supervision as a means of achieving the goals set out in the preceding paragraphs.²⁹ Whatever inhibited the application of this part of the blueprint paralysed in fact the realisation of the final ends and sterilised the entire project.³⁰ That is the reason why it was of major salience to determine the duty-bearers of the obligation to provide information to the Secretary-General of the United Nations.

This, in turn, required a definition of “non-self-governing territory”. As a result, we shall see, the blueprint transformed into “ another theatre of the struggle between the white man and the non–white humanity”. It is there the Belgian thesis played its cunning role.³¹

J. E. Muther, *ibidem*, see also F. van Langenhove, *Le Problème de la Protection...*, cit., p. 404.

²⁸ Aside R. B. Russel, J. E. Muther, *ibidem*, see also C. E. Toussaint, *The Colonial Controversy in the United Nations*, in «Yearbook of World Affairs», vol. 10, 1956, p. 185 and U. Fastenrath, *ibidem*, p. 1091.

²⁹ Article 73 (e) reads: “Members of the United Nations (...) accept (...) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.”

³⁰ M. Bedjaoui, *ibidem*, p. 1080.

³¹ J. L. Kunz, *Ibidem*, p. 106.

2.2 The “Belgian thesis” in identifying “non-self-governing territories”.

2.2.1 What is a “non-self-governing territory”?

2.2.1.1 The Charter.

Article 73 defines a “non-self-governing territory” as one “whose peoples have not yet attained a full measure of self-government”. This is “particularly vague” and the authors of the Charter provided no further precision.³² Though some might argue the contrary, the terminology they used during the drafting process does not make things clearer: they spoke about “dependant peoples”, “dependencies”, “dependant territories”, but sometimes also of “colonial territories” or “colonies” and initially of “dependent territories inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world”.³³ The intentions are not self-evident, except in one regard. The “peoples” concerned need to live in defined “territories”. “This would exclude from Chapter XI the problem of minorities not inhabiting a clearly defined territory but scattered throughout a State”.³⁴

Chapter XI was not only vague in its definitions, it also gave no indication as to who was to decide what territory ought to be regarded “non-self-governing”.³⁵ Yet, whosoever competence it was to decide this in effect interpreted “self-government”³⁶ and moreover, determined the geographical unit to be taken into consideration in this respect.

³² J. L. Kunz, *Ibidem*, p. 104 and N. Veïcopoulos, *Traité des territoires dépendants. Tome III : Les territoires non-autonomes*, Paris, 1985, p. 1076, footnote 2149 and p. 1102.

³³ N. Veïcopoulos, *ibidem*, p. 1076, footnote 2149 and R. B. Russel, J. E. Muther, *ibidem*, p. 813 *et seq.*

³⁴ J. Crawford, *The Creation of States...*, cit., p. 359.

³⁵ A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice*, Leiden, A.W. Sijthoff, 1973, p. 53.

³⁶ C. E. Toussaint, *The Colonial Controversy...*, cit., p. 187 and N. Veïcopoulos, *ibidem*, p.1104.

2.2.1.2 Who decides?

Initially, it was left to the respective Members of the United Nations to decide what was meant by “non-self-governing territory”. In 1946 the Secretary-General of the United Nations send them each a letter in which they were invited to express their opinion on the factors to be borne in mind in determining the territories envisaged by Chapter XI and to designate such territories subject to their jurisdiction.³⁷ The request was of practical importance, since under article 73 (e) the Secretary-General was due to receive information regarding “non-self-governing territories”. “Out of only twenty-two replies (...), only ten commented on these two questions. Moreover, only eight Members voluntarily enumerated territories on which they would transmit information”.³⁸ These territories were subsequently listed in General Assembly Resolution 66 (I), which lists 74 territories under eight different administering States.³⁹ Nearly all were colonies or protectorates and were separated by salt-water of the States concerned.⁴⁰

Consequently, a small number of so-called “colonial powers” got trapped in a system of international accountability for their colonial administration. They faced “a large and non-benevolent majority consisting, first of all, of the Asian-African bloc -the core of the colonial rebellion, and the Soviet states, promoting the colonial rebellion for their own reasons⁴¹, joined by the Latin American Republics”.⁴² The struggle commenced in which the

³⁷ J. L. Kunz, *ibidem*, p. 106, A. Rigo Sureda, *ibidem*, p. 49, J. Crawford, *ibidem*, p. 360 and J.E. Falkowski, *Indian Law/Race Law: A Five-Hundred-Year History*, Praeger Publishers, New York, 1992, p.49. The letter dated 29 June 1946.

³⁸ J.E. Falkowski, *ibidem*. The Members were Australia, Belgium, Denmark, France, New Zealand, The Netherlands, United Kingdom and United States.

³⁹ G.A. Res. 66 (I), *Official Records of the first session of the General Assembly, Part II, Resolutions*, p. 124. See Annex.

⁴⁰ The exceptions for one or the other reason constituted the Cook Islands, the Tokelau Islands and Alaska.

⁴¹ “It was to lead to the liberation of oppressed peoples which was, in turn, to contribute to the success of the socialist revolution”. See A. Cassese, *Self-determination of peoples. A legal reappraisal*, Cambridge, Cambridge University Press, 1996, p. 15.

⁴² J. L. Kunz, *ibidem*, p. 106.

majority tried to get rid of the colonial yoke and in which the colonial powers attempted to reverse the irreversible and to avoid the unavoidable.

As soon as 1948, the colonial powers ceased providing information on not less than 11 listed territories.⁴³ They pertained that these territories had acquired full self-government in light of changes made in the constitutional relationships with them.⁴⁴ As a result, arguably the territories in question fell no longer under article 73 and the omissions were justified. The situation was a logical consequence of leaving the decision-making power about the label of “non-self-governing territory” to each individual United Nations Member. It was in accordance with international law, for article 73 stipulated nothing to the contrary and article 2 (7) of the United Nations Charter consolidated the Members’ domestic jurisdiction.

The majority of the United Nations Members, however, would not allow the colonial powers to evade international supervision by avoiding their crucial obligation to report under article 73 (e). The General Assembly adopted Resolution 222 (III), by which the Members were demanded to “communicate to the Secretary-General, within a period of six months, such information as might be appropriate” relating to “the constitutional position and status of any such territory” on which the transmission of information was considered no longer necessary.⁴⁵ One year later, in 1949, the General Assembly readily explicitly asserted its competences to decide the perennial question: what is a “non-self-governing territory”. Indeed, in Resolution 334 (IV) the Assembly stated that it considered that it was within its responsibility “to express its opinion on the principles which have guided or which in the future guide the Members concerned in enumerating the territories for which the obligation exists to transmit information under Article 73 e of the Charter;” In pursuance of this, the Assembly established the *Ad Hoc* Committee on Factors, which was “to examine the factors which

⁴³ U. Fastenrath, *ibidem*, p. 1092 and A. Rigo Sureda, *ibidem*, p. 54.

⁴⁴ *Ibidem*.

should be taken into account in deciding whether any territory is or is not a territory whose people have not yet attained a full measure of self-government.”⁴⁶

So, the General Assembly asserted its competence to decide.⁴⁷ It was but one of the moves in the battle of anti-colonialists against the colonial powers. It was but one of the tricks used to transform Chapter XI into a system of supervision similar to the one provided for trust territories.⁴⁸ This direct challenge to the jurisdiction of the administering powers pushed them in a defensive position.⁴⁹ They would ignore the adopted resolutions, since they were not legally binding. The strongest counter-offensive was taken by Belgium, in the *Ad Hoc* Committee on Factors, in plenary session of the General Assembly and wherever it could.⁵⁰ The Belgian delegates P. van Zeeland, P. Ryckmans and F. van Langenhove developed a theory, which has been referred to ever since as the “Belgian Thesis”.

2.2.2 The “Belgian thesis”.

2.2.2.1 The thesis.

The “Belgian thesis” kicked off by reminding the Members of the United Nations that the General Assembly was not empowered to decide upon a

⁴⁵ G.A. Res. 222 (III), *Official Records of the third session of the General Assembly, Part I, Resolutions*, p. 85.

⁴⁶ G.A. Res. 334 (IV), *Official Records of the fourth session of the General Assembly, Resolutions*, pp. 43-44.

⁴⁷ N. Veïcopoulos, *ibidem*, p. 1109.

⁴⁸ U. Fastenrath, *ibidem*, p. 1091 *et seq.* and F. van Langenhove, *The Question of the Aborigines...*, cit., pp. 80-84.

⁴⁹ J. L. Kunz, *ibidem*, p. 108.

⁵⁰ J. L. Kunz, *ibidem*, p. 108. Belgium was appointed member of the *Ad Hoc* Committee. See G.A. Res. 567 (VI), *Official Records of the sixth session of the General Assembly, Resolutions*, p. 60 and G.A. Res. 648 (VII), *Official Records of the seventh session of the General Assembly, Resolutions*, p. 34.

legally binding definition of what was a “non-self-governing territory”.⁵¹ Such a decision rested with each individual Member. Belgium, nevertheless recognized the power of recommendation which the Assembly derives of article 10 of the Charter.⁵² Belgium hoped it could convince the Assembly of its interpretation of the subject under discussion.

As was described before, “non-self-governing territories” were generally equated with the 74 territories, which eight States had voluntarily listed as falling under Chapter XI. Belgium argued that this interpretation was too restrictive. It pointed out that the Charter had not singled out “colonies” and “protectorates”, but “non-self-governing territories”.⁵³ In its opinion, this terminology comprised all territories in which “indigenous populations” lived who were “insufficiently developed to be able to govern themselves”.⁵⁴ They all had to “benefit from the same guarantees” as provided by article 73.⁵⁵

“Belgium perceived the issue as involving the exploitation of people at a lower stage of civilization by those on a higher stage of civilization and as having nothing to do with geography”.⁵⁶ It asserted: “The United Nations has the interests of peoples at heart; territories are important only because of the people who live there and suffer.”⁵⁷ Territories, it believed, were a function of the peoples living there and not the opposite. Therefore, “territories whose peoples have not yet attained a full measure of self-

⁵¹ *Memorandum of the Belgian Government Relative to Non-Self-Governing Territories*, in *Replies of governments indicating their views on the factors to be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government*, *Ad Hoc* Committee on Factors, May 8, 1953, U.N. Doc. A/AC.67/2 and Corr. 1 and 2, p. 3 and 23, also reproduced in *The Sacred Mission of Civilization...*, cit.

⁵² *Ibidem*, p. 4 and 23.

⁵³ P., Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1991. p. 16 and N. Veïcopoulos, *ibidem*, p. 1107, footnote 2202.

⁵⁴ F. van Langenhove, Statement at the Plenary Session, December 16, 1952, reproduced in *The Sacred Mission of Civilization...*, cit., p. 31.

⁵⁵ *Ibidem*.

⁵⁶ J.E. Falkowski, *Indian Law/Race Law...*, cit., p. 49.

⁵⁷ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952..., cit., p. 28.

government” could not be restricted to colonies and protectorates. When peoples were found to be “non-self-governing”, the territories where they lived had to be regarded “non-self-governing” too, whatever designation these had been given before and whether these were geographically separated from the metropolitan areas or not.⁵⁸ For good understanding, the thesis only regarded indigenous peoples living in clearly defined territories. This was, however, almost invariably the case around the world and usually they did not form “minorities intermingling with the more advanced inhabitants” of the region.⁵⁹

This was the core of the “Belgian thesis”. It was, as stated before, advanced throughout the debates succeeding the question of who was under a duty to provide information to the Secretary-General under article 73 (e). According to General Assembly Resolution 742 (VIII), an answer to the question was necessary “in order that (...) a decision may be taken by the General Assembly on the continuation or cessation of the transmission of information”.⁶⁰ Belgium, however, noted that one was “concerned not only with determining when an administering State may be allowed to *cease* transmitting information, but also with determining when a State is obliged to *begin* submitting information”.⁶¹ Having adopted the stance explained just above, it expressed its indignation regarding the “so anomalous a situation”⁶², where only eight Members had submitted information to the Secretary-General, “although more than half the sixty Members of the United Nations had backward indigenous peoples in their territories”.⁶³ Belgium contended that it “had a great deal of documentation to prove that a number of States were administering within their own frontiers territories

⁵⁸ *Memorandum of the Belgian Government...*, cit., p. 19.

⁵⁹ *Memorandum of the Belgian Government...*, cit., p. 10 and F. van Langenhove, *The Question of the Aborigines...*, cit., p. 25.

⁶⁰ G.A. Res. 742 (VIII), *Official Records of the eighth session of the General Assembly*, Resolutions, p. 22.

⁶¹ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952..., cit., p. 18.

⁶² *Memorandum of the Belgian Government...*, cit., p. 19.

which were not governed by the ordinary law; territories with 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 the 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”.⁶⁴ Belgium “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’”.⁶⁵ By withholding information on those indigenous peoples, Belgium believed that those UN Members were hiding from the “sacred trust of civilisation” with which they had equally been entrusted by Chapter XI. Indeed, in its eyes the sacred trust was not limited to a few States administering territories up till then known as colonies. Any State, in whose territory there lived peoples who had not attained the normal level of civilization, was bound by the trust.⁶⁶

2.2.2.2 The argumentation.

Belgium advanced many reasons for its conviction that the UN Charter provided protection for indigenous peoples all around the world and instituted in this respect an international supervision machinery. “It viewed the history, spirit and meaning of the Charter to require a universal application of the “sacred trust”.⁶⁷ It argued against the motives for a more narrow interpretation and used the Resolutions adopted by the General

⁶³ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, *Official Records of the seventh session of the General Assembly*, Fourth Committee, 253rd Meeting, paragraph 17.

⁶⁴ P. Ryckmans, Statement at the Ninth Session of the General Assembly, Meeting of the Fourth Committee, November 2, 1954, *Official Records of the ninth session of the General Assembly*, Fourth Committee, 419th Meeting, paragraph 20.

⁶⁵ *Ibidem*.

⁶⁶ P. van Zeeland, Statement at the Seventh Session of the General Assembly, plenary session, November 10, 1952, reproduced in *The Sacred Mission of Civilization...*, cit., p. 8.

⁶⁷ J.E. Falkowski, *ibidem*, p. 49.

Assembly as a weapon in its defence. It ended by pointing out the discriminating and absurd results of the restrictive point of view.

Mainly, Belgium believed that “problems were the same everywhere” and that, therefore, “they imposed the same duties”.⁶⁸ Indigenous peoples around the globe, living in “colonies” or not, confronted the same troubles. “Whether it came from explorers and ethnographers or emanated from official sources”, the available information showed “that certain peoples are still ‘completely savage’ or ‘inaccessible’; that some still pursue the barbarous practice of head-hunting; that many stagnate in conditions of economic destitution; that they live in a constant state of undernourishment and in unsanitary conditions, (...); that there is an almost complete lack of welfare services for them”.⁶⁹ The civilizing work had thus surely not been completed upon achievement of independence by many countries in America, Asia and Africa. These countries “inherited” the “trust of civilisation”.⁷⁰ The obligations flowing from Chapter XI were essentially humanitarian, dealing with prosperity and political, economic, social and cultural progress.⁷¹ There was “no inherent reason why they should be restricted to colonies only”.⁷² The Preamble of the Charter had proclaimed solemnly that the UN Members were resolved “to employ international machinery for the promotion of the economic and social advancement of all peoples”.⁷³ It was arbitrary and discriminatory to deny certain indigenous peoples protection because of geographic criteria.⁷⁴ It was against the spirit of Chapter XI.

