Self-determination Asia-Pacific Style: Alien Domination and Freedom's Tortuous Path Revisited*

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INTRODUCTION:

The Advisory Opinion of the International Court of Justice (ICJ) in the *Western Sahara* case[1] remains relevant more than two decades after it was handed down, and the call for self-determination has become increasingly loud following its enunciation as a legal principle in that case. Intended initially as an escape avenue for colonial peoples to freedom and independence it seems now to embrace the situation of ethnic groups in pre-existing states not under colonial yoke.[2] This situation has generated serious misgivings about the meaning and content of some provisions of

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* This essay is dedicated to the author's 1996 class in International Law whose unparalleled interest in the course and whose participation and various contributions to seminars in the subject made it all possible.

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1 (1975) ICJ Rep.12.

Earlier cases include *The Aaland Islands Case*, Advisory Opinion of the International Committee of Jurist in Official Journal of the League of Nations, Special Supplement No.3, October 3, 1920, 1 and *The South West Africa (Namibia) Case*, ICJ Reps 1971, 31.

2 S Blay 'Self-determination: A Reassessment in the Post Communist Era' (1994) 22 *Denver Journal of International Law and Policy* 275; also T M Franck 'Post-Modern Tribalism and the Right to Succession' in *Peoples and Minorities in International Law,* C Brolmann *et al* eds (The Netherlands: Martinnis Nijhoff Publishers 1993) 3. See also H A Amankwah 'Self-determination in the Spanish Sahara: A Credibility Gap in the UN Practice and Procedure in the Decolonisation Process' (1981) 14 *Comp. & Int. Law Journ. Of South Africa* 34.

the United Nations Charter and the various Conventions and Resolutions on the right of self-determination.[3]

The concept of self-determination is synonymous with freedom and, therefore, of universal application. The Asia-Pacific region has not been immune from its pull. Places such as New Caledonia, East Timor and Irian Jaya in Indonesia, Tibet, Sri Lanka, Papua New Guinea, Hong Kong and even Australia are currently grappling with the concept.

The aim of this paper is to re-evaluate the impact of the principle of self-determination in its application to novel situations in the Asia-Pacific region and to assess its future prospects.

Some have argued that other UN documents, when read together with the UN Charter suggest that there is no legal basis for limiting the right of self-determination to colonial peoples, and that indeed the UN envisaged that colonialism would fade away but that the spirit of self-determination would "go marching on".[4] These documents, the argument continues make ample room for a new appraisal of the human condition in respect of freedom and the genesis of the concept of internal self-determination as opposed to the external manifestations of self-determination which was the initial concern of the UN Charter.[5] This is the situation giving rise to the misgivings alluded to earlier that is the confusion regarding the use of words such as 'peoples' and 'minorities' in UN documents for the purposes of the exercise of the right of self-determination.[6]

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3 For example, Arts: 1(2), 55 and 73, UN Charter, *Declarations on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN*, G A Res. 2625(XXV), 25 UN GAOR Supp No 28, UN Doc A/9631 (1975) and *Declaration on the Granting of Independence to Colonial Territories and Peoples*, UN GA Res. 1514(XV) 1960.

4 See *International Convention of the Elimination of All Forms of Racial Discrimination*, March 7, 1966, 660 U.N.T.S. 195. Entered into force Jan. 4, 1969. As of Dec. 31, 1979, fully 105 states had ratified this treaty; *International Covenant on Economic, Social and Cultural Rights*, Dec. 19, 1966. Entered into force Jan. 3, 1976. *International Covenant on Civil and Political Rights,* Dec. 19, 1966. Entered into force March 23, 1976. These Covenants were adopted by the UN General Assembly: G.A. Res. 2200A, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/16546 (1966). See also C Tomuschat 'Self-determination in a Post Colonial World' in Tomuschat C (ed), *Modern Law of Self-Determination,* (Dordrecht: The Netherlands Martin Nijhoff Publishers 1993) 1; and S. Blay, *supra* n 2.

5 Tomuschat *Id.*

6 Cassesse says in this regard that it is the ability of a people to choose the sovereign under which they live, to be free of alien masters and not to be

This writer agrees with the view that freedom should not, in principle, be confined and that, therefore, the right of self-determination should be available even to peoples within the pre-existing state, that is, "minorities".[7]

There are those who would point to the former Eastern European nations of the USSR, Czechoslovakia and Yugoslavia as cases of the disintegration of nations. However, it would seem more accurate to describe those situations as cases of the restoration of the *status quo.* Many of the constituent states of these nations were coerced into an amalgam; in the case of Yugoslavia for instance, by the sheer power and charisma of Marshall Tito, and so while he remained alive, his personality ensured the coalescence of the union. The cohesive property of the union of Yugoslavia dissipated with Tito's demise, leaving the states free once more to go their separate ways.[8] Rather than bemoan the fate of those states, the world perhaps ought to be reminded of the spirit of freedom in humanity and the fact that the disintegration of former Eastern European nations gave rise to the re-birth of democracy. More people are asserting their legitimate right to a voice in their own governance. The emerging concept of "the right to democratic governance" is an aspect of this freedom.[9]

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handed from sovereign to sovereign as if they were property, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge: Cambridge University Press (1995) 4. H Hannum also says: "The proposition that every person should have the right to control his destiny has long been one of which poets have sung and for which patriots have been ready to lay down their lives," *Autonomy, Sovereignty and Self-Determination* (Philadelphia, University of Pennsylvania Press 1990) 2.

7 The UNESCO meeting of Experts on Further Study of the Rights of Peoples (Paris 1990) proposed the following criteria for determining the difficult issue of what entity constitutes a people: (a) cultural homogeneity; (b) linguistic unity; religious ideological affinity; (d) common historical tradition; (e) racial or ethnic identity; (f) territorial connection; (g) common economic existence or life.

8 See Cassesse, *supra* n. 6 at 268 *et seq.*

9 See T Franck 'The Emerging Right to Democratic Governance', (1992) 86 *AJIL* 46.

I THE RIGHT TO SELF-DETERMINATION AS A JURISPRUDENTIAL NOTION OR CONCEPT: A HISTORICAL PERSPECTIVE

Libertarians like Bentham, Mill and Rousseau gave prominence to the concept of "self-development" of the individual and the state.[10] In the "New World" the idea found expression in the Monroe Doctrine and President Woodrow Wilson applied it in order to ensure self-determination in Europe.[11] The founding-fathers of the United Nations, realising that the subjugation of one people by another was dangerous and created a potentially explosive situation not conducive to the international peace and security desired by a world which in one generation had witnessed two wars, and was intent on removing all the causes of war from international life, gave expression to the concept in the UN Charter.[12]

In the Advisory Opinion of the ICJ in *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), the Court said:

> The subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.[13]

In the Court's Advisory Opinion in the *Spanish Sahara* case, the Court said:

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10 See C L Wayper *Political Thought*, London: Frank Cass & Co. (1974) 113-115, 146-150; also Cassesse *supra* n 6, 13-15.

11 W R Bisschop said: "Self-determination is based on the principle of decision by a majority of those who are directly concerned." 'Sovereignty' (1921-22) 2 *BYIL* 122 at 130.

Eagleton lamented the fact that instead of fighting for independence, nations are now merely appealing to the UN. He recalled the examples of the French and American wars of independence and wondered what becomes of the "self" concept if another agency should do the "fighting" for the people. (1953) 47 *AJIL* 88-93. For the current US view see: M Pomerance 'The United States and Self-Determination: Perspectives on the Wilsonian Conception' (1976) 70 *AJIL* 1. See also S P Sinha., 'Has Self-Determination Become a Principle of International Law Today?' (1973) 14 *Indian JIL* 169.

12 Reference has been made to Articles 1(2) and 55 of the UN Charter, *supra* n 3, See also the provisions of Chapter XI of the UN Charter.

13 *Supra* n 1 at 39.

> An Advisory opinion of the court on the legal status of the territory at the time of Spanish colonization and on the nature of any ties then existing with Morocco and with the Mauritanian entity may assist the General Assembly in the future decisions which it is called upon to take, the General Assembly has referred to its attention to 'continue its discussion of this question' in the light of the court's advisory opinion. The Court when considering the object of the question in accordance with the text of Resolution 3292 (XXIX) cannot fail to note that statement. As to the future action of the General Assembly various possibilities exist, for instance, with regard to consultations between the interested states, and the procedures and guarantees required for ensuring a *free and genuine expression of the will of the people.* In general an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonisation of Western Sahara.[14]

The bulk of the law, however, is embodied in a number of United Nations' resolutions. Reference has been made to Resolution 1514[15] which provides the basis for the process of decolonisation which, since 1960, has resulted in the creation of many states which are today members of the United Nations.[16] It is complemented by General Assembly Resolution 1541(XV).[17] Although Resolution 1541 contemplates more than one possibility for non-self-governing territories, viz:

(a) emergence as a sovereign independent state,

(b) free association with an independent state,

(c) integration with an independent state,

it, nonetheless recognises the essential feature of the right of self-determination as established by 1514.

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14 *Supra* n 1 at 36-37.

15 *Supra* n 3 Art. 2 provides: "All peoples have the right to self-determination, by virtue of that right they freely pursue their economic, social and cultural development." By Art 6 "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

16 *Decolonization: Fifteen Years of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples.* Vol II No 6 December 1975 47. Hereinafter cited: *Fifteen years.*

17 GA Res 1541 15 UN GAOR Supp 16 29-30 UN DOC A/4684 (1960).

Thus on free association *Principle* VII states that it shall come about as the "result of a free and voluntary choice by the people of the territory concerned expressed through informed and democratic processes.[18]" On integration *Principle* IX states:

> The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal suffrage. The United Nations could when it deems it necessary supervise these processes.[19]

General Assembly Resolution 2625(XXV)[20] *(Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations)* indicates other possibilities besides independence, association and integration, but reiterates the fundamental and basic necessity of taking the wishes of the people concerned into account. It states:

> The establishment of a sovereign and independent state, the free association or the emergence into any other political status *freely determined by a people* constitute modes of implementing the right of self-determination.[21]

It provides further:

> Every state has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order... to bring a speedy end to colonialism, having regard to the freely expressed will of the people concerned.[22]

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18 *Id.*

19 *Id.*

20 GA Res 2625 21 UN GAOR Supp 16 103 UN DOC A/6316 (1966) *supra.* n 3.

21 *Id.*

22 *Id.*

II SOME MODALITIES OF THE EXERCISE OF THE RIGHT OF SELF-DETERMINATION

In the process of decolonisation, the United Nations has supervised the act of self-determination of peoples through plebiscite, referendum or election (particularly where the act would determine a change in the status of the people concerned) – as well as merger or association with another state or territory. In 1956 the United Nations supervised a plebiscite which brought about the merger of the Gold Coast now Ghana with the British Trust Territory of Togo on the eve of Ghana's independence.[23] It did so again in the merger of the British Trust Territory of Northern Cameroons with Nigeria in 1959,[24] and again in 1961 when the British Trust Territory of Southern Cameroons joined the Republic of Cameroons.[25] The partition of Ruanda-Urindi in 1961 was accomplished under UN supervision,[26] while in 1962 when West Samoa decided to join New Zealand in a free association, it did so under United Nations supervision.[27] Then in 1965 an election was held in the Cook Islands to choose a legislature to draw up a constitution for a free association of the Islands with New Zealand.[28] In 1969 in the farce of "free-choice" in West Irian by which it joined Indonesia, the UN "participated" in the process.[29] When the Ellice Islands, now Tuvalu decided to separate from the Gilbert Islands in 1974 the UN Special Committee sent observers to the referendum.[30]

In 1963 Malaysia, Indonesia and the Philippines invited the Secretary General to send a mission to ascertain the wishes of the people of Sarawak and North Borneo on the question of integration with Malaya into the new Federation of Malaysia. This was done and the mission reported favourably on the act of free choice to the Secretary General.[31]

In the case of Gibraltar, however, the United Nations opposed a referendum, the sole purpose of which was to determine a choice between the retention of the *status quo* of links with the United Kingdom and merger with Spain.[32] Of course some colonial territories gained

23 *Fifteen Years*, *supra* n 16 at 19.

