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SELF-DETERMINATION: THE CASE STUDY OF HAWAII

By

Kazi Aktar Hamid

**Dissertation submitted to the School of Graduate Studies and Research in partial
fulfillment of the requirements for the degree of the Doctor of Laws (LL.D)**

University of Ottawa/Université d'Ottawa



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ISBN 0-315-93581-2

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ACKNOWLEDGEMENTS

I would like to express my thanks to a number of individuals who contributed, in one way or another, to the preparation of this doctoral dissertation. Without their help, this study would not have been completed.

First and foremost, I would like to express my gratitude to my father-in-law, Col. (Retd.) A. Maleque, Chairman, Bangladesh Thai Aluminum Ltd., without whose unstinting moral and financial support the preparation of this dissertation would have been quite impossible.

It is not possible to express my appreciation with words the loving assistance and support of my wife, Rubina Hamid and our son Ryan Hamid, who shared my joys and frustrations throughout the research and writing period. Acknowledgement is also due to my brother Mr. Aziz Ahmed and my brother-in-law Mr. Zahid Maleque for their much needed help in times of financial difficulty.

My gratitude goes to my supervisor Professor Bradford W. Morse of the University of Ottawa Faculty of Law whose help will always be remembered with honour, and without whose assistance I could not have finished the dissertation. I wish also to thank my friend and colleague, Mr. Steven McDonald, for kindly reading my manuscript and making valuable comments. I also express my sincere gratitude to Mr. Christopher Bolland for working as my research assistant. However, I assume sole responsibility for any errors or omissions it may contain.

Acknowledgment is also due to Professor Chin-Shih Tang of the University of Ottawa Law Library. Thanks are also due to the members of the Inter-library Loans Section at Morisset Library for their efficient handling of my requests.

ABSTRACT

The thesis examines, first, the juridical nature of the right to self-determination as a human right, evolving primarily from the nationalist feelings of a group of people. The American and French Revolutions are examples of external and internal self-determination, respectively, developing from the nationalist feelings. Second, an examination has been undertaken of the basic reasons for a claim to the right to self-determination, out of which unequal treaties and forceful annexation have been argued to be the most important. Third, it has been submitted that the rights to self-determination and to resistance are intertwined, and that the right to resistance matures when all peaceful means of restoring the rights of a group of people fail. Fourth, the whole discussion of the right to self-determination and resistance is applied to Hawaii, which was annexed by the United States through a coercive and unequal treaty in the late nineteenth century. Thus, the thesis examines the validity of the Treaty of Annexation and supports the idea that native Hawaiians have a right to self-determination under international law, and never gave up their right to remain independent. Finally, the thesis recommends some measures to be adopted in order for native Hawaiians to regain their lost independence.

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- 3) TREATY OF RECIPROCITY (1875).

LIST OF ABBREVIATIONS

A.E.R.	All England Law Reports.
A.J.I.L.	American Journal of International Law.
AM. INDIAN L. REV.	American Indian Law Review.
AM. J. JUR.	American Journal of Jurisprudence.
Am. Quart.	American Quarterly.
AM. UNIV. L. REV.	American University Law Review.
BOSTON COLL. THIRD WORLD L. J.	Boston College Third World Law Journal.
Brit. Y. B. Int'l L.	British Yearbook of International Law.
BROOK. J. INT'L L.	Brooklyn Journal of International Law.
BULL. AUST. SOC'Y LEG. PHIL.	Bulletin of the Australian Society of Legal Philosophy.
Bull. Peace Prop.	Bulletin of Peace Proposals.
CAL. W. INT'L L. J.	California Western International Law Journal.
Cal. L. Rev.	California Law Review.
CAN. REV. OF STUD. IN NATIONALISM	Canadian Review of Studies in Nationalism.
CASE W. RES. J. INT'L L.	Case Western Reserve Journal of International Law.
Col. J. L. and Soc. Prob.	Columbia Journal of Law and Social Problems.
Col. J. Transnat'l L.	Columbia Journal of Transnational Law.
COMP. & INT'L L. J. S. AF.	Comparative and International Law Journal of South Africa.
Cong. Inf. Serv.	Congressional Information Service.
CONG. SESS.	Congressional Session.
Cornell Int'l L. J.	Cornell International Law Journal.
DEN. J. INT'L L. & POL'Y	Denver Journal of International Law and Policy.
DEPT STATE BULL.	Department of State Bulletin.
EASTERN J. INT'L L.	Eastern Journal of International Law.

E.R.	The English Reports.
Europ. T.S.	European Treaty Series.
FORDHAM INT'L L. J.	Fordham International Law Journal.
FOR. AFF.	Foreign Affairs.
FOR. REL. U.S.	Foreign Relations of the United States.
GA J. INT'L & COMP. L.	Georgia Journal of International and Comparative Law.
Harv. Civil-Rights-Civil Lib. L. Rev.	Harvard Civil-Rights-Civil Liberties Law Review.
HARV. HUM. RTS. Y.B.	Harvard Human Rights Yearbook.
HARV. INT'L L. J.	Harvard International Law Journal.
HARV. L. REV.	Harvard Law Review.
HARV. THEO. STUD.	Harvard Theological Studies.
HAWAII B. J.	Hawaii Bar Journal.
HOWARD L. J.	Howard Law Journal.
Hum. Rts. J.	Human Rights Journal.
Hum. Rts. L. J.	Human Rights Law Journal.
Hum. Rts. Q.	Human Rights Quarterly.
ICJ	International Court of Justice.
I. L. M.	International Legal Materials.
INDIAN J. INT'L L.	Indian Journal of International Law.
INT'L AFFAIRS	International Affairs.
Int'l Comm'n J. Rev.	International Commission of Jurists Review.
Int'l & Comp. L. Q.	International and Comparative Law Quarterly.
INT L. & POLITICS	International Law and Politics.
ISRAEL L. REV.	Israel Law Review.
IWGIA	International Work Group for Indigenous Affairs.
J. Hum. Rel.	Journal of Human Relations.
J. Mod. Af. Stud.	Journal of Modern African Studies.

J. PHIL.	Journal of Philosophy.
K.B.	King's Bench Division.
L.Q. Rev.	Law Quarterly Review.
LAW & POL'Y IN INT'L BUS.	Law and Policy in International Business.
LNOJ	League of Nations Official Journal.
McGill L. J.	McGill Law Journal.
MICH. L. REV.	Michigan Law Review.
N.Y. L. SCH. J. INT'L & COMP. L.	New York Law School Journal of International & Comparative Law.
N.Y.U.L.Q. Rev.	New York University Law Quarterly Review.
N.Y.U. J. Int'l L. and Pol.	New York University Journal of International Law and Politics.
OXFORD J. LEGAL STUD.	Oxford Journal of Legal Studies.
PCIJ	Permanent Court of International Justice.
PROC. AM. SOC'Y INT'L L.	Proceedings of the American Society of International Law.
SCR	Supreme Court Report.
SOUTH AF. L. J.	South African Law Journal.
SOVIET Y. B. INT'L L.	Soviet Yearbook of International Law.
St. Tri.	State Trials.
SYRACUSE J. INT'L L. & COMM.	Syracuse Journal of International Law and Communication.
TEMPLE INT'L & COMP. L. J.	Temple International and Comparative Law Journal.
TEXAS J. INT'L L.	Texas Journal of International Law.
TEXAS L. REV.	Texas Law Review.
T.I.A.S.	Treaties and Other International Act Series.
UCLA PAC. BASIN L.J.	UCLA Pacific Basin Law Journal.
U.N.G.A. Res.	United Nations General Assembly Resolution.
U.N. GAOR	United Nations General Assembly Official Record.

U.N.T.S.	United Nations Treaty Series.
Univ. Toronto Fac. L. Rev.	University of Toronto Faculty of Law Review.
U.S.T.	United States Treaty.
Va. J. Int'l L.	Virginia Journal of International Law.
Vanderbilt J. Transnat'l L.	Vanderbilt Journal of Transnational Law.
WISCONSIN L. REV.	Wisconsin Law Review.
YALE J. INT'L L.	Yale Journal of International Law.
YALE L. J.	Yale Law Journal.
Y.B. Int'l L. Comm'n	Yearbook of International Law Commission.
Y.B.U.N.	Yearbook of the United Nations.

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General Introduction

With much of what is happening throughout the world, a number of problems and questions have surfaced requiring the formulation of whole new approaches. The kaleidoscopic events of the 20th century have confronted lawyers and politicians with a plethora of tasks and opportunities. The growing demand for freedom, as illustrated by the dismantling of the Berlin Wall, the overthrow of the communist dictator Ceausescu in Romania and the cries for change in Czechoslovakia, Hungary, Poland and the Soviet Union, is challenging our traditional understanding of several fundamental principles of law, international relations and politics. These events are indicative of the fact that issues of human rights are ultimately responsible for the configuration of our present-day world. The notion of self-determination may be said to dominate the whole realpolitik surrounding the movement towards freedom and independence. Recent events in Latvia, Lithuania, Estonia and the worldwide struggle of indigenous peoples, including the less highly publicized struggle in Hawaii, have revived the debate regarding the unequal treaty doctrine, which assails the legitimacy of colonial power by challenging the legality of past arbitrary acts committed in contravention of the law of nations.

The term "unequal treaty" usually refers to an unjust or inequitable arrangement in which the two parties do not stand on an equal footing. Unequal treaty arrangements are usually imposed by one of the parties through coercion or undue influence. This thesis explores the unequal treaty doctrine with particular reference to Hawaii.

The thesis is divided into two parts. The first will deal with the historical and legal foundation of the right to self-determination generally. The second will apply this right to self-determination to Hawaii.

Chapter I of Part I presents an historical background to the concept of self-determination, stressing that the concept is essentially a political struggle by "a people" to obtain a representative form of government, meaning a government that permits the free expression of the general will of the people through periodic free and fair elections. It will seek to establish a link between nationalism and self-determination whereby the former is the primary source of the right to the latter. It will argue that even though the concept of self-determination has existed from time immemorial, it was the success of the American and the French Revolutions that affirmed the two distinct politically legitimate principles of self-determination. The American Revolution asserted the concept of external self-determination against colonial oppression and domination; the French Revolution highlighted the principle of internal self-determination in non-colonial situations through the struggle of the people against their own government. The ideals of the French Revolution were inspired by Rousseau's concept of General Will, whereby the people are the sovereign source of all power. Thus, in 1789, the "roi de France et de Navarre" became "roi de Français."¹ The American Revolution, on the other hand, set a precedent for armed resistance against a colonial power by a people whose nationalist feelings have arisen from a common consciousness and loyalty to a common territory. Moreover, it is submitted that even though struggles for self-determination essentially paralleled the birth of nationalism, their success has always depended upon international recognition. Consequently, the basis of the right to self-determination must be viewed from the perspective of internationalism or Mazzini's cosmopolitanism.

Chapter II discusses self-determination as a human right. It seeks the meaning of the "self" and of "a people" and shows that the right to self-determination is a legally established human right under international law, a continuing right "rooted in the human quest to be free from oppression."² It analyzes self-determination in both colonial and non-colonial situations, e.g., cases of external and internal self-determination. It also attempts to delineate and analyze the situations in which a

people can make a legitimate claim for secession.

Chapter III deals with the basic elements of the right to self-determination. It discusses the reasons that motivate claims to the right to self-determination, namely, genocide, racial discrimination and forceful separation, denial of the right to preserve a separate identity, and annexation through unequal treaty. The chapter will present a discussion of the different aspects of the aforementioned elements in order to demonstrate and establish their legitimacy as foundations of the right to self-determination. An argument will be presented to the effect that an illegal and forceful annexation can also be a strong ground for a legitimate claim to the right to self-determination.

Chapter IV investigates in detail, from an historical perspective, the relationship between the right to self-determination and the right of resistance, and demonstrates the differences between opposition and resistance as well as between resistance and terrorism. It also considers the stages of opposition and their limitations under international law. The analysis suggests that it is difficult to distinguish terrorism from wars of national liberation because terrorist acts are invariably accompanied by claims of political motivation. The chapter explores whether violent resistance can legally be resorted to by a people as a last resort in order to exercise their right to self-determination.

In Part II, the principles presented in Part I are applied to Hawaii, which was annexed by the United States in 1898. Chapter V examines the Hawaiian annexation as a case of aggression. In this chapter, an in-depth study has been undertaken of the status of the law of aggression in the nineteenth and early twentieth centuries. An effort has also been made to demonstrate that the plan of aggression carried out by the American Ambassador to Hawaii contravened existing customary international law and diplomatic practice under the law of nations. Finally, the fact that the United States's actions against the sovereign independent nation of Hawaii violated the

principle of pacta sunt servanda (good faith) is discussed.

Chapter VI deals with the Treaty of Annexation between the United States and Hawaii as an example of an unequal treaty, which can be defined as a treaty entered into under pressure (economic and military) or undue influence. It discusses the various tenets of the unequal treaty doctrine, which have been developed by writers, judicial organs and State practice. The chapter concludes that the Treaty of Annexation was unequal and therefore void ab initio.

Chapter VII presents the relationship between Hawaiian annexation and the right to self-determination. It discusses the aftermath of Hawaiian annexation and likens the loss of land and dignity suffered by Hawaiians to the trauma of rape victims. It also argues that present-day Hawaii is a non-self-governing territory and that native Hawaiians have been the victims of continuous American discrimination and exploitation. The feasibility of a Hawaiian liberation struggle is also discussed.

The thesis concludes with a final chapter summarizing the results of the foregoing research and offering recommendations for change.

Endnotes

1. COBBAN, *The Nation State and National Self-Determination* 35 (1969).
2. Obebe, *THE RIGHT TO ECONOMIC SELF-DETERMINATION: NIGERIA UNDER THE SHAGARI GOVERNEMENT*, 2 *TEMPLE INT'L & COMP. L. J.* 56 (No. 1, 1987-88).

Part I

Chapter I

Historical Analysis of the Concept of Self-Determination

Introduction

The history of humankind has been one of struggle and bloodshed. It is largely a common phenomenon that human beings, apart from fighting against nature for survival, are involved in a continuous struggle against their fellow beings to meet their physical and mental needs. That is why Rousseau observed that "[m]an is born free, and [yet] everywhere he is in chains."¹ Over the course of time, people formed groups with others holding substantially similar interests. The sense of belonging that this engendered became important to each group's efforts to cope with threats from other groups holding different interests. This is probably how the breeding of political society began and how human beings experienced their first taste of nationalism.² Subsequently, with the passage of time, this desire to belong became the driving force in the struggle for self-determination -- meaning the collective right of a people to determine the course of their lives and to govern their destinies. These collective groups first formed clans and these clans formed tribes. When these tribes subsequently expanded, they took the shape of city-states.³ These city-states then expanded into empires.⁴

It is submitted that nationalist feelings existed among the aboriginal peoples of Australia, North America, New Zealand and Hawaii since the creation of their societies. Such aboriginal societies were actually much more civilized than their European counterparts during the medieval period. As Mr. Justice Hall noted in his dissenting opinion in Calder v. Attorney-General of British Columbia,⁵ "[t]he Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of 'civilized' Europe of the 16th and 17th centuries."⁶ In these aboriginal societies, collective interest prevailed over individual interest. This indicates a higher degree of civility than is found in most modern societies.

Several different views exist as to the genesis of the nationalistic principle of self-determination. Dobson argues that the phenomenon of a people, motivated by nationalist sentiment and democratic principles, striving for internal self-determination by violently rebelling against a king or other ruler, dates back to the English Peasants' Revolt of 1381, in which the Church Priests played an important role.⁷ Among these priests were Wat Tyler and John Ball, later recognized during the French Revolution⁸ as seminal advocates and practitioners of "popular liberty."⁹ Despite the unsuccessful conclusion of the Peasants' Revolt, Dobson described it as "the first significant intervention of the English sans-culottes in national politics."¹⁰

Shafer, however, argues that the origin of modern nationalism can be traced to the eighth century.¹¹ Cobban asserts that even this places it too late, as nation-states existed during the "pre-classical world" in the Mediterranean region. These nation-states destroyed themselves through internecine warfare, and were subsequently replaced by the Greek and Roman city-states.¹² There were no nation-states during the classical period.¹³ In the pre-medieval period, many European nation-states were known by the names of their chief provinces, for example, France from the Ile de France and Poland from Polonia.¹⁴ Strangely enough, in some cases of State formation during the middle ages, e.g. the Swiss Confederation, common cultural and political bonds were absent except for a common desire to stay together.¹⁵ Varg places the origin of modern nationalism during the American Revolution, identifying this as the first occurrence of a "self-conscious awareness of unity and separateness growing out of a common historical background and ideology."¹⁶ While all of these examples contain bits and pieces of the character of modern nationalism, none quite captures the essence of the concept. Dobson comes closest to pinpointing the time when the essential characteristics of nationalism first existed, but even he has placed it too late.

The revolutionary idea that the people constitute the sovereign source of power in a State was first espoused in the west by Marcilius (also known as Marsiglio) of Padua in the 14th century in his treatise Defensor Pacis.¹⁷ Emerton has interpreted Marsiglio's conception of popular sovereignty to include notions of social justice.¹⁸ The three basic themes in Defensor Pacis, as interpreted by Gewirth, were:

(1) the state is a product of reason and exists for the end of men's living well; (2) political authority is primarily concerned with the resolution of conflicts and is defined by the possession and structure of coercive power; (3) the sole source of legitimate political power is the will or consent of the people.¹⁹

The revolutionary concept that "the sole source of legitimate political power is the will or consent of the people" became the driving force of popular sovereignty for nations struggling for self-determination. It found its way from Machiavelli and Hobbes to Rousseau and the French Revolution.²⁰ Connor has commented that

Machiavelli's final chapter of the Prince, written in 1513, might be viewed as a harbinger of the notion of national self-determination ... [and] Machiavelli's comments on Italian liberation constituted at most an early suggestion of the idea of national self-determination rather than a developed discourse.²¹

Certainly, the principle that the will of the people is paramount was one of the cardinal forces behind the American Revolution against British colonialism.²²

It is therefore submitted that the consent of the people or "popular sovereignty" and the nationalist struggle for self-determination are closely interconnected. An examination will now be made of the fiery nature of nationalism and its dominant role

in the struggle of people for both internal and external national self-determination. The American and French Revolutions will be used as examples of the struggle for external and internal self-determination respectively. Finally, this chapter will examine the relationship between national self-determination and the concept of cosmopolitanism or internationalism, as it affects humanity as a whole.