⁶⁸ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, ..., cit., paragraphs 17 and 30 and *Memorandum of the Belgian Government...*, cit., p. 8.

⁶⁹ F. van Langenhove, *The Question of the Aborigines...*, cit., pp. 85-86.

⁷⁰ *Ibidem*, pp. 77 and *Memorandum of the Belgian Government...*, cit., p. 9.

⁷¹ *Memorandum of the Belgian Government...*, cit., p. 22.

⁷² *Ibidem*.

⁷³ Preamble of the Charter of the United Nations and P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, reproduced in the *The Sacred Mission of Civilization...*, cit., p. 14.

⁷⁴ J.E. Falkowski, *ibidem*, p. 51; *Memorandum of the Belgian Government...*, cit., p. 21 and F. van Langenhove, *Le Problème de la Protection...*, cit., p. 426.

Furthermore, in the eyes of Belgium, Chapter XI was the “the direct successor” of the so-called “native inhabitants clause of the League of Nations”, article 23 (b) of the Covenant.⁷⁵ As explained earlier, on the one hand, Chapter XI was drafted as a chapter on the “general policy” with regard to dependent territories under the United Nations and, on the other hand, article 23 (b) of the Covenant constituted the only disposition regarding all dependent territories under the League of Nations. Logically, both having such a general ambit, Chapter XI was believed to substitute the clause concerning native inhabitants.⁷⁶ Mindful of this, Belgium then fired: “And the majority of the States which refuse to accept what is called the Belgian thesis were members of the League of Nations. They have never explained why, what was admissible 25 years ago is no longer so today. Twenty-five years ago, they were obliged by the League of Nations to secure just treatment of all their native peoples wherever they were, in overseas territories, or so-called colonial territories or metropolitan territories. Why don’t they accept today what they accepted when they were members of the League of Nations? Does this show international-minded progress?”.⁷⁷ To Belgium it all looked more like “turning back the pages of history”.⁷⁸

History, however, was not a legal argument and the majority of the UN Members further claimed that the authors of the Charter only envisaged colonies and protectorates when stipulating the term “non-self-governing territories”. In reality, it was impossible to establish beyond doubt that the true intentions were those.⁷⁹ In fact, the only certainty was that non of the

⁷⁵ J.E. Falkowski, *ibidem*, p. 49; See also *Memorandum of the Belgian Government...*, cit., p. 23.

⁷⁶ F. van Langenhove, *Le Problème de la Protection...*, cit., p. 404; See also *Memorandum of the Belgian Government...*, cit., p. 23.

⁷⁷ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952..., cit., p. 27. See also other Statements in *The Sacred Mission of Civilization...*, cit., pp. 8 and 28-29 and *Memorandum of the Belgian Government...*, cit., p. 31.

⁷⁸ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, reproduced in the *The Sacred Mission of Civilization...*, cit., p. 11.

⁷⁹ F. van Langenhove, *Le Problème de la Protection...*, cit., p. 410.

drafters in San Francisco had challenged the rule set by article 23 (b), that none of them had expressed the intention to free themselves of the obligation to secure just treatment of native inhabitants.⁸⁰ Therefore, Belgium concluded by quoting Professor Hans Kelsen that “the authors of the Charter probably referred only to territories inhabited by relatively primitive natives still in a backwards state of civilization”.⁸¹

In any case, the reading as to the meaning of “non-self-governing territories” remained doubtful. On such occasion, it was probably not bad to revert to the seminal principle of the dispositions, which was introduced in international law by Francisco de Vitoria: the interests of the indigenous peoples ought to be paramount.⁸² Thus, Belgium asked: “Isn’t it up to us to give the benefit of doubt to the populations concerned by taking the interpretation which is the most favourable to them?”

The majority of the Members of the United Nations found, however, another strategy to interpret the contentious terminology. They reached out for the wording of article 74, the second article under Chapter XI. It establishes a distinction between “territories to which this Chapter applies” and “metropolitan areas”. Attributing to the latter a sense according to which were designated all territories other than the ones qualified as colonies or protectorates, anyone could deduce that colonies and protectorates were the only “territories to which this Chapter applies”.⁸³ The assumption, however, that “metropolitan areas” designated all territories but the ones categorized as colonies or protectorates, had no legal foundation. The term was not defined in the Charter, nor in customary law, for it usually received the residual scope in contrast to other defined terms, which were different in

⁸⁰ F. van Langenhove, Statement at the Plenary Session, December 16, 1952, reproduced in *The Sacred Mission of Civilization...*, cit., p. 31 and *Memorandum of the Belgian Government...*, cit., p. 31.

⁸¹ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, reproduced in the *The Sacred Mission of Civilization...*, cit., p. 12.

⁸² F. van Langenhove, *Le Problème de la Protection...*, cit., pp. 425-426.

⁸³ *Ibidem*, p. 408.

each and every treaty.⁸⁴ “Territories to which this Chapter applies”, were thus not to be determined *a contrario* to “metropolitan areas”, but in accordance with the definition given by article 73: “territories whose peoples have not yet attained a full measure of self-government”. This definition was couched in general terms and mentioned no exceptions.⁸⁵ The meaning was not to be restrictive.

Finally, the majority in the General Assembly resorted to their Resolutions in which they had decorticated the definition given by article 73.⁸⁶ “Self-government” was readily understood as meaning either independence, either free association, either integration. “Peoples” were to be to a certain degree “of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from” the metropolitan peoples.⁸⁷

To this extent, the conclusions of the *Ad Hoc* Committee on Factors were not troublesome for the interpretation defended by the “Belgian thesis”.⁸⁸ The expatiations regarding “territories”, however, had to off set the thesis. Territories were to be geographically separated in some measure “by land, sea or other natural obstacles” in such a way that it inhibited easy relations with the “capital of the metropolitan government”.⁸⁹ So, it was believed that colonies and protectorates would be singled out and other indigenous peoples would be excluded from the definition. Moreover, Belgium took “legal cognisance” of the fact that the established Factors represented the majority opinion.⁹⁰ Nevertheless, it sarcastically went on by stating: “But we are obliged to admit that such as they are [the Factors], they confirm our

⁸⁴ *Ibidem*, p. 409.

⁸⁵ *Memorandum of the Belgian Government...*, cit., p 21.

⁸⁶ Resolutions 567 (VI), 648 (VII) and 742 (VIII) were the result of the work of the *Ad Hoc* Committee on Factors.

⁸⁷ G.A. Res. 567 (VI), *ibidem*, p. 62; G.A. Res. 648 (VII), *ibidem*, p. 35; G.A. Res.742 (VIII), *ibidem*, p. 22.

⁸⁸ *Memorandum of the Belgian Government...*, cit., p 11-13.

⁸⁹ G.A. Res. 567 (VI), *ibidem*, p. 62; G.A. Res. 648 (VII), *ibidem*, p. 35; G.A. Res.742 (VIII), *ibidem*, p. 22.

thesis”.⁹¹ This was, at least, partially true, since many, though not all, indigenous peoples, inhabiting areas considered to be territorially contiguous with the metropolitan land, lived isolated and fairly inaccessible.⁹² Nothing was to be surprising about that: “In tropical areas, stretches of land are obstacles far harder to surmount than stretches of sea. This has always been true; for centuries, virgin forests and jungle have been barriers impassable to civilization, whereas the seas and oceans have from the remotest antiquity made contacts possible and even facilitated them. With the development of sea and air communications they are speedily crossed”.⁹³

So, Belgium demonstrated that no reasonable argument defeated their thesis entirely with regard to the identification of “non-self-governing territories”. It concluded, furthermore, that to adopt the opposite restrictive viewpoint was to create discriminatory and absurd situations. One example of such absurd results was given by F. van Langenhove.⁹⁴ Chapter XI had been recognised as applicable to the indigenous peoples of Sierra Leone, French Guinea and Ivory Coast. Liberia, by contrast, contested the applicability to its indigenous peoples in its hinterland, which were largely underrepresented in the Chamber of Representatives. All, however, belonged to the same race, sometimes to the same tribe, had attained a same cultural level and lived under comparable political dominion. This was but one case where absurdity was established. It evidenced the discrimination of many particular indigenous peoples. Flowing from this, Belgium, finally warned for another form of discrimination. “Two categories of Members were being created in the United Nations: on the one hand, the privileged Members who refused to supply any information, but who arrogated to themselves the function of censorship; and, on the other hand, a number of States which had voluntarily

⁹⁰ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952..., cit., p. 18.

⁹¹ *Ibidem*.

⁹² *Memorandum of the Belgian Government...*, cit., p. 12.

⁹³ *Memorandum of the Belgian Government...*, cit., p. 9.

⁹⁴ F. van Langenhove, *Le Problème de la Protection...*, cit., p. 410.

recognized the obligations deriving from Chapter XI. (...) Such discrimination could only hamper the ‘harmonious development of international relations’ and lead to a situation that could hardly be tolerated”.⁹⁵

Thus, Belgium had forcefully and with great conviction defended its position, but what was to be the outcome of all this bravado?

2.3 The outcome.

2.3.1 The cunning idea, but the wishful thinking.

2.3.1.1 The cunning idea.

Belgium envisioned “a situation that could hardly be tolerated”. Decolonisation was the situation it most likely referred to. It was not ready to lose its colony, the Congo.

One way to refute decolonisation policy was to deny the existence of “colonialism”. Belgium gave it a try: “We often hear of colonialism spoken of as an evil which should be eradicated with the least possible delay. If the evil still existed, I should agree with those who denounce it. The word “colonialism”, as traditionally used, conjures up a picture of the exploitation of people at a lower stage of civilization by others at a higher stage. (...) But we believe that with a few rare exceptions (...) this type of colonialism is obsolete”.⁹⁶ Belgium was no longer exploiting, but civilizing. There was to be no doubt about that. As King Albert I of Belgium stated already in 1909:

⁹⁵ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, ..., cit., paragraphs 28-29.

⁹⁶ P. van Zeeland, Statement at the Seventh Session of the General Assembly, plenary session, November 10, 1952..., cit., p. 7.

“For a people who love justice, the effort in the colonies can be nothing else than a civilizing mission”.⁹⁷

This majestic lip-service, even if to some extent verified in practise, would not change the minds of the anti-colonialists. Their actions, Belgium noticed, were inspired by “prejudices of a political nature against the task of the administrating Powers” and “those prejudices doubtless had their causes in history”.⁹⁸ Thus, Belgium realised it had to adopt another strategy if it wanted to avert decolonisation.

In San Francisco, the responsibility to develop “self-government” was understood to comprise the obligation to grant independence, in appropriate circumstances. A majority of the Members of the United Nations, however, read: independence at all means. This, Belgium believed, was “exaggerations and overbidding” and was distinctive for the deplorable “absence of responsibility” among anti-colonial States.⁹⁹

The “Belgian thesis” was intended to change this irresponsible behaviour. Arguing in favour of millions of indigenous peoples, Belgium in reality argued for bringing many anti-colonial States within the scope of Chapter XI. Belgium even provided a concrete list of countries harbouring indigenous peoples in non-self-governing territories in almost every area in the world, including Africa, North and South America, Asia, Australia and a number of Pacific Islands.¹⁰⁰ It was in fact an attempt to subject them all to an equal responsibility to develop “self-government”. Belgium was convinced that this would stop the loud advocacy for independence at all means. Enlightened by responsibility, they would abhor to jeopardize their own territorial integrity and abjure the fight for independency. F. van

⁹⁷ *Ibidem*, p. 7.

⁹⁸ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, ..., cit., paragraph 29.

⁹⁹ F. van Langenhove, Statement at the Plenary Session, December 10, 1952, reproduced in *The Sacred Mission of Civilization...*, cit., p. 30.

¹⁰⁰ See *The Sacred Mission of Civilization...*, cit., p. 59 *et seq.* See also Annex..

Langenhove wrote in respect of the “Belgian thesis” that some countries “apparently recognised the difficulty of contesting its merits (...) For this reason, it has prompted them to maintain an attitude of prudent reserve, for it has given them to understand that an offensive aimed at the colonial powers might have repercussions in their own countries”.¹⁰¹

So, P. Thornberry deduced that “van Langenhove effectively admitted to the thesis as a Belgian tactic”.¹⁰² Similarly, G. Alfredsson had already exposed the “insincerity of the proposals” in that they were “mainly intended to delay or derail the decolonisation”.¹⁰³ Indeed, the prospect of territorial dismemberment would neutralise the decolonisation effort. Attempting to convince the General Assembly that “non-self-governing territories” equated with indigenous peoples anywhere, was in fact cunningly trying to introduce a proverbial Trojan Horse into the stronghold of the anti-colonialists.

2.3.1.2 The wishful thinking.

The “Belgian thesis” was implementing a cunning idea, but ultimately rested on wishful thinking. Decolonisation could not be stopped. It was a historical movement propelled by the conjunction of diverse forces mutually reinforcing each other: the decline of the colonial empires following the war, the awakening of a consciousness regarding the colonial exploitation among indigenous elites, East-West rivalry, the United Nations tribune, ...¹⁰⁴ It was characterised as “irresistible, irreversible and irrepressible” by the UN organs.¹⁰⁵ It was “inevitable”¹⁰⁶ and thus the “historical necessity” was

¹⁰¹ F. van Langenhove, *The Question of the Aborigines...*, cit., p. 84.

¹⁰² P., Thornberry, *International Law and the Rights of Minorities...*, cit., p. 17.

¹⁰³ G. Alfredsson, *Greenland and the Law of Political Decolonization*, in «German Yearbook of International Law», vol. 25, 1982, p. 295. See also P. Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses*, in P. Aikio, M. Scheinin (eds.), *Operationalising the Right of Indigenous Peoples to Self-Determination*, Tuku/Abo, Institute for Human Rights, Abo Akademi University, 2000, p. 54.

¹⁰⁴ J. Charpentier, *Autodétermination et décolonisation*, in *Mélanges offerts à Charles Chaumont*, Paris, A Pendone, 1984, p.119; See also R. Falk, *Self-Determination Under International Law...*, cit., pp. 42-43.

¹⁰⁵ M. Bedjaoui, *Article 73...*, cit., p. 1075. See also G.A. Res. 1514 (XV) adopted by the General Assembly on 14 December 1960.

¹⁰⁶ P., Thornberry, *International Law and the Rights of Minorities...*, cit., p. 17.

transformed in a juridical obligation, by means of the right to self-determination.¹⁰⁷

On 14 December 1960, the General Assembly proclaimed solemnly in Resolution 1514 (XV), better known as the “Declaration on Granting Independence to Colonial Countries and Peoples”, “the necessity of bringing to a speedy and unconditional end colonialism” and to this end declared that “all peoples have a right to self-determination” and that “immediate steps shall be taken in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories”.¹⁰⁸ One day later, Resolution 1541 (XV) was adopted, in the Annex of which the General Assembly set out the “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”.¹⁰⁹

This Resolution had been prepared by another *Ad Hoc* Committee instituted after the denial of several new Members of the United Nations that they administered non-self-governing territories.¹¹⁰ Principle VI of the Resolution defined “self-government” once again as either independence, either free association, either integration. Principle IV disposed that “*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”. This is believed to be the *coup de grâce* of the “Belgian Thesis”. It was “clearly intended to exclude from the scope of Chapter XI indigenous peoples in independent countries”.¹¹¹ So, the

¹⁰⁷ J. Charpentier, *ibidem*, p. 119. See also A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments*, UN Doc E/CN.4/Sub2/404/Rev 1, 1981, p. 39.