24 *Id.*

25 *Id.*

26 *Id* at 22.

27 *Id.*

28 *Id* at 20.

29 *Id* at 22.

30 *Id* at 21.

31 *Id* at 22.

32 *Id* at 20.

independence through armed struggle. The cases of South Africa, Mozambique and Angola are all too well known to deserve any extensive treatment here. These, however, are exceptions to the general rule.

In former Eastern European countries the United Nations was similarly involved in the partition of former Yugoslavia. The transition in former Czechoslovakia and the USSR was relatively peaceful and required no UN supervision although the situation in Chechnya remains volatile and intractable.[33]

Thus, whether external or internal, the act of the exercise of self-determination entails the observance of a process or procedure designed for a meaningful ascertainment of the wishes of the people concerned, that is, whether they have indicated their consent to be under a particular form of governance or political arrangement. It is for this reason that some commentators regard the law on self-determination as procedural rather than substantive law.[34] In the absence of the availability of concrete evidence demonstrating that a people have actually voluntarily agreed to be under a political arrangement, it cannot legally be said that it has exercised a free choice or predilection of a system. It has been observed

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The case of Gibraltar is a thorny issue it having passed to Britain by conquest and under the Treaty of Utrecht (1713) which transferred title to the territory to Britain but which reserved the titular title to Spain. This two and a half square miles territory now has a population of some 30,000 persons who enjoy a very high standard of living benefiting mainly from dock-yard installations. The people of the territory are mainly Maltese, Italians and Jews who in Spain's view are aliens who have no right of self-determination because if they exercised that right and became independent with all the incidents of sovereignty which independence entails, it means Spain would have lost its reversionary title under the Treaty of Utrecht. Britain cannot trade away what it does not have.

Britain also insists that it cannot abandon the territory to Spain and that she would decolonise the territory as it had done to all her ex-colonies by having due regard for the wishes of the people.

There is no doubt that the people are overwhelmingly in favour of Britain's continued hegemony. Hence the stalemate. The danger inherent in the Spanish view - that aliens who have settled on a territory have no right of self-determination when carried to its logical conclusion will be a basis for driving the peoples of countries such as Israel, South Africa and Belize and possibly the USA and most Latin America out of the places they now occupy.

33 See S Blay, *supra* n 2.

34 Pomerance says: "The essence of self-determination is in the method, not the result," *Self-Determination in Law and Practice* (Cambridge, Cambridge University Press 1982) 24-25.

that human beings should not be treated as chattels or goods or other species of property and subject to alienation or transfer by a so-called owner.[35]

III EXTERNAL SELF-DETERMINATION

This writer will examine in this section typical examples of external self-determination in the Asia-Pacific region. These are only examples and are by no means exhaustive of the phenomenon.

(i) Tibet and The People's Republic of China (PRC)

Tibet's location in the shadows of the Himalayas has the effect of rendering it isolated and virtually unknown until the events which led to the flight of the Dalai Lama to India.[36] This statement, however, is not intended to diminish its importance as the centre of Buddhism. For a complete appraisal of its legal status, a brief history of Tibet's political history is set out below.

Tibet epitomises an ancient nation with an identifiable political structure (yet today lacking international legal recognition); it is an apposite case of the denial of the right to self-determination to a people. As the Irish Ambassador observed in the General Assembly of the UN:

> Tibet has fallen into the hands of the Chinese People's Republic for the few years..... For thousands of years or for a couple of thousand at any rate, it was as free and as fully in control of its own affairs as any nation in this Assembly, and a thousand times more free to look after its own affairs than many of the nations here.[37]

Tibet's political history can be traced to 127 B.C.[38] At that time it was one of Asia's most influential powers. The inscription of the treaty between China and Tibet at the Potala Palace in Lhasa city is an eloquent testimony to its might. Only Buddhist renaissance was potent enough to restrain

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35 See Cassesse, *supra* n 6.

36 See discussion *infra.*

37 Statement of Mr Frank Aiken. See G.A Doc. A/PV.898 (1960), p. 52. He repeated these sentiments in the General Assembly in 1965, see G.A. Doc A/PV.1394(1965), 61. The political climate of state relations at this period is well discussed by both P. French. Younghusband: the last Great Imperial Adventurer (London: Harper Collins Publishers 1995) ; also M.C van Walt van Praag, The Status of Timbet: History, Rights and Prospects in International Law (Boulder, Colorado; Westview Press 1987) passim.

38 M C Van Walt Van Pragg, supra n 37 at 152.

Tibet's expansionist aspirations. Tibet was, however, subsequently overran by the Mongols led by Ghengis Khan who subsequently brought it under Mongol domination.[39] But Mongolia's domination of Tibet was more of a spiritual than secular nature because it was based on the recognition by the Mongols of Tibet's spiritual headship of Lama Pandita over the still predominantly disunited Tibet in exchange for Mongolian patronage. Not surprisingly some historians dub this relationship "Cho-Yun" or Priest-Patron.[40] This relationship came to form the basis of the relationship between the future Manchu Emperors and the Dalai Lamas which ironically underpins current Chinese claims of sovereignty over Tibet. Later the Mongols under Kubilai Khan overran China and established the Yuan Dynasty (1279-1368).[41] In this era, the Mongols continued the accord, that is, the Priest-Patron relationship earlier developed between them and Tibet in return for Tibet's loyalty.[42] Altan Khan conferred on the Tibetan Buddhist leader Sonan Gyatso the title of Dalai Lama IV and confirmed him sole sovereign and spiritual head of Tibet.[43] At the time of the rule of Goushri Khan, Goushri retained control of the armed forces and protected the Dalai Lama.[44]

The Chinese Ming Dynasty asserted Chinese independence between (1386-1644).[45] As is usually the case in transitional times, the power struggle between the Mongol Empire and the Ming Dynasty left little or no time for the warring camps to consider Tibet's situation.[46] The Ming Dynasty was subsequently overthrown by the Manchu who founded the Quing Dynasty (1644-1912). Manchu sovereigns of the Quing Dynasty

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39 Statement of Mr Frank Aiken. See G.A. Doc A/PV.898 (1960) 52; supra n 37.

40 *Id.*

41 The international lawyer and legal representative of Tibet, M C van Walt van Praag comprehensively reviews the history of Tibetan sovereignty over several chapters in his authoritative book, supra n 37.

42 These are the historical Tibetan, Mongolian and Chinese cultures.

43 King Songtsen Gampo and his successors achieved unification, and importantly commissioned the formulation of Tibetan script for the transfer of Indian Buddhist teachings. See van Walt van Praag, *supra* n 37 at 2.

44 The text of this treaty was recorded on three stone pillars in the Tibetan capital, Lhasa and the Chinese capital of the time. The text is still legible on the pillars in Lhasa. See H E Richardson 'The Sino-Tibetan Treaty Inscritption of A.D. 821/23 at Lhasa.' (1978) 2 *JRAS* 153-154.

45 The Dalai Lama, *My Land and People: Memoirs of the Dalai Lama of Tibet.* (Potala Corporation: New York, 1962) at 58.

46 (1279-1368).

maintained close ties with Tibet.[47] As was the case in earlier eras, the Dalai Lama accepted the Manchu Emperor's offer of patronage and visited his successor's court in Beijing in 1653.[48] It is clear from historical accounts that the Fifth Dalai Lama met the Emperor as an equal and independent sovereign, as the temporal power of the Lama was backed by the arms of the Gushri Khan and the devotion of all Mongolia. The sovereigns bestowed upon each other unprecedented titles reaffirming the Manchu-Tibetan Cho-Yon relationship.[49] At the height of Manchu power, the Emperor undoubtedly succeeded in exerting a degree of political influence over Tibet by virtue of troops sent there in 1720 to protect the Dalai Lama from invading Gorkhas and internal unrest.[50] The relationship that existed has been likened to that between a superpower and a satellite or protectorate. At all times Tibet maintained an independent existence from the Manchu Empire. The Manchu influence waned until the British invaded Lhasa in 1904, when the last vestige of the Manchu influence remained in the form of a 'permanent ambassador' of the Emperor known as the Amban.[51]

The invading British force was led by Captain Younghusband who negotiated the *Lhasa Convention* with the appointed King in Absence, the Dalai Lama having fled the capital. The Manchu, in failing to protect Tibet from invasion, despite requests from the Dalai Lama, were in breach of their obligations under the Cho-Yon relationship.[52] Despite the *Lhasa Convention's* prohibition of Tibet's dealing with any foreign powers without Britain's permission, Captain Younghusband reported that he did not consider that the Convention impinged on the Imperial government's continuing 'suzerainty' over Tibet. It must be observed that this was the first occasion on which this Euro-centric term was used to describe Manchu-Tibetan relationship.[53]

The Chinese Imperial government considered that the *Lhasa Convention* converted Tibet into a vassal state of Great Britain, and in an act totally inconsistent with Cho-Yon, Imperial troops invaded Lhasa in 1910 to assert actual influence and fill the power vacuum created when the British left Tibet. The Chinese occupation of Lhasa was short-lived due to the

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47 van Walt van Pragg, n. 37 *supra* at 6.

48 J Kolmas *Tibet and Imperial China* (Centre for Oriental Studies, ANU, Canberra: 1967) 35.

49 *Id.* at 60.

50 (1386-1644) *Id.* at 76.

51 (1644-1912) *Id.* at 89.

52 *Id.* at 140.

53 *Id.* at 140.

1911 Revolution in China. After the fall of the Manchu Empire, Chinese troops surrendered to the Tibetan Army and were peacefully repatriated.[54]

Thereafter, relations with China became strained. While proclaiming to the world that Tibet was one of China's five races, the Chinese waged a border war and formally urged Tibet to join the Republic. In 1913 Tibet entered a Joint Declaration that bound Great Britain not to recognise Chinese suzerainty in Tibet unless China signed the *Simla Convention.*[55]

Despite pressure from the United States, Great Britain and China, Tibet remained neutral during World War II and refused to allow the passage of war materials through its territory.[56]

Thus it can not be seriously denied that in Tibet's 2000 years history, it has the impressive record of only coming under a degree of foreign influence for a short period in the 13th and 18th centuries.

In 1946 Tibet entered a formal treaty with Nepal. In exchange for protection against attacks from a foreign power Tibet paid Nepal an annual sum and granted it favourable trading conditions. Nepal received tribute from Tibet and assumed protection over it, thus replacing the Manchu to a certain extent.[57]

Tibet's history changed abruptly in 1949 when China's Peoples Liberation Army (PLA) occupied half the country.[58] The Dalai Lama dispatched a delegation to meet with Mao Tse-Tung. Fearing the worst, the Dalai Lama did not grant the delegation plenipotentiary powers nor did they carry the official Tibet government seal. During negotiations the Chinese presented a 'Seventeen Point Agreement' which did not recognise Tibet's independence and purportedly conceded China control powers over Tibet's defence and foreign affairs. Threatened with the imminent invasion of Lhasa, the delegation signed the agreement although they had no authority to bind the Dalai Lama or the Tibetan government. The agreement was signed in May 1951, yet by August the PLA remained in occupation of Lhasa.[59]

The nomadic Tibetan tribesmen on the border with China never submitted to Chinese occupation and began raiding Chinese outposts in 1955. In

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54 *Id.* at 146-50.

55 R Terrill, *China in Our Time* (Sydney: Hale and Iremonger 1995) 104.

56 M C van Walt van Pragg *supra* n 37 at 152.

57 *Id.* 157.

58 In what Beijing farcically termed the 'peaceful liberation of Tibet.' van Walt van Praag, *supra* n 37 at 143.

59 *Id.* at 162.