Nationalism

Nationalism is generally characterised as an "emotion"²³ or a "belief."²⁴ Shafer provides a more complete definition of nationalism as

a sentiment of (1) shared devotion on the part of a group (large or small) as to what members believe (or are persuaded to believe) to be their people (culture, language, and history) and their indifference or hostility to other peoples; these members (2) desire for a continuation or the establishment of independence of their state (sovereignty, whatever that means); their (3) sharing of common pride (or humiliation) and hopes; and their common belief in an entity (the nation) that is larger than the sum of its parts.²⁵

In other words, when a group of people shares one of the values through which they identify themselves and struggles towards a common goal, a shared sentiment and an identification of common aims are created and a nation is born. In the process, those people struggle to ensure that their national representatives represent their true will.²⁶ The very concept of nationalism permits different groups of people to assert collective interests. The assertion of group or collective interests is the most important

element in today's nationalism, as it has been from time immemorial. That is why Cobban states:

The Latin term natio was applied only to the barbarian tribes outside the Roman world. It is often assumed that there is an established historical connection between these tribal "nations" of the barbarian world as the Romans knew them, and the nation states of modern times. For older than the nation state, it has been said, "reaching back into the misty dawn of pre-history. is the national community which, founded on the personal life of the nation, yet exercised most of the functions of the state."²⁷

In Cobban's view, the seeds of nationalism were planted with the formation of a sense of national community that accompanied the development of the so-called barbarous tribes. For a good example of the formation of a national community exercising most of the functions of a State, North Americans need look no farther than the case of their own native peoples. As Felix Cohen noted, "[f]rom the earliest years of the [American] Republic the Indian tribes have been recognized as distinct, independent, political communities, ... qualified to exercise powers of self-government, ... by reason of their original sovereignty ..."²⁸ If nationalism refers to the bond of unity formed by a group of people sharing and facing life's consequences together, then clearly it began in the "misty dawn of pre-history."

The American Revolution introduced a slightly different aspect of nationalism, that of the struggle against an external oppressor to achieve national self-determination. Cameron argues that the American Revolution was not primarily a nationalist movement²⁹ since it was comparable to a child, upon attaining maturity, rebelling against the control of his or her parents. As Thomas Paine aptly remarked:

To know whether it be in the interest of this continent to be independent, we need only ask this easy, simple question: Is it in the interest of a man to be a boy all his life?³⁰

While Paine's point is a valid one, it must be stated that the American Revolution did make an important contribution to the concept of nationalism. It affirmed that a group of people need not necessarily have a common heritage, language and ethnic background in order for a demand for popular sovereignty to flourish among them: loyalty to a territory alone can be a powerful source of such a demand. In this context, nationalism was redefined by Paine as "the transformation of a dormant right into a political claim; the notion of natural political boundaries; the demand of a historic community to possess its own state."³¹ The most important legacy of the American Revolution was the legitimization of the principle that a mature nation ready to take charge of its own destiny may struggle to free itself from colonial domination -- the principle of the right to external self-determination. Wherever there is a yearning for external self-determination, one may expect to find the shared expectation or belief that the people will one day have an independent State.

The French Revolution introduced a particularly thorny aspect of the concept of nationalism, namely the struggle against an internal oppressor to gain national self-determination. The struggle against an oppressive regime, particularly if it holds power in compliance with the State's constitutional law, is the most problematic and yet the most significant aspect of national self-determination. (The legal consequences of such a struggle will be dealt with in a later chapter.) While Cameron's assertion that modern nationalism began with the French Revolution³² is not entirely correct, his characterization of the Revolution as a patriotic struggle³³ by the people of France to gain control of the means of government is an accurate one. This patriotic struggle sought to change France's social and political structure without altering her fundamental French character. The revolution affirmed Marsiglio's fundamental democratic principle that the people, and not the King, are the source of all sovereign power.³⁴ in the sense that the French people would

always be in a position to change their ruler should the need arise.

The French Revolution was a successful assertion of the right to internal self-determination: the French people, acting in concert, overthrew a powerful monarch. Cobban says that "[w]ith the French Revolution we reach the age when nationality can turn into nationalism... [because now] the state can identify itself with the nation and patriotism swell[s] into nationalism."³⁵ The shared emotion in this case was a common desire for freedom from oppression together with a drive for popular sovereignty.

The components of nationalism, as illustrated in the American and French Revolutions, have mainly to do with sovereignty. In the more obvious example of the American Revolution, the violent struggle for external self-determination was motivated by the desire to throw off the yoke of colonial domination. The French Revolution presents a more complicated case. The desire for internal self-determination is more difficult to justify, as the oppressor is often the legally legitimate ruler. Here, the motivation is the fundamental desire to achieve popular sovereignty. Overall, then, it may safely be asserted that at the core of nationalism is the basic human desire for popular sovereignty.

The American and French Revolutions: The Affirmation of a Principle

Given a choice, no nation would wish to remain under the domination or command of another forever. The American colonies had always been treated by Great Britain as a subservient and permanent reservoir of resources intended for the exclusive benefit of England. As Hinkhouse puts it:

When they thought of America they thought of benefits to England. If a slogan had been used it would have been "America for Englishmen," not "America for Americans."³⁶

The English not only treated American colonists as subjects, but also as inferiors.³⁷ Ignorance and English pride kept the British public poorly informed about America and Americans.³⁸ As a result, while an Englishman would be warmly welcomed when he came to America, an American of British descent visiting England was more likely to be met with a cold handshake.³⁹

It is a violation of the natural rights of people that a legislative body, unaware of the situation of a people in a remote corner of the world, should enact laws affecting those people without their consent or representation. According to Paine,

[n]atural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others.⁴⁰

Repeated interference by the British Parliament and Privy Council in the internal affairs of the American States (e.g., in 1759, the Privy Council forbade the Governor of Virginia to sign the Virginia Act unless and until it was approved by the Council) bred widespread discontent in America.⁴¹ This disenchantment with England led to the emergence of a more self-conscious attitude on the part of Americans and, as Stuart remarked, "English loyalty faded ..."⁴² All of these events culminated in the growth of American nationalism whereby the sentiment developed into a desire to turn a dormant "aspiration" into a real "political claim."⁴³ Here, the Americans may be identified as a "people" with a "consciousness of shared characteristics"⁴⁴ and this consciousness made them a "national community."⁴⁵ In British colonial history, the American colonists were the first to successfully struggle to be free from the

colonial yoke "according to the law of nature and nature's God."⁴⁶ The American Revolution set a precedent for all colonized peoples of the world -- past, present and future -- to follow.

The French Revolution, on the other hand, could be described as a struggle by the many -- the oppressed, lower classes -- against unjust oppression by the few -- the privileged classes. Inspired by the fiery writings of Rousseau, and to a certain degree by the American Revolution,⁴⁷ the French revolutionaries wanted to bring about a radical change in the structure of their government so that it would be based on the consent or "general will" of the people.

Rousseau's general will did not necessarily mean the will of the majority, even though that played a significant role. It could best be described as the will to give paramouncy to the best interests of the group over the self-interest of the individual.⁴⁸ Even though Rousseau did not write about nationalism per se, his theory of the general will of the people is associated with "humanitarian nationalism."⁴⁹ He first asserted the concept that "the principle of popular sovereignty"⁵⁰ shall be "the foundation of political democracy."⁵¹ although the question of who the "people" were remained unanswered.⁵² Nevertheless, Rousseau's concept of general will provided a solid foundation for the people's struggle to achieve a government and political system of their own choosing,⁵³ and recognized the principle of internal self-determination. The French Revolution, inspired in large part by Rousseau's conception of the general will, gave practical shape to the centuries-old idea that the sovereignty of the nation rested with the people and not with the King or government, and that the people could use force, if necessary, to overthrow a ruler if it was the general will of the people that this be done. Article 3 of 'Annexe 1' of the Declaration des droit de l'homme et du citoyen du 26 aout 1789 reads:

Le principe de toute souveraineté reside
essentiellement dans la Nation. Nul corps, nul

individu ne peut exercer d'autorité qui n'en émane
expressément.⁵⁴

Rousseau's conception of the "general will" became the pivot around which the new society in France revolved. Thus, popular sovereignty became intertwined with the principle of internal self-determination.

The ramifications of the American Revolution have been powerful and pervasive. The principle of external self-determination it illustrated has fueled the fires of nationalism in many national communities that struggle to throw off the domination of other nations. This nationalistic principle may be seen at work today in many parts of the world, such as Eritrea, Estonia, Latvia, Lithuania and Hawaii, to mention just a few.

The principle of internal self-determination, as introduced by the French Revolution, has had even more far-reaching implications. This principle speaks to the quality of human life on a grander scale and, as such, transcends the boundaries of national communities. The principle of internal self-determination knows no boundaries, as it relates to the quality of life in general, and not simply to the relationship between two States. As such, it has a more cosmopolitan or international significance and may be applied universally.

Nationalism vs. Internationalism

A revolutionary achievement based on the concepts of equality, liberty and justice not only benefits the people it directly affects, it may also become an example for others struggling to achieve the same goal. History teaches us that revolutionary movements draw strength and borrow strategies from other revolutionary struggles.

and that all nationalist movements grow out of human morality -- identifying themselves with the natural law. Therefore, the destiny of humankind is bound by some common elements of humanity.⁵⁵ Mazzini summed up the idea as follows:

Every Nation is Humanity's worker; it labours for humanity, in order to attain a common end for the good of all; if it perverts its mission to selfish ends, it declines and must be subjected, inevitably, to a phase of expiation that will last in proportion to its degree of guilt.⁵⁶

Mazzini postulated that nations have a common obligation to represent their citizens in such a way as to promote the greater good of humanity,⁵⁷ and that States act as mediums between individuals and humanity as a whole.⁵⁸ That is why "mankind was above all nations."⁵⁹ The obligations toward humankind are the highest of all obligations.⁶⁰

Moreover, Mazzini also distinguished between nationality and nationalism. Nationality represents a stepping stone towards the good of humanity, whereas nationalism has a limited spirit.⁶¹ It is through nationalistic spirit that people gain the feeling that a particular nation -- their nation -- can solve its own economic, social and political problems -- oblivious to the fact that the problems of all human beings are more or less the same.⁶²

Nationalism, on the other hand, teaches people to act on shared sentiments by working together with fellow citizens within their own State to improve their collective lot. Nations are, in turn, supposed to act in such a way as to further the well-being of the human race as a whole. As Mazzini put it:

Nations are the citizens of Humanity, as individuals are the citizens of the nation. And as every individual should strive to promote the power and prosperity of his nation through the exercise of his special function, so should every nation in

performing its special mission, according to its special capacity, perform its part in the general work, and promote the progressive advance and prosperity of humanity.⁶³

Mazzini draws an insightful distinction between nationalism on the one hand and "cosmopolitanism" or internationalism on the other. The State may be the starting point for most human endeavour, but the ultimate beneficiary should be the human race as a whole. Nationalism excludes others; cosmopolitanism includes all. In other words, the task of cosmopolitanism is to humanize nationalism by imbuing it with the values common to humankind.⁶⁴

The history of nineteenth century Europe is, for the most part, a story of nationalism: "[n]ationalism emergent, nationalism militant, nationalism expansionist."⁶⁵ Yet it is also a story of the rise of economic cooperation, industrialism, communications, and of the movement of people, capital and goods, all transcending national boundaries.⁶⁶ The Congress of Vienna, which existed from 1815-1914, took the form of an international government, albeit with authority over a limited number of issues. Even though the Congress system did not last, its contribution to the rise of international consciousness has been far-reaching. First of all, the Congress produced a Declaration condemning the slave trade, which read:

... considering the universal abolition of the slave trade as a measure particularly worthy of their attention, conformable to the spirit of the times and to the generous principles of their august sovereigns, they are animated with the sincere desire of concurring in the most prompt and effectual execution of this measure by all the means at their disposal, and of acting in the employment of these means with all the zeal and perseverance which is due to so great and noble a cause.⁶⁷

Second, the Congress set up the Central Commission for the Navigation of the Rhine

in order to secure freedom of international commercial navigation on that river.

Article 110 of the Final Act of the Congress read:

The navigation of the rivers ... from the point where each of them becomes navigable to its mouth shall be entirely free and shall not, as far as commerce is concerned, be prohibited to anyone; due regard being had, however, to the regulations for policing and navigation, which regulations shall be alike for all and as favourable as possible to the commerce of all nations.⁶⁸

The age of economic cooperation began with advances in the field of communications. The various European nations entered into treaties dealing with telegraphic communication as early as 1849.⁶⁹ Realizing that uniformity is required for the success of this process, twenty countries participated in a conference held at Paris in 1865. By 1911, the number of participants had grown from twenty to forty-eight States and colonies.⁷⁰

Since the nineteenth century, the drive of internationalism has become technologically oriented. The more that science and technology advance, the more the world is made aware of the necessity of international cooperation.⁷¹ Technology has brought the people of the world closer together than ever before. In the early twentieth century, the principle of self-determination -- meaning political freedom together with the economic security and well-being of the people -- began to receive important recognition from the international community. The principle of popular sovereignty began to receive international endorsement.⁷² This time nationalist sentiments turned international to serve and meet the growing expectations and aspirations of economic and political emancipation common to all colonized peoples. However, it is to be noted here that Mazzini forecast the basic principles of the modern League of Nations as early as 1871.⁷³ By the middle of the twentieth century, after the failure of the League of Nations, the participants in the League felt that the world needed a more open international system.⁷⁴ It was hoped that a greater degree

of openness would counteract the kind of political and "economic nationalism"⁷⁵ that played such a powerful role in the demise of the League and in the rise of German nationalism. This idea led to the promulgation of the famous Atlantic Charter, signed by President Roosevelt and Prime Minister Churchill on August 11, 1941.⁷⁶ Article 4 of the Charter reads:

They [the United States and Great Britain] will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.⁷⁷

The Atlantic Charter not only recognized the existence of interdependencies and the need for cooperation between nations, but was a watershed in the recognition of the principle of self-determination as a right. Article 3 of the Charter reads:

They [the United States and Great Britain] respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.⁷⁸

Prime Minister Churchill told the British Parliament in September, 1941 that the self-determination provision in Article 3 of the Atlantic Charter did not apply to India or Burma, but only to the European territories formerly occupied by Nazi Germany.⁷⁹ Ironically, it was the the Soviet Ambassador who defended the principle that all nations had the right to self-determination, claiming that self-determination was a cornerstone of the Russian political system.⁸⁰ Subsequently, the Declaration by the United Nations⁸¹ expressly recognized the Atlantic Charter, as did the Declaration of Four Nations on General Security,⁸² which cited "the necessity of establishing at the earliest practicable date a general international organization..."⁸³ The principles of

the Atlantic Charter were "incorporated in the United Nations Charter."⁸⁴

One of the purposes of the United Nations Organization is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."⁸⁵ The development of the international community has helped to transform the concept of self-determination from a mere abstract principle to an essential human right. Any movement or struggle for freedom, equality and justice is now a matter of international concern. Finally, the world has recognized Mazzini's concept of "cosmopolitanism."

In a sense, then, the concepts of nationalism and internationalism are inextricably linked. Seemingly incompatible, even contradictory, they may in fact be complementary. Nationalism can be regarded as the starting point for the betterment of human life everywhere -- the main goal of internationalism.

Conclusion

The principle of self-determination began as an inchoate feeling that grew out of long-standing political and social grievances. From pre-history through to the American and French Revolutions, the triumph of the principle depended upon the success of the struggle against oppression and colonialism. Throughout the twentieth century, world leaders, and the international community as a whole, began to feel increasing pressure to accord it the status of a human right and to use it to put an end to colonialism and internal State-sponsored oppression. With subsequent historical developments, the principle emerged as a legal right, an occurrence that will be discussed in greater depth in the next chapter. Citing the example of the French

Revolution and basing its argument on the need for consent as a condition precedent to government, the international community has now recognized as well that the principle applies to peoples' struggles for representative government. The theory of self-determination thus developed from the democratic principles of popular sovereignty.

The demand for self-determination springs from nationalism. However, the application of the principle has become international and conforms to Mazzini's concept of universal humanitarianism. With the passage of time, the application of the principle has become pervasive and now it is even involved with other issues of human rights, such as the oppression of powerless groups by dominant groups, sometimes aided by the State itself. It was just such a situation that produced the French Revolution, in which the common people asserted their right to internal self-determination by wresting power from an elite minority.

In order to describe the connection between humanity and nation, one need only look to Mazzini.⁸⁶ He argued that it was the greater task of States and national groups to represent humanity.⁸⁷ His ideas are reflected in the contemporary international law of human rights, whereby individuals, and not just States, are considered to be the subjects of international law. Thus, the principle of self-determination as an inalienable human right extends from each individual to the whole of humanity.

As will be shown in later chapters, contemporary international law incorporates the ideas of Marsiglio and Mazzini into a set of principles that may be used to defend and maintain the quality of human existence. The progression of self-determination from a political right for a national community to a fundamental human right for all individuals follows logically, and indeed fulfills the dream of Mazzini.

Endnotes

1. Social Contract, Book 1, Chapter 1, in Watkins (trans.), Rousseau: Political Writings (1953), quoted in NOONE, JR., Rousseau's Social Contract: A Conceptual Analysis 9 (1980) [hereinafter cited as Noone, Rousseau's Social Contract].

2. See, e.g., Shafer, IF ONLY WE KNEW MORE ABOUT NATIONALISM, in 7 CAN. REV. OF STUD. IN NATIONALISM, 205 and 215, note 35 (1980) [hereinafter cited as Shafer, If Only We Knew More About Nationalism]; Varg, The Advent of Nationalism: 1758-1776, in 16 Am. Quart. 169-181 (1964) [hereinafter cited as Varg, The Advent of Nationalism]; Stuart, THE ORIGINS OF AMERICAN NATIONALISM TO 1873: AN HISTORICAL SURVEY, in 6 CAN. REV. OF STUD. IN NATIONALISM 142 (1979) [hereinafter cited as Stuart, The Origins of American Nationalism]; COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION 24-27 (1969). For more studies on nationalism, see TRENT, THE POLITICS OF NATIONALIST MOVEMENTS - A RECONSIDERATION, in 2 CAN. REV. OF STUD. IN NATIONALISM 157 (1974-75) [hereinafter cited as Trent, The Politics of Nationalist Movements]; NATIONALISM: A Report by a Study Group of Members of the Royal Institute of International Affairs (1966); Connor, NATIONALISM AND POLITICAL ILLEGITIMACY, in 8 CAN. REV. OF STUD. IN NATIONALISM (1988) [hereinafter cited as Connor, Nationalism and Political Illegitimacy]; HAYES, HISTORICAL EVOLUTION OF MODERN NATIONALISM (1961) [hereinafter cited as Hayes, Historical Evolution]; Parel, HUMANISM AND NATIONALISM, 4 CAN. REV. OF STUD. IN NATIONALISM 1 (1976-77). [Hereinafter cited as Parel, Humanism and Nationalism].

3. Cobban, id.

4. Id.

5. Calder v. Attorney-General of British Columbia, (1973) SCR 346.

6. Id., at 346-347.

7. DOBSON, The Peasants' Revolt of 1381, at 15 (1970).

8. Id., at 355.

9. Id.

10. Id., at 18.

11. Shafer, If Only We Knew More About Nationalism, supra, note 2.
12. Cobban, The Nation State and National Self-Determination, supra, note 2 at 24-25.
13. Id.
14. Id. at 26-27.
15. Id. at 27.
16. Varg, The Advent of Nationalism, supra, note 2.
17. Marsilius finished Defensor Pacis in 1324. GEWIRTH, MARSILIUS OF PADUA: DEFENSOR OF PEACE, at xviii (1956) [hereinafter cited as Gewirth, Marsilius of Padua].
18. Emerton stated:

Certainly American democracy, if it is to work out the mission with which it seems to be entrusted, cannot afford to refuse the support or to neglect the warnings it may derive from a study of Marsiglio's ardent plea for a Peace of the world [based] upon a just balance of social classes.