¹⁰⁸ G.A. Res. 1514 (XV) adopted by the General Assembly on 14 December 1960.

¹⁰⁹ G.A. Res. 1541 (XV) adopted by the General Assembly on 15 December 1960.

¹¹⁰ A. Rigo Sureda, *The Evolution of ...*, cit., pp. 56-57. Among these new Members were Spain and Portugal. See J. Crawford, *The Creation of States...*, cit., pp. 360-361.

¹¹¹ G. Bennett, *The Developing Law of Aboriginal Rights*, International Commission of Jurists, *The Review*, vol. 22, June 1979, p. 42.

“Belgian Thesis” was rejected in favour of the “salt water” theory.¹¹² Mainly Latin American States, but also Philippines, Ethiopia, Mexico,...refused to accept the comparison made between their internal situation and the colonial one.¹¹³ Their problems were, as they contended, economic and cultural, not colonial, but above all, it was a “parvenu” reaction by invoking the *uti possidetis iuris* principle upon gaining accession to the UN *qua* Member States.¹¹⁴ “Salt water” decolonisation or self-determination was borne out by United Nations practice, ever since.¹¹⁵

One author has noticed that “in fact the language in which the Resolution [was] expressed was ill suited to its purpose, for there are many island communities which, although not normally described as colonial peoples, [were] ‘geographically separate’ from the administering country”.¹¹⁶ This is the reason why the Representative of the United Kingdom once spoke of the “myth of salt water”.¹¹⁷ And this had prompted Belgium too, to satirize the theory: “Here, the question is raised as to which stretch of sea is necessary for a country to be considered as being included within the metropolitan frontiers”.¹¹⁸ The remarks of the administering States could not prevent the

¹¹² P. Thornberry, *International Law and the Rights of Minorities...*, cit., p. 17.

¹¹³ P. Thornberry, *ibidem*; J.E. Falkowski, *ibidem*, p. 52; Z. Skurbaty, *As if peoples mattered: critical appraisal of ‘peoples’ and ‘minorities’ from the international human rights perspective and beyond*, The Hague, Martinus Nijhoff, 2000, p. 217.

¹¹⁴ Z. Skurbaty, *ibidem*, p. 218. See also A. Cassese, *Self-determination of peoples...*, cit., p. 318.

¹¹⁵ J. Crawford, *The Creation of States...*, cit., p. 362; J. Castellino, *International Law and Self-determination: The interplay of the Politics of Territorial Possession with Formulations of Post-Colonial ‘National’ Identity*, Martinus Nijhoff Publishers, The Hague, 2000, p. 87 and G. Alfredsson, *Greenland...*, cit., p. 295.

¹¹⁶ G. Bennett, *ibidem*, p. 42.

¹¹⁷ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952,...,cit. ,p. 26.

¹¹⁸ *Ibidem*. The delegate continued: “Take for example, the islands of Andaman and Nicobar. Are the islands of Andaman and Nicobar, which come under Indian sovereignty, a territory whose peoples have a full measure of self-government? Everybody knows this is not so. Are these islands attached to the territory of continental India by territorial continuity? Let me point out another example; the Polynesian island of Rapa Nui which is better known under the name of Easter Island. This island comes under Chilean sovereignty. Why doesn’t Chile supply information on the island of Rapa Nui? Why? Could it be because its people are too few? Yet, the Trusteeship Council occupies itself regularly with the population of Nauru where there are only 1500 inhabitants! The United Kingdom sends you regularly each information on Pitcairn Island and Tristan da Cunha where there are only a few hundred inhabitants. Is it not a question of the number of inhabitants. Is it a question of distance? But the Cook Islands on which New Zealand

doctrinal theory from transforming into a customary law requiring self-determination of colonial peoples.¹¹⁹

The European powers had well defended their interests and “*horum omnium fortissimo sunt belgae*”¹²⁰, but once again the Belgian people were defeated on all fronts. The “Belgian thesis” was discarded and control was lost over their colony in 1960.

2.3.2 Appearance and historical fact.

United Nations practice “gave the weak provisions of Article 73 an infusion of the principle of self-determination (...)”.¹²¹ Anticipating, the “Belgian thesis” contended that “an interpretation of Chapter XI unduly restricting the number of the peoples called upon to benefit from the obligations that it formulates, would be subject to particular criticism should it result in limiting to some peoples only the right of self-determination ensured by the Charter to all peoples”.¹²² So, it appears as if “the thesis radicalises self-determination by insisting that it can apply to indigenous groups and minorities”.¹²³ It is usually assumed that the “Belgian thesis” wanted to expand the scope of so-called external¹²⁴ self-determination, since self-

regularly sends information because they are Polynesian peoples, are much nearer New Zealand than Easter Island is to the Chilean Coast. Why don't we receive information on Easter Island? There are other peoples known to everybody: the Chans and the Karens of Burma; for years there has been mention of the difficulties between them and the Power which administers them. Why don't we receive information on these territories?”

¹¹⁹ A. Cassese, *Self-determination of peoples...*, cit., p. 129.

¹²⁰ C. J. Caesar, *Commentarii de bello Gallico, commentarius primus* or The Gallic War, book I. Ironically, it is followed by the words: “*propterea quod a cultu at humanitate provinciae longissime absunt*”. The entire translation reads: From all these, the Belgae are the bravest, because they are the furthest from the civilization and the refinement of [our] Province.

¹²¹ I. Brownlie, *An Essay in the History of the Principle of Self-Determination*, in C. N. Alexandrowicz (ed.), *Grotian Society Papers: Studies in the History of the Law of Nations, 1968*, The Hague, Martinus Nijhoff, 1970, p. 98.

¹²² F. van Langenhove, Statement at the Plenary Session, December 16, 1952, ..., cit., p. 31.

¹²³ P. Thornberry, *International Law and the Rights of Minorities...*, cit., p. 17. See also Z. Skurbaty, *ibidem*, p. 218 and S. Trifunovska, *One Theme in Two Variations – Self Determination for Minorities and Indigenous Peoples*, in «International Journal on Minority and Group Rights», vol. 5, 1997, pp. 187-188.

¹²⁴ *Confer supra*

determination operated in “statist/secessionist models”¹²⁵ during the decolonisation era.¹²⁶

This is, however, not what Belgium intended when it spoke about “self-determination”. One must not lose sight of the historical fact that already in San Francisco “numerous delegates understood self-determination merely in the sense of self-government, which they in turn took to mean internal autonomy (...); they did not, however, connect it with any right to independent statehood”.¹²⁷ This was far from foolish considering the quasi semantic identity of the terms “self-determination”, “autonomy” and “self-government”.¹²⁸ Belgium, at that time, led “the attempt to narrow the application of the principle [of self-determination] to freedom of self-government within the sovereignty of member states”.¹²⁹ And some years later, when Belgium was defending its thesis, its conception of self-determination or self-government had not changed. It did not read Chapter XI as a threat to state sovereignty.¹³⁰ “In Chapter XI States undertook to develop self-government, not to promote independence”.¹³¹

¹²⁵ G. J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, in «Stanford Journal of International Law», vol. 32, 1996, p. 282.

¹²⁶ G. T. Morris, *International Law and Politics Towards a Right to Self-Determination for Indigenous Peoples*, on <http://www.cwis.org/fwdp/International/int.txt>, Center for World Indigenous Studies, p. 18; J. Castellino, *Order and Justice: National Minorities and the Right to Secession*, in «International Journal on Minority and Group Rights», vol. 6, 1999, pp. 395-396; G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, Martinus Nijhoff, 1993, p. 47 and *Different Forms of and Claims to the Right of Self-Determination*, in D. Clark, R. Williamson, *Self-Determination. International perspectives*, Mc Millan Press, London, 1996, p. 68.

¹²⁷ U. Fastenrath, *Chapter XI...*, cit., p. 1090. See also A. Cassese, *Self-determination of peoples...*, cit., p. 46 and p. 65.

¹²⁸ “‘Autonomy’ derives from the Greek words: ‘auto’ meaning ‘self’ and ‘nomos’ meaning ‘law’ or ‘legal rule’”. See L. Hannikainen, *Self-Determination and Autonomy in International Law*, in M. Suksi (ed.), *Autonomy: Applications and Implications*, Kluwer Law International, The Hague, 1998, p. 79.

¹²⁹ R. B. Russel, J. E. Muther, *A history of...*, cit., p. 812. It proposed an amendment stating: “To strengthen international order on the basis of respect for the essential rights and equality of the states and of the peoples’ right of self-determination.”

¹³⁰ J.E. Falkowski, *ibidem*, p. 51. See also P. Ryckmans, Statement at the Ninth Session of the General Assembly, Meeting of the Fourth Committee, November 2, 1954, paragraph 23.

¹³¹ *Memorandum of the Belgian Government...*, cit., p. 25.

According to the “Belgian thesis”, most non-self-governing peoples were “unfit to found or administer a lawful State up to the standard required by human and civil claims”.¹³² For instance, “it could not reasonably be claimed that, in spite of the considerable progress they had achieved, the peoples of the Belgian Congo were immediately capable of complete self-administration in accordance with the requirements of the modern world”.¹³³ The undertone of the argument was often shamelessly racist.¹³⁴ Therefore, the at the time popular slogan “good government is no substitute for self-government” was considered naïve.¹³⁵ If an administering State “brought independence to a people that had not reached a sufficient stage of advancement to ensure its independent existence, it would fail in its task [its sacred trust], particularly in its obligation to promote the “political, economic and social” advancement of the people”.¹³⁶

Thus, Belgium, in its “Belgian thesis”, never supported an expansion of the right-holders of independence. In turn, however, it favoured (internal) autonomy for all non-self-governing peoples, particularly those called “backwards”. It referred to the idea of “integrated self-government” exposed by the Indian representative during discussions of the Fourth Committee.¹³⁷ Moreover, it pointed out that under domestic legislation, many indigenous peoples already lived in territories treated as distinct administrative entities and sometimes enjoying “considerable *de jure* or *de facto* self-government”.¹³⁸ International control was, however, lacking. Chapter XI and its reporting procedure provided such international supervision machinery.

¹³² Expression used in Francisco de Vitoria’s epoch regarding the aborigines of America. Quoted in F. van Langenhove, *The Question of the Aborigines...*, cit., p. 62. See also F. van Langenhove, *Le Problème de la Protection...*, cit., p. 407-408.

¹³³ P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, October 23, 1952, ..., cit., paragraph 29.

¹³⁴ See for example the expression: “a more highly developed race” or the following quotation: “the error of considering the Indian as an autonomous and intelligent being”. P. van Zeeland, Statement at the Seventh Session of the General Assembly, plenary session, November 10, 1952..., cit., p. 8 and *Memorandum of the Belgian Government...*, cit., p. 13.

¹³⁵ F. van Langenhove, *The Question of the Aborigines...*, cit., p. 78.

¹³⁶ *Memorandum of the Belgian Government...*, cit., p. 27.

¹³⁷ *Ibidem*, p. 15.

¹³⁸ *Ibidem*, p. 10.

By widening the interpretation of “non-self-governing territories”, international attention would be extended.¹³⁹ So, the “Belgian thesis” was not only a defence of colonialism, but also constituted a “counter-offensive” against the majority of the United Nations Members, “in favour of millions of backwards peoples not protected by Chapter XI”.¹⁴⁰ Belgium had focused its attention on peoples and not on territories. It believed as Judge H. Dillard later famously wrote that “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”.¹⁴¹ Therefore, it had criticized the factors established by the *Ad Hoc* Committee on Factors as “arbitrary” and “drawn up in a somewhat random fashion”.¹⁴² All non-self-governing peoples living in well-defined territories were concerned by Chapter XI. Rejecting the “Belgian thesis” thankfully opened the door for decolonisation, but it also ultimately entailed the abjuration of an international accountability mechanism for the incubating right to autonomy of all indigenous peoples.

Today, the decolonisation catharsis has almost come to an end. The geographical starting point for our world order appears generally legitimate. Moreover, the focus has shifted from “territories” to “peoples”. In this light, a new “Belgian thesis” might be acceptable to the world community.

¹³⁹ C. E. Toussaint, *The Colonial Controversy...*, cit., p. 175.

¹⁴⁰ J. L. Kunz, *Ibidem*, p. 109.

¹⁴¹ *Western Sahara* case, ICJ Reports, 1975, p. 122.

¹⁴² F. van Langenhove, *The Question of the Aborigines...*, cit., p. 76; P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, November 19, 1952..., cit., p. 18.

3 Indigenous peoples' right to self-government.

“Eendracht maakt macht.”

“L' union fait la force.”¹⁴³

3.1 The term “peoples”.

3.1.1 Semantics.

“All peoples” have a right to self-determination. It is recurring wording throughout several international instruments, such as the International Bill of Human Rights,¹⁴⁴ the Friendly Relations Declaration,¹⁴⁵ the OSCE Helsinki Final Act,¹⁴⁶ the African Charter on Human and Peoples' Rights,¹⁴⁷ and the 1993 Vienna Declaration.¹⁴⁸ At first sight, the language seems clear and particularly universal in scope. All human communities seem to be beneficiaries. In order to be sure they would probably, as laymen, grasp their Oxford English Dictionary.

There it starts to get complicated. The Dictionary defines “people” in more than one sense. “People” means “the whole body of enfranchised or

¹⁴³ Heraldic device of Belgium. A translation could be: “United we stand, divided we fall”.

¹⁴⁴ See common article 1 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR) and the International Covenant on Economic, Social and Cultural Rights.

¹⁴⁵ 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 (XXV), Principle V, para. 1.

¹⁴⁶ See Principle VIII. Guiding Relations between Participating States, in «ILM», vol. 14, 1975, p. 1292.

¹⁴⁷ See article 20 (1), OAU Doc. CAB/LEG/67/3 rev. 5, in «ILM», vol. 58, 1982, p. 21.

qualified citizens, considered as the source of power; esp. in a democratic state, the electorate”,¹⁴⁹ but it may also designate “a body of persons composing a community, tribe, race, or nation; = FOLK”.¹⁵⁰ This is probably the origin of all confusion and/or frustration surrounding the issue of self-determination. At the same time, it reflects a dichotomy with a long history: demos¹⁵¹ vs. ethnos,¹⁵² political vs. cultural conception,¹⁵³ Hobbes¹⁵⁴ vs. Burke¹⁵⁵ or Rousseau¹⁵⁶, “classical” vs. “romantic” approach,¹⁵⁷ “artificial” vs. “authentic” community,¹⁵⁸ nineteenth century French thinkers,¹⁵⁹ such as Renan¹⁶⁰ vs. nineteenth century German¹⁶¹ and Italian thinkers, such as Herder¹⁶², Fichte¹⁶³ and Mazzini,¹⁶⁴ state- or citizen-nationalism vs. ethno-nationalism,¹⁶⁵ Rawls¹⁶⁶ vs. Kymlicka¹⁶⁷, “community of organisation” vs.

¹⁴⁸ See Chapter I (2) Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993.

¹⁴⁹ *The Oxford English Dictionary*, vol. XI, Clarendon Press, Oxford, 1989, p.505.

¹⁵⁰ *Ibidem*, p. 504.