1957 Eastern Tibet was in a state of war. The PLA resorted to air strikes and artillery bombardments. The revolt spread to Lhasa in 1959 and involved the Dalai Lama himself. The Chinese were so alarmed by this state of affairs that they moved a quarter of a million troops into Tibet to crush the nationalist revolt against Chinese domination. In the face of this sudden build-up of armed might, the Dalai Lama escaped across the border to Tez-Pur in India. By the end of 1959 the last resistance fighters had been killed and assimilation policies were being implemented. Mao Tse-Tung had made good the statement he had uttered in 1950: "Tibet is a part of China".[60]

Since the invasion, China has consistently carried out a ruthless policy in Tibet with the manifest purpose of eradicating the Tibetan political entity as well as its ethnic, cultural and religious identity. Tibetans have been denied political rights. Human rights violations are a day to day occurrence. Thousands of people have been either executed or imprisoned. Food has been stolen and rationed. Religious persecution is intense. The Chinese communist regime in Tibet has been described as more brutal and inhumane than any other communist regime in the world.[61]

Claims to sovereignty based on conquest, occupation or the imposition of unequal treaties are illegal under international law. China has rejected all claims.[62] However, this view concurs with the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations* which provides:

> The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.[63]

For this reason China makes no claims to sovereign rights over Tibet as a result of the occupation following the armed invasion in 1949-50.[64]

The PRC refer to the invasion of Tibet as a "peaceful liberation" which it asserts was carried out with the concurrence of Tibet's people and institutions. The liberation is said to have relieved Tibetans of a feudal

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60 B Catchpole, *A Map History of Modern (*China London: Heinemann Educational Books Ltd 1976) 108.

61 van Walt van Praag, *supra* n 37 at 196.

62 *Id.* at 114-8.

63 UN G.A Res. 2625(XXV), 25 UN G.A OR Supp No. 28, UN Doc A/9631 (1975) *supra* n 3.

64 van Walt van Praag, *supra* n 37 at 115-119.

hierarchy and restored to them the fully integrated status the PRC claims has existed for centuries.[65]

The PRC's claim to Tibet is based on an interpretation of history that depicts Tibet as part of China some 300 years ago. This claim hinges on the alleged subjection of Tibet to China's strongest foreign rulers in the 18th century. This position is based on Chinese interpretation of the Cho-Yon relationship which they assert made Tibet a tributary of China. The government of PRC maintains that its relationship with Tibet is a domestic affair because Tibet is and has been for centuries an integral part of China.

Through its publications and statements the PRC denies the Tibetan People's entitlement to self-determination. However, it is not for the PRC as a state to deny the Tibetan people's right since this right is guaranteed by international law once it is established that Tibetans are a people for this purpose. Once established, the right is possessed, as a matter of law, by Tibetans as a people and not as a nation or state.

The PRC asserts that separatism is the wish of no more than a handful of Tibetans who are members of the Dalai Lama's clique. This assertion is contrary to the finding of an Australian Senate Delegation to Tibet in 1990 which concluded that a form of self-government is the will of the masses.[66]

As usual in disputes to which one of the world's super-powers is a party, the UN has been dilatory in its handling of the issues due to the politicisation of unambiguously legal issues[67] and content with passing hortatory resolutions.[68] It befell the lot of a voluntary and non-

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65 *Id.* at 143.

66 See The Hon. Justice Michael Kirby, *Decision of the Permanent Tribunal of Peoples in its Session of Tibet*, Strasbourg, France, November 1992; (1994) 68 ALJ 135-142.

67 At the United Nations the European Community member championed the Tibetan cause by tabling at the 48th Session of the UN Human Rights Commission draft resolutions due to Tibet's lack of *locus standii* at the UN. However, the USA opposed the resolutions. In the political manoeuvring which ensued the resolutions which finally emerged were nothing more than a considerable dilution their substance and, therefore, of little or no value to Tibet. See Van Walt Van Pragg, "The position of Unrepresented Nations and Peoples Organisations in the International Legal Order" in *Peoples and Minorities in International Law, supra* n 2 at 313. The UNPO fills the vacuum generated by the statehood requirement of international law for participation of entities in international fora.

68 GA Res 1353 (XIV)(1959), GA Res 1723(XVI)(1961) and GA Res 2079(XX)(1965) which called for cessation of human rights abuses in Tibet. (They however, contained no direct reference to the PRC which until 1971 had no seat in the UN.) and expressed grave concern that events

governmental organisation to do what the UN should do. The Permanent Tribunal of Peoples presided over by an Australian judge decided to publicise the Tibet issue by holding a hearing at Strasbourg, France in November 1992.[69]

Though the tribunal could not make a definitive and binding decision,[70] its consideration of the Tibet issue has jolted the conscience of the international community. It is hoped that this will serve to galvanise the UN into taking further action on the Tibet issue.

Australia for her part has maintained an incoherent and dilatory policy consistent with that of her Western allies, perhaps oblivious of the fact that her location in Asia would require of her the pursuit of a more robust and forthright policy if for no other reason than that of establishing her credibility and her belief in the democratic ideals (human rights, people's right of self-determination and the rule of law) which she stridently maintains she cherishes.[71]

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occurring in Tibet "violate fundamental human rights and freedoms, *including the principle of self-determination of the Tibetan people.*" (Emphasis added).

69 The Permanent Tribunal of Peoples was inaugurated in Bologna, Italy in 1979 following the *Algiers Declaration on the Right of Peoples* (1976) and constituted by eminent jurists, philosophers, theologians and others committed to a universal application of human rights, It has investigated several world situations with varying results including West Sahara (1979); Philippines (1980); Eritrea (1980); East Timor (1981); Armenia (1984) and Brazil's Amazon (1990). See Van Pragg *supra* n 52.

70 The Tribunal found that the "Cho-Yon" relationship that existed between the Mongol Khans and the Tibet Dalai Lamas did not fit into Western European notions traditionally used to determine the features of the nation status, and concluded therefore, that Western legal concepts of "suzerainty" and "vassalhood" were inadequate for categorising the relationship and consequently was unable to come to any conclusions on the question of the status of Tibet at the time of its invasion by the Chinese Peoples Liberation Army (1940-50). The 1993 London Conference of International Lawyers, however, reached the consensus that Tibet had attained sufficient attributes of sovereignty prior to the invasion.

71 It is true that in 1990 the Parliament of Australia passed a resolution endorsing the three UN Resolutions on Tibet and called on the Chinese government to enter into earnest dialogue without preconditions with the Dalai Lama and his representatives and to put an end to practices which had the effect of denying the people of Tibet their fundamental rights and freedoms. It is also true that the Dalai Lama visited Australia in 1992 and 1996 and had audience with the former Prime Minister Mr Paul Keating and Mr John Howard. However, in 1996 when Senator Bourne put the

(ii) East Timor

Almost contemporaneously as the spectre of Spanish Sahara was haunting the UN, the apparition appeared in Asia too. It was in Timor. Timor, a tropical country in the extreme eastern tip of the Musatenggara Archipelago occupies an area of approximately 30,000 square kilometres, the western half of which forms part of the Republic of Indonesia.[72] It has a population of approximately 670,000. The people are dark skinned and lightly built and exhibit a mixture of Malay and Melanesian traits.[73] They speak the native Tetum (one of the Austronesian group of languages) and Portuguese which serves as the official language.[74]

Economically the country is said to be highly under-developed and exports only coffee, which accounts for over 80% of its export trade. It is believed that the country is rich in mineral deposits such as gold, copper, manganese and petroleum.[75] The Portuguese reached the island in 1512 and had to fight wars of survival with the Dutch until 1859 when a peace treaty was signed giving the west of Timor to the Dutch, while Portugal retained the eastern half.[76] Like Spain, Portugal had regarded its overseas possessions as extensions of the metropolitan country. Under the Overseas

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same 1990motion to the Senate it was opposed by the Foreign Affairs Department which would only support a modified version of the 1990 motion, ie. Limiting it to human rights violations only. The Senate, it would seem, has abandoned its 1990 call for the exercise of the right of self-determination by the Tibetan people. Both the Foreign Affairs and Trade Ministers have reiterated the proposition that Australia regards Tibet as part of China since 1972, that is, a reaffirmation of the "One China" policy. See "Defiant Stand on Tibet masked by Busy Back Peddling," *The Weekend Australian*, 5-6 October, 1996 2. See also D Schulz, 'Revolutionaries in Saffron', *The Australian Magazine*, 7-8 September (1996) 18-23.

72 *Decolonisation: Issue on East Timor*, No. 7 August 7 (1973) p.3,. On the East Timor issue see generally R S Clark, 'The Decolonisation of East Timor and the United Nations Norms on Self-Determination and Aggression,' (1980) 7 *Yale Journal of World Public Order, 1*; P D Elliot, 'The East Timor Dispute,' (1978) 27 ICLQ 238; R S Clark, 'Some International Law Aspects of the East Timor Affair,' (1992) 5 *Leiden Journal of International Law*, 265; K Suter, *East Timor and West Irian*, London, Minorities Rights Group Report No. 42, (1982); H A Amankwah, *supra* n 2.

73 *Decolonisation, Id* at 4.

74 *Id.* See also S Watson 'Determination and the International Legal Order: The Tibetan Experience' (1997) 4 *JCULR* 89.

75 *Id.*

76 *Id.* at 6.

Organic Law of 1972, the territory was formally designated an 'autonomous region of the Portuguese Republic' with a legislative assembly elected on corporate lines, although effective power continued to be vested in Lisbon.[77]

With the overthrow of the Caetano regime and the subsequent change in Portuguese colonial policy, three political parties emerged in Timor: *Uniao Democratica de Timor* (UDT), which favoured the continuation of Portuguese presence, the *Frente Revolucionaria de Timor Leste Independente* (FRETELIN) which advocated complete independence of East Timor, and *Associacao Popular Democratica de Timor* (APODETI) which supported integration with Indonesia.[78]

Due to the plurality of the aims and objectives of the three political parties, civil war broke out and FRETELIN emerged clearly as the party in effective control of the territory. In a move inconsistent with Timorese independence the UDT moved into the west - which is part of Indonesia - and courted Indonesian aid.[79] This was precisely the opportunity which Indonesia, using the stability of the area, that is, South East Asia and the Pacific, wanted as a pretext to intervene and annex Timor. Indonesia then sent armed men which it called "volunteers" into Timor to fight alongside forces loyal to UDT. FRETELIN retreated into the northern mountainous region whence it is still waging a war of liberation.[80]

Meanwhile the feeble voice of FRETELIN was barely audible at the UN and the organisation was exhibiting the same ambivalence and total lack of initiative it had shown in the Spanish Sahara case.[81]

The Security Council passed a "toothless" resolution[82] which recognised "the inalienable right of the people of East Timor to self-determination and independence"[83] in accordance with the principles of the UN Charter and of the Declaration on Decolonisation, and "deplored" the intervention of the armed forces of Indonesia in East Timor and "regretted" that Portugal had not fully discharged its responsibilities as administering power in the territory under Chapter XI of the Charter.[84] The resolution called on all

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77 *Id.* at 7.

78 *Id.* at 8-9.

79 *Id* at 23-32.

80 *Id.*

81 *Id* at 58.

82 Resolution 384 (1975), see Annex 11 *Id.* at 67-78. Note that the US abstained from voting.

83 *Id.*

84 *Id.*

states to "respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly Resolution 1514(XV).[85] It also called on Indonesia "to withdraw without delay all its forces from the territory" and asked Portugal as the administering power to cooperate fully with the UN "so as to enable the people of East Timor to exercise freely their right to self-determination".[86] It also requested the Secretary-General "to send urgently a special representative to east Timor for the purpose of making an on-the-spot assessment of the existing situation and of establishing contact with all the parties in the territory and all states concerned in order to ensure the implementation of the present resolution".[87] The Secretary-General was to submit recommendations to the Council as soon as possible.