EMERTON, THE DEFENSOR PACIS OF MARSIGLIO OF PADUA: A CRITICAL STUDY, in 8 HARV. THEO. STUD. 81 (1951)

19. Gewirth, Marsilius of Padua, supra, note 17, at xxx-xxxi.
20. Id.
21. Connor, Nationalism and Political Illegitimacy, supra, note 2 at 225, footnote 25.
22. Gewirth, Marsilius of Padua, supra, note 17.
23. COBBAN, DICTATORSHIP: Its History and Theory. 163 (1939). [Hereinafter cited as Cobban, Dictatorship]
24. Id.

25. Shafer, *If Only We Knew More About Nationalism*, supra, note 2, at 205.
26. See, e.g., Kedourie, *NATIONALISM* 9 (1966).
27. Cobban, *The Nation State and National Self-Determination*, supra, note 2, at 24-25. See also Macartney, *National States and National Minorities* 21 (1934).
28. Cohen, *Handbook of Federal Indian Law* 122 (1971).
29. CAMERON, *NATIONALISM, SELF-DETERMINATION AND THE QUEBEC QUESTION* 26-27 (1974). [Hereinafter cited as *Cameron, Quebec Question*]
30. PAINE, *RIGHTS OF MAN* (1969), quoted id., at 26. Also see *Cameron, Quebec Question, id.*
31. Id., at 27.
32. Cameron says, "Nationalism, as an articulated set of political beliefs, appeared about the time of the French Revolution." Id., at 25.
33. White, *WHAT IS NATIONALITY?*, in 12 *CAN. REV. OF STUD. IN NATIONALISM* 10 (1985).
34. Cobban, *The Nation State and National Self-Determination*, supra, note 2, at 33-34.
35. Cobban, *Dictatorship*, supra, note 23, at 165.
36. HINKHOUSE, *THE PRELIMINARIES OF THE AMERICAN REVOLUTION AS SEEN IN THE ENGLISH PRESS 1763-1775*, at 100 (1969).
37. GREENE, *HISTORICAL VIEW OF THE AMERICAN REVOLUTION* 13-14 (1970).
38. Id., at 14.
39. Id., at 17.
40. Paine, *Rights of Man*, supra, note 30, at 90.
41. KNOLLENBERG, *ORIGIN OF THE AMERICAN REVOLUTION: 1759-1766*, at 11-12 (1961).

42. Stuart, *The Origins of American Nationalism*, supra, note 2. See also Varg, *The Advent of Nationalism*, supra, note 2.

43. Cameron, *Quebec Question*, supra, note 29, at 27.

44. Trent, *The Politics of Nationalist Movements*, supra, note 2.

45. Id.

46. Lint, *THE LAW OF NATIONS AND THE AMERICAN REVOLUTION*, in KAPLAN (ed.), *The American Revolution and "A Candid World"* 112 (1977).

47. The contribution of the American Revolution to the French Revolution is worth noting. We find this in the writing of Thomas Paine. He stated in one place:

As it was impossible to separate the military events which took place in America from the principles of the American Revolution, the publication of those events in France necessarily connected themselves with the principles which produced them.... Count Vergennes resisted for a considerable time the publication in France of the American constitutions, translated into the French language; but even in this he was obliged to give way to public opinion ...

Paine, *Rights of Man*, supra, note 30, at 117.

Reinforcing and tremendously magnifying the examples set by America, the Revolution in France made it the custom of reformers to specify individual rights and to regulate the powers of government, in written constitutions planned explicitly for this purpose.

LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION*, (Palmer trans.) at V (1973). For more on the French Revolution, see COBBAN, *THE SOCIAL INTERPRETATION OF THE FRENCH REVOLUTION* (1968); GOTTSCHALK, *Jean Paul Marat: A Study in Radicalism* (1967).

48. Noone, Rousseau's Social Contract, supra, note 1 at 73-75. For more about Rousseau, see Miller, ROUSSEAU: DREAMER OF DEMOCRACY (1984).

49. Hayes, Historical Evolution, supra, note 2, at 22.

50. Id., at 22-23.

51. Id.

52. Id.

53. Id.

54. Reproduced by IMBERT, Les droit de l'homme en France (LA DOCUMENTATION FRANÇAISE) No. 4781 (1985-6, 47F). at 122. Article 6 reads:

La Loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement, ou par leurs représentants, a sa formation. Elle doit etre la meme pour tous, soit qu'elle protege, soit qu'elle punisse. Tous les citoyens, étant égaux a ses yeux, sont également admissibles a toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leur talents.

Id., at 123.

55. Salvemini, Mazzini 50 (1962).

56. Id., at p.51.

57. Id., at 51-52.

58. Kohn, PROPHETS AND PEOPLES: STUDIES IN NINETEENTH CENTURY NATIONALISM 88 (1969). [Hereinafter cited as Kohn, Prophets and Peoples]

59. Id.

60. Id.

61. Id., at 89.

62. Id. Mazzini describes the relationship between individuals with a common bond and common feelings as follows:

A man -- it may be a foreigner in some remote corner of the world -- arises, and amidst the universal silence, gives utterance to certain ideas which he believes to be true, and maintains them throughout persecution, and in chains, or dies upon the scaffold, and denies them not. Wherefore do you honour that man, and call him saint and martyr? Why do you respect, and teach your children to respect, his memory ... as if they belonged to the history of your ancestors?

4 LIFE AND WRITINGS OF JOSEPH MAZZINI (CRITICAL AND LITERARY). 262-263 (1891).

63. 5 LIFE AND WRITINGS OF JOSEPH MAZZINI (AUTOBIOGRAPHICAL AND POLITICAL). 274 (1891).

64. 3 LIFE AND WRITINGS OF JOSEPH MAZZINI 7 (1891). Also see Parel, Humanism and Nationalism, supra, note 2, at 18.

65. LYONS, INTERNATIONALISM IN EUROPE: 1815-1914, at 11 (1963).

66. Id.

67. Reprinted id., at 288.

68. Reprinted Id., at 55. Also see, Woolf, International Government 163-64 (1971). There are conflicting opinions as to when the real thrust of internationalism began, whether through the creation of the Conseil Supérieur de Santé in Constantinople in 1838 to prevent cholera in Turkey, or in 1815 with the creation of the Congress of Vienna under the Treaty of Vienna for the implementation of navigational provisions on some European rivers. Id. Also see Goodrich, THE UNITED NATIONS 4-5 (1959).

69. Reinsch, *Public International Union* 15 (1st ed., 1911).

70. Lyons, *Internationalism in Europe*, *supra*, note 65, at 39-41.

71. For example, the creation of the International Telegraphic Union and the Universal Postal Union. *Id.*, at 6.

72. President Wilson combined the concept of self-determination with that of representative government. Article III of Wilson's First Draft of the Covenant read:

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

2 MILLER, *THE DRAFTING OF THE COVENANT*, (DOCUMENT 3) 12-13 (1928). It has been stated in the commentary in respect of Wilson's draft of Article III as follows:

Article III as drawn, proceeds, after the language of guaranty, to state generally that territorial readjustments may be effected hereafter.

First: those that become necessary by reason of changes in racial conditions and aspirations or in social and political relationships pursuant to the principle of self-determination.

Second: those that in the judgment of three-fourths of the Delegates may be demanded by the welfare

and manifest interest of the peoples concerned, if agreeable to these peoples.

Id., at 71.

Cobban states:

The key to the understanding of Wilson's conception of self-determination is the fact that for him it was entirely a corollary of democratic theory. His political thinking derived, by way of the American democratic tradition, from the democratic and national ideals of the French and American Revolutions.... Rousseau's General Will was for him no merely ideal will, but the actual will of the people, that only required to be freed from the ill will of the autocratic governments for its innate goodness to be manifested.

Cobban, *The Nation State and National Self-Determination*, supra, note 2, at 63. Article X of the Covenant of the League of Nations reads:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

President Wilson stated in respect of Article X of the Covenant:

Then there was the question as to whether it interfered with self-determination; that is to say, whether there was anything in the guaranty of Article X about territorial integrity and political independence which would interfere with the assertion of the right of great populations anywhere to change their governments, to throw off the yoke of sovereignties which they did not

desire to live under. There is absolutely no such restraint. I was present and can testify that when Article X was debated the most significant words in it were the words 'against external aggression.' We do not guarantee any government against anything that may happen within its own borders or within its own sovereignty.

WAR AND PEACE, The Public Papers of Woodrow Wilson [Presidential Messages, Addresses, and Public Papers, 1917-1924], Speech of September 24, 1919, at 373-376. For more information about the Wilsonian concept of Self-Determination, See Michla Pomerance, The United States and Self-Determination: Perspective on the Wilsonian Conception, 70 A.J.I.L. 1-27 (1976).

73. Kohn, Prophets and Peoples, supra, note 58, at 90.

74. DONOVAN, MR. ROOSEVELT'S FOUR FREEDOMS 6 (1966). For more information about the failure of the League of Nations, see NICHOLAS, THE UNITED NATIONS AS A POLITICAL INSTITUTION (1975).

75. Donovan, Mr. Roosevelt's Four Freedoms, id.

76. RUSSELL, A History of The United Nations Charter 39 (1958).

77. The Atlantic Charter, reprinted id. (APPENDIX B), at 975.

78. Id. The significance of the Atlantic Charter was expressed by President Roosevelt to Prime Minister Churchill as follows:

A year ago today you and I, as representatives of two free Nations, sat down and subscribed to a declaration of principles common to our peoples. We based, and continue to base, our hopes for a better future for the world on the realization of these principles. This declaration is known as the Atlantic Charter.

THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 328 (1942); also see THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 368 (1943); also quoted in LAING, INTERNATIONAL ECONOMIC LAW AND PUBLIC ORDER IN THE AGE OF EQUALITY, 12 LAW & POL'Y IN INT'L BUS. 739, note 50 (1982) [hereinafter cited as

Laing, Age of Equality]. For more information on the significance of the Joint Declaration, see Russell, A History of the United Nations Charter, supra, note 76, at 39-43.

79. Id., at 75-76.

80. Donovan, Mr. Roosevelt's Four Freedoms, supra, note 74, at 42-43.

81. Declaration by the United Nations, January 1, 1942. Reproduced in Russell, A History of the United Nations Charter, (APPENDIX C), supra, note 76, at 976. In this Declaration 26 nations "subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter." Id. Also quoted in Laing, Age of Equality, supra, note 78, at 735.

82. Declaration of Four Nations on General Security. Russell, A History of the United Nations Charter, [APPENDIX D], supra, note 76, at 977.

83. Article 4. Declaration of Four Nations on General Security, id.

84. Laing, Age of Equality, supra, note 78, at 738, particularly his footnote.

85. Article 1(2) of the United Nations Charter. Done at San Francisco, June 26, 1945. 3 Bevans 1153, 1976 Y.B.U.N. 1043. Also see Article 55 of the Charter which states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(b) solutions of international economic, social, health, and related problems...

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id.

86. Salvemini, Mazzini, supra, note 55, at 51.

87. Id., at 51-52.

Chapter II

Self-Determination as a Human Right

Introduction

In the previous chapter, nationalism was presented as the cardinal force behind the desire for self-determination. Like animals, human beings are gregarious in nature but will fight enemies who seem to threaten their community life. Sharing, common feelings, the urge for the preservation of identity and a sense of belonging to a group are instincts from which nationalism springs forth. This is the stage at which is born a group's desire to determine who they are and to ensure their survival. Before one considers whether self-determination is a human right or not, it is necessary to attempt to find out why a person possesses rights. J. Maritain stated:

The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such ... [and] the human person ... is the subject of rights, possesses rights. These are things which are owed to man because of the very fact that he is man.¹

The problem with the above statement is that it fails to elucidate the distinction between mere rights and inalienable rights. Mere or simple rights are usually given by the State and can be taken away by the State, whereas inalienable rights can never be taken away. History has demonstrated that human beings have had to pay (and are still paying) an astronomical price in order to be able to assert some of the basic rights with which they were born. When people learned to live in groups, in order to express their interests collectively and more forcefully against other dominant or threatening groups, collective determination emerged as a pre-condition to their existence. In its absence, no individual could liberate him- or herself from domination by another group in the society.²

In the twentieth century, due to the impact of the Atlantic Charter and the political roles played by Prime Minister Churchill and President Roosevelt,³ the principle of self-determination finally received international recognition through the United Nations Charter.⁴ Article 1(2) of the Charter clearly states that one of the purposes of the United Nations Organization is:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...⁵

The freedom of a people to determine its own destiny received express recognition as a right in two other major international covenants: the International Covenant on Economic, Social and Cultural Rights⁶ and the International Covenant on Civil and Political Rights.⁷ Article 1(1) of each Covenant reads:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁸

If one analyzes the above article, one finds that the right of self-determination includes the following elements:

- 1) The freedom to determine political status;
- 2) The freedom to pursue economic development;
- 3) The freedom to pursue social development; and
- 4) The freedom to pursue cultural development.

The above elements of self-determination were also expressed in the Declaration on the Granting of Independence to Colonial Countries and Peoples (XV),⁹ and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁰

For example, the Declaration on Friendly Relations reads:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.¹¹

Again, Article 2 of the Declaration on the Granting of Independence reads the same as Article 1(1) of the two Covenants.¹² The problem is that the shared Article 1(1) has been criticized for its vague and evasive nature.¹³ Cassese states that its relevance to colonial and non-colonial situations is still a mystery,¹⁴ and that the most that can be said with much certainty is that Article 1(1) is aimed at preventing secession.¹⁵ However, it can safely be argued that references to self-determination in these international instruments include both the colonial and non-colonial contexts. This is because without freedom from colonial and domestic oppression it is impossible for a people to exercise their inalienable right to "freely determine their political status and freely pursue their economic, social and cultural development."¹⁶

The struggle for internal self-determination originated with the idea of popular sovereignty, a concept deeply rooted in such landmark proclamations as the English Magna Carta (1215) and Habeas Corpus Act (1679), the American Declaration of Independence (1776) and the French Declaration of Rights of Man and of the Citizen (1789).¹⁷ The barons who obtained the Magna Carta from King John in 1215 in order to serve their own interests, unwittingly laid the legal foundations for modern democracy. Article 39 of the Magna Carta states that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."¹⁸ The English Magna Carta and Habeas Corpus Act crystallized and protected

certain rights of the people from the arbitrary actions of the monarchy. The American Declaration of Independence went a step further, rejecting outright the supremacy of any particular individual and recognizing the people as the sovereign source of power. Finally, the words of the Magna Carta were echoed in Article 7 of the French Declaration of 1789, which states that "[n]o man shall be accused, arrested or detained except in the cases determined by the law and in accordance with the forms established by law."¹⁹ The French Revolution dealt a severe blow to the divine right of the monarch, a concept that was "replaced by the Divine Right of the People."²⁰ Referring to the French Revolution, Cobban states:

The revolutionary theory that a people had the right to form its own constitution and choose its own government for itself easily passed into the claim that it had a right to decide whether to attach itself to one state or another, or constitute an independent state by itself... The logical consequence of the democratization of the idea of the state by the revolutionaries was the theory of national self-determination.²¹

In both the American and French Revolutions, the central point of grievance was the flagrant violation of human rights. In France the abuses were perpetrated by the King, the nobility and the clergy. In America, the rights and aspirations of the people were ignored by the colonial power, which passed laws in the English Parliament without political representation from the colonies. When a people is ruled without its consent, common sense dictates that there exists a legitimate political ground for the overthrow of the ruler. This was the case in both the American and French Revolutions.

This Chapter deals with the various aspects of the right to self-determination as a human right. It will develop a definition of self-determination by considering the concept in the context of human rights. First, a human right will be defined. Second,

self-determination as a human right will be established, in two parts: (a) the "self" or "a people" will be determined, then (b) the legal status of the right to self-determination will be examined. The chapter will subsequently look at the two types of self-determination (external and internal), and will argue that self-determination is a continuing right. Finally, secession will be examined. What this chapter will demonstrate, then, is that self-determination is a continuing human right, fully sanctioned by international law.

What is a Human Right?

A human right is one derived from the legitimate claims of individuals in accordance with their needs. Milne, in his work Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights, provided an important interpretation of a right when he described it as an "entitlement." According to Milne, one has a right to something to which one is entitled. If one does not suffer as a result of the deprivation of something, then it can be argued that that something is not an entitlement.²² The existence of these rights or entitlements is independent of philosophical or political whims.²³ Sridath Ramphal characterized human rights in this way:

They have their origin in the fact of the human condition, and because they have, they are fundamental and inalienable. More specifically, they are not conferred by constitutions, conventions or governments. These are the instruments, the testaments, of their recognition; they are important, sometimes essential, elements of the machinery for their protection and enforcement; but they do not give rise to them. They were born not of man, but with man.²⁴

Cranston takes a different approach in defining human rights. He argues from the standpoint of universal morality and natural law, stating that human rights are those that cannot be taken away "without a grave affront to justice."²⁵ A problem arises when examining the positivist attitudes of Jeremy Bentham, Hans Kelsen and John Austin, who denied the validity of natural law as such. According to these positivists, the concept of human rights is merely fictional and therefore baseless.²⁶

Other authors look to religious scriptures for evidence, claiming that the concept is as old as "human society"²⁷ and that it developed along with human civilization. Nagendra Singh asserts that the concept can best be described with reference to the ancient Sanskrit text:

I seek no Kingdoms nor heavenly pleasures nor
personal salvation since to relieve humanity from
its manifold pains and distress is the supreme
objective of mankind.²⁸

Nagendra Singh's notion of human rights is founded upon the slightly different principle of fundamental freedoms, which every person is entitled to by virtue of being human.²⁹ Human rights and fundamental freedoms are two sides of the same coin. The concept of fundamental freedoms sees political and economic fairness in moral terms. The concept of human rights, however, is centred upon a legal notion.

Writers, such as Singh, who seek the source of human rights in religious scriptures may be criticized on the ground that all religions speak of divine rights rather than of human rights.³⁰ However, their interpretations of some of the rights found in those scriptures that speak of the common principles of goodness and justice are universally recognized. Some examples of this are the Bhuddist doctrine of ahimsa, which dates back to the third century B.C., the Hindu doctrine of kinship,³¹ the Islamic teaching of universal brotherhood and the Christian teachings of love and forgiveness. On the other hand, many of the ancient kings and sultans who claimed to

derive their divine rights from God and the scriptures were notoriously engaged in atrocities against their fellow human beings. It is therefore quite clear that the doctrine of "divine rights" serves only the purposes of those in positions of traditional power. That is why today, the phrase "divine right" is associated with the arbitrary power of certain monarchs and rulers.

The concept of human rights is also found in John Locke's Two Treatises of Civil Government (1689), published immediately after the Glorious Revolution, which brought about the end of the Stuart dynasty.³² His writings were a direct response to the constitutional crisis precipitated by the despotic rule of that dynasty. This, as Der Vyver notes, led to the establishment of the idea that "the doctrine of human rights ... [is] intimately related to the problem of excessive governmental power."³³

Human rights have three dimensions: national, regional and international. At the national level, human rights claims are asserted against one's own government. For example, the right to be free from torture imposes an obligation on the State not to torture anyone; the right to life imposes an obligation on the State not to take away life without the due process of law.