¹⁵¹ “One of the divisions of ancient Attica; (...) The people or commons of an ancient Greek state, esp. of a democratic state, such as Athens” See *The Oxford English Dictionary*, vol. IV, Clarendon Press, Oxford, 1989, p. 449. See also T. Makkonen, *Identity, Difference and Otherness: the Concepts of “Peoples”, “Indigenous Peoples” and “Minority” in International Law*, Helsinki, University of Helsinki, Faculty of Law, 2000, p. 65 and K. Knop, *Diversity and Self-Determination in International Law*, Cambridge, Cambridge University Press, 2002. p. 55.

¹⁵² In ancient greek this means “race, tribe, gentile”, a foreign community. See Greek-English-Greek dictionary, <http://www.kypros.org/cgi-bin/lexicon>. See also T. Makkonen, *ibidem*, p. 23 and K. Knop, *ibidem*, p. 55.

¹⁵³ A. Cobban, *The Nation State and National Self-Determination*, T.Y. Crowell, New York, 1969, pp. 118-124. See also A. Rigo Sureda, *The Evolution of ...*, cit., pp. 23-24.

¹⁵⁴ M. Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, in «ICLQ», vol. 43, 1994, p. 249.

¹⁵⁵ A. Cobban, *ibidem*, p. 121.

¹⁵⁶ *Ibidem*. See also M. Koskenniemi, *ibidem*, p. 250 and D. Beetham, *Democracy and Human Rights*, Polity Press, Cambridge, 1999, p. 111.

¹⁵⁷ M. Koskenniemi, *ibidem*, pp. 249-250.

¹⁵⁸ *Ibidem*.

¹⁵⁹ J. C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, Cambridge, Cambridge University Press, 1996, p. 74.

¹⁶⁰ K. Knop, *ibidem*, p. 55.

¹⁶¹ J. C. Duursma, *ibidem*, p. 74.

¹⁶² A. Cobban, *ibidem*, pp. 118-119. See also K. Knop, *ibidem*, p. 55 and M. Koskenniemi, *ibidem*, p. 261.

¹⁶³ K. Knop, *ibidem*, p. 55.

¹⁶⁴ A. Cobban, *ibidem*, p. 122. See also A. Cassese, *Self-determination of peoples...*, cit., p. 13.

¹⁶⁵ T. Makkonen, *ibidem*, p. 65 and A. Eide, *In Search of Constructive Alternatives...*, cit., p. 143.

¹⁶⁶ C. R. Beitz, *Rawls’s Law of Peoples*, in C. Kukathas, *John Rawls: Critical Assessment of Leading Political Philosophers. Volume 4: Political liberalism and the Law of Peoples*,

“community of blood and origin”,¹⁶⁸ “people” primarily defined by subjective criteria vs. objective criteria,¹⁶⁹ “common sympathies”¹⁷⁰ vs. common “race, ethnicity, culture, tradition, history, language, religion”¹⁷¹, “people” as “a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcends organic-national differences”¹⁷² vs. “people” as “organically constructed, woven around historical myths and memories, enriched by the forces of autochthony, actual or mythical, and situated in an ever deepening national culture”.¹⁷³

It goes without saying that theory and reality are far more complex than this dichotomous sketch. The given descriptions on either side of the divide are not necessarily interchangeable or interconnected. Moreover, the dividing line itself is not rigorous. Sometimes both faces belong to the same coin. Nevertheless, the split is enlightening in regard of the legal meaning of the term “peoples”.¹⁷⁴ In what follows, I will use “demos” and “ethnos” as semantic ambassadors of the dual conception of “peoples”.

3.1.2 *Sed Lex.*

The term “peoples” is an international legal concept. It is an “inherent property” of such concepts “that they are formally independent of the non-

Routledge, London, 2003, p. 221 and A. Buchanan, Rawls’s Law of Peoples: Rules for a vanished Westphalian world, in C. Kukathas, *ibidem*, p. 255.

¹⁶⁷ W. Kymlicka, *Is Federalism a Viable Alternative to Secession?*, in P. B. Lehning, *Theories of Secession*, Routledge, London, 1998, p. 114 and 123.

¹⁶⁸ A. Whelan, *Wilsonian Self-determination and the Versailles Settlement*, in «ICLQ», vol. 43, 1994, p. 108, quoted in J. Castellino, *International Law and Self-determination...*, cit., p. 15.

¹⁶⁹ A. Cobban, *ibidem*, p. 122; J. C. Duursma, *ibidem*, p. 73 and K. Knop, *ibidem*, p. 61.

¹⁷⁰ J. S. Mill, *Considerations on Representative Government*, in J. Gray (ed.), *On Liberty and Other Essays*, Oxford, Oxford University Press, 1991, p. 427.

¹⁷¹ J. C. Duursma, *ibidem*, p. 73.

¹⁷² J. H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in «*European Law Journal*», vol. 1, 1995, pp. 234-244.

¹⁷³ J. H. H. Weiler, *European models: Polity, people and system* in P. Craig, C. Harlow (eds.), *Lawmaking in the European Union*, p. 30.

legal world”.¹⁷⁵ They ought not to be mixed up with ordinary understandings. The Vienna Convention on the Law of Treaties provides legal practitioners with the necessary tools for interpreting them.¹⁷⁶ Amongst these tools, “ordinary meaning” is an important and primary means, but not the only one. The object and purpose of a treaty, the intentions of the drafters and the context¹⁷⁷ of the contentious terms can be employed in the heuristic enterprise.

The legal history of self-determination and thus of the term “peoples” was kick-started by the adoption of the UN Charter in 1945 and received a serious boost with self-determination’s incorporation in the two 1966 UN Covenants on Human Rights.¹⁷⁸ These treaties have to be interpreted according to the 1969 VCLT. Although the VCLT states that it has no retroactive working,¹⁷⁹ its rules of interpretation must be applied, for they are assumed part of customary international law.¹⁸⁰

According to the *travaux préparatoires* of the 1966 Covenants, “the term ‘peoples’ should be understood in its most general sense”.¹⁸¹ This was also stressed by the Special Rapporteur A. Cristescu who wrote that “the right to self-determination is universal: it should be applied to all peoples and all nations”.¹⁸² In fact, it was the West that, inadvertently, “contributed to the widening of the scope of the Article”, by insisting that self-determination was not to be limited to colonial situations.¹⁸³ *In memoriam* of the “Belgian thesis” strategy, some even raised an ethnos conception of people during the drafting process to obtain the non-inclusion of the right to self-

¹⁷⁴ See T. Makkonen, *ibidem*, p. 65.

¹⁷⁵ T. Makkonen, *ibidem*, p. 55.

¹⁷⁶ See articles 31-33 of the 1969 Vienna Convention on the Law of Treaties.

¹⁷⁷ Comprised within the context is any subsequent practice in application of the treaty.

¹⁷⁸ A. Cassese, *Self-determination of peoples...*, cit., p. 43 and 65.

¹⁷⁹ Article 4 of the 1969 VCLT.

¹⁸⁰ G. Ress, *Interpretation*, in B. Simma (ed.), *The Charter...*, p. 18.

¹⁸¹ M. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, p. 32.

¹⁸² A. Cristescu, *The Right to Self-Determination...*, cit., p. 39.

¹⁸³ A. Cassese, *Self-determination of peoples...*, cit., p. 52.

determination.¹⁸⁴ Such an ethnos conception, however, gained no currency in subsequent state practice. As we will see later, practice essentially¹⁸⁵ upheld a demos conception of people. This went hand in hand with an external conception of self-determination and political decolonisation, which was “a quest for people’s sovereignty, rather than for national self-determination in its ethnic sense”.¹⁸⁶

Self-determination has, however, not been restricted to decolonisation. As A. Cassese has written, “self-determination, instead of withering away with the demise of colonialism, is showing its resilience and indeed is even acquiring a new lease of life”.¹⁸⁷ So, the end of colonialism marks the beginning of a new era evidenced by “the gradual crystallization of a customary norm proclaiming internal self-determination as a principle of democratic governance”.¹⁸⁸ It is this “diluted notion of self-determination” that “opens the way to an equally radical reunderstanding of the notion of a ‘people’, to cover any collectivity that feels itself united by some degree of cultural or other affinity (...)”¹⁸⁹ Indeed, in such a form self-determination is no longer incompatible with territorial integrity and consequently, the legal understanding of “people” may expand to embrace the ethnos conception.

¹⁸⁴ *Ibidem*, pp. 51-52. See also T. Makkonen, *ibidem*, p. 63.

¹⁸⁵ In the early days of decolonisation the General Assembly took a “pragmatic approach”: “when ethnic differences in (...) territories seemed to portend future instability, the General Assembly was quite willing to divide those territories into separate political entities along ethnic lines”. Examples are the partition of the Palestine mandate and the divide of the trust territory of the British Cameroons. This approach was “abandoned after the adoption of Res. 1514 (XV) in 1960”. See T. D. Musgrave, *Self-Determination and National Minorities*, Oxford UP, Oxford, 1997, paperback edn. 2000, pp. 157-158. See also A. Cassese, *Self-determination of peoples...*, cit., pp. 78-79. This does not undermine the contention that customary law consolidated a demos conception of people. As is well known, since the *Nicaragua* case, it is not necessary for practice to be “in absolutely rigorous conformity” with the purported customary rule. See *Nicaragua v. United States*, ICJ Reports, 1986, p. 98; *International Law Reports*, vol. 76, p. 432, referred to in M. N. Shaw, *International Law*, Cambridge UP, Cambridge, 2000, fourth edition, p. 61.

¹⁸⁶ A. Eide, *In Search of Constructive Alternatives...*, cit., p. 148.

¹⁸⁷ A. Cassese, *Self-determination of peoples...*, cit., p. 323.

¹⁸⁸ *Ibidem*.

¹⁸⁹ D. Makinson, *Rights of Peoples: A Logician’s Point of View*, in J. Crawford (ed.), *The rights of peoples*, Oxford, Clarendon Press, 2001, p. 76. See also A. Kiss, *The Peoples’ Right to Self-Determination*, in «Human Rights Law Journal», vol.7, 1986, p. 173; M. Koskenniemi, *ibidem*, p. 256 and K. Henrard, *Devising an adequate system of minority protection: individual human rights, minority rights and the right to self-determination*, Martinus Nijhoff, The Hague, 2000, p. 306.

Such “incremental expansion semantic-wise”¹⁹⁰ might cure international law of its current “blindness” “to the demands of ethnic groups, and national, religious, cultural, or linguistic minorities”.¹⁹¹

Self-determination, thus, has the potential of becoming a real human rights norm, “universal in scope” and benefiting “all segments of humanity”.¹⁹² In this respect it is interesting to note that the Human Rights Committee in its General Comment on Article 1 ICCPR “upholds and confirms the meaning [of peoples] to be derived from a literal meaning of the provision (...)”.¹⁹³

In any case, the legal notion of “people” is bound up with the “inherent duality”¹⁹⁴ of self-determination (external-internal). “The content and the holders of the right to self-determination” are thus preferably not separated.¹⁹⁵ Already the Secretariat in San Francisco made this clear when it provided the negotiators with the following definition of “peoples”: “the word ‘peoples’ is used in connexion with the phrase ‘self-determination of peoples’. This phrase is in such common usage that no other word would seem appropriate”. Mindful of this, I will now attempt to surface the intimate connexion between content and holder. The reader must, however, not forget that this area has been called a “conceptual morass”.¹⁹⁶

¹⁹⁰ Z. Skurbaty, *As if peoples mattered...*, cit., p. 216 and 226, were the expression is used in a different context.

¹⁹¹ A. Cassese, *Self-determination of peoples...*, cit., p. 328.

¹⁹² S. J. Anaya, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, in G. Alfredsson and M. Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes*, Kluwer International Law, The Hague, 2002, p. 9.

¹⁹³ C. Tomuschat, *Self-Determination in a Post-Colonial World*, in C. Tomuschat (ed.), *Modern Law of Self-Determination...*, cit., p. 3. See also Z. Skurbaty, *As if peoples mattered...*, cit., p. 233.

¹⁹⁴ T. Makkonen, *ibidem*, p. 62.

¹⁹⁵ *Ibidem*, p. 65.

¹⁹⁶ B. Kingsbury, *Reconstructing Self-Determination: A Relational Approach*, in P. Aikio, M. Scheinin (eds.), *Operationalising...*, p. 20.

3.2 External and internal Self-determination.

3.2.1 The distinction.

The distinction between external and internal self-determination was initially an “invention of political talking and scholarly writing”.¹⁹⁷ Today, jurisprudence, state and UN practice have added legal weight to the phenomenon.

The first explicit political reference was made in the OSCE Helsinki Final Act.¹⁹⁸ A. Cassese was among the first academics to write about the duality of self-determination.¹⁹⁹ He defines “external” self-determination as referring to “the ability of a people (...) to choose freely in the field of international relations (...)” its political status. “Internal” self-determination, he regards as coterminous with the right to choose one’s own government and to be free from oppression by central government. The two aspects of self-determination do not constitute “different rights” but are in fact “different modes of implementation” of one and the same right to self-determination.²⁰⁰

In their turn, each of the two “modes of implementation” contains a panoply of means to realize self-determination. External self-determination can take the form of independence, integration in, or association with a third State.²⁰¹ Internal self-determination can be shaped in multiple ways, ranging from federal schemes and autonomy arrangements to minority rights and

¹⁹⁷ G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, ..., cit., p. 50.

¹⁹⁸ See Principle VIII. Guiding Relations between Participating States, in «International Legal Materials», vol. 14, 1975, p. 1292.

¹⁹⁹ A. Cassese, *Political Self-Determination-Old Concepts and New Developments*, in A. Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 137.

²⁰⁰ D. Raič, *Statehood and the Law of Self-Determination*, Kluwer Law International, The Hague, 2002, p. 227.

²⁰¹ See Friendly Relations Declaration, G.A. Res. 2625 (XXV), Principle V, para. 4.

guarantees of non-discrimination.²⁰² Essentially, however, internal self-determination shelters a right “to participate (a right to have a say) in the decision-making processes of the State”.²⁰³ Therefore, this mode of implementation has a continuous character.²⁰⁴ In contrast, external self-determination only has a “temporary nature”, meaning that once a certain political status has been chosen the right to self-determination is normally consumed in that regard.²⁰⁵

Knowing now what the distinction stands for and what internal self-determination comprises, one might question its “surplus value” as legal invention. Some commentators have argued that it obviously adds value to the human rights protection system in that it takes care of group interests.²⁰⁶ They contend that the common assumption according to which rights of individuals sufficiently promote group interests has been proven wrong. Others have argued that the existing legal set of instruments, when used in a creative manner, can achieve the goals they all share.²⁰⁷ This has in turn been questioned by postulating that internal self-determination can provide the existing legal set of instruments with the “enhanced status” of customary

²⁰² T. Makkonen, *ibidem*, p. 69 referring to M. Pomerance, *Self-determination in Law and Practice*, 1982, p. 74. See also R. McCorquodale, *Self-Determination: A Human Rights Approach*, in «CLQ», vol. 43, 1994, p. 864, reproduced in R. McCorquodale, *Self-Determination in International Law*, Ashgate and Dartmouth, Aldershot, 2000, p. 477; P. Thornberry, *The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism*, in C. Tomuschat (ed.), *Modern Law of Self-Determination...*, cit., pp. 133-134; A. Eide, *In Search of Constructive Alternatives...*, cit., p. 165 and pp. 170-172 and A. Cassese, *Self-determination of peoples...*, cit., pp. 352-359.