The existence of two governments, the FRETELIN - controlled Democratic Republic of East Timor in the mountains, and the Provisional Government supported by Indonesia, made the task of the Special Representative of the Secretary-General rather Herculean. He reported that "any accurate assessment of the situation remained elusive".[88] The factions could not guarantee his personal safety in the war-torn territory. A second resolution - in terms similar to the first - was passed by the Security Council after the Secretary-General's report had been discussed.[89]

On 26 May 1975 the Special Committee was invited by the "Provisional Government of East Timor" to send a mission to attend the first meeting of the Regional Popular Assembly of 37.[90] However, the Special Committee declined the invitation, the Chairman of the Committee giving as his reason the fact that the Security Council had in no way been involved in the proceedings leading up to the announced meeting of the "Assembly".[91]

Just as in the case of the Moroccan claim to the Spanish Sahara, the Indonesian claim to East Timor is based on ties of "blood and culture between the people of the territory and their kin in Indonesia Timor".[92]

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85 *Id.*

86 *Id.*

87 *Id.*

88 *Id* at 61.

89 Resolution 389 (1976). See Annex III *Id* at 69-70.

90 *Id* at 60.

91 *Id* at 64.

92 *Id.*

Sahara occupies an area of some 26,600 square kilometres on the north-western coast of Africa. It is impossible, however, to state the population with any degree of certainty, because as nomadic people they roam the

Although few nations have expressly recognised Indonesia's forcible assumption of sovereignty over East Timor,[93] many have done so

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desert tending their animals and settling for a season where they can find water in an oasis. It is believed that the population is in the region of 75,000. There are three big towns, El AAiun the capital which was believed to have had a population of 30,000 before the troubles, Semara and Villar Cisnero which had 7,000 and 5,000 inhabitants respectively.

The inhabitants have ties with Morocco, Mauritania and Algeria with which the territory shares borders, and because of their nomadic way of life colonial boundaries have no meaning for them, a fact which makes the holding of a referendum a real problem. As the UN Visiting Mission observed,

> "because of their nomadic way of life, the people of the terrotory move easily across the borders to the neighbouring countries, where they are received by members of their tribes or even of their families...This ebb and flow of people across the borders of the terrotory makes it difficult to make a complete census of the inhabitants of Spanish Sahara and also poses the complex problem of the identification of the Saharans of the territory and makes it even more difficult to take a satisfactory census of refugees."

The language of the territory is Hassania which is a form of Arabic. Far from being an arid desert land, which is what it has been taken for in the past, the territory is rich in phosphate deposits.. The existence of oil and iron deposits in the territory can also not be ruled out, while its position on the coast gives it strategic importance. Given the present trend in the development of the law of the sea and the claim for a 200 mile fishery zone for the conservation of the seas' natural resources, its maritime potential is not to be taken lightly.

Report of the UN Visiting Mission to Spanish Sahara in *Report of the Special Committee* UN Doc. A/10023/ Add 5 Annex 7 (hereinafter cited: Visiting Mission). On the Spanish Sahara issue see generally, Franck, T M., "The Stealing of the Sahara," (1976) *70 AJIL* 694; T M Franck , and P Hoffman, 'The Right of Self-Determination in Very Small Places,' (1975/76) 8 *NYU JILP* 331; also H A Amankwah, *supra* n 2.

93 For example, Malaysia whose representative at the UN made the following statement in the General Assembly's Fourth Committee on December 4 1978: 'The people of East Timor had on previous occasions expressed and even documented their genuine desire to attain independence through integration with Indonesia. In accepting their request the Malaysian Government is satisfied that the Government of Indonesia had gone to the extremes to [*sic*] carefully make sure that the request was in accordance with [the] wishes of the people, for we are convinced that they would not have acceded to it were it against their wishes. It is therefore the firm view of my government that East Timor is part of the sovereignty and territorial integrity of Indonesia and my delegation supports the view of the

implicitly. Among the countries recognising the incorporation of East Timor into Indonesia, Australia has gone furthest in its act of recognition. *The Case Concerning East Timor*[94] is important because although the Court declined to adjudicate on the application before it, it did reaffirm the right of self-determination of the East Timorese.

In 1979 Australia and Indonesia started negotiations concerning the exploration, exploitation and delimitation of the continental shelf in the area known as the Timor Gap. The two states then signed the *Treaty on the Zone of Co-operation in an area between the Indonesian Province of East Timor and Northern Australia,* to be known as the *Timor Gap Treaty.*[95] This then permitted the exploration and exploitation of the petroleum resources in the area.

Portugal, as the Administering power still recognised by the UN, sought damages for East Timor against Australia for entering into the treaty. The application summed up Australia's breaches of international law. In its submission, Portugal asked the Court to declare the following:

(i) that the people of East Timor have a right to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources.

(ii) that Australia has infringed and is infringing the powers of Portugal as the Administering power of the territory of East Timor.

Indonesian delegation that the present discussion is an interference in the internal affairs of the Indonesians."

It remains our position that the people of East Timor have already exercised their right of self-determination through the legitimate Peoples Assembly in accordance with Resolutions 1514(XV) and 1541(XV)' (*Press Release* of the Permanent Mission of Malaysia to the UN, New York 1978, 2-3,4). Quoted in Cassese *supra* n 6 at 226.

The effect of the principle of "historical consolidation" by which it is assumed that "there comes a time when realities, however illegal or inequitable they may have been initially, appear to have become irreversible and the world community's interest in orderliness and stability might justify cloaking it with the mantle of legality" also has to be born in mind. See J. P. Fonteyne, "The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position", 45 *Australian Journal of International Affairs,* (1991) 170, 178.

94 (*Portugal v Australia*) 1995 ICJ Reps, para 14.

95 (1991) *Australian Treaty Series,* No. 9. For an appraisal of the treaty, see W Martin and D Pickergill 'The Timor Gap Treaty 1991' (1991) 32 *Harvard International Law Journal,* 566; J Cooke, 'Filling the Gap-Delimiting Australia-Indonesia Maritime Boundary' (1987) 10 *Australian International Law* 133.

(iii) that Australia, by entering into a treaty with Indonesia, has infringed the right of the people of East Timor to self-determination, to territorial integrity and its unity and its permanent sovereignty over its wealth and natural resources.

(iv) that Australia is contravening Security Council Resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations.[96]

In response to this, the Court decided to apply the Monetary Gold Doctrine,[97] and ruled that since Indonesia had not submitted to its jurisdiction, any adjudication would run counter to the well established principle of international law which is also embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a state with its consent.[98] While the position of the executive arm of government in Australia is difficult to judge, the judiciary would appear to adopt a 'hands-off' East Timor attitude.[99]

Most importantly, however, the Court reaffirmed the right of the East Timorese people to self-determination,[100] and although Australia's complicity with Indonesia escaped adjudication by the majority, the judgment nevertheless implicitly points to her delinquency as a responsible international citizen.

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96 This derives in part from the *erga omnes* principle, and Art 2(2), UN Charter.

97 The doctrine was first invoked in the *Monetary Gold Case,* 1954 ICJ Reps 31.

98 The Court's reason for declining to exercise jurisdiction in this case is the difficulty the Court faced of adjudicating on the lawfulness or otherwise of Indonesia's conduct without its consent: ref Art. 36(2) *Statute of the International Court of Justice*. See Note 108 *supra* paras. 33 and 34.

99 See *Jose Ramos Horta v Commonwealth* (1994) 181 CLR 183.

100 *Id.* Para. 37 For some comments on the case see C M Chinkin, 'East Timor Moves into the World Court' (1993) 4 *European Journal of International Law,* 206; M C Maffei 'The Case of East Timor before the International Court of Justice - Some tentative Comments' (1993) 4 *European Journal of International Law* at 223; I Shearer, 'The Decision (of the ICJ) in the East Timor Case' (1995) 69 *ALJ* 949.

(iii) New Caledonia's Kanak Population

New Caledonia became a colony of France in 1853 and was put to use towards the advancement of France's naval and commercial interests.[101] From this time until the cessation of World War II the indigenous people, the Kanak, were denied the right to vote and were not classed as French citizens.

At the outset of the colonization of the territory, France pursued a policy of mass immigration. Native tribes were wrestled away from their ancestral lands and confined to reserves. The colonial history of the territory was, therefore, a struggle in which land was the central issue. The immigration program has been so extensive that the Kanak have been reduced to a minority, albeit, the largest of a number of ethnic groups in their own country. Today the Kanak represent 42.5% of the population while Europeans account 37.1%.[102] The rest of the population is made up of other immigrants brought in by the French to provide labour. In addition to the settlers, there are large numbers of French civil servants and military personnel.

The Europeans live mostly in Noumea and on average earn five times the Kanak income. They also control the nickel mines which account for much of New Caledonia's export earnings.[103] In contrast, the Kanak are dependent largely on subsistence farming. Radical groups among the Kanaks sought the return of ancestral lands and the recognition of Kanak culture and languages as short term goals while the long term goal was autonomy. The challenge posed by the continuous growth of fanatical Kanak demands was met by the French government's direct response of extensive immigration to the territory to thwart the Kanak independence movement.[104]

It was not until July 1983 that the French government recognised the right of the people of the territory of New Caledonia including the Kanaks to independence.[105] The major political party at the time advocating the right to self-determination, the *Front Independentiste* attained credibility after it articulated its aims of the abolition of colonialism, recognition of the

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101 H Fraser, *New Caledonian Anti-Colonialism in a Pacific Territory,* Canberra: Australian National University, Peace Research Centre, (1988) 1.

102 B MacDonald, 'Current Developments in the Pacific' (1982) 17 *Journal of Pacific History* 51.

103 *Id.*

104 J Connell, 'The Fight for Kanaky: Decolonisation in the South Pacific' (1987) 1 *Australian Geographer* 59.

105 Fraser, *supra* n 101 at 16.

inherent right to independence of the Kanak people as first occupants, and the assurance of the French government to encourage the exercise of self-determination. For the European majority against independence there was the assurance that independence would only come through democratic procedures within the framework of the French Constitution.[106] This first consensus was seen by the *Front Independentiste* as a step in the right direction, but the realisation dawned that although the right to independence was recognised, the means to execute it was still withheld. Omitted from the conference discussions was any mention of an electoral process without which the Kanak could not win a referendum on the independence issue.

This was the prevailing political climate which led the South Pacific Forum into pushing for New Caledonia's relisting with the United Nations Decolonisation Special Committee as a non-self governing territory to which the United Nations General Assembly Resolution 1514(XV) should apply. New Caledonia was on the first United Nations list of non-self governing territories in 1946, however, shortly thereafter France ceased to provide information on the territory to the United Nations, consequently developments (political, social or economic) in New Caledonia were not addressed for many years.[107] The United Nations General Assembly voted in December 1986 to refer New Caledonia to the United Nations Committee on Decolonisation.[108] France predictably rejected this decision, arguing that any political change in New Caledonia was solely France's domestic constitutional issue. However, in the same year, the United Nations General Assembly reaffirmed New Caledonia's "inalienable right to self-determination and independence." The Special Committee's resolution of 14 August 1987 reaffirmed the right of the New Caledonian people to "a free and genuine act of self-determination consistent with United Nations principles and practices of self-determination and independence".[109]

Independence movements in New Caledonia gathered momentum in the late seventies when Union Caledonienne (UC), a political party in New Caledonia, adopted a policy of support for independence. This was further enhanced when the *Front de Liberation Nationale Kanak et Socilites* (FLNKS) was formed in 1984. Led by Jean-Marie Tjibaou, the FLNKS succeeded in uniting many factions and splinter parties into a single party

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106 *Id.*

107 UN Doc. A/41/668 reproduced in H Reicher (ed) *Australian International Law* (Sydney: Law Book Company 1995) 43.

108 *Id* at 45.