An example of a human rights claim at the regional level would be an individual bringing a complaint against his or her own government to an institution established by agreement between a group of geographically proximate States, including the State in which the complainant lives. For example, under Article 36 of the African Charter on Human and Peoples' Rights,³⁴ individuals may communicate human rights violations to the African Commission on Human and Peoples' Rights, established under Article 30 of the African Charter. Such communication is allowed so long as it is not disparaging or insulting to one's own State and provided the complainant discloses his or her name.

An individual can also bring a complaint against his or her own government in the

European Commission of Human Rights under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁵ The Commission fielded its first individual complaint in 1955 and has since received more than 9,000 applications.³⁶ When the Commission encounters a case involving an important human rights breach, it usually refers it to the European Court of Human Rights.

At the global level, one can bring complaints before the Human Rights Committee under Articles 1 and 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.³⁷ The Committee investigated one such complaint in the famous Canadian case of Lovelace v. Canada.³⁸ The Human Rights Committee decided that the Canadian government's actions were in violation of Article 27 of the Covenant on Civil and Political Rights. This provision guarantees the rights of ethnic, religious and linguistic minorities to enjoy their own culture, practise their own religion and use their own language. Mr. Nèjib Bouziri, in his individual opinion, stated that in addition to Article 27, Canada also violated Articles 2 (para 1), 3, 23 (paras. 1 and 4) and 26 of the Covenant.³⁹ Human rights at the international level involve the customary or conventional dimension of the rights of people with respect to their own State or the international community. It has become clear that human rights claims are claims made by peoples or individuals

the purpose of which is to defend by institutionalized means the rights of human beings against abuses of power committed by the organs of the State and, at the same time to promote the establishment of human living conditions and multi-dimensional development of the human personality.⁴⁰

There is, however, a difference between human rights and citizens' rights. In drawing this distinction, Imro Szabo bases his argument on the French Declaration of the Rights of Man and of the Citizen and argues that in the case of human rights, a person "is imagined to exist outside society who [the individual] is assumed to exist

prior to society."⁴¹ Human rights are rights that existed before the state came into being, and for this reason they are "natural and inalienable rights."⁴² The rights of citizens are the product of positive law.⁴³ That is why they are "subordinate to and depend upon [human rights]."⁴⁴ Citizens' rights can be taken away by the government; human rights cannot. That is why they are referred to as inalienable. Marx and Engels recognized this when they commented that:

In man and in his rights, society postulates a selfish being, independent of everyone, who is the subject of property (private property) and whose freedom (from ownership) constitutes the legal form and the basic requirement: man is an abstract subject in relation to the state, while human rights are alleged to be natural rights, abstract natural rights. The citizen, on the other hand, has rights only as a member of the political society: these are rights whose value is limited. The rights of the citizen are neither absolute nor unconditional, they are not granted to man everywhere and at every moment: they are not innate rights.⁴⁵

In this sense, the laws made by domestic legislative bodies are subordinate to those of the international community: municipal laws derive their legitimacy from international law.⁴⁶ The rights of citizens vary from State to State but some basic human rights are universal in nature and command absolute respect from every State. The primary logic behind the supra-national character of international law is that international law is a product of natural justice, and the ethical standard of any positive law is considered from the perspective of whether "it manages to measure up to certain objective standards of ethics and natural justice."⁴⁷

The internationalization of human rights began with the Treaty of Augsburg of 1555, in which the European States pledged to endorse freedom of religion, and this was further advanced by the "peace-settlement of Westphalia of 1648" (Treaty between

the Roman Empire and Sweden) guaranteeing religious freedom.⁴⁸ Human rights issues received further impetus from the Treaty of Kutchuk Kainordji of 1774 between the Sultan of Turkey and Russia, which provided for the protection of the Christian minority in Turkey. Then came the American Bill of Rights, the first ten amendments of which, passed by the Congress on September 25, 1789, ensured the right to religion, freedom of speech and the press, the right to petition the government for the redress of grievances (Article I), the right to bear arms (Article II), the right against "unreasonable searches and seizures" (Article IV), the right to a "speedy and public trial" (Article VI) and the right to "life, liberty, and property" (Article V).

However, it is noteworthy that in the phrase "We the People" in the Preamble of the U.S. Constitution, as the United States Supreme Court stated in the Dred Scott Case⁴⁹ in 1857, black people

[were] not included, and were not intended to be included.... [because they were] altogether unfit to associate with the white race ...; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit....⁵⁰

However, in 1772, in Somerset v. Stewart,⁵¹ the British House of Lords held that any slave brought from the United States to England was entitled to freedom.⁵² Slavery was prohibited and abolished throughout the British colonies in 1833.⁵³

Human rights gained impetus from the Act of the Federal Constitution of Germany of June 8, 1815, which provided the Jewish people with religious and civil rights in the new German Federation, and from Article 1 of the Final Act of Congress of June 9, 1815, which recognized the minority rights of the Polish people.⁵⁴ The Geneva Convention on Upper Silesia of 1922 recognized the individual as a subject of

international law "by granting him the right of petition" before an international organ in order to protect his or her rights under the Convention. Under the rules of procedure of the Arbitral Tribunal and the Mixed Commission, a petitioner had the right to become a party to the proceedings before both the administrative and the judicial agency.⁵⁵

The international human rights movement received a big boost from the anti-slavery Convention of 1926, and subsequently from the international concern expressed concerning the treatment of Jews in Russia and of Armenians in the Turkish Empire.⁵⁶ The argument is sometimes made that it also received acknowledgment "from the international implications of Nazi denials of human rights."⁵⁷ The flagrant denial of Jewish minority rights by Germany during the Second World War and the enormity of the Holocaust forced the whole world to rethink the entire international system for the protection of human rights.

This ultimately led to two major international events. The first of these was the declaration of four freedoms by President Roosevelt and Prime Minister Churchill in the Atlantic Charter of 1941. These four freedoms were the "freedom of speech and expression," "freedom to worship God," "freedom from want" and "freedom from fear."⁵⁸ The second event was the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948.⁵⁹

Municipal human rights laws can be classified as either substantive or procedural.⁶⁰ Substantive human rights encompass certain basic rights, such as freedom of speech, press and religion, and "the right to petition the government for a redress of grievances."⁶¹ (The right to petition can be a procedural right as well.) Procedural human rights encompass certain principles of criminal and civil procedure, such as the right to legal representation and a fair trial according to due process of law, "the proscription of double jeopardy in criminal prosecutions and the prohibition of cruel and inhuman punishment."⁶²

At the international level, human rights have been classified by Karel Vasak into first-, second- and third-generation rights.⁶³ According to Vasak, civil and political rights are first-generation rights; social, economic and cultural rights are second-generation rights; and third-generation rights are solidarity rights, which include the right to development, peace, a clean environment and one's communal heritage.⁶⁴ An important right that should be added to Vasak's discussion is the right to be free from the threat of nuclear weapons and warfare. This right should be distinguished from the right to peace because the latter generally refers to freedom from conventional warfare, including structural violence in the society, international discontent and anarchism.⁶⁵ This distinction is important because at present, nuclear weapons and warfare are "the greatest peril confronting the modern world."⁶⁶ The right to be free from the threat of nuclear weapons and warfare can perhaps best be described as a fourth-generation right.

Again, individual rights at the national level are the positive rights of individuals that stem from the municipal and constitutional laws of individual States. When one talks about individual rights at the international level, reference is usually made to individuals as subjects of international law, the claims they make against the international community have to do with such matters as the rights of aliens,⁶⁷ of stateless persons or of refugees. Individuals are members of the international community by virtue of being members of particular States⁶⁸ and "universal morality requires [the State] to respect [the rights of non-nationals] always and everywhere. It has an obligation... to treat all foreigners as fellow human beings and therefore always to respect their human rights."⁶⁹

At the national level, the substantive origin of individual rights found expression in the French Declaration of the Rights of Man and the Citizen of 1789 and the American Bill of Rights, which was added to the Constitution in 1791.⁷⁰ In this regard, Sieghart states:

Between them, these included such things as equality before the law, due process of law, freedom from arbitrary arrest and imprisonment, freedom from unreasonable searches and seizures, the presumption of innocence, fair trial, freedom of assembly, speech, conscience, and religion -- and the right to own property.⁷¹

Collective rights, on the other hand, are the rights of a group of people sharing or willing to share some common values in a society. Since these rights belong to a group of people, they are also known as group rights.⁷² There is no difference between group rights and the collective rights of people. These collective rights develop from the increasing demands and expectations of individuals, which drive people to identify with their fellow beings.⁷³ Sieghart has divided these collective rights into six classes. They are:

- [1] Self-determination and equality rights;
- [2] Rights relating to international peace and security;
- [3] Permanent sovereignty over natural resources;
- [4] Rights in relation to development;
- [5] Rights in relation to [the natural] environment, and
- [6] Rights of minorities.⁷⁴

James Crawford has added one more group right, "the right of the groups to exist,"⁷⁵ in other words, the right of a group to be free from acts of genocide committed or condoned by its national government.⁷⁶ When these rights, as interpreted by Sieghart, are compared with Vasak's classification of rights, then self-determination and the rights of minorities become the first-generation rights that encompass any group's right to exist. The second-generation rights would be "permanent sovereignty over natural resources" and "rights in relation to development." The

third-generation rights would be "rights in relation to environment." Fourth-generation rights would include "rights relating to international peace and security."

Of these seven collective rights, as classified by Sieghart and Crawford, the right to be free from genocidal acts, and the right to self-determination and non-discrimination may collectively be called the right to existence. These rights may alternatively be described as rights of the first degree. Other rights, such as permanent sovereignty over natural resources, rights in relation to development and the environment are rights of the second degree since these are the corollary rights to human existence. Of all the collective rights, the right to self-determination, meaning the right of a group of people "freely to determine their political status and freely to pursue their economic, social and cultural development"⁷⁷ is to a group of people what economic and political freedom is to individuals.⁷⁸ It is impossible for human rights to exist without self-determination.⁷⁹ The right to self-determination, therefore, is at the core of all rights.

Self-Determination as a Human Right

(a) The Quest for "Self" or "A People"

It sometimes takes considerable effort to find out who the "self" or "a people" is in order to determine whether a particular group of people can claim that status. Will it be based on colour, ethnic background, language, common heritage, political opinion or other factors? History shows that a group of people acquires the special status of "a people" at a particular time, based on the necessity and importance of the claim at

that time. A group claiming independence on the basis of common religion may become divided if one segment speaks a different language than the other. In this situation, any claim for self-determination will be based on language and the group's distinctiveness will be determined by the language it speaks. That is why we identify a particular group as Jews, Moslems, Christians or Hindus or, on the other hand, we recognize a particular group of people as Bengalis or French.

According to Cristescu, "a people" is a social entity with its own identity and characteristics, that has a "relationship with a territory," even if it has been expelled from that territory and replaced by another population.⁸⁰ Makinson takes a different view. He argues that, since there are many "variations" in the methods used to draw the line between peoples that have special rights and "others who do not,"⁸¹

(t)he only way in which such arbitrariness could be avoided would be by the device of building normative elements into the definition of the concept itself. Under the folds of a more or less complex wording, "a people" would then essentially be defined as a collectivity whose degree of cohesion and sense of distinctness (based on the elements of descent, language, religion, culture, history, and others) are deemed "sufficiently strong to merit" attribution of a right of self-determination.⁸²

Then he goes on to say:

Such a logical short cut is a perennial temptation, but inserting a normative component into the very definition of what is to count as a people renders the structure of norms circular, and would render the right to self-determination for all peoples nothing more than an empty tautology.⁸³

Makinson has tried to show that the problem of who has the right to self-determination is a constantly recurring one. The dilemma faced in determining the legitimacy of a claim is never-ending and circular in nature. At the same time, there is no other known criterion for measuring the validity of a claim than by applying the tests he describes. These are still the principal yardsticks by which legitimacy is measured. What is missing from Makinson's analysis is a determination of whether a group of people whose distinguishing characteristic is a shared political opinion would be considered "a people." As a result, his analysis is incomplete.

It is important to note that when making a determination of who "a people" is, one must take into account the legitimacy of the claim, whether they enjoy the same rights and protections as the majority or dominant group(s) in the society, and whether they have access to all the same facilities.

The common elements of "descent, language, religion, culture and history" may not always be the most appropriate guiding principles when a group of people shares nothing except an ideology or political opinion (e.g., a group of people engaged in a liberation struggle inspired by Marxism or by democratic principles). This view is not without controversy, however. Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) does not accord a political group the same status as a "national, ethnical, racial or religious group."⁸⁴ Simply stated, the convention does not recognize a group of dissidents, or even a formal political party, as a protected group. Historical and current events in Chile, Panama, the Soviet Union, Eastern Europe and other developing countries show that to exclude political parties from recognition as a group today would be a gross injustice and would facilitate States' oppression of dissidents struggling for political change. That is why it is submitted that there need not necessarily be any similarity in language, descent or cultural heritage; a common belief or political objective should suffice to affirm the distinctiveness of a group of people. Hertz has offered a

normative criterion for the determination of "a people." He argues that the following three factors determine whether a group should be considered "a people":

- 1) The criteria for determining nationality.
- 2) The means of forming and expressing a national will.
- 3) The purposes and limits of the national will.⁸⁵

The truly difficult task is to determine the nationality of "a people." Will it be common heritage, religion, colour, shared expectations or political beliefs? If a group shared one of these characteristics, then the first criterion for the determination of nationality for that particular claim would be met. Under the second test, the means of forming and expressing a national will might include lawful protests, civil disobedience and resistance. The third test concerns the objectives of such a national will, such as whether the group wishes to stay together, to secede from the main body politic, or to join some other nation.

Aureliu Cristescu, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, listed the following as elements of the concept of "a people":

- (a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;
- (b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
- (c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in Article 27 of the International Covenant on Civil and Political

Paragraph (a) above may be interpreted to include minority or other "non-dominant groups,"⁸⁷ or groups driven by some other "subjective criterion,"⁸⁸ meaning the existence of "a common will in the group, a sense of solidarity, directed toward preserving the distinctive characteristics of the group."⁸⁹ Paragraph (b) refers, in part, to cases of mass expulsion from a territory, such as the forceful expulsion of the Palestinian people from Palestine by Israeli authorities. Paragraph (c) is somewhat confusing, since Cristescu suggests that those who fall under Article 27 of the Covenant on Civil and Political Rights should not be considered "a people." The rationale for this is that their rights are already enumerated in the article. Article 27 states that

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.⁹⁰

Accepting Cristescu's argument would have a catastrophic effect on the concept of self-determination because it would undermine the whole notion of "a people." It could lead to the argument that aboriginal and other ethnic, religious or linguistic minorities throughout the world should not be considered "peoples," and would therefore have no right to self-determination, even if their rights had been grossly violated. Some of the most basic criteria for determining the existence of "a people" would be compromised. The international community now accords the right of self-determination to any group of people that has been "domestically colonized" -- forcefully occupied against their will by settlers -- or that has come under the domination of a more powerful group in the society, whether majority or minority. The aboriginal groups in Canada, Australia, the United States, New Zealand, South Africa and Tibet have asserted with growing force their right to self-determination.

albeit over the objections and qualifications of the national governments in question. The right, as described in both the International Covenant on Civil and Political Rights⁹¹ and the Covenant on Economic, Social and Cultural Rights,⁹² belongs to "all the peoples." Furthermore, it is sometimes argued that race or colour should be a factor in defining "a people" as well. For example, at the beginning of African nationalism, "blackness" became a major factor of group identity. This has been described as "pigmentational self-determination."⁹³

Thus, it is clear that Cristescu's position -- particularly as it affects the definition of "self" or "a people" -- must be dispensed with if the concept of self-determination is to survive in any meaningful way. Otherwise, religious, ethnic and linguistic minorities would have no recourse but to petition their own oppressive governments for additional rights, an option unlikely to have much of a positive impact on their situations.

Asbjørn Eide has made a modest attempt to define "self," arguing that "a people" must have some distinctive characteristic that differentiate them from the majority or dominant people of the country.⁹⁴ Even though he lists the elements of "ethnic, cultural [and] linguistic differences" as necessary, these alone are not enough.⁹⁵ He also stresses the importance of a "clear territorial division" to identify the "self," stating that "[w]hen members of the group demanding self-determination are geographically spread among the dominant population, there will rarely be a valid claim for self-determination."⁹⁶ The problem with this condition is that it permits the principle of territorial integrity to override the claim of self-determination.

Even though no decided international case has defined "a people," an effort was made in the Greco-Bulgarian Communities Case⁹⁷ to define a "community" as follows:

... a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity

of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.⁹⁸

The phrase "sentiment of solidarity" probably requires this feeling of togetherness to be in an expressed form. This definition of a "community" is therefore defective. There may be situations in which the members of a group are afraid to express their desire for togetherness because to do so would be to court persecution for perceived disloyalty to their country.⁹⁹

The International Commission of Jurists also wrestled with the idea of "a people" in dealing with the events in East Pakistan and proposed the following elements:

- (1) a common history;
- (2) racial or ethnic ties;
- (3) cultural or linguistic ties;
- (4) religious or ideological ties;
- (5) a common territory or geographical location;
- (6) a common economic base; and
- (7) a sufficient number of people.¹⁰⁰

The Commission has put forward a number of criteria without identifying the relative weight of each or how many need be met. This would not be of much assistance to a judge charged with deciding a group's status in a particular case.

Moreover, what is lacking in the above definition is the element of "legitimate" interest. "Legitimate interest" is sometimes argued to be a central issue in deciding whether a particular group constitutes "a people" under the law of nations.¹⁰¹ A legitimate interest may accrue from either political or economic concerns.¹⁰² In

determining the legitimacy of a claim, suggests Suzuki, one may take into consideration

(1) the probable consequences of the grant or denial of the right to the group; and

(2) the compatibility of their demands with global policies.¹⁰³

Suzuki's analysis is very much policy-oriented. Unfortunately, what is an acceptable "probable consequence" and which demands are compatible with global policies, and to what extent, are unclear. Consequently, it would be left to the discretion of individual States to make these determinations and the views of the more powerful States would dominate.

The number of people in a group is also an important factor. While it is easy to say that the number should be "sufficient," it is more difficult to say how many will suffice. The populations of States in current international society range from a few thousand to a billion.¹⁰⁴ The smallest nation has the same legal rights and responsibilities under international law as the largest.¹⁰⁵ In this regard, Jack Forbes lays down some interesting propositions:

The United States would never agree to the creation of a "Navajo Republic," nor would Canada and the United States tolerate an "Eskimo Liberation Movement." On the other hand, there is no good reason why groups such as the Navajo should not possess a stable form of local autonomy coupled with representation in the Congress of the United States. Nor is there any valid reason why the Eskimo peoples of Alaska, Canada, and Greenland should not be able to form an autonomous federation, under the joint supervision of the United States, Canada, and Denmark.¹⁰⁶

What Forbes is saying is that these small groups of indigenous people are qualified to form dependent autonomous States. These could be akin to the present Mohawk Akwesasne Reserve in Ontario, Quebec and New York State. There is no reason why these national communities could not survive as separate but dependent States with autonomy over local matters.

The sufficiency of the number of people in a group must be judged on a case-by-case basis. There is no set number under the law of nations the attainment of which entitles a group to form an independent State. Nevertheless, the list of criteria put forward by the International Commission of Jurists for identifying "a people" is thus far the most comprehensive, although it contains some inherent flaws.