²⁰³ D. Raič, *ibidem*, p. 237. See also A. Rosas, *Internal Self-Determination*, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, Martinus Nijhoff, 1993, p. 227-232.

²⁰⁴ D. Raič, *ibidem*, p. 234.

²⁰⁵ *Ibidem*, p. 226.

²⁰⁶ K. Henrard, *Devising an adequate system...*, cit., p. 296; pp. 316-317 and D. Raič, *ibidem*, pp. 239-242 and I. Brownlie, *The Rights of Peoples in Modern International Law*, in J. Crawford (ed.), *The rights of peoples...*, cit., p. 2 *et seq.*

²⁰⁷ G. Alfredsson, *Access to International Monitoring Procedures: Choices between Self-Determination and the Human Rights of Groups*, in Michael C. van Walt van Praag, Onno Seroo (eds.), *Report of the International Conference of Experts Held in Barcelona from 21 to 27 November 1998: The implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, UNESCO Division of Human Rights, Democracy and Peace/ UNESCO, Centre of Catalonia, p. 203. See also C. Tomuschat, *Democratic Pluralism: The Right to Political Opposition*, in A. Rosas, J. Helgesen (eds.), *The Strength of diversity: Human Rights and Pluralist Democracy*, 1992, p. 39 referred to by A. Rosas, *Internal Self-Determination...*, cit., p. 246.

law, non-derogatory right, and even *jus cogens*.²⁰⁸ Yet this postulate has been refuted in some respects by others.²⁰⁹

Whatever the outcome of the doctrinal debate, it seems that the distinction has nevertheless been consolidated by jurisprudence,²¹⁰ other state practice²¹¹ and UN practice²¹².²¹³ In light of the distinction it is now possible to turn to the right-holders of self-determination.

²⁰⁸ A. Rosas, *Internal Self-Determination...*, cit., pp. 246-248.

²⁰⁹ A. Cassese, *Self-determination of peoples...*, cit., pp. 53-54.

²¹⁰ *Reference re Secession of Quebec*, S.C.R., vol.2, 1998. This was a reference to the Supreme Court of Canada by the Canadian Government relating to the secession of Quebec. Quebec declined to appear before the Court but an *Amicus Curiae* was appointed and the Court heard the opinions of a number of international lawyers. Another case is *Katangese Peoples' Congress v. Zaire*, where the complainant requested the African Commission to recognize the independence of Katanga, but where the forementioned Commission held "the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and the territorial integrity of Zaire". See N. Enonchong, *Foreign State Assistance in Enforcing the Right to Self-Determination Under the African Charter: Gunme & Ors v. Nigeria*, in «Journal of African Law», vol. 46, 2002, pp. 252-255. See also the ruling by the Constitutional Court of the Russian Federation on the constitutionality of a decision of Tatarstan to hold a referendum on the status of the Republic. The Court held that: "the Republic of Tatarstan has the right to submit to the vote the issue of its legal status, because this right follows from the right of peoples to self-determination". To sustain its findings the Court also referred to international instruments such as common article 1 of the 1966 Covenants and G.A. Res. 2625. See D. Raič, *ibidem*, p. 256-257.

²¹¹ See US Deputy Secretary of State in the Clinton administration stating that: "democracy is the political system most explicitly designed to ensure self-determination" in S. Talbott, *Self-Determination in an interdependent world*, «Foreign policy», spring 2000, p. 159. See also the reports of numerous parties to the ICCPR, where references are made, implicitly and explicitly, to internal self-determination. See D. Raič, *ibidem*, p. 285. See also H. Quane, *A Right to Self-Determination for the Kosovo Albanians?*, in «Leiden Journal of International Law», vol. 13, 2000, p. 221: Of 97 studied states, "87 commented on self-determination. Of these, 69 states or 79% commented directly or indirectly on internal self-determination".

²¹² D. Raič, *ibidem*, p. 236, referring the condemnations by the Security Council of the Apartheid regime in South Africa and many other statements of UN organs. See in particular also the 1996 General Recommendation XXI on self-determination of the Committee on the Elimination of Racial Discrimination, which upholds the distinction. See K. Myntti, *The right of Indigenous Peoples to Self-Determination and Effective Participation*, in P. Aikio, M. Scheinin (eds.), *Operationalising...*, pp. 105-106.

²¹³ P. Alston, *Peoples' Rights: Their Rise and Fall*, in P. Alston (ed.), *People's rights*, Oxford, Oxford University Press, 2001, p. 270 and A. Rosas, *Internal Self-Determination...*, cit., p. 229.

3.2.2 Right-holders of external self-determination.

“No civilization would ever have been possible without a framework of stability, to provide the wherein for the flux of change. Foremost among the stabilizing factors, more enduring than customs, manners and traditions, are the legal systems that regulate our life in the world (...)”²¹⁴

“Just as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos”.²¹⁵

It is generally accepted that there are at least three “categories”²¹⁶ of peoples who enjoy the right to external self-determination under customary international law: populations of territories under colonial rule, populations of territories subjected to foreign military occupation and populations of sovereign States.²¹⁷ In one breath, G. Alfredsson has defined people as “the population of a separate political unit, with delimited territory and with a background in mainly colonial history or recent occupation”.²¹⁸ “People” has thus been defined in a remarkably coherent fashion as “the geographical entity (...) rather than the popular entity (...)”. In fact, international law seems to have agreed upon granting an unrestricted right of external self-

²¹⁴ H. Arendt, *Crises of the Republic*, 1972, quoted in Z. Skurbaty, *As if peoples mattered...*, cit., p. 252.

²¹⁵ E. Roosevelt, *The Universal Validity of Man's Right to Self-Determination*, Dept. St. Bul., vol. 27, 8 December 1958, p. 919, quoted in A. Cassese, *Self-determination of peoples...*, cit., p. 318.

²¹⁶ One author has characterised this way of appointing the beneficiaries of self-determination as the “categories approach” as opposed to the “coherence approach”, which establishes a general definition of “peoples” that makes sense of the colonial identity. See K. Knop, *Diversity and Self-Determination...*, cit., p. 54.

²¹⁷ A. Cassese, *Self-determination of peoples...*, cit., p. 59, pp. 90-99, p. 129, pp. 287-288, p. 327; A. Eide, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, in Commission on Human Rights, *Prevention of Discrimination against and the protection of Minorities*, E/CN.4/Sub.2/2000/10, p. 5.

²¹⁸ G. Alfredsson, *Different forms of and claims to the right of self-determination*, in Clark D., Williamson R., *Self-Determination. International perspectives*, Mc Millan Press, London, 1996, pp. 59-60. See also A. Eide, *In Search of Constructive Alternatives...*, cit., p. 155.

determination to all *demoi* existing somehow in international law at the time, when self-determination became a legal principle.

Colonial peoples constituted *demoi*,²¹⁹ since they lived within internationally recognised boundaries,²²⁰ somehow distinct from the boundaries of the colonial Powers of which they were dependent and had developed common sympathies through their fight for liberation.²²¹ This was later confirmed in the Friendly Relations Declaration, which stipulated that their territories have “under the Charter of the United Nations, a status separate and distinct from the territory of the State administering” them.²²² This is also the reason why some scholars have expressed the view that “the creation of a new State in a colonial context is not, strictly speaking, a secession”.²²³ Upon independence, the colonial boundaries transformed into state boundaries in accordance with the so-called *uti possidetis juris* principle.²²⁴ In essence, however, the territorial integrity of the colonial power remained legally unaffected.²²⁵

The other two types of peoples endowed with the right to external self-determination also represent *demoi*. They are essentially overlapping categories. Indeed, external self-determination for peoples under foreign occupation flows from the prohibition on the international use of force for

²¹⁹ For a contrary view, see K. Knop, *Diversity and Self-Determination...*, cit., p. 55.

²²⁰ See for example the Congress of Berlin. See G. J. Simpson, *The Diffusion of Sovereignty...*, cit., p. 270.

²²¹ C. Chaumont, *Le droit des peuples à témoigner d’eux-mêmes*, in «Annuaire du Tiers Monde», vol. 2, 1976, p. 27, referred to by K. Knop, *Diversity and Self-Determination...*, cit., p. 56.

²²² See Friendly Relations Declaration, G.A. Res. 2625 (XXV), Principle V, para. 6. See also J. Charpentier, *Autodétermination et décolonisation...*, cit., p. 120 and M. Bedjaoui, *Article 73...*, cit., p. 1080.

²²³ T. Franck, R. Higgins, A. Pellet, M. Shaw, C. Tomuschat, *L’intégrité territoriale du Québec dans l’hypothèse de l’accession à la souveraineté*, in Commission d’étude des questions afférentes à l’accession du Québec à la Souveraineté, *Les attributs d’un Québec souverain, Exposés et études*, vol. I, 1992, translated as *The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty*, in A. F. Bayefsky (ed.), *Self-Determination in International Law: Québec and Lessons Learned*, The Hague, Kluwer Law International, 2000, p. 283.

²²⁴ See for example A. Cassese, *Self-determination of peoples...*, cit., p. 191.

²²⁵ T. Franck, R. Higgins, A. Pellet, M. Shaw, C. Tomuschat, *ibidem*, p. 282. See also K. Knop, *ibidem*, p. 75.

territorial gain.²²⁶ Their right to external self-determination is therefore realised through the withdrawal of the foreign troops.²²⁷ As G. Alfredsson writes: “Aggression should not bear fruit. Occupation and annexation of part of a territory should not lead to the creation of a new people; it is still the people of that territory as a whole who should decide”.²²⁸ Thus, “outside the colonial context, the primary subjects of external self-determination are the whole people of each State”.²²⁹ It is a truism that such populations constitute *demoi*.

It should now be clear that - aside some exceptional circumstances (which will be dealt with under section 3.3) - only peoples in the sense of *demoi* at a certain point in history have been given the right to exercise self-determination externally. What is the rationale for this restriction? How come *ethnoi* have not been allowed to exercise the right to self-determination externally in a unilateral fashion?

Ultimately, the reason why an unrestricted right to external self-determination has been confined to old *demoi* is our universal belief that “all human beings are born free (...)”, but also “equal (...)”.²³⁰ Indeed, equal freedom demands legal restrictions. “In general terms, self-determination is about groups or individuals being free from domination by others, though it does not imply freedom from all constraints”.²³¹ E. Kant wrote that “freedom (independence from the constraint of another’s will) is the sole and original right that belongs to every human being by virtue of his humanity, insofar as it is compatible with the freedom of everyone else”.²³²

²²⁶ Article 2 (4) of the Charter of the United Nations. See G. Alfredsson, *Different forms of and claims...*, p. 61.

²²⁷ A. Cassese, *Self-determination of peoples...*, cit., p. 130 and pp. 147-150.

²²⁸ G. Alfredsson, *Different forms of and claims...*, p. 61.

²²⁹ J. Crawford, *The Right of Self-Determination in International Law...*, cit., pp. 63-64. See also K. Myntti, *The right of Indigenous Peoples...*, cit., p. 108 and H. Quane, *A Right to Self-Determination for the Kosovo Albanians?*, ..., cit., p. 220.

²³⁰ Article 1 of the Universal Declaration of Human Rights, G.A. Res. 217A(III).

²³¹ P. Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses...*, cit., p. 49.

²³² See A. Ingram, *Rights and the Dignity of Humanity*, in L. Hancock, C. O’Brien, *Rewriting rights in Europe*, Ashgate, Aldershot, 2000, p. 4. The quotation has been slightly

One could replace some words and read: self-determination is the sole and original right that belongs to every people by virtue of its peoplehood, insofar as it is compatible with the self-determination of every other people.

Unfortunately, peoples are not “physical realities”.²³³ “There are no authentic nations”.²³⁴ “The fact is that, whenever in the course of history a people has become aware of being a people, all definitions have proved superfluous”.²³⁵ Peoples are constructed through political and ideological struggle and, moreover, “are conceptualised in conflicting and overlapping ways”.²³⁶ Therefore, if self-determination of peoples needs to be compatible with the self-determination of every other people, it can no longer be “absolutist” or “binary” in nature, meaning that it can no longer be an entitlement “to state-formation or nothing at all”.²³⁷ “All-or-nothing patriots”²³⁸ are but selfish and thus morally condemnable. Self-determination does not equal self-ism. *Ethnoi* and new *demoi* should accept a “relativist”²³⁹ understanding of self-determination. A right to external self-determination ought to be limited in the interests of every human being.

restructured. See also article 4 of La Déclaration des droits de l’homme et du citoyen de 1789: “La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui. Ainsi, l’exercice des droits naturels de chaque homme n’a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi”.

²³³ J. Charpentier, *Autodétermination et décolonisation...*, cit., p. 122.

²³⁴ M. Koskenniemi, *National Self-Determination Today...*, cit., p. 269. See also E. Kamenka, *Human Rights: Peoples’ Rights*, in J. Crawford (ed.), *The rights of peoples...*, cit., p. 133: “Nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history. They do not form a natural kind”.

²³⁵ A. Cristescu, *The Right to Self-Determination...*, cit., p. 40.

²³⁶ M. Koskenniemi has called this the “onion-problem” of nationalism. See M. Koskenniemi, *National Self-Determination Today...*, cit., p. 260 and p. 269. See also T. Makkonen, *Identity, Difference and Otherness...*, pp. 33-34 and S. J. Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, in P. Aikio, M. Scheinin (eds.), *Operationalising...*, p. 5.

²³⁷ See T. Makkonen, *ibidem*, p. 68. This has been called the “end-state” approach in B. Kingsbury, *Reconstructing Self-Determination...*, cit., p. 22. See also A. Cobban, *The Nation State and National Self-Determination...*, cit., p. 144.

²³⁸ E. J. Cárdenas, M. F. Cañas, *The Limits of Self-Determination*, in W. Danspeckgruber (ed.), *The Self-Determination of Peoples...*, cit., p. 107.

²³⁹ T. Makkonen, *ibidem*, p. 68.

That self-determination is not an “absolute right without any limitations” is also the finding of R. McCorquodale, who developed a “human rights approach” to self-determination.²⁴⁰ Thus, there are “limitations to protect other rights” and “limitations to protect the general interests of society”.²⁴¹ In particular, the territorial integrity principle and the *uti possidetis* principle, which is “responsible for the territorial definition of the State to which the principle of territorial integrity will apply”,²⁴² are conceived as legitimate breaks on “the high levels of psychic and social energy”²⁴³ self-determination is able to generate.²⁴⁴

If such argumentation would fail to convince the reader, then it is but possible to paint the gloomy picture of unrestricted external self-determination for all. Combined with the “principle of nationality”²⁴⁵ or the “ideology of ethno-nationalism in its expansionist, exclusivist and secessionist modes”,²⁴⁶ unrestricted external self-determination is “continual fuel for strife”,²⁴⁷ a “phrase (...) loaded with dynamite”,²⁴⁸ “an opened box of Pandora”,²⁴⁹ a “Frankenstein’s monster”.²⁵⁰ It would blow the world to pieces in a “downward disintegrative spiral”,²⁵¹ “matrëshka-wise”,²⁵² and

²⁴⁰ R. McCorquodale, *Self-Determination: A Human Rights Approach...*, cit., p. 875. See also H. Hannum, *A Principled Reponse to Ethnic Self-Determination Claims*, in G. Alfredsson and M. Stavropoulou (eds.), *Justice Pending...*, cit., p. 263.