109 *Id.*

with the aim of gaining independence from France for the Kanak.[110] During the 1980's tension grew as rival groups inclined towards extremist ideologies. A boycott of the 1984 elections by the FLNKS further heightened tensions and might have led to the decision of seven settlers to ambush and kill a group of Kanak returning from an FLNKS meeting. They were all acquitted despite the incontrovertible evidence of some eighty eyewitnesses.[111]

It was in this acutely politically charged climate that the French government decided to conduct a referendum on the issue of New Caledonia's continued connection with France.[112] The referendum which was held on 13 September 1987 was boycotted by 80% of the Kanak but was insisted by the French government to be a poll that was a democratic expression of the wishes of the New Caledonian people, and that the outcome was 98% in favour of the territory's continued membership of the French Republic.[113] The conduct of the referendum did not satisfy international opinion as it was inconsistent with the UN procedures and processes for decolonisation for a number of reasons: co-operation with the United Nations was refused, there was no political education regarding the options; the choice was restricted to two quite stark options and punitive consequences were implicitly and occasionally explicitly attached to the independence option.[114]

Following the referendum, tension remained high with the kidnapping of a number of French gendarmes by Kanak activists. The hostages were held in caves on the island of Ouvea. Thirteen days later the hostages were freed by French Commandos and all activists were killed, some even after surrendering.[115]

Towards the end of 1988, the FLNKS leader, Jean-Marie Tjibaou, entered into agreements, the *Matignon Accords*, with the French government and the anti-independence party, *Rassemblement pour Caledonie dans le Republique* (RPCR).[116] The *Matignon Accords* which served to defuse the volatile political situation in the territory proclaimed that in 1998, the

110 *CIA World Fact Book*, URL: http://www.adfa.oz.au/CS/flg/wf93/nc.html.

111 *Id.*

112 Fraser, *supra* n 101 at 37.

113 *Id.*

114 Connell, *supra* n 104 at 63.

115 CIA World Fact Book, Note 123 supra.

116 This agreement formed the basis of the current *Territorial Statute of New Caledonia*, promulgated by Law No. 88-1028, November 9, 1988. See also Eagles, *From New Caledonia to Kanaky*, http://www,caa,org.au/CAA/horizns/h17/kanaky.html.

people of Kanaky will vote in a referendum on "whether the territory remains within the French Republic or whether it accedes to independence." Further, the *Matignon Accords* inaugurated a ten year programme to ameliorate the social, economic and political conditions of the Kanak people.[117]

The view is widely held that Tjibaou's acceptance of the *Matignon Accords* led to his assassination on 4 May 1989;[118] as many Kanak believed that in entering into such an agreement, they had relented in their struggle up the independence path. There appears to be some truth in this because the *Matignon Accords* does not provide for a "genuine act of self-determination" as the United Nations requires.[119] Furthermore, France argues that the United Nations supervision of decolonisation is not necessary because the "issue of independence is now dead and that New Caledonians are determining their own fate through the Matignon process."[120]

The *Matignon Accords* do not address the fundamental issues of Kanak land rights or international supervision by the United Nations to ensure self-determination. While it cannot be denied that the *Matignon Accords* were entered into primarily to defuse the tension and violence, the aftermath of the Ouvea massacre, the *Accords* nevertheless did create a "functioning Territorial Assembly providing a forum for domestic political activity...by ensuring a minimum level of co-operation between the Kanak and the settlers."[121]

Both the pro-independence party, the FLNKS and the anti-independence party, the RPCR, recognise the

> "urgent necessity of contributing to a return to civil order so as to create conditions where the population could choose freely and with assurance about their future, to be masters of their own destiny."[122]

The FLNKS proposal for the future of New Caledonia is to establish a new state in 1998, with France retaining areas of control including law and order, the judiciary, foreign affairs and defence until at least 2001.[123] The

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117 *Id.*

118 J Scott-Murphy, 'The Empire Strikes Back?' (1990) 15 *Legal Services Bulletin* 84.

119 *Id.*

120 *Id* at 85.

121 *Id.*

122 *Id.*

123 Eagles, *supra* n 116 at 2.

FLNKS firmly reiterated that this must lead to independence. The RPCR took a contrary stance and proposed a thirty-year "pact of peace and development" with New Caledonia remaining part of France.[124]

Recent developments in the Matignon process evinces the conclusion that the French may have concluded the *Accords* to curb the independence movement and never intended independence as an option for New Caledonia. Early in 1996, the FLNKS and the PRCR had meetings with the French government over the referendum issue. The proposals put forward by the French government clearly show that France is not contemplating independence for the territory. The government proposed a return to the pre-1958 state of considerable autonomy within the French Republic. The FLNKS denounced the "proposal as a breach of previous French commitment to the right of self-determination."[125]

Clearly New Caledonia's future political status hangs in the balance. However, a more fundamental issue has to be confronted. It is the question: who constitutes a "people" in the territory for the purposes of the exercise of the right of self-determination? The indigenous Kanak population only, or the entire population of the territory including the settlers? Some writers favour an interpretation of "people" which encompasses the indigenous population only[126]. Their argument finds support in the fact that the colonists from France and elsewhere do not have the necessary characteristic of a "peoples" to satisfy Article 73 of the UN Charter, under Chapter XI headed, *Declaration Regarding Non-Self-Governing Territories* when read together with Article 1 of the *Decolonisation Declaration* which deplores "the subjection of peoples to *alien* subjugation, domination and exploitation..." The use of the word 'alien' could be relied on to confine the right of external self-determination to *the non-alien* population only.

However, a careful examination of Article 73 would suggest that the word 'inhabitants' is used interchangeably with 'peoples', giving the latter word a wider meaning than it otherwise would have. That meaning being the whole people of the colony, rather than a specific, identifiable 'peoples'. 'Inhabitants' would clearly refer to the whole population of New Caledonia, rather than the Kanak as a distinct group. The *Decolonisation Declaration* is expressed to be within the Charter of the UN; consequently it could be argued that the *Declaration* could not support an alternative view of self-determination.

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124 *Id.*

125 *Id.*

126 See for example, M R Islam, 'The Recent Self-Determination Referendum in New Caledonia' (1987) *15 Malaysian Law Journal*, 136.

While United Nations practice provides no clear guidance, it would seem that in a colonial setting non-indigenous populations have no right of participation in the exercise of the act of self-determination. However, such groups could constitute 'minorities' whose interests could be protected under internal arrangements, an issue falling within internal self-determination. This is the kind of situation which has also resulted in stalemate in Gibraltar.[127]

IV INTERNAL SELF-DETERMINATION

The right of self-determination and the principles governing state sovereignty and territorial integrity when juxtaposed evince tensions and contradictions. Such difficulties can only be alleviated by adopting an interpretation which reconciles the various legal principles and by assuming that in international law just as in domestic law, a law making body would not deliberately intend absurdities to result from the application of laws duly promulgated.[128] Thus while some collective rights are also human rights, for example, rights contained in the ICCPR,[129] human rights feature more prominently within a state system in which the rights of minorities are in issue and are 'continuing' rights. Collective rights properly-so-called on the other hand feature predominantly in the evolution of a new state system and are rights of 'peoples' which once exercised are extinguished forever and cannot be revived.[130]

Thus stated, it is possible now to distinguish the salient aspects of internal self-determination. These are the rights of the people to:

(i) develop their own political system;

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127 *Supra* n 32.

128 See however, Art. 31 of the *Vienna Convention on the Law of Treaties*, UN DOC a/Conf 39/11, 1969 which favours a literal rather than a "purposive" approach to interpretation of treaty texts; also *Interpretation of Peace Treaties Case (Second Phase) Advisory Opinion ICJ* Reps 1950, 221.

129 *Supra* n 8; also *Declaration of Principles of International Law on Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations*, Res. 2625(XXV), *supra* n 4 and the seminal article of P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 *Intern & Comp L Q*, 867; also N Jayawickrama, 'The Right of Self-Determination - A Time of Reinvention and Renewal' (1993) 57 *Saskatchewan L R*, 1.

130 See Tomuschat, *supra* n 4 at 248.

(ii) play an active and participatory role in amending the constitution (including the right of resistance against absolutism and domination);

(iii) govern and take part in the conduct of public affairs, including participation in elections, referenda etc.[131]

Claims intended, therefore, to wrestle sovereignty from a pre- existing state by a group within it, would, it seems, encounter insurmountable legal difficulties.

(i) The Sri Lankan Tamils

Sri Lanka's continuing ethnic conflict emanates from the issue relating to the extent to which economic and political power are to be shared between the majority Sinhalese and the minority Tamils.[132] Political developments in Sri Lanka reveal a persistent and widespread process of discrimination and subjugation of the Tamils by the Sinhalese, a situation which generated the conflict which prevails today.

Sri Lanka's population of eighteen million comprises of several ethnic groups: the Buddhist Sinhalese (75%), the Hindu Tamils (18%) and the Muslim Moors (7%). The Tamil group is further broken down into Ceylon Tamils, the original Tamil inhabitants of Sri Lanka (2/3rds) and Estate or Indian Tamils who were brought to Sri Lanka by the British (1/3rd).[133] The country itself consists of eight regions, with the Tamils concentrated in the north and the Sinhalese in the south.

Parts of Sri Lanka were occupied by the Portuguese in 1505 and later by the Dutch in 1658. However, the British seized the island, named it Ceylon, and incorporated it into the British empire in 1795. Ceylon became an independent member of the Commonwealth of Nations in 1948. The principal provisions of the *Independence Constitution of Ceylon* established safeguards to ensure minority representation,[134] including s 29 which stated:

> No...law shall...make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or ...confer on persons of any community or religion any privilege or advantage

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131 *Id.*

132 S W R de A Samarasinghe, 'Sri Lanka in 1983' (1984) *Asian Survey* 250.

133 See Hannum, *supra* n 6 at 280.

134 See Jayawickrama, *supra* n 129 at 7.

> which is not conferred on persons of other communities or religions.[135]

Unfortunately these measures proved to be inadequate in protecting the rights of the Tamils and other minority groups as the Sinhalese held the majority of parliamentary seats. In 1956 the *Official Language Act* was passed,[136] elevating the Sinhala language to the status of sole official language of the country, a strategy which provided a rationale for refusing Tamil speaking people positions in the civil service.[137] The Act also created a quota system and a standardisation program based on race for university entry, effectively limiting the number of Tamils admitted to universities.[138] Compounding further the problem of Tamil minority representation was the abolition of the Senate in 1971.[139]

In 1972 Ceylon became a republic under the new name Sri Lanka, and the new constitution, although retaining the basic features of parliamentary democracy, jettisoned the doctrine of the separation of powers.[140] The former s 29 was left out in the new constitution and Sinhala was enshrined as the only official language, a situation which prompted its rejection by the Tamil Federal Party (TFP).[141] The TFP was replaced by the Tamil United Liberation Front (TULF)[142] which changed the party's ideology from federalism to separatism. In the mid 1970's Tamil youths, frustrated by the lack of opportunity provided by the political avenues formed the

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135 *Id.*

136 B Cashman *et al*, 'The Human Rights Crisis in Sri Lanka: It's Background and Possible Solutions' (1987) 15 *Denver Journal of International Law and Policy* 361.

The citizenship rights of Estate/Indian Tamils were revoked upon independence on the ground that they had been brought to Sri Lanka from India by the British and were really Indian citizens, so should be repatriated: Hannum, *supra* n 10 at 280.

137 Under British rule the Tamils had occupied the majority of the civil service positions due to their commitment to education, a result of the poor agricultural land in the north and eastern provinces which they occupied. The Sinhalese saw this as an obvious threat to their superiority after independence.

138 Cashman *et al*, *supra* n 136 at 361.

139 Jayawickrama, *supra* n 141 at 8.

140 This constitution was drafted by the Sri Lanka Freedom Party, See M J A Cooray, 'Three Models of Constitutional Litigation: Lessons from Sri Lanka' (1992) 21 *Anglo-American Law Review* 430.

141 Cashman *et al, loc cit.*

142 Hannum, *supra* n 6 at 284 to 285.

Liberation Tigers of Tamil Eelam (LTTE). The LTTE adopted militarism as its preferred method of achieving its separatist claims.[143]

A second republican constitution was promulgated in 1977 by the *United National Party* (UNP) which revived the separation of powers doctrine, maintained the quota system of university entry and declared equal recognition for both Tamil as well as Sinhala as national languages.[144] Again the Tamil political party (TULF) refused to endorse the constitution.