It may be asked whether the members of a group must be associated with one another, and with a particular territory, for any set period of time in order to qualify as "a people." Michla Pomerance provides a good answer to this question:

The definition of "self" is clearly not only space-bound and group-bound; it is also time-bound... [T]he population in Alsace-Lorraine in 1919, following fifty years of German rule and colonization, was not considered a 'self' whose wishes needed to be consulted. The historic rights of an earlier community were preferred over the desires of the existing inhabitants.¹⁰⁷

Certainly, the right of self-determination is closely associated with the notion of "first in time." Thus, a strong case can be made in support of the primacy, as between conflicting self-determination claims in a given territory, of the claims of aboriginal peoples over those of later settlers.

Formulating a wholly satisfactory definition of "a people" for the purpose of determining a group's right to self-determination is by no means a simple task.

Several factors must be considered in order to make a fair judgment. The primary considerations would seem to be that

- (a) the group in question must have, chronologically, the earliest claim to the territory that they occupy (or wish to re-occupy).
- (b) denial of that claim would cause great harm to the group, and
- (c) the group must have some easily recognizable bond that binds it together, be it race, language, religion or ideology.

Should these qualifications be met, a group could be designated "a people," and their claim would have to be seriously considered by the international community.

(b) The Legal Status of the Right to Self-Determination

It follows logically that the right to self-determination grew as a component of the struggle of peoples for democracy.¹⁰⁸ The concept gained substantial momentum when the Declaration on the Granting of Independence to Colonial Countries and Peoples¹⁰⁹ was adopted unanimously by the U.N. General Assembly in 1960. For the first time in history, the world community declared, in Article 1, the "subjection of peoples to alien subjugation, domination and exploitation" to be "contrary to the Charter of the United Nations ..."¹¹⁰ and, in Article 2, that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹¹¹

The current view of international legal scholars is that these norms expressed in the Declaration have achieved the status of customary international law. Brownlie has

stated that

[t]he Declaration relates to the normative development in the field of human rights of national groups, and in particular, the right of self-determination. The Declaration, in conjunction with the United Nations Charter, supports the view that self-determination is now a legal principle... Resolution 1514 (XV) is in the form of an authoritative interpretation of the Charter rather than a recommendation. ¹¹²

Richardson has commented that the Declaration

represents an authoritative interpretation and implementing measure by the Assembly of Article 1(2) of the Charter, which states the principle of self-determination of peoples, and is thereby legally binding on Member States as an interpretation of a previously ratified treaty. ¹¹³

Article 1(2) of the U.N. Charter was never intended to establish norms binding on member States, but simply to state the purposes of the Organization. Therefore, although the Declaration may well be an authoritative interpretation of the Charter, it cannot be an authoritative interpretation of a binding legal norm concerning self-determination. It is possible, however, to support Professor Reisman's position that the Declaration is the "most authoritative expression" ¹¹⁴ of the right to self-determination.

In addition, a challenge can be mounted on the ground that, under Article 10 of the Charter, the General Assembly may make non-binding recommendations only. ¹¹⁵ Nevertheless, Schachter has asserted that this

does not mean that they lack "authority," for at least in some cases such resolutions will be regarded as

expressing the "general will" of the international community and as persuasive evidence of legal obligation.¹¹⁶

The International Court of Justice stated in the Namibia Advisory Opinion that:

it would not be correct to assume that because the General Assembly is in principle vested with the recommendatory powers, it is debarred from adopting, in specific cases... within the framework of its competence, resolutions which make determinations or have operative design... To deny a political organ of the United Nations which is successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an undertaking.¹¹⁷

The right to self-determination received judicial recognition in both the Namibia¹¹⁸ and Western Sahara Cases.¹¹⁹ In the Namibia Case, the Court stated that

... 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.¹²⁰

Moreover, in his separate opinion in the Namibia Case, Judge Ammoun, citing a statement by the representative of Pakistan, said that the "right of self-determination is a norm of the nature of jus cogens, derogation from which is not permissible under any circumstances."¹²¹ Judge Ammoun also referred to the principle of self-determination in his separate opinion in the Barcelona Traction Case.¹²²

Thus it was that U Thant could say, at the 1969

session of the Organization of African Unity, held at Addis Ababa in the presence of 17 African Heads of State, that the United Nations "had widened the concept of the right of self-determination and independence, so as to cover the recognition of the lawfulness of the struggle carried on by such nations for the exercise and enjoyment of that right in practice." He might have quoted in addition the principle of equality and that of non-discrimination on racial grounds which follows therefrom, both of which principles, like the right of self-determination, are imperative rules of law.¹²³

Besides judicial recognition, the right to self-determination has also received recognition in the writings of publicists. It is sometimes argued that even though Article 1(2) of the United Nations Charter speaks of "the principle of equal rights and self-determination of peoples,"¹²⁴ Article 2(7) in essence restricts its effectiveness by stating that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ..."¹²⁵ Dr. Rosalyn Higgins provides a powerful counter-argument, noting that to support this notion is "to fail to give any weight either to the doctrine of bona fides or to the practice of states as revealed by unanimous and consistent behaviour."¹²⁶ One also finds the principle of self-determination treated as "a rule of positive international law" in the writings of Bokor-Szego.¹²⁷

The Declaration on Friendly Relations proclaimed as one of the seven principles of international law, "[t]he principle of equal rights and self-determination of peoples," which stated that

all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural

development, and every State has the duty to respect this right in accordance with the Charter.¹²⁸

At the same time, one of the seven principles recognized in the Declaration was respect for the territorial integrity of States. In the conflict between the right to self-determination and respect for territorial integrity, the former must prevail because it is the very basis of peoples' right to collective existence.¹²⁹

The above discussion suggests that the right to self-determination is a positive rule of law. This conclusion is by no means undisputed. For example, Professor Gross has stated that the "existence of the alleged right of self-determination in the legal sense will depend upon the authority or competence of the organs of the United Nations, particularly of the General Assembly, to create such a right or obligation."¹³⁰ Gross concluded in 1971 that

subsequent practice as an element of interpretation does not support the proposition that the principle of self-determination is to be interpreted as a right to self-determination or that the human rights provisions have come to be interpreted as rights with corresponding obligations either generally or specifically with respect to the right to self-determination.¹³¹

Professor Gross does not seem to have kept pace with a changing world. He stated in 1984 that "the 'principle' of self-determination in Article 1(2) of the [U.N.] Charter has not been transformed into a right to self-determination and that, independently of the Charter, no such right has become part of customary international law ..."¹³²

Gross's view can be substantiated by reference to the Declaration on Granting Independence, Article 6 of which, echoing Article 2(4) of the United Nations Charter, reads: "Any attempt aimed at the partial or total disruption of the national unity and

the territorial integrity of a country is incompatible with ... the Charter of the United Nations,¹³³ and Article 7 of which prohibits any interference in the domestic matters of States. These provisions limit the scope of Article 2 of the Declaration, which states that "all peoples have the right to self-determination,"¹³⁴ but only in respect of the rights of outside States to intervene. This is because the Declaration applies to States and not to peoples seeking self-determination.

The practical effect of Article 2(4) of the Charter and Article 7 of the Declaration largely depends on the role played by the more powerful States in international relations. The events in Vietnam, Afghanistan, Grenada, and lately in Nicaragua showed little respect for Article 2(4) of the Charter and Article 7 of the Declaration. In these cases, States, especially the superpowers, intervened militarily in favour of one side or another in a struggle for internal or external self-determination, resorting to the plea of either the Brezhnev Doctrine,¹³⁵ the Monroe Doctrine¹³⁶ or the Johnson Doctrine.¹³⁷ As Thomas Franck put it,

since there is usually no way for the international system to establish conclusively which state is the aggressor and which the aggrieved, wars continue to occur, as they have since time immemorial, between parties both of which are using force allegedly in "self-defense." Thus, the fighting between China and India, Pakistan and India, and even between North and South Korea began with both sides insisting that they were defending themselves against an armed attack by the other. Presumably some or all of the parties are lying: but which ones?... The temptation remains what it was before Article 2(4) was conceived: to attack first and lie about it afterwards.¹³⁸

In current international relations, the significance of Article 2(4) of the United Nations Charter is challenged by "the lack of congruence between the international

legal norm of Article 2(4) and the perceived national interest of states, especially the Super-Powers.¹³⁹ In this respect, as emphasized by Dr. Higgins, the doctrine of bona fides must be accepted in order for international law to remain a living law. Otherwise, it would stagnate, and the plight of oppressed peoples would be sacrificed to the maintainance of the status quo.

An exception to Article 2(4), however, is needed in the case of national liberation movements against colonial or racist regimes. This has been the Soviet view, and that of most developing countries, for a long time, although not without vested political interest.¹⁴⁰ Professor Reisman, referring to Article 2(4) of the Charter, argues that a State is justified in using military force and covert activities unilaterally in nine situations:

self-defense, which has been construed quite broadly; self-determination and decolonization; humanitarian intervention; intervention by the military instrument to replace an elite in another state; uses of the military instrument within spheres of influence and critical defense zones; treaty-sanctioned interventions within the territory of another state; use of the military instrument for the gathering of evidence in international proceedings; use of the military instrument to enforce international judgments; and counter-measures such as reprisals and retorsions.¹⁴¹

It is submitted that Professor Reisman has gone too far. To resort to the unilateral use of force in cases other than those of self-defense, self-determination, decolonization and enforcement of international judgments would clearly violate the principle of sovereign equality of nations, and would thus seriously complicate relations between States. However, in those four situations, the unilateral use of force is justifiable.

The consensus of the international community that self-determination is a legal right comes from the fact that it has gained recognition in numerous international instruments, sometimes being expressly referred to as a "right." For example, Chapter I of the Charter of Economic Rights and Duties of States reads:

Economic as well as political and other relations among States shall be governed, inter alia, by the following principles:

...

(g) Equal rights and self-determination of peoples.¹⁴²

Article 7 of the Resolution on the Definition of Aggression reads:

Nothing in this Definition ... could in any way prejudice the right to self-determination.¹⁴³

Article 4(a) of the Declaration on the Establishment of a New International Economic Order reads:

The new international economic order should be founded on full respect for the following principles:

(a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States.¹⁴⁴

Article 20 of the African Charter on Human and Peoples' Rights reads:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue

their economic and social development according to the policy they have freely chosen.¹⁴⁵

In fact, the current international consensus is that the right to self-determination has become a peremptory norm of international law or jus cogens¹⁴⁶ from which no derogation is permitted by any treaty or unilateral State act.¹⁴⁷ Even General Assembly Resolution 2621 (XXV) of October 12, 1970 indirectly characterized the denial of the right to self-determination as a crime against humanity:

The further continuation of colonialism in all its forms and manifestations is a crime which constitutes a violation of the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and People and the principles of international law.¹⁴⁸

Thus, despite the assertions of those such as Gross who deny self-determination the status of a basic human right, it is clear that it has in fact achieved this status. Indeed, we must conclude that self-determination has gained the status of jus cogens, and must be recognized as such by all members of the international community. To deny oppressed peoples the right to self-determination would be tantamount to sacrificing the quality of human existence on the altar of the status quo.

External and Internal Self-Determination

The division of self-determination into external and internal forms comes from the writings of Antonio Cassese.¹⁴⁹ External self-determination refers to a people "opting for independence or union with other States."¹⁵⁰ Internal self-determination, on the other hand, refers to the struggle of a people to rid themselves of an oppressive or unrepresentative indigenous regime.¹⁵¹ It is also

known as self-preservation, since "an ethnic, racial, religious or other minority within a sovereign State has the right not to be oppressed by the central government."¹⁵²

Internal self-determination is closely associated with the idea of self-government. Self-government permits a group of people to manage both their political and economic affairs, free of political pressure and independent of someone else's will or periodic decisions.

Mazrui has identified five distinct conceptions of self-government:

First, self-government as an absence of colonial rule;

secondly, self-government as sovereign independence, with all its ramifications in relations with other countries;

thirdly, self-government as internal management of internal affairs, including the maintenance of law and order, a matter which may have serious implications externally;

fourthly, self-government in the liberal democratic sense as government supported 'by the will of the nation, substantially declared'; and

fifthly, self-government by rulers manifestly belonging to the same race as the ruled.¹⁵³

The idea of domestic or limited self-government, in both colonial and non-colonial situations, is essentially a compromise in the struggle for internal self-determination.¹⁵⁴ It is the self-management of the internal or local affairs of a people.¹⁵⁵

External self-determination refers primarily to cases falling under Chapter XI of the United Nations Charter dealing with the people of non-self-governing territories, such as Puerto Rico, the West Bank or Namibia until recently.

Neither the Charter of the United Nations nor the two international covenants¹⁵⁶ define "self-determination." Nor do they clarify which kind of self-determination they are referring to, even though it can be argued that Article 1 (1) of both Covenants applies to internal self-determination. Article 1(1) reads:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹⁵⁷

An individual reading Article 27 of the Covenant on Civil and Political Rights¹⁵⁸ may put forward two arguments. One is that the term "peoples" in Article 1(1) does not apply to groups mentioned in Article 27. A conflicting view is that this is not so, since Article 27 is a part of the Covenant, so that the target groups are usually "ethnic, religious or linguistic minorities."¹⁵⁹ Cassese asserts that internal self-determination

is realized when the State has a "government representing the whole people belonging to the territory without distinction as to race, creed or colour." When these conditions are lacking, the people or the minority can demand that their right of self-determination be respected; in pursuit of the exercise of their right, they are even entitled to secede.¹⁶⁰

Some people might say that native groups do not have the right to internal self-determination when they live in a democratic non-racial society. What Cassese says does not mean that aboriginal peoples do not have the right to internal self-determination because it is the right to external self-determination that is being

denied. The aboriginal peoples regard the federal government as an external force in their locality that prevents them from achieving their aspirations by force of numbers through the democratic process.

Cassese obviously had in mind the Declaration on Friendly Relations when he referred to the realization of the right to self-determination. Still, the problem remains as to what we should call a representative government -- whether it must be a Western-style democratic government or can include communist, socialist, traditional and religious governments.¹⁶¹

Article 7 of the Algiers Declaration of the Rights of Peoples (1976) attempted to characterize the nature of a representative government. Even though it is neither a General Assembly Resolution nor an international convention, but a document prepared by jurists, politicians and economists with no immediate legal consequences, the significance of the Algiers Declaration lies in the fact that it reflects the "hopes and ideals of individuals."^{161.1} It reads:

[A representative government is] a democratic government representing all citizens without distinction of race, sex, belief or colour, and capable of ensuring effective respect for the human rights and fundamental freedoms of all.¹⁶²

This definition states that a representative government is a democratic one, but gives no guidance as to when a government meets this condition. Must it be composed of delegates directly elected by the people in a multi-party system, or can it be the product of a one-party system? In other words, in order to be truly representative, must a government be elected periodically by the people and have one or more effective opposition parties? It is not clear what the framers meant when they used the word "democracy" in the Algiers Declaration.

The provision further stipulates that in order to be representative, a government must represent all of its citizens without distinction as to "race, sex, belief or colour," and must ensure "human rights and fundamental freedoms."

Even if a government does meet these conditions, there may still be instances of oppression or discrimination of a minority population. In such cases, the minority would be left out of the mainstream political process. However, Article 4 of the Algiers Declaration makes an effort to protect minority rights where it states that "[n]one shall be subjected, because of his national or cultural identity, to massacre, torture, persecution, deportation, expulsion or living conditions such as may compromise the identity or integrity of the people to which he belongs."¹⁶³ Otherwise, Article 21 authorizes the impairment of "the territorial integrity and political unity of the State."¹⁶⁴

Cassese is of the opinion that the Algiers Declaration authorizes minorities to exercise their right to both internal and external self-determination, and that a claim for internal self-determination turns into a legitimate claim for external self-determination when "the minority is systematically oppressed by the central power and the rights and freedoms of its members are denied."¹⁶⁵ In other words, "[t]he bogey of territorial sovereignty must not be allowed to overshadow the suffering of peoples."¹⁶⁶ The point is that the "requisite oppression" must be present before a claim can be made.¹⁶⁷

An important question is whether people living in a society free of racial prejudice, where remedies are available for the protection of minority rights, can ever make a legitimate claim to a right to external self-determination.¹⁶⁸ Such a society may be hard to find. It is submitted, however, that if a minority cannot achieve freedom from discrimination, oppression or numerical dominance within the confines of the existing State (i.e. through internal self-determination), then it should be entitled to assert a claim for external self-determination.

Even poverty and suffering is generally accepted as giving rise to a claim of self-determination, because these are anathema to human rights; the right to self-determination -- either external or internal -- is often bound up with such misery.¹⁶⁹ The right to external self-determination gains momentum "in the face of perceived oppression."¹⁷⁰ It is submitted that in a multi-racial State, even if the government represents "the whole people belonging to the territory without distinction as to race, creed or colour"¹⁷¹ a people may still be entitled to turn a claim for internal self-determination into a claim for external self-determination if other criteria, such as the presence of a common language, common culture and economic viability are met although no discrimination may exist.

Self-Determination as a Continuing Right

Self-determination is not a right to be exercised once and for all. When the question is raised as to whether self-determination is a continuing right, one is immediately faced with the fact that the struggle for human existence and the quest for justice never end. In this context, self-determination must be an ongoing, and not just a one-time exercise, in accordance with the ever-changing dictates of human society. The world is full of the unlimited wants and insatiable demands of various groups of people. The liberation struggle in Afghanistan, the problems of the Nagas in India and of the Tibetans in Tibet are but a few examples of attempts to fulfill such aspirations.¹⁷²

On a slightly different issue, there is a continuous struggle by developing countries to achieve a fair distribution of the world's resources so as to enable them to gain economic self-determination, for which they seek to implement the provisions of the New International Economic Order¹⁷³ and establish Permanent Sovereignty Over Natural Wealth and Resources.¹⁷⁴ The purpose of economic self-determination is, as

Article 55 of the United Nations Charter states, to "promote higher standards of living, full employment and conditions of economic and social progress and development"¹⁷⁵ for everybody in the world. The approach that should be taken is that people should always retain the right to raise their voices continuously to protest injustice, or to right wrongs done to their ancestors by the colonial powers through division and annexation. In the former case, people should be entitled to assert their continuous opposition and resistance; in the latter, they should be permitted to repudiate treaties entered into by their forebears by applying the principle of rebus sic stantibus or fundamental change of circumstances.¹⁷⁶

Theo Boven states that:

[i]f a government fails in its duties and is not (or no more) the rightful agent and defender of the rights and interests of the people, such a government has lost its legitimacy¹⁷⁷

Article 21(3) of the Universal Declaration of Human Rights further establishes the idea that people shall always be in a position to be the "basis of the authority of government"¹⁷⁸ and that this authority "shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."¹⁷⁹ Arguments have also been proffered to show a close link between the continuity of the right to self-determination and general contract law theory. This has been well described by Levin:

When a nation exercises its right to self-determination, form[s] an independent state, voluntarily remains in a multinational state or joins another multinational state, its right to free determination of its further internal political, economic, social and cultural status passes to the sphere of state law of the state to which the nation

now belongs. But this holds good only as long as the conditions on which the nation became part of the given state are not violated by this state and as long as the nation's desire to stay within it remains in force, and it is not compelled to do so by coercive means. As soon as one of these phenomena occurs, the question again passes from the sphere of state law into the sphere of international law.¹⁸⁰

This right to act in the best interests of the nation is inherent, and can be exercised whenever necessary. This continuity of action is derived from nature itself where every living being constantly undergoes changes designed to ensure its survival. Naturally, human groups with different values and characteristics can form alliances, while preserving the option of dissolving them if one or more of the promises or conditions upon which it is based is broken.