²⁴¹ R. McCorquodale, *ibidem...*, cit., p. 876 and p. 878.

²⁴² D. Raič, *ibidem*, p. 303.

²⁴³ P. Allot, *Self-Determination – Absolute Right or Social Poetry?*, in C. Tomuschat (ed.), *Modern Law of Self-Determination...*, cit., p. 177.

²⁴⁴ R. McCorquodale, *ibidem...*, cit., pp. 879-882.

²⁴⁵ “Jede Nation ein Staat, jeder Staat ein nationales Wesen”. See A. Cassese, *Self-determination of peoples...*, cit., p. 13. The principle has been described as “one of the most dangerous ideas for democracy”. See J. J. Linz, A. Stepan, *Toward Consolidated Democracies*, in Diamond, L., et al (eds.), *Consolidating the Third Wave Democracies: Themes and Perspectives*, John Hopkins UP, Baltimore and London, 1997, p. 24.

²⁴⁶ A. Eide, *In Search of Constructive Alternatives...*, cit., p. 140. He argues that it is “one of the most serious contemporary threats to a peaceful evolution of the international order and to the advancement of human rights protection”.

²⁴⁷ R. Falk, *Self-Determination Under International Law...*, cit., p. 31.

²⁴⁸ R. Lansing, Secretary of State under President W. Wilson, quoted in A. Cassese, *Self-determination of peoples...*, cit., p. 22.

²⁴⁹ J. Charpentier, *Autodétermination et décolonisation...*, cit., p. 120.

²⁵⁰ E. Plischke, quoted in A. Cassese, *Self-determination of peoples...*, cit., p. 340. See also P. Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses...*, cit., p. 54.

²⁵¹ R. Falk, *Self-Determination Under International Law...*, cit., p. 35.

“*ad infinitum*”.²⁵³ The result would be “anarchy”,²⁵⁴ “utter chaos”,²⁵⁵ “fratricidal struggles”,²⁵⁶ “racism”, “xenophobia”, “segregation”, “exploitation” and “ethnic cleansing”.²⁵⁷ In more diplomatic language: “peace, security and economic well-being for all would become ever more difficult to achieve”.²⁵⁸ Humanity would thus be faced with a Hieronymus Bosch like reality. It is obvious that no sensible human being wants to live life in such a setting. Once and for all it should thus be clear that union, not unity is the destiny of humanity. And therefore the exercise of the right to external self-determination should be confined to the *demoi* existing at the time of the foundation of the current world order, abstraction made of exceptional circumstances.

Is a general ban on external self-determination the death kiss of world’s *ethnoi* and new *demoi* ? No. “Strong national cultures can survive even without their own state, as demonstrated by the Catalans, Basques, Scots, Welsh, Tamils (in India), Quebecois, Tibetans, [Flemish] and many indigenous peoples, so long – and this is an important caveat – as the human rights of their members are protected”.²⁵⁹ Nevertheless, the restriction on external self-determination has not led to a ban on secessionism under international law.²⁶⁰ “The breaking away of a nation or an ethnic group is

²⁵² Z. Skurbaty, *As if peoples mattered...*, cit., p. 195. See also J. Crawford, *The Right of Self-Determination in International Law...*, cit., p. 13.

²⁵³ R. Higgins, quoted in T. Makkonen, *ibidem*, p. 74.

²⁵⁴ The International Commission of Rapporteurs dealing with the 1921 Aaland Islanders’ claim for secession from Finland, quoted in K. Henrard, *Devising an adequate system...*, cit., p. 301.

²⁵⁵ E. J. Cárdenas, M. F. Cañas, *The Limits of Self-Determination...*, cit., p. 102.

²⁵⁶ *Burkina Faso v. Mali* (Frontier dispute), ICJ Rep., 1986, p. 565 (para. 20).

²⁵⁷ A. Eide, *In Search of Constructive Alternatives...*, cit., p. 140.

²⁵⁸ Boutros-Ghali, B., *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, report of the Secretary-General of the United Nations in UN Document A/47/277-S/24111, 17 June 1992, para. 17.

²⁵⁹ H. Hannum, *A Principled Reponse to Ethnic Self-Determination Claims...*, cit., pp. 265-266.

²⁶⁰ A. Cassese, *Self-determination of peoples...*, cit., p. 340. See also T. Franck, R. Higgins, A. Pellet, M. Shaw, C. Tomuschat, *L’intégrité territoriale du Québec dans l’hypothèse de l’accession à la souveraineté, ...*, cit., p. 284.

neither authorized nor prohibited by the legal rules; it is simply regarded as a fact of life, outside the realm of law (...)”²⁶¹

3.2.3 Right-holders of internal self-determination.

“(…) in many territorial units there are distinct, often antagonistic nationalities (...) One of the most severe sources of injustice and denial of human rights today is that the apparatus of State power has been captured by one of those fragments of a people, defined as the totality of persons within a given State, while the other elements are subjugated to varying degrees”²⁶²

As was stated before (under section 3.2.1) the distinction between external and internal self-determination has gained some legal relevance. This does not, however, imply that the right-holders of internal self-determination are now determined beyond controversy.

The “least controversial” beneficiary of the internal aspect of self-determination is “the entire population of existing States”²⁶³ According to A. Cassese, a customary rule of international law is “*in statu nascendi*” in this regard.²⁶⁴ It is already treaty law under article 1 of the ICCPR.²⁶⁵ This is evidenced by the Human Rights Committee’s request to “describe the constitutional and political processes which in practice allow the exercise of [the right to self-determination]”²⁶⁶ and by the reports submitted by States in

²⁶¹ A. Cassese, *ibidem*.

²⁶² R. Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in J. Crawford (ed.), *The rights of peoples*, ..., cit., p. 26.

²⁶³ D. Raič, *Statehood and the Law of Self-Determination*, ..., cit., p. 244.

²⁶⁴ A. Cassese, *Self-determination of peoples*..., cit., p. 103 and p. 306.

²⁶⁵ A. Cassese, *Self-determination of peoples*..., cit., p. 102. As of 2 May 2003, there are 149 State Parties to the ICCPR.

²⁶⁶ CCPR General Comment 12, para. 4.

accordance with this request.²⁶⁷ Both the Friendly Relations Declaration and the 1993 Vienna Declaration have been supportive of the view that State populations enjoy internal self-determination. They stipulate that a State only conducts itself in compliance with the principle of self-determination when its government represent the “whole people belonging to the territory”.²⁶⁸ Finally, the OSCE Helsinki Final Act and the African Charter provide some kind of legal weight to the emerging customary rule.²⁶⁹

Thus, more or less all *demoi* endowed with the right to exercise self-determination externally also have a right to exercise it internally. As to the *ethnoi* and new *demoi* the situation is far less clear.

A. Cassese has convincingly argued that there is a customary rule supporting internal self-determination for racial groups.²⁷⁰ The finding is based on State practise regarding Southern Rhodesia and South Africa in combination with the Friendly Relations Declaration which states that governments must represent the “whole people belonging to the territory without distinction as to race, creed or colour”.²⁷¹

As to minorities in general, the opinions of legal scholars are diverse. K. Henrard has summarized it in this way: “the following positions can be distinguished: those who make a radical distinction between minorities and peoples, those who do not exclude a possible overlap between both concepts and finally those who take a more centralist position as they emphasize that the minority should take part in the exercise of the ‘people’ in globo”.²⁷² She concludes, nevertheless, by observing that “overall, there seems to be a

²⁶⁷ See earlier footnote in regard state practice under section 3.2.1.

²⁶⁸ See Friendly Relations Declaration, G.A. Res. 2625 (XXV), Principle V, para. 7 and Chapter I (2) Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.

²⁶⁹ D. Raič, *Statehood and the Law of Self-Determination*, ..., cit., pp.246-247.

²⁷⁰ A. Cassese, *Self-determination of peoples*..., cit., p. 108 and p. 129.

²⁷¹ *Ibidem*, pp. 109-121.

²⁷² K. Henrard, *Devising an adequate system*..., cit., p. 292.

growing acceptance that minorities (should) benefit in some way and to some extent from a right to self-determination”.²⁷³

The legal situation of indigenous peoples will be dealt with later (under section 2.4.1). At this point it is nevertheless possible to draw a general conclusion in regard all *ethnoi*. In theory, as shown before (under section 3.1.2), there would be no serious argument against *ethnoi*'s enjoyment of internal self-determination. There is however no such customary rule under international law. This is among other things borne out by the reaction of the international community in regard the Kosovo Albanians. In Security Council resolution 1244 which favours “substantial autonomy” for the Kosovo population all references to “self-determination” have been carefully avoided.²⁷⁴ Moreover, autonomy in itself does not imply recognition of a right to internal self-determination.²⁷⁵

Nevertheless, there are several developments, especially in jurisprudence²⁷⁶ which point to an emerging customary rule to internal self-determination for all *ethnoi* and new *demoi*. For example, the Supreme Court of Canada has held that: “It is clear that ‘a people’ may include only a portion of the population of an existing state” and “reference to ‘people’ does not necessarily mean the entirety of a state’s population”. There is other jurisprudence, state practice and doctrine going in the same direction, but it is beyond the scope of this thesis to elaborate on it.²⁷⁷

²⁷³ *Ibidem*.

²⁷⁴ See Res. 1244 adopted by the Security Council at its 4011th meeting, on 10 June 1999.

²⁷⁵ H. Quane, *A Right to Self-Determination for the Kosovo Albanians?*, ..., cit., p. 222.

This contention is based on the fact that States in their reports to the Human Rights Committee tend to refer to autonomy under article 27, but not under article 1 of the ICCPR.

²⁷⁶ See for example *Reference re Secession of Quebec*, S.C.R., vol.2, 1998, para. 113 and 124. See also Opinion no. 2 of the Arbitration Committee set up in 1991 by the EC Peace Conference on Yugoslavia, in «ILM», vol. 3, 1992, pp. 1497-1499, stating in para. 3: “Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he wishes”. Further see also the *Katangese Peoples*' case and the *Tatarstan* case (*confer supra*).

²⁷⁷ See D. Raič, *Statehood and the Law of Self-Determination*, ..., cit., pp. 247-264 and p. 288. According to this author, a customary right to internal self-determination for all *ethnoi*

In sum, international law has practically acknowledged a right to internal self-determination to all old *demoi*. All other types of communities ordinarily understood to constitute peoples do not have such a right under customary international law, abstraction made of racial groups. There is no good reason for this state of affairs. There is, however, a hopeful trend towards recognising a right to internal self-determination to “all peoples” in instruments, state practice, jurisprudence and doctrine.

3.3 An growing consensus in regard self-determination.

“Self-determination should be concerned primarily with people rather than territory”.²⁷⁸

Self-determination, as a legal principle, has been (ab)used to promote the good cause of decolonisation.²⁷⁹ Now that the process of decolonisation comes to an end,²⁸⁰ self-determination can win back its true nature.

Self-determination’s true nature or core has been positively defined as follows²⁸¹:

having a “distinct individuality”, meaning those having a “self” distinct from all other “selves inhabiting the globe”, already exist.

²⁷⁸ H. Hannum, *A Principled Reponse to Ethnic Self-Determination Claims...*, cit., p. 267.

²⁷⁹ One author has argued that there was never a right to self-determination for colonial peoples, but only an international obligation to decolonise. See J. Charpentier, *Autodétermination et decolonisation...*, cit., p. 124.

²⁸⁰ “All trust territories have now exercised their right to self-determination. Except for a few territories - most notably, Western Sahara – all non-self-governing territories have also achieved self-determination.” K. Knop, *Diversity and Self-Determination...*, cit., p. 53.

²⁸¹ It goes whitout saying that the following list is not exhaustive of academic opinion.

- the idea that “human beings, individually and as groups, are equally entitled to be in control of their own destinies”²⁸²
- a principle “entitling the people to choose its political allegiance to influence the political order under which it lives”²⁸³
- “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives”²⁸⁴
- “the right of popular participation in the government of the State as an entity”²⁸⁵
- “the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion”²⁸⁶
- the right of every people “to participate in the definition of its political, economic, social, or cultural future”²⁸⁷
- “the ‘need to pay regard to the freely expressed will of peoples’ each time the fate of peoples is at issue”.²⁸⁸

It is abundantly clear that self-determination is primarily about “method” or “process” and not about “outcome”.²⁸⁹ Self-determination is about democracy, not necessarily about independence. In fact, “an overwhelmingly negative consensus has surfaced” that “self-determination

²⁸² S. J. Anaya, *The Contours of Self-Determination...*, cit., pp. 8-9.

²⁸³ Halperin and Scheffer, quoted in E. J. Cárdenas, M. F. Cañas, *The Limits of Self-Determination...*, cit., p. 110.

²⁸⁴ I. Brownlie, *The Rights of Peoples in Modern International Law...*, cit., p. 5.

²⁸⁵ A. Eide, quoted in A. Rosas, *Internal Self-Determination...*, cit., p. 239.

²⁸⁶ T. Franck, *The Emerging Right to Democratic Governance*, in «AJIL», vol. 86, 1992, p. 52.

²⁸⁷ T. Franck, R. Higgins, A. Pellet, M. Shaw, C. Tomuschat, *L'intégrité territoriale du Québec...*, cit., p. 277.

²⁸⁸ A. Cassese, *Self-determination of peoples...*, cit., p. 128 and pp. 319-320. See also *Western Sahara* case, ICJ, Reports 1975, p. 33.

²⁸⁹ G. Nettheim, ‘Peoples’ and ‘Populations’: *Indigenous Peoples and the Rights of Peoples*, in J. Crawford (ed.), *The rights of peoples...*, cit., p. 119 referring to M. Pomerance; B. Kingsbury, *Claims by Non-State Groups in International Law*, Cornell International Law Journal, vol. 25, 1992, p. 504. A. Cassese, *Self-determination of peoples...*, cit., p. 320. P. Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses...*, cit., p. 51; E.-I. A. Daes, *The Spirit and the Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration*, in P. Aikio, M. Scheinin (eds.), *Operationalising...*, cit., p. 79 and Z. Skurbaty, *As if peoples mattered...*, cit., p. 261.

should not and cannot mean: fragmentation or balkanisation”.²⁹⁰ “As long as self-determination is perceived primarily as a right to independent statehood it will remain more a source of conflict than a substantive component in the settlement of disputes”.²⁹¹ Thus, normally, territorial integrity should override secessionist claims motivated by self-determination. Indeed, self-determination “stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate”.²⁹²

Today, the focus has shifted from territory to people, from external to internal self-determination. In the words of A. Rosas: “At the very end of the day, all elements of self-determination are ‘internal’, in the sense that the popular will must be taken into account”.²⁹³ This was confirmed by the Supreme Court of Canada when it held that “self-determination of a people is normally fulfilled through internal self-determination”.²⁹⁴

Now, what does this mean concretely? One thing is clear. In a world with less than 200 States and more than 5000 *ethnoi*, in a world where “only 4% of all the people live within boundaries coinciding with the extension of their ethnic groups”,²⁹⁵ self-determination should lead to “pluralist democracy”²⁹⁶ or “consociational democracy”²⁹⁷. “Consociational democracy is built on the principle of executive power-sharing and a certain degree of self-administration for each group, whether they live together or separately”.²⁹⁸ Thus, procedural in nature, “self-determination points to a number of options and opportunities a group might potentially have”.²⁹⁹ But

²⁹⁰ E. J. Cárdenas, M. F. Cañás, *The Limits of Self-Determination...*, cit., p. 105.