In 1979 the *Prevention of Terrorism (Temporary Provisions) Act, (PTA)* No. 48 was passed. Originally in force for three years, it became part of Sri Lanka's permanent law in 1982.[145] The legislation gave virtually unlimited power to security forces to arrest people and detain them indefinitely without trial.[146] The position of power held by the Sinhalese UNP was consolidated by the 1982 *Third* and *Fourth Amendments* to the constitution which extended the terms of office of the president and parliament from six to twelve years, subject only to referenda. Oppressive tactics were utilised to suppress opposition, including the abolition of civil rights, closure of opposition printing presses and detention, acts calculated to ensure that the Amendments were passed.[147]

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143 One of the first Tamil extremist groups, they are the strongest and the most influential of all Tamil freedom groups. The TULF sought separatism through the advocation of peaceful means. See Hannum, *supra* n 6 at 288; Jayawickrama, *supra* at 10 and P Hyndman, 'Human Rights, The Rules of Law and the Situation in Sri Lanka' (1985) 8 *University of New South Wales Law Journal* 337, 343.

144 However, Sinhala remained as the only official language in the country. Other problems with this constitution included the watering down of human rights by Art. 15 which allows restrictions on fundamental rights in the interests of national security, racial or religious harmony, national economy or public order. Very wide powers were also bestowed on the President who had the power to appoint and dismiss the Prime Minister, the Ministers and Deputy Ministers (Arts. 43, 44, 46 and 47). He also had the power to assign himself any subject or function (Article 44(2)); to dissolve parliament as well as exclusive powers of appointment of all of the judges of the Supreme Court, Court of Appeal and the High Court. Art. 35(1) further provided that (for as long as he holds office) 'no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.' See Hyndman, *supra* n 143 at 349-358.

145 Cashman, *supra* n 136 at 362.

146 Hannum, *supra* n 6 at 289.

147 These Amendments further undermined democratic values and further impaired the potency of the rule of law. Hyndman, *supra* n 143 at 350. It must be noted that Sri Lanka acceded to the *International Covenant on*

Although there had been outbreaks of communal violence previously,[148] the murder of thirteen soldiers by the LTTE in north Jaffna in July 1982 triggered widespread attacks on Tamils including two massacres of Tamil political prisoners which resulted in 53 deaths.[149] The attacks on civilian Tamils were organised and systematic events in which the perpetrators used electoral lists to identify Tamil residences and property.[150]

Government sources stated that there were only 400 deaths[151] from the July riots whereas Tamil sources put the number close to 1,500.[152] The government's response to these riots was the enactment of the *Sixth Constitutional Amendment* in August 1983 which required all persons holding official positions to swear an oath renouncing Tamil claims for a separate Tamil state.[153] As separatist claims were fundamental to the TULF ideology, Tamil parliamentarians forfeited their parliamentary seats, a situation which further curtailed Tamil participation in government.

The LTTE plan of unilateral declaration of independence scheduled for January 1987 was prevented by government ban on fuel shipments to Jaffna. This was accompanied by a major military offensive to wrestle back control of the north.[154] India sent relief supplies to ease civilian suffering. These were initially turned back by the Sri Lankan navy. They were, however, air-dropped over Jaffna city from Indian transport planes which were accompanied by four Mirage fighters.[155] These actions led to

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Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights in 1980 and the *International Convention on Elimination of all Forms of Racial Discrimination* in 1982.

148 May 1958, August 1977 where over 1,000 people were killed, and August 1981 - claims have been made that the security forces did nothing to help people being attacked. Hannum, *supra* n 6 at 285, Hyndman *supra* n 143 at 338.

149 Hannum, *supra* n 6 at 285.

150 *Id.* at 286.

151 *Id.*

152 *Id.* at 287. The riots also created thousands of Tamil refugees.

153 Hyndman, *supra* n 143 at 335.

154 *Id.* at 298; also Chandrahasan, N., "Use of Force To ensure Humanitarian Relief - A South Asian Precedent Examined," (1993) 42 *ICLQ* 666.

155 Sri Lanka alleged that India had breached the principle of non-intervention and that as a result Sri Lankan sovereignty had been violated: India on the other hand claimed it interfered on humanitarian grounds. See generally R M Gunewardene, 'Indo-Sri Lanka Accord: Intervention by Invitation or Forced Intervention?' (1990-1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 211-234. See also Chandrahasan, *supra* n 154.

the conclusion of the *Indo-Sri Lankan Agreement*, July 1987, which involved Indian troops in a "peace-keeping" capacity[156] in the north, while Sri Lankan troops were confined to barracks. The Agreement also involved the establishment of Provincial Councils which encompassed the merger of the north and eastern provinces as an administrative unit, as well as unrelated concessions by the Sri-Lankan government in the foreign policy area, thus effectively protecting Indian interests in the region.[157]

The Sinhalese saw the Agreement as a direct interference by India in Sri Lanka's sovereignty, and the fusion of the northern and eastern provinces as the end of the unitary state. After being re-elected the UNP government under pressure from the LTTE, the JVP,[158] the Tamil and Sinhala populations drew up an agreement with India for the withdrawal of the IPKF.[159]

A cease-fire between the government and the LTTE in 1990 lasted little more than two months before the LTTE resumed the fight against the Muslims and Sinhalese in the Eastern Province.[160] The war was resumed with the use of aerial bombing by government forces, which were indifferent to civilian casualties for the sole purpose of gaining control of the northern province.

The fighting made thousands of people refugees and isolated the Jaffna peninsula from the rest of the country where it created poverty and paralysed civil administration.[161] The LTTE exerted some control over the Jaffna peninsula by establishing its own police force and extracted taxes.[162]

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156 The IPKF - The Indian Peace Keeping Force. For the text of the Agreement, see (1987) 26 *ILM* 1175; also. A D Arulpragasam, 'International Agreements' (1988) 29 *Harvard International Law Journal* 179; See also B Matthews, 'Sri Lanka in 1988' (1989) 29 *Asian Survey* 230.

157 Hannum, *supra* n 6 at 299.

158 An extremist Sinhala group intent on toppling the UNP government because of the Indian involvement and the poor handling of the Tamil situation.

159 B. Matthews, 'Sri Lanka in 1989' (1990) 30 *Asian Survey* 145.

160 It has long been the claim of the LTTE and Tamils generally that the government's migration program of settling Sinhalese and Muslims in the east, traditionally a Tamil stronghold is a deliberate attempt to weaken the Tamil majority and thus erode their power in the region and frustrate claims of a Tamil Homeland.

161 S K Hennayake, 'Sri Lanka in 1982' (1993) 33 *Asian Survey* 159.

162 *Id.*

Three proposals for a solution to the crisis were offered to the Parliamentary Select Committee but all were rejected by the majority parties mostly due to the merger of the eastern and northern provinces proposal which had become the focus of the dispute.[163] The LTTE, despite recent bloody infighting which resulted in over 50 deaths, rejected the proposals, its leader Prabhakaran stating that only through the sacrifice of more blood could Eelam be achieved, thus firmly re-establishing its non-negotiable stance on a separate Tamil Eelam.[164]

After seventeen years of UNP rule, the Peoples Alliance(PA) was elected with 62% of the vote. It promised a political solution which would involve a meaningful devolution of power and inquiries into human rights abuses, corruption and death of civilians.[165] Despite a relaxation on the embargo on the flow of goods to the Jaffna peninsula and the initiation of talks with the LTTE during 1994, the LTTE have shown little commitment to peaceful negotiation. Its continued mistrust of the government and the failure of a series of negotiations under a cease fire agreement in 1995 resulted in the resumption of hostilities.[166] Details of an extensive decentralisation package were leaked in September 1995 but the package is still to be officially tabled. The LTTE, however, has already rejected the package outright and continued fighting.[167]

Perhaps it would be beneficial to examine the Sri Lankan devolution package (hereinafter the Package) to see what promise of peace it holds. The Package involves a devolution of power which includes a degree of autonomy to the Tamil people. Major constitutional changes resulting in the inauguration of a 'union of regions' based on the existing eight provinces are also central to the Package.[168] Governmental powers are to be divided between the centre and regional councils in which power over defence, foreign affairs, currency and foreign exchange, telecommunications and postal services, transportation and customs will remain the preserved domain of the centre. Regional councils will exercise control over land and land settlement, law and order, education and the residual powers outside of the centre's control. The power of taxation will be by allocation and a grants system involving a National Finance

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163 *Id.* at 162-163.

164 *Id.*

165 G Keerawella and R Samarajiva, 'Sri Lanka in 1994' (1995) 35 *Asian Survey* 153.

166 H B Schaffer, 'Sri Lanka in 1995' (1996) 36 *Asian Survey* 217-218.

167 *Id.* 221-222.

168 Although some changes to the border of the Eastern Province is expected in order to protect the Muslim and Sinhala minority ; *Id* at 219-220.

Commission.[169] The major concession of the Package is a proviso to the effect that the centre will have the power to dismiss a regional council if its conduct threatens the integrity and sovereignty of Sri Lanka. This discretionary power, it seems, undermines the integrity of the entire Package and would possibly result in its failure.

The Package undoubtedly inaugurates a federation; however, strong opposition from the Sinhala population toward the concept of federalism, which they see as a precursor of a Tamil separate state, inhibits the use of the capital "F" letter by the government.[170] The Sinhalese have also questioned the wisdom in the devolution of power onto regions where Tamils are the dominant population. Not surprisingly, the LTTE rejected the Package out of hand, and have continued their campaign of violence, with two attacks on military and police camps in January 1996.[171] Whatever Tamil support there is for the Package has been muted for fear of retribution from the LTTE.[172]

Despite opposition from the Sinhalese and the LTTE, the Package has yet to be formally introduced into parliament, and for it to come into force it must be reviewed by a Parliamentary Select Committee, approved by two third majority of parliament and passed in a national referendum. The crisis is further exacerbated by the proposed constitutional reform of other areas of government, including the abolition of the presidential system in favour of the re-introduction of the Westminster system, which the UNP has seen as an avenue to ousting President Kumaratunga, thereby ensuring the complete demise of the Package.[173]

If implemented, however, the Package would represent an internal exercise of the right of self-determination by granting a degree of autonomy to the Tamil population. The Sri Lankan government has recognised that a substantial accommodation of Tamil interests must be conceded in any plan to resolve the ethnic conflict. However, the situation appears to remain deadlocked as opinions further polarise and the parties, the UNP, the Sinhalese, as well as the LTTE remain unrelenting in their respective claims.

The alternative to a constitutional settlement of the Sri Lankan debacle is of course the extra-legal method of secession, which is the external

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169 *Id.*

170 *Id.*

171 'The Tigers Strikes Again' *The Weekend Australian* 28-29 September (1996) 22.

172 Schaffer, *supra* n 166 at 220-221.

173 *Id.*

exercise of the right of self-determination which is usually resorted to where internal avenues have proved inefficacious.[174] Issues concerning practicalities such as whether the new territory would be economically viable, whether the people would be better protected under the new territory and whether justice would be achieved under the new regime, would all need to be addressed. Issues of legality and legitimacy would need to be tackled, for example, whether the new territory would be able to attain statehood, an issue which involves complex considerations of recognition, sovereignty and territorial integrity.[175]

The gravamen of the exercise of the right of self-determination is the facilitation of the ascertainment of the true expression of the will of the people and in the context of Sri Lanka it remains unclear whether the Tamil population in the entire country really want a separate state. Until the will of the people is expressed there can be no speculation on the legitimacy of separatist claims. In the mean time, the Sri Lankan government has not provided the means to elicit such expression of Tamil wishes, and UN practice provides no clear-cut answers.