Article 28 of the Algiers Declaration speaks of the same principle from the perspective of human rights. It states:

Any people whose fundamental rights are seriously disregarded has the right to enforce them, especially by political or trade union struggle and even, in the last resort, by the use of force.¹⁸¹

The Algiers Declaration thus declared that a people may always, through the use of force if necessary, assert their fundamental rights, meaning the rights recognized by general principles of law, whenever they are violated. The international instrument that expressly recognizes this right as a continuing right is the Helsinki Declaration. Principle VIII of the Helsinki Accord reads:

... all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their

political. economic. social and cultural
development.¹⁸²

The above principle, by making use of the word "always" and the phrase "when and as they wish," has given the right to self-determination the characteristic of a continuing right. Today this right, as described by the American delegate in the Third Committee of the General Assembly in 1972, encompasses the following concept:

Freedom of choice ... [is] indispensable to the exercise of the right to self-determination. For this freedom of choice to be meaningful, there must be corresponding freedom of thought, conscience, expression, movement and association. Self-determination entails legitimate, lively dissent and testing at the ballot box with frequent regularity.¹⁸³

The recent crackdown by the Chinese Government on the student pro-democratic movement in Tiananmen Square, the massive exodus of East Germans to West Germany, and the pro-democratic movements in many countries with totalitarian governments further prove the truth of the American delegate's statement. Self-determination will always be a continuing right indispensable to the very survival of all human beings, whether the issue at stake is economic or territorial. It is obvious that human rights are not issues to be dealt with once, and then ignored. They must be continually observed in order to preserve the quality of human existence.

Secession

One of the most controversial issues in the realm of self-determination in contemporary international law is regarding when a people has the right to secede.

The right of secession has been, to a great extent, recognized by the international community in the case of colonized peoples. It is important, however, to clarify whether such a right exists in a non-colonial situation.

The right to self-determination has emerged as a powerful weapon against involuntary associations forged by "conquest, forced annexation, subjugation, dynastic union, and colonial expansion."¹⁸⁴ However, the plea of "involuntary association" has not been the only justification for secession, since in many cases associations were voluntary in the beginning but ceased to be so once differences surfaced and assertions of the right to secede were made.

The birth of Bangladesh (formerly East Pakistan) is a good example. British India was divided in 1947, on the basis of religion, into predominantly Moslem Pakistan and predominantly Hindu India. However, while West Pakistan was populated by Urdu-speaking Pakistanis, East Pakistan was made up of Bengali-speaking Bengalis. Subsequently, when differences began to emerge, and human rights violations and economic exploitation became widespread, the Bengalis asserted a claim for self-determination on grounds of linguistic difference and geographical separation. Eventually, of course, they won for themselves the independent country of Bangladesh.

It is important to note that the legitimacy of secession seems to depend upon its eventual success.¹⁸⁵ Otherwise, the larger, existing State will plead maintenance of territorial integrity. One may ask whether the people of a region even has a moral right to secede. In *Leviathan*, Hobbes stated that no matter how oppressive a ruler was, the people had no right to resist him. He based his argument on the notion that the people had "authorized all his actions, and in bestowing the sovereign power, made them their own."¹⁸⁶ However, this view was disputed by Althusius who, on the basis of "the nature of contract, of office and of mandate, the idea of popular sovereignty, the Law of Nature and the Word of God,"¹⁸⁷ argued that even though a

"tyrant" is a ruler upon whom the people may be presumed to have legitimately bestowed the power to rule, if he subsequently breaks his promises to them, they have the right to treat him as a "public enemy" and to drive him away.¹⁸⁸ Then he went on to support secession on the grounds of (a) self-defence from imminent danger, (b) protection of one's provinces against tyranny, and (c) the breach of any of the provisions of the contract of union.¹⁸⁹

It is sometimes argued that the right to self-determination becomes more clear with a demand for territorial self-determination or secession,¹⁹⁰ especially when a people lives under colonial domination and finally decide to form an independent State. Is there any particular method or test by which a group may be viewed by the international community as exercising a legitimate right of self-determination?¹⁹¹

Kamanu's approach to this question is quite interesting. It is based upon the Wilsonian conception of self-determination, whereby one must determine whether the nation demanding Statehood will be able to perform its duties and obligations as a State.¹⁹² This interpretation is somewhat dangerous since it could give rise to claims of independent statehood from virtually every small ethnic group in Asia and Africa. Although many of these would be economically viable on their own, several enjoy the same rights and access to facilities as the ruling group in their State. Should they claim independent Statehood, it could unjustifiably threaten international peace and security.¹⁹³ Kamanu rules out any secessionist movement on the ground that it might challenge and weaken "the legitimacy of the multi-national [or multi-racial] state."¹⁹⁴ This latter approach, though, sacrifices the protection of minority rights for maintenance of the status quo.¹⁹⁵ It is submitted that an exception should be made for nations that had independent Statehood once, but were subsequently forcefully annexed by other States, as was the case with Hawaii and the Baltic States. Such peoples did not choose, and are therefore not responsible for, their present political status. They should be viewed as having a very special status in the international community, even though they are now part of other States. They should

be regarded as "floating nations."

Kamanu also argues that separatist demands can be assuaged through the "timely accommodation of ... dissident groups."¹⁹⁶ He believes that the mere fact of cultural, racial or linguistic distinctness is not enough, in and of itself, to support a claim of separate Statehood, but that such a claim must be based on "definite and substantial grievances."¹⁹⁷

How do we know which demands are based upon such grievances? It is submitted that the following may be regarded as "definite and substantial grievances" in support of a secessionist claim:

- 1) denial of the right to physical existence;
- 2) denial of racial equality;
- 3) economic exploitation;
- 4) forceful annexation through threat and/or aggression;
- 5) annexation through unequal treaty.

The presence of one or more of the above circumstances justifies a claim to a right of external self-determination, primarily in cases of subjugation by a foreign power. In contemporary international relations, the political existence of a State or government depends on how it treats its own people. This becomes clear by reading Articles 1 and 2 of the Declaration on Granting of Independence together with Article 3 of the Declaration.¹⁹⁸ Together, these Articles state that "[a]ll peoples have the right to self-determination"¹⁹⁹ who are under "alien subjugation, domination and exploitation"²⁰⁰ including "Trust and Non-Self-Governing Territories... which have not yet attained independence."²⁰¹ Those territories must be permitted to "freely determine their political status and freely pursue their economic, social and cultural development."²⁰² By the phrase "freely determine their political status," international law guarantees the right of Statehood to peoples living under alien subjugation and colonial domination, or in trust or non-self-governing territories. On the other hand, the Declaration on Friendly Relations imposes a duty upon the

international community, stating that :

Every State has the duty to refrain from any forcible action which deprives peoples referred to... of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.²⁰³

The above Declaration thus legitimizes the struggle for self-determination for peoples who are under alien subjugation. It also provides them with the right to seek and receive support from other States. Article 29 of the Algiers Declaration reinforces this concept by stating that "[l]iberation movements shall have access to international organizations and their combatants are entitled to the protection of the humanitarian law of war."²⁰⁴ The relevant point is that any secessionist movement must be carefully examined before any support is rendered. Reckless support of secessionist movements would dangerously threaten international peace and security. Once a secessionist movement has been determined to be legitimate, however, it behooves the international community to accord it full recognition and support.

Conclusion

"Rights are claims that have achieved a special kind of endorsement or success: legal rights by a legal system; human rights by a widespread sentiment or an international order."²⁰⁵ Today the right to self-determination has become the legal framework for human existence, and overrides some of the most important provisions of the United

Nations Charter. This has been recognized by Michla Pomerance:

Within the U.N., self-determination is viewed by the majority as a kind of "supernorm," a principle which has been lifted from the realm of politics and morality to the very pinnacle of legal rules. According to this perspective, even the linchpin of the U.N. Charter, the principle prohibiting the threat or use of force in international relations (art 2, para 4), may be overridden in the name of the more sacred "right of self-determination."²⁰⁶

Pomerance's assertion is supported by the fact that Article 20(2) of the African Charter on Human and Peoples Rights states that "[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."²⁰⁷ The phrase "resorting to any means" implicitly refers to the struggle for independence by either "colonized" or "oppressed peoples." The presence of the word "or" is, prima facie, an indication that colonized peoples are generally oppressed peoples as well. "Oppressed peoples" may also refer to peoples oppressed by their own governments. To free themselves from either condition, people have the right to resort to "any means recognized by the international community," even to armed resistance.

Although the United Nations Charter neither defines self-determination nor addresses its legal status, a careful reading of that document suggests that it regards self-determination as a right. For example, Articles 1(2) and 55 speak of the development of friendly relations on the basis of equality and of rights of self-determination. Through Article 56, a "pledge" has been made by the "member" states to take joint and separate actions for the purposes set forth in Article 55. This pledge of action demonstrates that an international obligation has been accepted in respect of "equal rights and self-determination of peoples."²⁰⁸ Today, the concept of self-determination has come to include the right of a group to permanent

sovereignty over natural resources,²⁰⁹ since such sovereignty is a "basic constituent of the right to self-determination."²¹⁰ The right to self-determination is thus a continuous struggle for the betterment of the human condition and may arise in different forms at different times. As Marie put it, "[s]elf-determination cannot simply be conceived as a right exercised once and for all at a given point in history..."²¹¹

Is there any difference between human rights, peoples' rights and minority rights? Human and peoples' rights are basically the same thing. They are possessed by the members of both majority and minority groups in a country. Minority rights are expressly accorded by Article 27 of the International Covenant on Civil and Political Rights to any particular "ethnic, religious or linguistic"²¹² minority. Can these people opt for external self-determination if their call for internal self-determination goes unheeded? This question was, to a certain extent, answered by Brownlie when he stated that

[t]he issues of self-determination, the treatment of minorities and the status of indigenous populations are the same and the segregation of topics is an impediment to fruitful work.²¹³

Brownlie disdains the granting of special treatment to minorities or indigenous peoples when questions of self-determination arise. In his view, people are people, whether they form a majority or a minority, a new population or an indigenous group. This leads to the interpretation that Article 27 of the Covenant on Civil and Political Rights is redundant for the purpose of the determination of "self." Brownlie finds the treatment of minorities and the status of indigenous peoples to be an integral part of the issue of self-determination. Self-determination can sometimes be sought by a majority group, if that group is being dominated by a more powerful minority group, as is the case in South Africa. On the other hand, Brownlie's test could permit new immigrants to a country to claim minority status, and with it a right

to self-determination for the purpose of maintaining and preserving their culture, identity, and political and economic rights. Where do we draw the line? The answer may be found in Article 25 of the Covenant on Civil and Political Rights, which states:

Every citizen shall have the right and the opportunity...

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.²¹⁴

In addition to the human rights recognized by Article 27 of the Covenant on Civil and Political Rights, minorities are guaranteed rights as citizens of the State by Article 25. However, paragraph (a) of Article 25 may actually act as an impediment to minorities in their quest for recognition of their rights, rather than securing their distinct identity in the society. The problem arises because of the right "[t]o take part in the conduct of public affairs..."²¹⁵ As James Crawford has noted,

[w]here the group is a small minority within the State, the right to participate in public affairs on this basis is likely to be a recipe for assimilation, for the extinction of the group as a community, irrespective of its wishes.²¹⁶

Whether this is an exaggeration will depend on the group and on the context. For example, Palestinians are scattered in small groups throughout the Arab States, often enjoying the protection of these States as citizens. Even though they are treated as

citizens and carry passports of those States, they retain their identity as Palestinians. A similar arrangement has been made with some of the indigenous groups of Canada, e.g., the Iroquois Confederacy. The point is that if a State permits its minorities to maintain their own distinct identity and heritage, and if they have the will to do so, assimilation need not take place. When the rights necessary for the maintenance of their identity are denied and reckless violations of their rights are sponsored by the State, a ground for resistance arises that can ultimately lead to a claim for secession. A claim for secession will be legitimate once all efforts at accommodation have failed and it has become clear that there is no hope of the dominant and seceding groups ever living together in peace.²¹⁷ This situation will be discussed in greater detail in Chapter III.

It should be noted that the right to external self-determination sometimes appears to be operative only in cases of inter-racial, and not intra-racial, domination.²¹⁸ The Biafran War serves as an example of this.²¹⁹ This conclusion is controversial because, in the Biafran case, although the members of both the majority and the seceding groups were black, they had different tribal affiliations.

Another important aspect of self-determination is political cession, e.g., the will of a group of people to join other groups, such as the desire of the people of West Bengal to join Bangladesh. Another example would be the desire of the people of Soviet Azerbaijan to be united with Iranian Azerbaijan or of the Kurds of Turkey, Iran and Iraq to become an independent nation. This has been recognized by the Declaration on Friendly Relations, which states:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.²²⁰

Finally, the right to self-determination gives the power of choice to the people whether to stay or to separate. This has emerged as an absolute right of the people, one that may always be asserted against their own State.

The next chapter deals with the reasons that can give rise to the right of self-determination. What this chapter has accomplished is to define self-determination as a human right. This has been further clarified by setting out the conditions under which a group may be considered a "people" justified in exercising this right. The right to self-determination has been further established as a peremptory norm of international law. It has also been established that denial of the right to internal self-determination leads logically to a legitimate claim for external self-determination. This principle holds no matter how much time elapses between the claims for internal and external self-determination, as the right to self-determination is a continuing right, and not one to be exercised once and for all.

This also provides the justification for secession -- which is simply a case of external self-determination -- provided the people seeking independence have a valid claim. On the whole, then, this chapter establishes self-determination as a basic human right and sets out the conditions under which that right may be exercised.

Endnotes

1. Maritain, THE RIGHTS OF MAN AND NATURAL LAW 65 (1943).
2. Vasak, Human Rights: As a Legal Reality, in Vasak (ed.), 1 THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS 5 (1982) [hereinafter cited as Vasak, Human Rights].
3. See Article 3 of the Atlantic Charter, reprinted in RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER (APPENDIX B) 975 (1958).
4. CHARTER OF THE UNITED NATIONS. Done at San Francisco, June 26, 1945. 59 Stat. 1031 T.S. No.993. 3 Bevans 1153, 1976 Y.B.U.N. 1043.
5. Id.
6. U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 360(1967) [hereinafter cited as Covenant on Economic, Social and Cultural Rights].
7. U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16)52, U.N. Doc.A/6316 (1967), reprinted in 6 I.L.M. 368 (1967) [hereinafter cited as Covenant on Civil and Political Rights].
8. Covenant on Civil and Political Rights, id. Covenant on Economic, Social and Cultural Rights, supra, note 6.
9. Declaration on the Granting of Independence to Colonial Countries and Peoples. U.N.G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No.16) 66, U.N. Doc. A/4684 (1961) [hereinafter cited as Declaration on the Granting of Independence].
10. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No.28) 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970) [hereinafter cited as Declaration on Friendly Relations].
11. Id.

12. Article 2 of the Declaration on the Granting of Independence reads:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Supra, note 9. Also see Article 1(1) of both the Covenants. supra, notes 6 and 7.

13. CASSESE, POLITICAL SELF-DETERMINATION -- OLD CONCEPTS AND NEW DEVELOPMENTS, in CASSESE, UN Law/Fundamental Rights: Two Topics in International Law 142-143 (1979).

14. Id. at 143.

15. Id.

16. Article 1(1) of both the Covenants, supra, notes 6 and 7.

17. See Ramphal, KEY-NOTE ADDRESS, in DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW 9-10 (Report of a Conference held in The Hague 27 April -- 1 May, 1981. Convened by the International Commission of Jurists) [hereinafter cited as Ramphal, Key-Note Address].

18. Reproduced in ROBERTSON, HUMAN RIGHTS IN THE WORLD 12 (1972).

19. Id. at 14. Also see SIEGHART, The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights 23 (1985) [hereinafter cited as Sieghart, The Lawful Rights of Mankind]. This concept of peoples' rights went a step further in 1581 when a number of subjects of King Philip II of Spain met and asserted that:

God did not create the subjects for the benefit of the Prince, to do his bidding in all things whether Godly or ungodly, right or wrong, and to serve him as slaves but the Prince for the benefit of the subjects, without which he is no Prince.

Reproduced id.

20. COBBAN, NATIONAL SELF-DETERMINATION 5 (1945).

21. Id.

22. Milne, HUMAN RIGHTS AND HUMAN DIVERSITY: An Essay in the Philosophy of Human Rights 89 (1986) [hereinafter cited as Milne, Human Rights and Human Diversity].

23. Ramphal, Key-Note Address, supra, note 17, at 10.

24. Id.

25. CRANSTON, WHAT ARE HUMAN RIGHTS? 36 (1963).

26. See Bentham, A Fragment on Government, at 4.19 (1931); Kelsen, Principles of International Law, at 310-311 (1952). Austin, The Province of Jurisprudence Determined, at 102 (1954).

27. Ramphal, Key-Note Address, supra, note 17.

28. Reproduced in Singh, ENFORCEMENT OF HUMAN RIGHTS 2 (1986).

29. Id., at 1.

30. See, e.g., DROST, HUMAN RIGHTS AS LEGAL RIGHTS 11 (1965).

31. Singh, Enforcement of Human Rights, supra, note 28, at 2.

32. VYVER, THE CONCEPT OF HUMAN RIGHTS: ITS HISTORY, CONTENTS AND MEANING, in Forsyth and Schiller (ed.), HUMAN RIGHTS: THE CAPE TOWN CONFERENCE at 11 (Proceedings of the First International Conference on Human Rights in South Africa 22-26 January, 1979) [hereinafter cited as Vyver, The Concept of Human Rights].

33. Id. According to Locke, it was the duty of the sovereign to act as a trustee of the subjects in order to safeguard their "natural rights." In case of a failure of the sovereign to do so, the subjects could enter into a contract with another sovereign. This happened with James II, the last Stuart King. Id., at 12. Also Pagels, THE ROOTS AND ORIGINS OF HUMAN RIGHTS, in Henkin (ed.), HUMAN DIGNITY: The Internationalization of Human Rights 6 (1979); cf. Wyzanski, THE PHILOSOPHICAL BACKGROUND OF THE DOCTRINES OF HUMAN RIGHTS, id. at 10.

34. African Charter on Human and Peoples' Rights, adopted June 27, 1981. O.A.U. Doc.

CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 59 (1982).

35. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. Done at Rome, Nov. 4, 1950. Entered into force, Sept. 3, 1953. Europ. T.S. No 5.

36. BOYLE, Practice and Procedure on Individual Applications under the European Convention on Human Rights, in Hannum (ed.), Guide to International Human Rights Practice 133 (1984).

37. OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. Opened for signature, Dec. 19, 1966. Entered into force, March 23, 1976. U.N.G.A. Res. 2200 (XXI), 21 GAOR, Supp. (No. 16)59, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 383 (1967).