²⁹¹ A. Cassese, *Self-determination of peoples...*, cit., p. 350.

²⁹² T. Franck, *The Emerging Right...*, cit., p. 59.

²⁹³ A. Rosas, *Internal Self-Determination...*, cit., p. 250.

²⁹⁴ *Reference re Secession of Quebec*, S.C.R., vol.2, 1998, para. 126.

²⁹⁵ T. Makkonen, *Identity, Difference and Otherness...*, p. 4. See also A. Eide, *In Search of Constructive Alternatives...*, cit., p. 166-167.

²⁹⁶ D. Beetham, *Democracy...*, cit., p. 113-114. See also A. Cassese, *Self-determination of peoples...*, cit., p. 306.

²⁹⁷ A. Lijphart, *Majority rule versus democracy in deeply divided societies*, *Politicon*, vol. 4, 1977, p. 2, referred to by A. Eide, *ibidem*, p. 165.

²⁹⁸ A. Eide, *ibidem*, p. 166. See also K. Henrard, *Devising an adequate system...*, cit., pp. 313-314.

²⁹⁹ Z. Skurbaty, *As if peoples mattered...*, cit., p. 261.

is there consequently no danger of self-determination becoming “all things to all men”?³⁰⁰ Yes, but as Z. Skurbaty has written: “I see absolutely no reasons to be apprehensive about the implications of such an assumption”.³⁰¹ Indeed, isn’t human liberty, as guaranteed by article 1 of the Universal Declaration of Human Rights, also all things to all men? Proclaiming such a right has not prevented human beings from acting morally or in accordance with the law. Logically, this ought not to be different in respect of the right to self-determination.

Thus, being all things to all men, self-determination might even include a right to secede, a right to dismember, but simply and solely in “self-defence”. It is obvious that territorial integrity “cannot be an end in itself”.³⁰² Moreover, “blatant subjugation of groups” is undoubtedly a concern of the international community.³⁰³ Already under the League of Nations the Commission of Rapporteurs in the *Åland Islands* case took the view that exceptionally a right to ‘separation’ of the minority from the State might arise.³⁰⁴ Such a right would also find support in the Friendly Relations Declaration and in the third preambular paragraph of the UDHR referring to the “recourse, as a last resort, to rebellion against tyranny and oppression”.³⁰⁵ However, such a right is still disputed. Though *opinio juris* might be considerable, state practice is still not following.³⁰⁶ Nevertheless, it is bound to emerge some day, for it lies in line with the growing consensus. Thus, the Supreme Court of Canada decided: “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession”.³⁰⁷

³⁰⁰ R. Higgins, *Problems and Process*. International Law and How we Use It, Oxford UP, Oxford, 1994.

³⁰¹ Z. Skurbaty, *As if peoples mattered...*, cit., p. 215.

³⁰² G. J. Simpson, *The Diffusion of Sovereignty...*, cit., p. 283.

³⁰³ E. J. Cárdenas, M. F. Cañas, *The Limits of Self-Determination...*, cit., p. 102.

³⁰⁴ See A. Cassese, *Self-determination of peoples...*, cit., p. 31.

³⁰⁵ G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples, ...*, cit., p. 49.

³⁰⁶ See H. Hannum, *A Principled Reponse to Ethnic Self-Determination Claims...*, cit., pp. 264-265; H. Quane, *A Right to Self-Determination for the Kosovo Albanians?*, ..., cit., pp. 226-227.

What becomes apparent is the “remedial” nature of self-determination. Scholars have spoken of “remedial secession”³⁰⁸ and according to S. J. Anaya any form of self-determination should be “remedial”.³⁰⁹ Legitimacy of a particular claim to self-determination thus flows from the appropriateness to remedy a particular situation.³¹⁰ Similarly, according to F. L. Kirgis legitimacy of a particular degree of self-determination is dependent on the degree of representative government.³¹¹ The more representative a government is the lower the degree of self-determination one can claim. Thus, one could say that self-determination is not all things to *any* man. However, the problem remains that the reasoning is highly circular: a claim to self-determination is legitimate if there is an equivalent lack of self-determination.

Therefore, as J. Salmon has written: “The real difficulty of the matter is to define how a people exercises its internal right to self-determination. If sovereignty resides in the people, how does that people voice its will? How is democracy achieved? These are by no means easy questions to answer”.³¹² Indeed, almost a decade later H. Hannum writes: “Even the most ardent world federalists or human rights advocates are not ready to dictate the appropriate form of government for each of the world’s nearly 200 independent states”.³¹³ The author further asserts that “the challenge is to identify the level at which needs are best addressed and to locate powers accordingly (perhaps along the lines of the EU concept of ‘subsidiarity’).³¹⁴ The most daring attempt so far to answer these questions and challenges has probably been the “Lund Recommendations on the Effective Participation of

³⁰⁷ *Reference re Secession of Quebec*, S.C.R., vol.2, 1998, para. 134 and para. 138.

³⁰⁸ Amongst others see J. Crawford, *The Right of Self-Determination in International Law...*, cit., pp. 56-57.

³⁰⁹ S. J. Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law...*, cit., pp. 12-14.

³¹⁰ S. J. Anaya, *The Contours of Self-Determination...*, cit., p. 12.

³¹¹ F. L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, in «AJIL», vol. 88, 1994, pp. 308-310.

³¹² J. Salmon, *Internal Aspects of the Right to Self-Determination: Towards a democratic legitimacy principle?*, in C. Tomuschat (ed.), *Modern Law of Self-Determination...*, cit., p. 280.

³¹³ H. Hannum, *A Principled Response to Ethnic Self-Determination Claims...*, cit., p. 266.

National Minorities in Public Life” elaborated under the auspices of the OSCE High Commissioner on National Minorities and under the Chairmanship of the Director of the Raoul Wallenberg Institute, Professor Gudmundur Alfredsson. In these recommendations, there is among other things a list of functions that are generally exercised by the central authorities.³¹⁵

This is definitely not the end of the matter. “As is true with other human rights, implementation is not easy (...)” Nevertheless, “ (...) such difficulties do not detract from the legitimacy of the underlying rights”.³¹⁶

Self-determination thus has the potential to become a real human right: universal in scope and concerned with people instead of territory. For a while, “‘peoples’ has been stripped of its ordinary meaning and reconstructed as something quite different”³¹⁷, but self-determination is finding back its true nature. Self-determination may no longer be a “cruel deception”.³¹⁸ The function of international lawyers “should be to make sense of existing normative language, corresponding to widely-regarded claims of right, and not to retreat into a self-denying legalism”.³¹⁹ “Therefore, the legal edifice should be re-arranged. It should be possible to call a people, in the ethnic sense, a people, in the legal sense, without having to fear that such recognition entails devastating consequences”.³²⁰

³¹⁴ *Ibidem*, p. 271.

³¹⁵ See Chapter III on self-governance. The functions include: “defense, foreign affairs, immigration and customs, macroeconomic policy, and monetary affairs”.

³¹⁶ H. Hannum, *A Principled Reponse to Ethnic Self-Determination Claims...*, cit., p. 267.

³¹⁷ B. Kingsbury, *Claims by Non-State Groups in International Law...*, cit., p. 499.

³¹⁸ J. Crawford, *The Right of Self-Determination in International Law...*, cit., p. 64.

³¹⁹ *Ibidem*, p. 64.

³²⁰ C. Tomuschat, *Self-Determination in a Post-Colonial World...*, cit., p. 16.

3.4 Indigenous peoples' rights.

3.4.1 Self-determination.

In 1983 Special Rapporteur José Martínez Cobo wrote in his Study of the Problem of Discrimination Against Indigenous Populations commissioned by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1971 that “self-determination, in its many forms, must be recognised as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their future”.³²¹ Twenty years later, one might wonder if this “basic precondition” has been recognized on the international level. Do indigenous peoples have a right to self-determination?

Questioning whether they have such a right is asking whether they are peoples in law. Indigenous peoples are clearly *ethnoi*. “They have their own specific languages, laws, values, and traditions; their own long histories as distinct societies and nations; and a unique economic, religious, and spiritual relationship with the territories in which they have so long lived”.³²² Being *ethnoi* and in light of what has been developed earlier, it must be clear that they are definitely potential “peoples” in international law. The consequential right to self-determination would however be clearly circumscribed. No external exercise of the right to self-determination would be allowed except under exceptional circumstances, but internal exercise would be possible. These considerations are however a bit premature, since *ethnoi* in general have up till now not been recognised as “peoples”. A closer look is nevertheless required, for indigenous peoples are a special category of *ethnoi*.

³²¹ See T. D. Musgrave, *Self-Determination and National Minorities...*, cit., p. 175.

³²² E.-I. A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, in «Transnational Law & Contemporary Problems», vol. 3, 1993, p. 6,

Indigenous peoples are special in that they have enjoyed special attention on the international plane. In ILO Convention No. 169, entitled “The Convention Concerning Indigenous and Tribal Peoples in Independent Countries”, they have been explicitly defined as “peoples”.³²³ This was however qualified by the third paragraph of Article 1 stating that: “the use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”. It follows that under the Treaty no right to self-determination has been granted implicitly. Indigenous peoples have, however, been recognised such a right in the current UN Draft Declaration on the Rights of Indigenous Peoples. Article 3 provides that “indigenous peoples have a right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.³²⁴ The wording is identical to the one used in common Article 1 of the ICCPR and the ICESCR, preceded by “indigenous”. But what is to be understood by this language?

T. Moses has written that it has not only to do with political self-determination, but also with “hunting, fishing, and trapping”.³²⁵ He continues: “I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen of our people. I think of hunger and people destroying the land (...)”.³²⁶ Undoubtedly, economic, social and cultural self-determination are essential in the understanding of self-determination. These forms of self-determination are however subordinate to political self-determination.³²⁷ Political self-determination is a prerequisite for economic, social and cultural self-

reproduced in S. J. Anaya, *International Law and Indigenous Peoples*, Ashgate, Aldershot, 2003, p. 367.

³²³ See Article 1 Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session.

³²⁴ Article 3 of the Draft Declaration on the Rights of Indigenous Peoples, UN doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

³²⁵ T. Moses, *The Right of Self-Determination and its Significance to the Survival of Indigenous Peoples*, in P. Aikio, M. Scheinin (eds.), *Operationalising...*, p. 162.

³²⁶ *Ibidem*.

determination³²⁸ So, the question is what kind of political self-determination indigenous peoples would be receiving under the Declaration?

Generally, self-determination in Article 3 of the Draft Declaration has been understood to mean primarily internal self-determination.³²⁹ The right to internal self-determination would thus constitute the principal legal distinction between indigenous peoples and minorities, according to E.-I. A. Daes.³³⁰ This interpretation of self-determination is also in accordance with the potential consensus understanding of self-determination upon which was dwelled in section 3.3.

The Draft Declaration sticks fast in the UN machinery and it is therefore too early to say with certainty that indigenous peoples have a right to self-determination under positive international law. Moreover, even if the General Assembly would adopt the Declaration as it stands, it would only constitute soft law, albeit with a high moral character.

3.4.2 Autonomy.

As pointed out earlier, autonomy is semantically identical to self-determination. Legally, however, the terms' content is different. The content of the concept of autonomy is "still vague and imprecise",³³¹ though

³²⁷ G. Alfredsson, *Access to International Monitoring Procedures...* cit., p. 206.

³²⁸ *Ibidem*, p. 205 and G. Alfredsson, *Different forms of and claims to the right of self-determination...* cit., p. 73.

³²⁹ See G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples ...*, cit., p. 42 referring to E.-I. A. Daes; A. G. Kouevi, *The Right to Self-Determination of Indigenous Peoples: Natural or Granted? An African Perspective*, in P. Aikio, M. Scheinin (eds.), *Operationalising...*, p. 151; J. Crawford, *The Right of Self-Determination in International Law...*, cit., p. 25. See also Explanatory note on the Draft Declaration, reproduced in part in K. Myntti, *The right of Indigenous Peoples...*, cit., p. 88.

³³⁰ E.-I. A. Daes, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, in Commission on Human Rights, *Prevention of Discrimination against and the protection of Minorities*, E/CN.4/Sub.2/2000/10, p. 9.

³³¹ A. Cassese, *Self-determination of peoples...*, cit., p. 355.

attempts have been made to render it more clear and precise.³³² There is, however, no commonly agreed definition of autonomy in international law. Nevertheless, autonomy, generally, “has been and can be referred to as self-government, self-management, home rule, or merely the delegation of powers to a municipal authority with expanded functions. The label should not matter as long as a central government agrees to power-sharing and leaves local matters in the hands of local representatives”.³³³ Furthermore, one needs to know that autonomy is generally defined as either territorial or non-territorial (i.e. cultural, personal or functional).³³⁴

Autonomy has been considered “the best means of upholding the necessary balance among different communities or minorities in a pluralistic society”.³³⁵ It is “probably the most effective means of protecting the dignity and identity of diverse groups within states”.³³⁶ Therefore, it has been nominated “the ‘queen’ of human rights protection mechanisms”.³³⁷ Nevertheless, there is no general group right to autonomy under current international law.³³⁸

The legal situation of indigenous peoples is however a bit more nuanced. Those who live in States that have ratified the ILO Convention No. 169 enjoy some form of non-territorial autonomy.³³⁹ Territorial autonomy is however still not a right of indigenous peoples under international law.³⁴⁰ There is however good hope that both forms of autonomy will become a right of these peoples in a near future, for Article 31 of the Draft Declaration

³³² See the “Lund Recommendations on the Effective Participation of National Minorities in Public Life”; see also H.-J. Heintze, *On the Legal Understanding of Autonomy*, in M. Suksi (ed.), *Autonomy: Applications and Implications...*, cit., pp. 7-32.

³³³ G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples...*, cit., p. 52 and *Different forms of and claims to the right of self-determination...* cit., p. 72.

³³⁴ H.-J. Heintze, *On the Legal Understanding of Autonomys...*, cit., pp. 18-24.

³³⁵ E. J. Cárdenas, M. F. Cañas, *The Limits of Self-Determination...*, cit., p. 110.

³³⁶ G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples...*, cit., p. 52.

³³⁷ H.-J. Heintze, *On the Legal Understanding of Autonomys...*, cit., p 10, quoting M.

Brems.

³³⁸ K. Myntti, *The right of Indigenous Peoples...*, cit., p. 118 and H.-J. Heintze, *On the Legal Understanding of Autonomys...*, cit., pp. 13-14.

³³⁹ See K. Myntti, *The right of Indigenous Peoples...*, cit., pp. 118-122.

³⁴⁰ *Ibidem*, p. 129.

on the Rights of Indigenous Peoples provides that “indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions”. This provision is endorsed by the “Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-government”, adopted by the UN Meeting of Experts in Nuuk, Greenland in 1991.³⁴¹ It is also supported by Article XV of the draft declaration on the rights of indigenous peoples adopted by the Inter-American Commission on Human Rights in 1997.³⁴²

Until the Draft Declaration has been adopted by the General Assembly there is no right to autonomy under international law. The chances that such a right will emerge are however high, since what is bothering to governments in the Draft Declaration is the reference to self-determination, not the mention of autonomy.

3.4.3 Self-government.

As evidenced by the preceding sections, the emergence of a right to self-determination or a right to autonomy or both for indigenous peoples is near. But how near? What is the respective likelihood of these rights surfacing? And does it matter in the context of the “Belgian thesis”?