Due to various factors such as the exercise of internal self-determination involving the granting of autonomy to Tamils, the violent and unstable nature of the LTTE,[176] the strong opposition from the Sinhalese majority as well as the international community[177] and the legal difficulties in seceding,[178] the establishment of Tamil Eelam appears to be increasingly unlikely. However, in the absence of clarification of the principles which should govern the ascertainment of Tamil claims, the inescapable conclusion would be that the Tamil claims are legitimate and that the only available option at this point in time is secession, a very precarious

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174 A Heraclides, *The Self-Determination of Minorities in International Politics* (London: Frank Cass & Co., 1991) 1-15.

175 See generally - Cashman, *et al supra* n 136 at 355-377; Heraclides, *supra* n 174 ; Cassese *supra* n 6 at 122.

176 For example their infighting, their policy of ethnic cleansing, their rather lessness and murder of moderate Tamils especially Tamil politicians they disagree with, their involvement in the international drug trade to finance their war and their resolute unwillingness to negotiate. See Schaffer, *supra.* n 166 *loc. cit.*

177 Especially India which has separatist problems of its own to deal with: the Sikh Separatist Movement.

178 Including maintenance of territorial integrity, especially for the maintenance of global peace and security, and recognition as indicia of statehood. See Art. 1, *Montevideo Convention on Rights and Duties of States,* 1933 (1934) 28 *AJIL (Supplement)* 75; 165 *LNTS,* 19; *USTS,* 881.

alternative. It is not, however, certain whether all Tamils want a separate state.

(ii) Bougainville and its people's fight for independence from Papua New Guinea

Bougainville is a small island off the coast of New Guinea. It is the largest of the Solomon group of islands and forms part of the State of Papua New Guinea. However, the people, their traditions and culture can be more similar to those of the Solomon Islanders than of mainland Papua New Guinea. Bouganville has a population of approximately 110,000 people, and is 8730 square kilometres in size. There are over 700 different languages on the New Guinean islands and 19 identifiable languages on the island of Bougainville itself. Traditionally, the people live in small communal groups. They have limited contact with other parts of the island as it is mountainous and much of the terrain is impenetrable except by foot. Bougainville is, however, accessible by plane and other forms of the motorised transportation.

France was the first European power to make contact with Bougainville in 1768. During the 1800's, it was partially occupied by the Germans. Germany's defeat in World War I resulted in the League of Nations making Bouganville a Mandated Territory along with north-eastern New Guinea under the Australian rule. In 1920 Bougainville became part of the then territory of New Guinea. Japan captured the island in 1942 during World War II and US Marines seized it back in 1943. At the cessation of the war, Bougainville along with the eastern half of New Guinea came to be known as Papua New Guinea and was placed under UN Trusteeship under Australian administration until 1975, when PNG became an independent state.[179]

Bougainvilleans were largely subsistence farmers, growing enough food for themselves and exchanging the excess with locals or members of nearby tribes for cooking wears, beads etc. The introduction of agricultural technology has resulted in large scale growing of cash crops

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179 For a history of PNG see, J Jinks *et al* (eds.), *Readings in New Guinea History,* Brisbane: (Angus and Robertson Publishers 1973).

Recent interpretations of Bougainvillean history are contained in, *Bougainville: A Pacific Solution*, Report of the Visiting Australian Parliamentary Delegation to Bougainville, Canberra: Australian Government Publishing Service,(1994); A Mamak and R D Bedford, *Bougainvillean Nationalism,* (Christchurch: University of Canterbury Press 1974); J Griffin *et al, Papua New Guinea: A Political History,* (Melbourne: Heinemann Publishers 1979).

for sale and export. Bougainville has enormous mineral deposits including copper and gold. Mining has greatly changed the traditional lifestyle of many Bougainvilleans, bringing with it economic growth and all the trappings of modernization. With mining came an influx of migrants. Mining companies employed large numbers of people, both local and non-Bougainvilleans. The concentration of work into relatively small areas has resulted in the establishment of large towns and the herding of traditionally tribal peoples into western-style settlement.

The bulk of the Bougainvillean people are of Melanesian descent. They are, however, ethnically different and distinguishable from other Melanesian-based people, and while they are different within themselves, with each tribal community having variances in their language, religion and tradition, they see themselves as one 'people' and thus seek independence and the opportunity to govern in their own right. When Papua New Guinea was granted independence in 1975, the people of Bougainville declared themselves an independent state.[180] This situation lasted for only two months,[181] for the people lacked experience in the running of government while the lack of sufficient infrastructure inhibited the island's ability to be effectively self-governing. The people never lost sight of their ultimate goal and still actively advocate the right to secede from PNG.

In the years leading up to PNG's independence, Australian influence in PNG affairs was at its apogee. The Panguna mine located at Panguna approximately 26 kilometres from the south-east coast was built at this time. Bougainville Copper Limited (BCL), an Australian owned company invested some $400 million in the project. The PNG government also had a substantial stake in the mine, contributing $73 million to the project including the purchase of a 20 per cent equity interest in the company.[182] The land on which the mine was located was communal land under traditional tenure. The inhabitants were believed to have been

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180 See J K Semos, *Sovereignty, Resources and Society: Mining and Undermining Resource Sovereignty in Bougainville, Papua New Guinea,* (Ph D Thesis, Department of Tropical Environmental Science and Geography, James Cook University, 1996) 15-20.

181 Bougainville agreed to remain a part of PNG in return for the PNG government's concession to decentralise political authority in the country by the creation of regional administrations with limited powers. See Semos, *Id.*

On the devolution of political authority in PNG generally: See A Regan, 'Developments in the Law in Decentralisation in PNG' (1991) 19 *Melanesian Law Journal* Special Issue *passim.*

182 See *Bougainville: A Pacific Solution, supra* n 179 for details.

"compensated" for the loss of their land and relocated, but they now claim that the amount of compensation given them was grossly inadequate. The islanders were also concerned about the extent of damage being done to the environment.[183] Indifference of the mining operators to these problems and to the wishes of the people generally only fuelled the fire of tension between the islanders and mainland PNG. Even after PNG became independent, the PNG government failed to consult with the Bouganvilleans, relying on the doctrine of state sovereignty,[184] by which

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183 The record of environmental degradation attributable to the operations of foreign companies and multi-national in Papua New Guinea is notorious. This writer was involved in the defence of the Broken Hill Pty. Co. Ltd. (BHP) Australia in the case instituted against that company in the Supreme Court of the State of Victoria, by Papua New Guinean nationals (*Alex Maun v The Broken Hill Pty. Co. Ltd.* and *OK Tedi Mining Ltd.*, July 11 1994), in respect of the pollution of the Fly River water-way. The case was, however, settled out of court for an unspecified amount. For the full story of the case, see *The Australian*, 7 September 1995 p.5; 13 Sept 1995 p.8; also *The Australian Financial Review*, 18 August 1995 p. 8.

184 UN Resolution on *Permanent Sovereignty over Natural Resources*, Res. 1803(XVII) Dec. 14 (1961), appears to favour the position of the PNG government. See also G Elian, *The Principle of Sovereignty Over Natural Resources* (The Netherlands: Nighoff & Moorhoff 1979) 10-15; R O O'Regan, 'The Ownership of Minerals and Petroleum in Papua New Guinea: A Comment' (1992) 8 *QUTLJ* 142; C P Haynes, 'The Ownership of Minerals and Petroleum in Papua New Guinea: *Milirrpum to Mabo* and *Teori Tau* to *Tumbuna Tano*' (1994) 1 *Australian Journal of Natural Resources Law and Policy*, 33; F H Hinsley, *Sovereignty*, Cambridge (Cambridge University Press 1986) 2; K Hossain and S R Choudhary, *Permanent Sovereignty Over Natural Resources in International Law* (London: Frances Printer 1984).

Bougainvilleans on the other hand assert title to minerals under the regime of customary land law and tenure, a view supported by Semos supra, and P Donigi: see his *Indigenous or Aboriginal Rights to Property: A PNG Perspective* (Utrecht, The Netherlands: International Books Publishers 1994).

The complexity of PNG's land law has been reappraised in a recent work: J Mugambwa and H A Amankwah, *Papua New Guinea Land Law and Policy: Cases and Materials* (Hobart: Pacific Law Press 1996).

Previous works on the subject also throw some light on the current problem. See especially P Sack (ed.), *Problems of Choice* (Canberra: ANU Press 1974); Sack, *Land Between Two Laws* (Canberra: ANU Press 1973); R Crocombe and R Hide, 'New Guinea: University in Diversity' in *Land Tenure in the Pacific*, Crocombe (ed.) (Suva, Fiji: University of the South Pacific Press 1987) 326. Elsewhere in the Asia Pacific region seeL T

Papua New Guinea acquired sovereignty over natural resources and therefore stating that there was no need for it to consult with a minority group within the state. Furthermore, the Bougainvilleans consider that the enormous contribution that the mines make to the Papua New Guinean economy is disproportionate to the four per cent return Bouganville receives from the government in financial assistance. The inequality in bargaining power and the drain of their natural resources are further factors of aggravation.

It was the culmination of many matters such as those indicated earlier that led to the eruption of violence.[185] The ineffectiveness of the political alternatives to the resolution of the problem, the exploitation by the Australian company of the island's natural resources,[186] the PNG government's disregard of the political, personal and human rights of the Bougainvllean people, were all important factors in this development. The Bougainvilleans saw no alternative means of redress and the Bougainville Revolutionary Army (BRA) was born.[187] The explosion at the Panguna mine which effectively paralysed all operations and sealed off the mine was the first act of sabotage.

The aim of the BRA is to see Bougainville secede to form a separate nation and their means to achieving this, as is usually the case with so many other similar situations, is through arm struggle. The BRA has sustained its

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Ghee and M J Valencia (eds), *Conflict Over Natural Resources in South-East Asia and the Pacific* (Tokyo: UN University Press 1990) 3.

185 See *Bougainville: A Pacific Solution*, *supra.* 179.

186 The politics of foreign capital and investment in developing nations is beyond the scope of this paper, however, it is an inescapable theme and one to be borne in mind as one ponders on Bougainville tragedy: See J J Villamil (ed), *Transitional Capitalism and National Development: New Perspectives on Dependence* (New Jersey: Humanities Press 1979) 213; I P de Lupis, *Finance and Protection of Investment in Developing Countries* (2nd ed), (London: Gower Publishers 1987); H M Theodore, *Multinational Corporations and the Politics of Dependence: Copper in Chile*, (Princeton: Princeton University Press 1974) 6 *et seq.* S Henningham and R May (eds) *Resources Development and Politics in the Pacific Islands* (Bathurst: Crawford House Press 1993).

187 There are parallels here with situations elsewhere in the world, for example, Katanga in the Congo: See Semos *supra*; and the current situation in Ogoniland (the Delta State) in Nigeria, where Shell Limited, a British Multi-national Corporation is the alleged villain: See E O Eghosa, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State' (1995) 94 *African Affairs* 328. See also M R Islam, 'The Bougainville Secession Crisis in PNG' (1990) 18 *Melanesian Law Journal* 31.

militant assault on the PNG government for almost a decade and there are recent reports that the intensity of hostilities is again on the increase. The severity of the problem is exemplified by the assassination of the Bouganville Transitional Government (BTG) Premier, Theodore Miriung.[188]

It is clear that the Bougainville people are entitled to expect that they should be able to participate in the democratic process and that their basic human rights and other entitlements are guaranteed. This expectation, however, would seem unrealistic as is usually the case with many other ethnic groups. It has been suggested that where basic human rights are being infringed by the governing state, that those people have recourse to the United Nations. This however, is only the case where a member nation of the UN is willing to place on the UN's agenda the case of the people concerned. This unfortunately does not seem to have eventuated in the case of the Bouganvilleans.

The UN is of course aware of the breaches of human rights on Bougainville and is maintaining a watchful eye on the situation.[189] Apart from this, no substantial assistance for Bouganvilleans has yet come from the UN. This may be because of a desire not to interfere in PNG internal affairs in accordance with Art 2(7) of the UN Charter.