38. UN-Human-Rights Committee (UN-HRCee), Geneva/New York. Decision of July 30, 1981-- Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.6/24 -- Submitted by: Sandra Lovelace -- Date of Communication: 29 December 1977 -- State party concerned: Canada. Reproduced in 2 Hum. Rts. L.J. 158 (1981).

39. Id., at 167.

40. Szabo, Historical Foundations of Human Rights and Subsequent Developments, in Vasak (ed.), 1 THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS 11 (1982) [hereinafter cited as Szabo, Historical Foundations of Human Rights]. Nowadays it is possible to bring human rights grievances before the United Nations. Under the United Nations Economic and Social Council Res. 1503, the Sub Commission on Discrimination may take note of any alleged human rights violation and notify the Commission on Human Rights. BILDER, THE STATUS OF INTERNATIONAL HUMAN RIGHTS LAW: AN OVERVIEW, in INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE 12 (Published by the American Bar Association, 1978) [hereinafter cited as Bilder, The Status of International Human Rights Law]. Also see Fonseca, How to File Complaints of Human Rights Violations: A Practical Guide to Intergovernmental Procedures (1975).

41. Szabo, Historical Foundations of Human Rights, id. at 15.

42. Id.

43. Id.

44. Id.

45. Quoted in Id., at 16.

46. The primacy of international law is made clear in the following remark of Professor Kunz:

The primacy of the law of Nations means that the supra-ordination of the international juridical order to the municipal juridical orders of the single States, means that the 'sovereign States' are delegated partial juridical orders of the international juridical order, means that the pyramid of the law does not end with the basic norm of the juridical order of a given single state, but that at the top of the pyramid of law stands the international juridical order...

Kunz, The 'Vienna School' and International Law, 11 N.Y.U.L.Q. Rev. 402 (1934).
Professor Kunz further states:

The peers in England are 'equal' because they were all in the same way subordinated to the King; all men are equal before God or before the law, because they are all subordinated in the same way to God or to the law; all States are 'equal', because they are all subordinated in the same way to international law.

Id., at 401.

47. VEATCH, HUMAN RIGHTS: FACT OR FANCY? 7 (1985).

48. Drost, Human Rights as Legal Rights, supra, note 30, at 16.

49. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

50. Id., at 407-408. Also see Marshall, REFLECTIONS ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, in 101 HARV. L. REV. 1 (Number 1, 1987-88). The

Cherokee cases indicate that American Indians were not protected by the Constitution either. See the comments made by Samuel, in Caine, THE INFLUENCE ABROAD OF THE UNITED STATES CONSTITUTION ON JUDICIAL REVIEW AND A BILL OF RIGHTS, 2 TEMPLE INT'L & COMP. L.J. 73 (Number 1, 1987-88) [hereinafter cited as Comments by Samuel].

51. Somerset v. Stewart, 20 St. Tri. 1 (1772).

52. Id. See also Comments by Samuel, supra, note 50.

53. Id.

54. Drost, Human Rights as Legal Rights, supra, note 30, at 16-17.

55. Id., at 102.

56. Bilder, The Status of International Human Rights Law, supra, note 40, at 1. Also see PETTMAN, TEACHING FOR HUMAN RIGHTS 34-35 (1984).

57. Bilder, The Status of International Human Rights Law, supra, note 40, at 1.

58. See LAING, INTERNATIONAL ECONOMIC LAW AND PUBLIC ORDER IN THE AGE OF EQUALITY, in 12 LAW & POL'Y IN INT'L BUS. 734 (1980).

59. UNIVERSAL DECLARATION OF HUMAN RIGHTS, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). Some of the provisions of the Declaration have achieved the status of jus cogens in international law. From 1958 to 1972, references to the Universal Declaration of Human Rights were made in 25 new national constitutions and 8 legislative acts. SIEGHART, INTERNATIONAL LAW OF HUMAN RIGHTS 53, note 9 (1983). Professor McDougal says that the norms set out in the Universal Declaration of Human Rights have "become customary international law and thus a part of the law of nations." Professors Falk and Lillich expressed similar opinions. See their affidavits in the case of Filartiga v. Pena-Irala, 79-cv-9-917 (E.D.N.Y., 1979) (On file in Second Circuit Library). Also see 630 F.2d. 876 (1980).

60. Vyver, The Concept of Human Rights, supra, note 32, at 19.

61. Id.

62. Id.

63. Vasak, A 30-Year Struggle, in UNESCO Courier at 29 (Nov. 1977). Also see Mestdagh, THE RIGHT TO DEVELOPMENT: FROM EVOLVING PRINCIPLE TO 'LEGAL' RIGHT: IN SEARCH OF ITS SUBSTANCE, in DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW, at 148 (Report of a Conference held in The Hague on 27 April - 1 May 1981, Convened by the International Commission of Jurists) [hereinafter cited as Mestdagh, The Right to Development].

64. Vasak, *id.* Also see Mestdagh, *id.*

65. For more on the right to peace, see Nanda, NUCLEAR WEAPONS AND THE RIGHT TO PEACE UNDER INTERNATIONAL LAW, in 9 BROOK. J. INT'L L. 283 (1983); ROSTOW, PEACE AS A HUMAN RIGHT, in 4 N.Y.L. SCH. J. INT'L & COMP. L. 215 (1982-83).

66. Sakharov, A Letter From Exile, N.Y. Times Magazine, June 8, 1980, at 3.

67. See, e.g., Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they Live, U.N. Doc. E/CN.4/Sub.2/392/Rev.1 (1980); Draft International Convention on the Protection of the Rights of all Migrant Workers and their Families, U.N. Doc. A/C.3/36/10 (1981). Also see LILLICH, The Human rights of aliens in contemporary international law 121-124 (1984).

68. Milne, Human Rights and Human Diversity, *supra*, note 22, at 169-170.

69. *Id.*, at 170.

70. Sieghart, The Lawful Rights of Mankind, *supra*, note 19, at 27.

71. *Id.*

72. Ratushny, CONTEXTUAL AND FUNCTIONAL DIMENSIONS OF HUMAN RIGHTS: A CANADIAN PERSPECTIVE. (Paper prepared for the Conference on Peoples' Rights organized by the Center for International Legal and Economic Studies of the Zagazig University, Cairo, Egypt, November 25, 1985; to be found at the Institute of Human Rights Research and Education Center, University of Ottawa)

73. Szabo, Historical Foundations of Human Rights, *supra*, note 23, at 18. According to T. Boven, "Collective rights par excellence are the rights of minorities with a view to preserving and developing their characteristics and the right of peoples to self-determination." Boven, Distinguishing Criteria of Human Rights, in Vasak (ed.), 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 55 (1982).

74. Sieghart, *International Law of Human Rights*, supra, note 59, at 367-378. Also see CRAWFORD, *The Rights of Peoples: 'Peoples' or 'Governments'?*, in CRAWFORD (ed.), *The Rights of Peoples* 56-57 (1988).

75. Crawford, id., at 57.

76. Id.

77. Boven, *Distinguishing Criteria of Human Rights*, supra, note 73.

78. Ghazali, *Opposition to violations of human rights, with particular reference to apartheid, racism and general international law*, in Unesco, *Violations of human rights: possible rights of recourse and forms of resistance* 71(1981) [hereinafter cited as Ghazali, *Violations of Human Rights*].

79. Id. Also see Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in 1 Vasak (ed.), *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 11 (1982)

80. Cristescu, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination*, E/CN.4/Sub.2/404/Rev.1, at 41.

81. MAKINSON, *RIGHTS OF PEOPLES: Point of view of a Logician*, in CRAWFORD (ed.), *The Rights of Peoples* 74-75 (1988) [hereinafter cited as Makinson, *Rights of Peoples*].

82. Id., at 75.

83. Id. Sometimes the concept of 'peoples' gets mixed up with the concept of State. These are two different 'abstractions.' Id. at p.73. Also see Cristescu, *The Right to Self-Determination: Historical and Current Development on the basis of United Nations Instruments* (UN Doc. E/CN.4/Sub 2/404/Rev.1, 1981, para 266).

84. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. Adopted by the U.N. General Assembly, Dec. 9, 1948. Entered into force, Jan. 12, 1961. 78 U.N.T.S. 277.

85. HERTZ, *NATIONALITY IN HISTORY AND POLITICS: A PSYCHOLOGY AND SOCIOLOGY OF NATIONAL SENTIMENT AND NATIONALISM* 240 (1951).

86. Cristescu, THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENTS ON THE BASIS OF UNITED NATIONS INSTRUMENTS, United Nations, at para 279 (1981) (Sales No. E80.xiv.3).

87. UNITED NATIONS, Report of the Tenth Session of the Commission on Human Rights, 18 ESCOR Supp. 7, UN Doc.E/2573 at 48-49 (1954).

88. SOHN, The Rights of Minorities, in Henkin (ed.), THE INTERNATIONAL BILL OF RIGHTS: The Covenant on Civil and Political Rights 279 (1981).

89. Id.

90. Covenant on Civil and Political Rights, supra, note 7.

91. Id.

92. Covenant on Economic, Social and Cultural Rights, supra, note 6.

93. Mazrui, TOWARDS A PAX AFRICANA: A Study of Ideology and Ambition 14 (1967). Mazrui elaborated on this concept by stating:

For many nationalists in Africa and Asia the right to sovereignty was not merely for nation-states recognizable as such in a Western sense but 'peoples' recognizable as such in a racial sense, particularly where differences of colour were manifest... It is from this fundamental consideration that there emerges not so much national sovereignty as racial sovereignty in terms at least of the colour of the skin. It was on the basis of such sovereignty that Nkrumah could say: "I am most happy about India's annexation of Goa, which I consider long overdue." It must have been on similar assumptions of the inherent sovereignty of each race that many other leaders in Asia and Africa supported Nehru's action on Goa.

Mazrui, Id. at 33-34 [hereinafter cited as Mazrui, Towards a Pax Africana]

94. Eide, Internal Conflicts under International Law: Focus on Ethnic Conflict.

Minority Rights and Human Rights, in 18 Bull. Peace Prop. 317 (No.4, 1987).

95. Id.

96. Id.

97. GRECO-BULGARIAN COMMUNITIES CASE, P.C.I.J. ser. B, No.17, at 21 (1930), reproduced in HABRO, THE CASE LAW OF THE INTERNATIONAL COURT 287 (1961).

98. Id.

99. See the statement made by the Yugoslav Government on the "subjective factor" of defining minority. Reproduced in Capotorti, Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. UN Docs. E/CN.4/Sub. 2/384 and Add 1-7 (1977); reprinted in UN Doc.E/CN.4/Sub. 2/384 (Rev. 1 1979); UN Pub. E.78.xiv.1. at 8-9.

100. SECRETARIAT OF THE INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN EAST PAKISTAN 70 (1972).

101. CARTER, Ethnic Minority Groups and Self-Determination: The Case of Basques, in 20 Col. J. L. and Soc. Prob. 62 (No.1, 1986).

102. Id.

103. Suzuki, Self-Determination and the World Public Order: Community Response to Territorial Separation, in 16 Va. J. Int'l L. 814 (1976).

104. Forbes, DO TRIBES HAVE RIGHTS? THE QUESTION OF SELF-DETERMINATION FOR SMALL NATIONS, in 18 J. Hum. Rel. 676 (1970).

105. Id.

106. Id., at 678. Also see FRANCK, THE RIGHT OF SELF-DETERMINATION IN VERY SMALL PLACES, in 8 N.Y.U.J. Int'l L. and Pol. 331 (1975).

107. Pomerance, SELF-DETERMINATION TODAY: THE METAMORPHOSIS OF AN IDEAL, in 19 ISRAEL L. REV. 312 (No.3-4, 1984) [hereinafter cited as Pomerance, Self-Determination Today].

108. The statement made by the U.S. Under-Secretary for Foreign Affairs in the West

German Bundestag on September 28, 1956 was as follows:

The right to ... self-determination ... being a constant element in various acts of international law, belongs to the unchangeable and inviolable human rights which are the real expressions in the whole free world of true democracy ... and form the basis of any human peaceful and just community.

Quoted in LESNIEWSKI, SELF-DETERMINATION AS A SMOKE SCREEN FOR OSTOPOLITICK 51 (1963).

109. Declaration on the Granting of Independence, supra, note 9.

110. Id.

111. Id.

112. Brownlie, Principles of Public International Law 187 (2nd ed. 1973).

113. Richardson, Self-determination of the South African Bantustan Policy, 17 Col. J. Transnat'l L. 203 (1978).

114. Reisman, The Case of Western Somaliland: An International Legal Perspective, in McDOUGAL AND REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 164 (1980).

115. Article 10 of the United Nations Charter, supra, note 4.

116. Schachter, THE RIGHT OF STATES TO USE ARMED FORCE, 82 MICH. L. REV. 1622 (1984). Judge Elias, former President of the International Court of Justice, concludes his discussion of General Assembly and Security Council Resolutions by quoting an observation made by the noted British publicist J.E.S. Fawcett:

The fact that ... all General Assembly Resolutions are formal recommendations only, does not prevent a few resolutions from embodying directive principles of agreed standards, which may, by reason of their content, purpose and form of

adoption, secure as great international observance as a treaty, that the provisions of such resolutions do not rank as legal obligations is then immaterial.

Quoted by Elias, *Modern Sources of International Law*, in Friedman, Henkin and Lissitzyn (eds.), *Transnational Law in a Changing Society* 45-52 (1972).

F. Vallat maintains that it is a "moot" point whether the General Assembly can enact legal norms and argues that

there is always likely to be a strong presumption that action taken by a state in accordance with a recommendation of the General Assembly is lawful. The legal effect of a resolution in this respect may be of the greatest significance in the context of the maintenance of peace and security, if the Security Council fails to take any action to deal with a breach of the peace, and the Assembly recommends measures, for the purpose of restoring the peace, to be taken by Member States against one and in support of the other in the conflict.

Vallat, *The Competence of the United Nations General Assembly*, in 97 Rec. des Cours, (Vol.II) 231 (1959).

117. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion 31 (1971) (21 June, 1971) [hereinafter cited as *Namibia Advisory Opinion*].

118. Id., at 31.

119. Western Sahara Case, Advisory Opinion, I.C.J., at 54-59 (1975).

120. *Namibia Advisory Opinion*, supra, note 117, at 31.

121. Id., at 77-78.

122. Case Concerning the Barcelona Traction, Light and Power Co., I.C.J. 304 (1970).

123. Id.

124. United Nations Charter, supra, note 4.

125. Id.

126. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS. (PART II) 101-102 (1963).

127. Bokor-Szego, New States and International Law 26-27 (1970). Bokor-Szego concluded:

While the right of self-determination has become a rule of positive international law through its incorporation in the U.N. Charter, the particular rules on the content of this right and the resulting responsibilities of states have been evolved, through custom, by state practice observing the Charter and making up in this way for the deficiency originating from the lex imperfecta character of the relevant provisions of the United Nations Charter.

Id.

128. Declaration on Friendly Relations, supra, note 10. The seven principles are:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

(d) The duty of States to co-operate with one another in accordance with the Charter.

(e) The principle of equal rights and self-determination of peoples.

(f) The principle of sovereign equality of States.

(g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community and promote the realization of the purposes of the United Nations.

Id. The rapporteur of the Committee on Friendly Relations commented:

Nearly all representatives who participated in the debate emphasized that the principle was no longer to be considered a mere moral or political postulate; it was rather a settled principle of modern international law. Full recognition of the principle was a prerequisite for the maintenance of international peace and security, the development of friendly relations and co-operation among states, and the promotion of economic, social and cultural progress throughout the world.

U.N. Doc. A/AC-125/L.53 Add.3, at p.9 (1967). Hector Gros Espiell stated in respect of the above principles that:

[t]he consequences and the corollaries which are set out in a heterogeneous manner under each of these principles in the Declaration adopted in Res. 2625 (XXV), the principles themselves constitute contemporary international law [and] are rules of

jus cogens.

Espiell, SELF-DETERMINATION AND JUS COGENS, in CASSESE (ed.), UN LAW/Fundamental Rights: Two Topics in International Law 169 (1979).

129. Ghazali, Violations of Human Rights, supra, note 78.

130. Gross, The Right of Self-Determination in International Law, in Kilson (ed.), New States in the Modern World 137 (1975). Also see Emerson, Self-Determination, 65 A.J.I.L. 460-461 (1971).

131. Gross, id., at 141-142.

132. GROSS, THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW, in GROSS, I ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 273-274 (1984).

133. Declaration on the Granting of Independence, supra, note 9.

134. Id.

135. The Breznev Doctrine was briefly described as follows:

1. A dispute within the Socialist "family" or "commonwealth" of Eastern Europe must be resolved within that grouping and not by or in the United Nations.
2. A member of the family of Socialist states must limit its sovereignty to conform to the requirements of the grouping.
3. The family of Socialist states may use force, even military force, by way of collective self-defense against any attempt to divert a member of the Socialist Commonwealth from orthodox conformity.

Franck, WHO KILLED ARTICLE 2(4)? OR: CHANGING NORMS GOVERNING THE USE OF FORCE BY STATES, 64 A.J.I.L. 832 (1970) [hereinafter cited as Franck, Who Killed Article 2(4)?]

136. The seventh annual message of President Monroe, delivered December 2, 1823, stated, inter alia:

At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg to arrange, by amicable negotiation, the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal had been made by his Imperial Majesty to the government of Great Britain, which has likewise been acceded to. The government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with his government. In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been adjudged proper for asserting, as a principle, in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.

Reprinted in STOCKTON, THE MONROE DOCTRINE AND OTHER ADDRESSES 1-2 (1898).

137. The Johnson Doctrine states that "American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere." Statement made by President Johnson, May 2, 1965, 52 Dept. of State Bulletin 746 (1965). Compare this with the Reagan Doctrine, which holds that "the United States would resist, by unilateral use of force if necessary, the direct or proxy penetration of Soviet power in predesignated geographical areas." Reisman, Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice, 13 YALE J. INT'L L. 172 (Number 1, 1988). The Reagan Doctrine is

also known as the "critical defense zone" policy. *Id.* Also see Reisman, Critical Defense Zones and International Law: The Reagan Codicil, 76 A.J.I.L. 589 (1982).

138. Franck, Who Killed Article 2(4)?, *supra*, note 135, at 811.

139. *Id.*, at 835. Also see Lippman, FIRST STRIKE NUCLEAR WEAPONS AND THE JUSTIFIABILITY OF CIVIL RESISTANCE UNDER INTERNATIONAL LAW, 2 TEMPLE INT'L & COMP. L.J. 156 (Number 2, 1988).

140. Shevchenko stated:

[T]he refusal to abandon support for national liberation movements as a weapon against the Western Powers, and persistent efforts by the Kremlin to penetrate the nations of the Third World for the purpose of luring them into its orbit, imply a willingness to project Soviet military power over globe and risk, if necessary, conventional wars...

SHEVCHENKO, BREAKING WITH MOSCOW 288 (1985). Also see Reisman, Criteria for the Lawful Use of Force in International Law, 10 YALE J. INT'L L. 280 (1984-85).

141. *Id.*, at 281-282.

142. U.N.G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31)50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 231 (1975).

143. U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No.31)142, U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974).

144. U.N.G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR, Supp. (No.1)3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974).