R. Falk has written that “it is too late to put the genie of self-determination back in the colonialist bottle”.³⁴³ Moreover, one has stated in the context of the Draft Declaration on the Rights of Indigenous Peoples that “the right of

³⁴¹ See UN doc. E/CN.4/1992/42.

³⁴² See K. Myntti, *The right of Indigenous Peoples...*, cit., pp. 112-113.

³⁴³ R. Falk, *Self-Determination Under International Law...*, cit., p. 38.

self-determination is the heart and the soul of the declaration”.³⁴⁴ The symbolic value of self-determination prompts many to believe that the language of self-determination is unavoidable and that a right to self-determination for indigenous peoples will come about.

The likelihood of this happening has however been contested by many others, in light of the continued aversion and opposition by governments. The reference to self-determination in Article 3 of the Draft Declaration does not clearly exclude external self-determination. Therefore, governments fear the reappearance of the ghost of decolonisation. This fear is understandable, though unfounded in light of the clear consensus that has emerged against external self-determination for sub-state groups under international law. Nevertheless, many diplomats and scholars have urged the parties to abandon the discourse of self-determination.³⁴⁵ It is believed that autonomy may have a better chance of surfacing if presented under its proper name instead of under the “self-determination umbrella”.³⁴⁶

Does the outcome of this controversy matter for the purpose of the thesis that is being developed here? No, for self-determination has been understood to mean internal self-determination, thus self-government and equally autonomy, in legal-political vocabulary, denotes self-government.³⁴⁷ So, “what’s in a name”?

It is fair to say that “self-government” will soon be recognised as a right of indigenous peoples. This is what counts, when contemplating a possible revival of the “Belgian Thesis”.

³⁴⁴ See quotation in B. Kingsbury, *Reconstructing Self-Determination...*, cit., p. 19.

³⁴⁵ R. Falk, *Self-Determination Under International Law...*, cit., p. 38 and G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples...*, cit., pp. 53-54 and *Different forms of and claims to the right of self-determination...* cit., pp. 75-76.

³⁴⁶ G. Alfredsson, *Different forms of and claims to the right of self-determination...* cit., p. 70.

³⁴⁷ See H.-J. Heintze, *On the Legal Understanding of Autonomys...*, cit., p 8.

4 A potential revival of the “Belgian thesis”.

4.1 Arbitrariness and unjustness of the foundations of our current world order.

I do not intend to dwell upon this point, but I believe it needs to be addressed, since the “Belgian thesis” has over the last 50 years often been invoked in support of an attack on the basis of our world order, i.e. the commonly recognised patchwork of States. More than once, the “Belgian thesis” was called upon to endorse the view that indigenous peoples have a right to external self-determination, i.e. amongst other things a right to form an independent State. It is my opinion that the “Belgian thesis” is out of place in such a discourse. Moreover, I believe that the foundations of the current world order are somehow arbitrary, but not unjust. Finally, I believe the discussion has on the whole become superfluous.

Belgium had no interest in supporting the formation of states on territories inhabited by indigenous peoples. On the contrary, it sought to preserve the world order of the mid-twentieth century. Belgium tried to maintain the colonial order. Therefore, self-determination was understood to mean autonomy within the established order. Admittedly, however, it was part of the Belgian strategy to be misunderstood. It might well be that no efforts were made to correct the wild tales or *indianenverhalen*³⁴⁸ about Belgium’s desire to grant independence to indigenous peoples. In retrospect, however, it is clear that there was no such desire. Reshaping the foundations of the world order was no objective of the “Belgian thesis”.

³⁴⁸ Dutch expression meaning literary “Indian stories”, i.e. tall stories or wild tales.

Admittedly, it is true that the “Belgian thesis” denounced the arbitrariness of internationally recognised boundaries. But arbitrariness is caused by history. Europe has neither been spared in this regard. It is nobody’s fault and in reality, it is only an illusion, for there is no inherent and authentic world order.

Limiting external self-determination to the internationally recognised territories of that time, i.e. limiting the right to self-determination to all *demos* of the mid-twentieth century was not arbitrary and was in fact tremendously just. All *demos* enjoyed the same right and all *ethnos* were refused such a right. The only qualification one might make is with regard to “indigenous peoples with treaties”. They might have to be considered as *demos*. Therefore, their fight for independence is probably justified. Their demand for external self-determination might have bigger chances of succeeding than similar demands by other indigenous peoples.³⁴⁹

To a large extent, however, the debate on whether the starting point of our world order is just has become superfluous. Most indigenous peoples do no longer aspire to become independent entities.³⁵⁰ There is therefore “for the time being a convergence between indigenous peoples and state decision-makers”.³⁵¹ This attempt to find common ground is also evidenced in doctrinal writings.

Thus, E.-I. A. Daes writes: “Once an independent State has been established and recognized, its constituent peoples [also indigenous peoples] must express their aspirations through the national political system and not through the creation of new States, unless the national political system

³⁴⁹ See G. Alfredsson, *Indigenous Populations, Treaties with*, in *Encyclopedia of Public International Law*, vol.8, p. 951 *et seq.*

³⁵⁰ See E.-I. A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination...*, cit., pp. 9-10. See also B. Kingsbury, *Reconstructing Self-Determination...*, cit., p. 24; R. Falk, *Self-Determination Under International Law...*, cit., p. 61; E. J. Cárdenas, M. F. Cañas, *The Limits of Self-Determination...*, cit., p. 113-114 and T. Moses, *Renewal of the Nation*, in G. Alfredsson and M. Stavropoulou (eds.), *Justice Pending...*, cit., p. 63.

becomes so exclusive and non-democratic that it no longer can be said to represent the whole of the population”.³⁵² Similarly, S. J. Anaya discards the necessity for reviewing the foundations of our current world order. He writes that the international community, using the principle of self-determination, developed particular prescriptions to do away with government structures of a classical colonial type. These prescriptions meant “for most colonial territories (...) procedures resulting in independent statehood”.³⁵³ He continues, however, by explaining that self-determination is “remedial” and that “not all peoples thus entitled to remedies are entitled to the *same* remedies, but rather to those remedies that are appropriate to the particular circumstances”.³⁵⁴ By subsequently observing that today there is an “absence of colonial structures in the classical form”, S. J. Anaya implicitly asserts that independent statehood is no longer the appropriate remedy for indigenous peoples.³⁵⁵ In a way, solutions “depend on the concrete historical conditions in which the given nation finds itself. (...) [And] conditions, like everything else, change, and a decision which is correct at one particular time may prove to be entirely unsuitable at another”.³⁵⁶

In conclusion, I believe the foundations of our current world order are largely just. Moreover, most indigenous peoples acknowledge this today. In any case, the “Belgian thesis” is not supportive of the opposite view and should no longer be invoked to subvert the basis of our current world order.

³⁵¹ B. Kingsbury, *Reconstructing Self-Determination...*, cit., p. 27.

³⁵² E.-I. A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination...*, cit., p. 7.

³⁵³ S. J. Anaya, *The Contours of Self-Determination...*, cit., p. 12.

³⁵⁴ *Ibidem*, p. 12.

³⁵⁵ *Ibidem*.

³⁵⁶ J. Stalin, *Marxism and the National Question*, in J. Stalin, *Marxism and the National and Colonial Question, A Collection of Articles and Speeches*, London, 1941, quoted in A. Cassese, *Self-determination of peoples...*, cit., p. 14, footnote 7.

4.2 A new lease of life for Article 73.

Some authors have confined Article 73 of the UN Charter to the realm of history.³⁵⁷ Firstly, its operation ended with the establishment of the so-called “Committee of 24”.³⁵⁸ Secondly, one might argue that with the end of decolonisation in sight the Article is bound to become obsolete. Such a diagnosis is however linked up with the usual understanding of the terms “non-self-governing territories” and “self-government”. I believe it is possible to breathe new life into Article 73 by revitalizing the “Belgian thesis”, i.e. by reinterpreting the wording of Article 73 in accordance with its ordinary meaning.

Practically, the reinterpretation of Article 73 is possible, for the way it was drafted allows development without formal amendment.³⁵⁹ More importantly it is also legally possible. Foremost, legal provisions should be so interpreted as to be “effective and useful”, when practically possible; it is a basic principle of legal interpretation.³⁶⁰ Moreover, aside the “effectiveness” rule, an evolutionary dynamic interpretation is justified with regard to the Charter, since it has formally remained almost unchanged for more than half a century.³⁶¹ Thus, the Charter, “like the constitution of a State, is subject primarily to objective interpretation, which does not strictly follow the subjective aim of the organization’s founders, but rather respects subsequent developments and changing circumstances. (...) In particular, the practice of the members and organs of the organization must be taken into account”.³⁶² Mindful of this, the importance of the Draft Declaration on the Rights of Indigenous Peoples is clear. It was elaborated by UN organs and defines a

³⁵⁷ K. Doehring, *Self-determination...*, cit., p. 51; M. Bedjaoui, *Article 73...*, cit., p. 1081.

³⁵⁸ This Committee was established by a Resolution adopted on the 27th of November 1961. It was entrusted with the task of looking after the implementation of Resolution 1514. See M. Bedjaoui, *ibidem*.

³⁵⁹ C. E. Toussaint, *The Colonial Controversy...*, cit., p. 171.

³⁶⁰ A. Cassese, *Political Self-Determination-Old Concepts and New Developments...*, cit., p. 151; See also G. Ress, *Interpretation...*, cit., p. 15.

³⁶¹ G. Ress, *Ibidem*, p. 15.

³⁶² K. Doehring, *Self-determination...*, cit., pp. 48-49.

new organisational purpose for the UN. In light of all the foregoing it is thus legally possible to reinterpret Article 73.

“Self-government” can win back its original sense. Just like the term “self-determination”, it should no longer be tantamount to independence at all means, but it should essentially stand for autonomy or internal self-determination. Such interpretation of “self-government” is not inspired by paternalistic or racist motifs, as was the case in the “Belgian thesis”, but by the growing consensus understanding of self-determination.

A new understanding of “self-government” makes it also possible to reinterpret “non-self-governing territories” in accordance with its ordinary meaning. Indeed, States no longer have to fear devastating consequences of such an interpretation. Thus, “non-self-governing territories” can mean all territories “whose peoples have not yet attained a full measure of self-government”.

Such reinterpretation of Article 73, along the lines of the “Belgian thesis”, allows the indigenous peoples to become the primary beneficiaries of Article 73. Indeed, “indigenous peoples have continued to suffer impediments or threats to their ability to live and develop freely as distinct groups in their original homelands”.³⁶³ They definitely constitute peoples who “have not yet attained a full measure of self-government”. Now, where is the added value of this finding?

“In many countries throughout the world in which indigenous peoples live, new legislation or executive decrees have been adopted, (...) to provide specific recognition of indigenous peoples’ rights in relation to land, culture, and other matters. In some countries, state executive officials have negotiated specific agreements with indigenous groups (...) to allow indigenous peoples to exercise administrative or governmental autonomy

³⁶³ S.J. Anaya, *The Contours of Self-Determination...*, cit., p. 12.

over a range of matters”.³⁶⁴ These initiatives are, however, characterised by a “lack of adequate implementation”, which is caused by insufficient “incentives or pressure from the international community”.³⁶⁵ To assure efficiency, States should be under a “duty”³⁶⁶ to develop self-government and under “international supervision”.³⁶⁷ Now, both these issues can be tackled by Article 73.

One may wonder if there are no alternatives to assure such international monitoring. I believe the Human Rights Committee might be in a position to deal with the issue once the Draft Declaration has been adopted. It could do so either under Article 1 ICCPR, in the event a right to self-determination would be acknowledged, either under Article 27 ICCPR, in case only autonomy would be spelled out in the Declaration. However, it is far from certain that self-determination will be laid down in the Declaration and States might not want to submit reports in regard autonomy under Article 27 to let sleeping dogs lie. In contrast, the reactivation of Article 73 is not depended on the rights finally recognised in the Draft Declaration.

It is submitted that Article 73, reinterpreted along the lines of the “Belgian thesis”, provides a legal basis for the creation of an accountability mechanism for the surfacing right to autonomy of all indigenous peoples. Article 40 of the Draft Declaration disposes that “the organs and specialized agencies of the United Nations system (...) shall contribute to the full realization of the provisions of this Declaration (...)”. I would propose to the Secretary General of the UN to write, as soon as the Declaration is adopted, a letter to all Members of the UN requesting them to list all “non-self-governing territories” they believe to have under their jurisdiction.

³⁶⁴ *Ibidem*, p. 8.

³⁶⁵ *Ibidem*.

³⁶⁶ A. G. Kouevi, *The Right to Self-Determination of Indigenous Peoples...*, cit., p. 151 and E.-I. A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination...*, cit., p. 9.

³⁶⁷ A. Cassese, *Self-determination of peoples...*, cit., p. 359 and C. Tomuschat, *Self-Determination in a Post-Colonial World...*, cit., p. 18.

5 Conclusion.

Two major conclusions have been drawn in the preceding chapter. In what follows, these are not reiterated as such. Instead they are incorporated in the response to the questions, which I promised to answer in the introduction to this thesis. Those queries are: Were the Belgians foolish? Or have they been misunderstood? And if so, how come and what did they really say? And if they said something else than what we were told they said, are the things they actually said still valuable today?

As hopefully everyone expected, the Belgians were everything but foolish. They were conscious and cunning, yet they were also naïve. They knew what they were doing and why they were doing it. They argued for self-government for all indigenous peoples, which they listed in a document covering the entire planet. So acting, they believed political decolonisation could be avoided, for all Members of the UN would realise that an offensive aimed at the colonial powers might be repercussive in their own countries. Obviously the Belgium's rationale was to maintain its overseas possessions. Yet this was naïve, for decolonisation was a historical movement, which was unavoidable.

So the Belgians were in fact insincere? No, not entirely, because they have been misunderstood. The legend of the "Belgian thesis" was based on a misunderstanding. A misunderstanding which probably came into existence and survived, because Belgium had no interest in correcting it. "Self-government", for indigenous peoples, was understood as independence, whilst the "Belgian thesis" explicitly stated that its understanding of the term equated autonomy. Autonomy, not independence, for indigenous peoples was supported by Belgium. Thus, the Belgians were sincere, though the motifs were not.

So, Belgium argued for autonomy, not for independence. It is a fallacy to state that Belgium wanted to expand decolonisation to all indigenous peoples. Thus, the myth of the “Belgian thesis” should be exploded.

Now the real “Belgian thesis” can be recovered. But is there any reason to do so? Is it still valuable? I believe it can be. Considering the growing consensus understanding of “self-determination”, the successor of “self-government”, and considering the upcoming recognition of the indigenous peoples’ right to self-government, the “Belgian thesis” should be recovered to breathe new life into Article 73 of the UN Charter. A reinterpretation of that Article along the lines of the “Belgian thesis” would impose a duty on all Members of the UN to develop self-government for indigenous peoples. Moreover, it would institute an international supervision mechanism under the auspices of the Secretary General. The legal opportunity lies in his hands. “Law proposes, but politics disposes”.

Annexes

- G.A. Res. 66 (I), *Official Records of the first session of the General Assembly, Part II Resolutions*.
- List of countries harbouring indigenous peoples in non-self-governing territories in almost every area in the world, set up by Belgium to substantiate its thesis.

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