In the case of Bougainville, the greatest obstacle which militates against the attainment of total independence is the restrictive definition given under international law to the term 'peoples.'[190] The strictly juridical

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188 As an interim measure pending the conclusion of a permanent peace agreement Bougainvilleans allowed the PNG government to station a representative on Bougainville. T. Miriung a moderate who defected from the BRA was chosen for the job. See M O'Callaghan, 'Murder of Bougainville Chief Harms Peace Hopes' *The Australian,* 14 October 1996, p.7.

189 See UN Doc. E/CN. 4/1996/4/Add.1.

190 There is no definition of "minorities" however the *Draft European Convention for the Protection of Minorities* prepared for the Council of Europe by the Venice Commission provided in Article 2(1): 'For the purposes of the Convention, the term "minority" shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnic, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language.'

Note that this is very similar to the *description* of a 'people' given by the UNESCO Experts cited in Tomuschat, *supra* n 4.. They included, common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and

interpretation of the term is sometimes in complete contradiction with the reality of the situation, as for instance the situation of Bouganville since according to all available ethnic criteria these are true 'peoples'. It has been argued that it should be possible to call a group, a 'people' in the legal sense without having to fear that such recognition entails devastating political consequence. As one writer observes:

> It is easier for the international community to group all of the underrepresented ethnic 'peoples' under the broad umbrella of 'minorities' and give them no political recourse.[191]

The alternative to secession is, of course, for the Bougainvilleans to seek internal self-determination, and actively seek representation and involvement in the running of the state so as to ensure that they receive some acknowledgement of their basic rights. This would also enable the islander people to monitor and maintain the use of their natural resources, which would ensure that they receive what they are justly entitled to in terms of compensation for environmental damage and disruption, and the money necessary to rebuild and improve the island's infrastructure. It has been suggested:

> The aim should be to accommodate the legitimate claims of peoples or even minorities by creating adequate political structures, giving them a say over what are essentially their own matters, without destroying the overarching institutions of government.[192]

However, for this to happen there must be cessation of hostilities for the commencement of negotiations within a tranquil environment.[193] A New

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common economic life. It may be observed that by this artificial distinction, the only distinction between a "minority" and a "peoples" is the fact that a minority is a group smaller in number than the rest of the population of the State. This then could be rationalized to mean that in order for a minority to become a peoples and ultimately achieve external self-determination, all they would have to do is grow larger in number so that they are no longer a number less than the rest of the State. The right to self-government therefore, it would seem, lies purely in the size of the group seeking it.

191 Tomuschat, *supra* n 4.

192 *Id.* 17.

193 In early 1997 the government of Papua New Guinea brought in mercenaries to wipe out the Bougainvillean resistance: see *The Weekend Australian* 22-23 February 1997 p. 1, a situation which, provided all the recipe for a military revolt culminating in the down-fall of the Prime Minister Sir Julius Chan and his Defence and Finance Ministers: see *The Australian* Wednesday, 26 March 1997, 4.

Zealand government peace initiative resulted in the conclusion of the *Lincoln Agreement on Peace, Security and Development on Bougainville* on January 22 1998 between the PNG government and the BRA. Among the key elements of the agreement are:

1) a 'permanent and irrevocable' ceasefire on Bougainville, due to take effect from 30 April 1998;
2) An extention of the truce monitoring group (TMG) until 30 April 1998;
3) The appoinment of a UN special observing mission to monitor peacekeeping arangements;
4) Agreement to a phased withdrawal of the PHG Defence Force from Bnougainville subject to restoration of civil authority;
5) An offer by the PNG governmnet to remove bounties and grant amnesty and pardons to 'persons involved in crisis-related activities';
6) Agreement to cooperate in the restoration and development of Bougainville;
7) Agreement to meet on Bougainville before the end of June to address the issue of Bougainville's political future; and
8) Agreement to hold elections on Bougainville to elect a Bougainville Reconciliation Government before the end of 1998.[194]

The agreement has been eclipsed by ominous foreboodings as the PNG government has not mustered the numbers required for its ratification by parliament and as the rebel leaders have warned – the military should stay clear of territory under their command.

(iii) Australian Aborigines

Ideas about self-determination in Australia have polarised the parties to the issue; the Australian government's preferred position is the delimitation of self-determination to an internal arrangement.[195] Aboriginal leaders on the other hand do not consider it as requiring anything short of a recognition of

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194 See, http:/www.dfat.gov.au/geo/spacific/png/png_lincoln_summary.html

195 *See Human Rights Manual*, Department of Foreign Affairs, Canberra, Australian Government Publishing Services, (1993) *passim*. See also M Visonty, 'A Separate Future' *The Weekend Australian Review* 9-10 November 1996.

sovereignty. Mr Mick Dodson, the Aboriginal Social Justice Commissioner characteristically said:

> Indigenous Peoples' right to self-determination goes to the very heart of our fundamental rights as *first people*....as it is not for governments to bestow self-determination upon us, not to seek to delegate or to dictate the terms of our self-determination in any way.[196]

Dr Lois O'Donoghue was even more forthright in her view when she said:

> I believe we cannot qualify this concept (ie. self-determination) *to exclude separate sovereignty* because it may give expression to self-determination for some indigenous peoples. In Australia this is not likely to be a practical solution, yet it is not a future I would like to see denied to others.[197]

The political scientists' theory that sovereignty is 'inalienable, indivisible and illimitable' has long been discredited and no longer holds sway over thinking in international relations.[198] However, in a national setting, there can be only one source of sovereign power. This leads to disparity in the bargaining power of the interested parties, that is, the State and the indigenous groups within it. It is this phenomenon of unequal bargain which attracts the protection of the law of nations in respect of indigenous peoples.[199] The issue then is not whether the indigenous Australian

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196 *The UN Working Group on Indigenous Populations* (Thirteenth Session) 24-28 July, 1995, (Geneva, Switzerland), "The Australian Contribution", p. 10.

197 *Id.* 15.

198 See P Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993) 45 *Stanford L R* 1311; R Lapidoth, 'Sovereignty in Transition' (1992) 45 *Journal of International Affairs 347;* R Stavenhagen, 'Challenging the Nation-State in Latin America' (1992) 45 *Journ. Of Inter'l. Affairs* 300.

199 On the peculiar situation of indigenous populations, See: R L Barsh, 'Indigenous Peoles: An Emerging Object of International Law' (1986) 80 *AJIL* 369; H Hannum, 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649; M Y Zieck, 'Indigenous Peoples' in Brolmann *et al* (eds), *Peoples and Minorities in International Law, supra* n 2 at 187; N Lerner, *Group Rights and Discrimination in International Law* (Dordrecht, Boston and London 1991) at 107 and R Thompson, *The Rights of Indigenous Peoples in International Law: Selected Essay on Self-Determination* (Saskatchewan: University of Saskatchewan Press 1987); J Crawford, *Rights of Peoples: In Particular Indigenous Peoples* (Oxford: Oxford University Press 1988).

population is entitled to the right of self-determination but what *form* it should take.

Historically, Aboriginal people have been treated as less than human in Australia. Their very existence was denied by the doctrine of *terra nullius*, under which the continent was claimed by the British in 1770. Under the federal constitution of 1900, legislative powers over Aboriginal people were specifically excluded from the purview of federal powers. It was only in 1967 that Aboriginal people gained the vote and citizenship and were counted in the federal census as of right.[200] It is a logical fallacy to maintain the position that non-human entities can be the subjects of human rights.

The evolving international law jurisprudence on the human rights of indigenous peoples appears to give a ray of hope. Self-determination is premised on the principle of government by consent, and the *Draft Universal Declaration on the Rights of Indigenous Peoples* (1994)[201] appears to hold the key to the bridging of the chasm between the positions of the Australian government and the leaders of Australia's indigenous people. The *Draft Declaration* affirms the rights of indigenous peoples to determine their own social and economic priorities,[202] to be consulted on development matters,[203] to be free to manage their traditional ecosystems and participate in resource development decisions,[204] and to have their distinctive and profound relationships with their lands and territories recognised.[205] Most importantly, their right to self-determination, defined as the right to determine their political relationship with their territorial governments, is recognised.[206] This would imply that governments would

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200 For a history of Aboriginal Australia see, H Reynolds, *The Law of the Land* (2nd ed), (Ringwood, Victoria: Penguin Publications 1992); also his other works, *The Other Side of the Frontier* (Penguin Books: 1990) and *Aboriginal Sovereignty: Three Nations, One Australia?* (Sydney: Allen & Unwin 1996).

201 E/CN. 4/1995/2, 103 *et seq.*

202 Art. 23.

203 Art. 30.

204 Art. 26.

205 Art. 25.

206 Arts. 3, 31. This view has long been held by many. As indicated earlier the issue now concerns the form which self-determination should take. See C J Iorns, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty' (1992) 24 *Case Western Reserve Journal of International Law* 199; also her, 'Internal Self-Determination', in *Proceedings of the First Annual Meeting of the Australian and New Zealand Society of International Law,* Canberra, ANU (1993) 53; S Pritchard, 'The Right of

be required to arrive at some constitutional accommodation with indigenous people on the question of the appropriate parameters of self-government of indigenous people within their state territories.

While the document is still to be finalised for adoption by the UN, it represents a middle position more acceptable to government than that of sovereignty. Knowledgeable Australians are already canvassing the idea of Aboriginal autonomy which is a kind of internal self-government short of sovereignty.[207]

V CONCLUSION

What emerges from this exposition is the realisation that the current state of the law of nations on self-determination, remains uncertain. Determinacy is a cardinal attribute of justice and in this respect international law leaves much to be desired.

Some scholars prefer a human rights approach, that is, treating the rights of peoples to self-determination as a human right, thus obliterating the artificial dichotomy of individual rights and group rights. This they consider the panacea for the problem.[208] While this approach has the potential of simplifying matters, it still hits a snag, which is traditionally not considered subjects but objects of international law, and thus individuals are less able under international law than groups to want to assert the right to a separate existence, and when groups do so, international law, with all its imperfections attempts to find a solution.[209]

At the risk of stating the obvious, some rights are more appropriate for groups than individuals. There is also the problem of the definition of "indigenous people" outside a colonial setting. Would the people of

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Indigenous Peoples to Self- Determination Under International Law' (1992) 2(55) *Aboriginal Law Bulletin* 4.

207 For example, H C Coombs, author of *Aboriginal Autonomy: Issues and Strategies* (Cambridge: Cambridge University Press 1994). See especially chapter 12 titled 'Aboriginal Political Leadership and the Role of the National Aboriginal Conference'; See also G Lui, 'Torres Strait Self-Government and the Australian Nation State' Paper delivered at a *Conference on International Indigenous Poitics and self-Determination*, Tromso, Norway, 8-12 November 1993, in which the author advocates the establishment of a regional government for the Torres Strait.

208 See R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 859.

209 See S J Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' (1990) 75 *Iowa Law Review* 842.

Bougainville, for example, come within the definition? Hints of arguments based on "indigenousness" pervades the thinking of some Bougainvilleans.[210] And would they form a "minority" group in the circumstances of PNG? Perhaps some solution may be found in the suggestion that ethno-cultural differences be quarantined from the political concept of the state. One scholar suggests:

> Perhaps the best solution is neither to embrace some form of utopian cosmopolitanism nor to assume an attitude that decries ethno-cultural differences. Too much richness would be lost if diverse cultural expression could not find expression. What deserves, instead, careful consideration is the need for separation of *ethno-cultural differences* from the *State* as a political entity. Thus, the next stage in the evolution of self-determination, the most radical stage of all might be one in which States would increasingly become polities belonging to their citizens defined in 'civic' terms rather than in 'ethno-national' terms. The separation of 'State' and 'nationality' would imply that within the 'non-national' or truly 'multi-national' State - that is, the State that belongs to all its citizens - citizens would be free to group themselves around their cultural heritage and symbols (just as in the liberal secular State, where every body enjoys full religious freedom, whatever the religion or the religious group to which he or she belongs).[211]

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210 See Semos, *supra.* n 180.

211 Cassesse, *supra* n 6 at 365.