145. African Charter on Human and Peoples' Rights, *supra*, note 34. The right to self-determination is also proclaimed in the Declaration on Social Progress and Development, G.A. Res. 2543 (XXIV), 24 U.N. GAOR Supp. (No. 30), U.N. A/7603 (1969); the Resolutions on the International Development Strategy for the Second United Nations Development Decade and on the Establishment of a New International Economic Order, G.A. Res. 2626 (XXV), 25 U.N. GAOR Supp. (No.1), U.N. Doc. A/9559 (1974); the Declaration on the Inadmissibility of Intervention in the Domestic Affairs

of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), 20 U.N. GAOR Supp. (No.14), U.N. Doc. A/6014 (1965), and in the various other instruments.

146. See the studies done by Cristescu, *The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter*, (E/CN.4/Sub.2/L.641), and Espiell, *Implementation of U.N. Resolutions relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*, (E/CN.4/Sub.2/390). Also see Espiell, *Self-Determination and Jus Cogens*, supra, note 90. Espiell remarked regarding the status of the right:

In present day legal theory the idea that self-determination is a case of jus cogens is widely supported, whether because it is held that the character of jus cogens is an attribute of the principle of self-determination of peoples or because it is considered that this right, being a condition or prerequisite for the exercise and effective realization of human rights, possesses the character as a consequence thereof.

Id., at 170. Also see Article 37 of the Draft Law of Treaties, in Report of the International Law Commission to the General Assembly on the work of the 15th Session, 2 Y.B. Int'l L. Comm'n, at 198-199 (1963).

147. Article 53 of the Vienna Convention on the Law of Treaties deals with "Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens).² It reads:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law...

VIENNA CONVENTION ON THE LAW OF TREATIES, U.N. Doc. A/CONF. 39/27, at 289, reprinted in 8 I.L.M. 679 (1969).

148. UNGA Res. 2621 (XXV), 25th Sess., Supp. no. 28 (A/8082), at 2.

149. Cassese, *POLITICAL SELF-DETERMINATION -- OLD CONCEPTS AND NEW DEVELOPMENTS*, in CASSESE (ed.), *UN LAW/Fundamental Rights: Two Topics in*

International Law 137 (1979). [Hereinafter cited as Cassese, Political Self-Determination].

150. Id.

151. Id.

152. Id.

153. Mazrui, Towards a Pax Africana, supra, note 93, at 21.

154. The Colombian delegate stated on May 15, 1945:

If it [self-determination] means self-government, the right of a country to provide its own government, yes, we would certainly like it to be included, but if it were to be interpreted, on the other hand, as connoting a withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy and we should not desire that it should be included in the text of the Charter.

Statement made by the Columbian delegate on the principle of self-determination on May 15, 1945 in Commission I, Committee I. VI U.N.C.I.O., at 20. Unpublished Microfilm, quoted in Cassese, Political Self-Determination, supra, note 149, at 138.

155. Mazrui, Towards a Pax Africana, supra, note 93, at 21.

156. Covenant on Economic, Social and Cultural Rights, supra, note 6; and Covenant on Civil and Political Rights, supra, note 7.

157. Id.

158. Covenant on Civil and Political Rights, id.

159. Id.

160. Cassese, Political Self-Determination, supra, note 149, at 144.

161. Id.

161.1. Id. at 155.

162. UNIVERSAL DECLARATION OF THE RIGHTS OF PEOPLES. Adopted by the participants in an international conference of jurists, politicians, sociologists, and economists in Algiers, July 1-4, 1976. Reprinted in 3 Alternatives -- A Journal of World Policy 280 (1977) [hereinafter cited as the Algiers Declaration]. Even though the Algiers Declaration does not have as much weight as a General Assembly Resolution or the Helsinki Declaration, the importance of the Declaration is undeniable.

163. Id.

164. Id.

165. Cassese, Political Self-Determination, supra, note 149, at 156.

166. Id.

167. BUCHHEIT, SECESSION 60-72 (1977).

168. Cassese, Political Self-Determination, supra, note 149, at 164, his note 16.

169. Marks, Principles and Norms of Human Rights Applicable in Emergency Situations, Emergency Situations, Underdevelopment, Catastrophes and Armed Conflicts, in Vasak (ed.), THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 191 (1982).

170. RONEN, THE QUEST FOR SELF-DETERMINATION 10 (1979).

171. Declaration on Friendly Relations, supra, note 10.

172. It is noteworthy that the General Assembly refused to accept the primacy of self-determination in the case of Gibraltar and of the Falkland Islands since these two territories are occupied by the citizens of a colonial power. Blay states that "international law is unclear as to whether such residents are entitled to self-determination." BLAY, SELF-DETERMINATION VERSUS TERRITORIAL INTEGRITY IN DECOLONIZATION, 18 INT'L L. & POL. 463-464 (1986).

173. DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER, May 1, 1974, U.N.G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR, Supp. (No. 1)3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974). Also see PROGRAMME OF ACTION ON THE ESTABLISHED OF A NEW INTERNATIONAL ECONOMIC ORDER, May 1, 1974, U.N.G.A. Res. 3202 (S-VI), 6 (Special) U.N. GAOR, Supp. (No. 1)5, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 720 (1974).

174. G.A. Res. 626, 7 U.N. GAOR Supp. (No.20) U.N. Doc. A/2361 (1952). Also see RESOLUTION ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, December 14, 1962, U.N.G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1963), reprinted in 2 I.L.M. 223 (1963).

175. United Nations Charter, supra, note 4.

176. The issue here is whether the principle of rebus sic stantibus overrides the principle pacta sunt servanda. Buchheit explains the principle of pacta sunt servanda as follows:

Ever since the heyday of the "social contract" theorists in the seventeenth and eighteenth centuries, it has been quite common to characterize a society as a contract either between the constituent citizens and their sovereign, or between the component groups making up the political association. The use of the contractual metaphor in this regard has led to an application of some maxims of contract law to the social condition, among the most important of which is the maxim pacta sunt servanda Once it has been exercised, the theorist would contend, these groups do not retain any residual right of self-determination in the form of an option unilaterally to secede from the society and disrupt its existence.

BUCHHEIT, SECESSION: The Legitimacy of Self-Determination 21 (1978). [Hereinafter cited as Buchheit, Secession].

177. Boven. THE RELATIONS BETWEEN PEOPLES' RIGHTS AND HUMAN RIGHTS IN THE CHARTER, in 7 Hum. Rts. L. J. 184 (1986).

178. Article 21(3) of the Universal Declaration of Human Rights reads:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures.

Universal Declaration of Human Rights, supra, note 59.

179. Id.

180. Levin, The Principle of Self-Determination of Nations in International Law, in SOVIET Y.B. INT'L L. 46 (1962).

181. Algiers Declaration, supra, note 162.

182. Final Act of the Conference on Security and Co-operation in Europe. Helsinki, August 1, 1975. Dep't of State Pub. No. 8826 (Gen'l For. Pol. Ser. 298), reprinted in 14 I.L.M. 1292 (1975).

183. Dep't of State Bulletin, at 741 (No. 1748, 1972).

184. Buchheit, Secession, supra, note 176.

185. Kaur, Self-Determination in International Law, in 10 INDIAN J. INT'L L., at 493 (1970); Nayar, Self-Determination beyond the Colonial Context: Biafra in Retrospect, in 10 TEXAS J. INT'L L. 342-343 (1975). Also see Grotius's view on secession, where he supported it in rare situations. GROTIUS, 2 DE JURE BELLIS AC PACIS LIBRI TRES, Ch. 6, para 4 (Kelsey trans. 1964).

186. HOBBS, LEVIATHAN, (Plamenatz ed.) 233 (1966).

187. Gierke, THE DEVELOPMENT OF POLITICAL THEORY, (Freyd trans.) 46 (1939).

188. Id.

189. Id.

190. Duchacek, *Comparative Federalism: the territorial dimension of politics* 69 (1970).

191. KAMANU, *Secession and the Right of Self-Determination: an O.A.U. Dilemma*, in 12 *J. Mod. African Stud.* 360 (1974). [Hereinafter cited as Kamanu, *Secession and the Right of Self-Determination*].

192. Id.

193. Id.

194. Id.

195. Id.

196. Id., at 361.

195. Id.

198. *Declaration on the Granting of Independence*, supra, note 9.

199. Article 2, Id.

200. Article 1, Id.

201. Article 5, Id.

202. Article 2, Id.

203. *Declaration on Friendly Relations*, supra, note 10.

204. *Algiers Declaration*, supra, note 162.

205. KAMENKA, *Human Rights, Peoples' Rights*, in CRAWFORD (ed.), *The Rights of Peoples* 127 (1988). [Hereinafter cited as Kamenka, *Human Rights, Peoples' Rights*].

206. Pomerance, *Self-Determination Today*, supra, note 75, at 310. The importance of the right to self-determination is rooted in its being a part of human rights. Umozurike states:

The principle of fundamental human rights is as important, or perhaps more so, as that of territorial integrity.

UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 199 (1972).

207. African Charter on Human and Peoples' Rights, supra, note 34.

208. Wright, Recognition and Self-determination, PROC. AM. SOC'Y INT'L L., (48th Annual Meeting) 30 (1954). Also see Sahovic (ed.), PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION 328 (1972).

209. Dolzer, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, in 7 Hum. Rts. L.J. 218 (1986); Also see Banerjee, The Concept of Permanent Sovereignty over Natural Resources: An Analysis, in 8 INDIAN J. INT'L L. 520 (1968).

210. Para. 2 of the Preamble of RESOLUTION ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, U.N.G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. (No.17) 15, U.N. Doc. A/5217 (1963), reprinted in 2 I.L.M. 223 (1963).

211. Marie, RELATIONS BETWEEN PEOPLES' RIGHTS AND HUMAN RIGHTS: SEMANTIC AND METHODOLOGICAL DISTINCTIONS, in 7 Hum. Rts. L. J. 203 (1986).

212. Covenant on Civil and Political Rights, supra, note 7.

213. Brownlie, The Rights of peoples in modern International Law, in 9 BULL. AUST. SOC'Y LEG. PHIL. 117 (1985). Also quoted by Partsch, RECENT DEVELOPMENTS IN THE FIELD OF PEOPLES' RIGHTS, in 7 Hum. Rts. L. J. 182 (1986).

214. Covenant on Civil and Political Rights, supra, note 6.

215. Id.

216. Crawford, ABORIGINAL SELF-GOVERNMENT IN CANADA, (A Research Report for the Canadian Bar Association, Committee on Native Justice) 15 (1988).

217. Kamanu, Secession and the Right of Self-Determination, supra, note 191, at 361.

218. Id., at 356-357.

219. See, e.g., id. at 366-367. Also see the 'domino theory' in this context, i.e. that successful secession in one part of Africa will affect the rest of Africa. Id. at 366.

220. Declaration on Friendly Relations, supra, note 10.

Chapter III

Primary Elements in a Claim to the Right to Self-Determination

Introduction

In contemporary international relations, the violation of human rights is a principal reason why a people will claim the right to self-determination. Another important reason is the unsettled political status of a people living in a certain territory. It is submitted that one of the following circumstances will most often be found to underlie a claim for self-determination:

- a) genocide;
- b) racial discrimination / forceful separation;
- c) denial of the preservation of separate identity; or
- d) annexation through unequal treaties.

Of these, genocide probably ranks as the most important. Genocide is human carnage carried out with a view to destroying, in whole or in part, a group of people. Racial discrimination is the denial to a particular race of people the same rights and privileges and the same access to public facilities and institutions as is enjoyed by the rest of the population. Racism has different faces: it may be overt or covert. Racial discrimination and genocide are closely related. Racial discrimination is often the first step towards the commission of genocide.

Genocide, however, can also take place within a racial group. It can be committed along political and religious lines, as witnessed by the nineteenth-century genocide of Armenians by the Turks or the twentieth-century genocide of the Jews by Nazi Germany.

Sometimes the dominant group in a State practises racial discrimination for the avowed purpose of maintaining its racial or other purity. Often this can lead to forceful separation of the oppressed group. One of the most extreme forms of racial discrimination, and one which includes forceful separation, is the system of apartheid or separate development currently in place in South Africa. Although

forceful separation and external self-determination achieve similar results, the former involves the imposition of independence or separation by force, while the latter involves a people's voluntary attainment of a separate and independent State for the purpose of maintaining its separate identity. The attempted cession to Swaziland of the South African "homeland" of Kangwane is an example of forceful separation.

A group's claim to the right to self-determination can develop from a desire to preserve, and denial by the State of the chance to preserve, its identity as a separate and distinct unit, including the maintenance of its cultural heritage. The instinct for cultural self-preservation is a powerful one. In Canada, for example, it has led aboriginal peoples to demand self-government. Similar demands are being made in every country where aboriginal peoples exist, in defiance of the assimilation policies of the governments of many of those countries.

Apart from aboriginal peoples, linguistic minorities, such as the French-Canadians in Quebec, are considering secession as a means of preserving cultural identity. Efforts to maintain a separate identity can also take the form of attempts to retrieve a lost territory from which a group feels it derives its identity. The campaign of the Palestinians to recover the West Bank is the best-known recent example of this.

Finally, a claim for self-determination can be made by a people whose territory was forcefully annexed through the imposition of an unequal treaty. Unequal treaties are those concluded under conditions of economic or political aggression or coercion by one party against another. The source of unequal treaties is the continuous struggle between nations for national security.

An absolute equality of capacity for rights among international persons was established as a fundamental postulate when the science was in a primitive stage. The subsequent history of international relations shows a continuous struggle

to impose limitations upon that equality.¹

Usually the more powerful State dictates the terms of the annexation treaty to the government of the weaker one (sometimes installed with the direct assistance of the former). These treaties are usually one-sided. They lack the element of reciprocity (or quid pro quo), giving all or most rights to the stronger party and placing the obligations on the weaker.² The peace treaties entered into by the great powers were of this kind. "Treaties granting authority to intervene, giving guarantees of independence, and providing for neutralization, in addition to those relating to consular jurisdiction and conventional tariffs, are a few of the most striking examples ..."³ As Buell pointed out:

There is a large group of treaties which I imagine may be called unequal. You have treaties granting extraterritorial rights, of which the Chinese treaties are an example. You have treaties in which great states guarantee the independence of small states without the small states undertaking any reciprocal guarantee or obligation. You have great states guaranteeing the neutrality of small states, such as the Belgian Treaty of 1839. You have ... treaties imposed by victorious states at the end of a decisive war, of which the most prominent example is the Treaty of Versailles, which I think most of us would call an unequal treaty; and you have had... a group of treaties negotiated by great states, I should say under some form of pressure, imposing on small states the obligation to allow the great state to intervene under certain circumstances. I imagine that the United States has negotiated as many of these treaties as other powers, such as our treaty with Cuba, our treaty with Haiti, our treaty with Panama. You have also the treaty which the Italian government has recently negotiated with Albania, the terms of which are more difficult to interpret, but which nevertheless do in effect give one state rights and impose upon another state obligations

which do not apply to the other party.⁴

A treaty is unequal because there is no voluntary consensus ad idem between the parties. Most unequal treaties were entered into during the colonial period. Once decolonization began, their legitimacy came under closer scrutiny. There is now a growing international consensus that the unequal treaties entered into during the colonial period have no legal standing⁵ and, inso facto, that the people of those formerly-independent territories are entitled to question their legality.

This chapter will examine each of the four above-mentioned reasons for claims to the right to self-determination. It will establish that if any group of people falls victim to genocidal persecution, racial discrimination/forceful separation, denial of the preservation of its separate identity or the annexation of its territory by means of an unequal treaty, that group is entitled to exercise a right of self-determination.

Genocide

The massacre of one group by another is the oldest type of conflict known to humankind. Among the earliest known examples of this are the great Assyrian massacres in the seventh and eighth centuries B.C.,⁶ and those carried out by Genghis Khan and Timur Lenk.⁷ In modern times, the world has seen the Turkish massacre of Armenians, six million Jews killed by the Nazis, three million Bengalis killed by the Pakistani Army, and the massacre of the Hutu by the Tutsi in Burundi. The deliberate extermination of aboriginal peoples throughout the world is also well known.

The word "genocide" was coined by Raphael Lemkin in his book, Axis Rule in Occupied Europe:⁸

By 'genocide' we mean the destruction of a nation or of an ethnic group. This new word ... is made from the ancient Greek word genos (race, tribe) and the Latin cide (killing), thus corresponding in its formation to such words as tyrannicide, homicide, infanticide, etc [G]enocide does not necessarily mean the immediate destruction of a nation, except when accompanied by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.⁹

Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.¹⁰

Sometimes a subtle distinction is drawn between holocaust and genocide. Under this distinction, a holocaust is "the complete physical annihilation"¹¹ of a group of people, while genocide is any attempt to erase the identity of a collectivity through the mass killing of its members, but without necessarily seeking to kill every last member of the group. It is sometimes argued that one of the primary causes of genocide is the inter-racial friction resulting from the arbitrary and artificial international boundaries inherited by modern developing countries from the colonial period.¹²

It is surprising to note that the Nuremberg Tribunal did not use the word "genocide" in its judgment, instead using such terms as "mass murders and cruelties," and referring to a plan for the total extermination and expulsion of "whole native populations"¹³ for German "colonization."¹⁴ The word was subsequently used, however, in the trials of Ulrich Greifelt and Gauleiter Arthur.¹⁵ On the other hand, the Nuremberg Charter created special rules only "against a named group of men in the service of a conquered enemy."¹⁶ Unfortunately, the massacre by a State of its own citizens was merely condemned; it remained in the realm of the domestic affairs of States.¹⁷

The crime of genocide received formal international attention for the first time in General Assembly Resolution 96(1) of 1946, which reads:

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings...

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

THE GENERAL ASSEMBLY, THEREFORE, AFFIRMS that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices -- whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds -- are punishable.¹⁸

At the end of 1947, the General Assembly, in pursuance of Resolution 180 (II), declared genocide to be "an international crime"¹⁹ that entailed "international

responsibility on the part of the individuals and States,²⁰ and instructed the Economic and Social Council to proceed to develop a Convention on Genocide.²¹ Finally, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide²² (the Genocide Convention) came up with an agreed definition of genocide. Article II reads:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.²³

It has been argued that the term "members of the group" in sub-paragraphs (a) and (b) means that genocide takes place the instant a single member of a group is attacked, provided an intention to commit the crime of genocide was present.²⁴

Stefan Glaser states:

En ce qui concerne le génocide, il nous semble certain que l'intention des auteurs aussi bien de la Convention sur le génocide que du Projet de Code était de reconnaître le génocide comme consommé même dans le cas où l'acte (neutre, etc.) a été commis à l'égard d'un seul membre de l'un des

groupes déterminés, dans l'intention de le détruire
 en tout ou en partie."²⁵

Stefan Glaser is not the only one who is of this view. Yoram Dinstein subscribes to the same idea.²⁶ Arguments have been made that the Convention would not apply to the murder of a single individual, but that such an act can best be described as homicide, even if the individual is a member of one of the groups mentioned in the Convention.²⁷ The important point is that the "mens rea" of the culprit must be directed against the life of more than one member of the group, even though the result was limited to one casualty."²⁸ Stefan Glaser also grappled with the terms "ethnicity," "race" and "nation" for the purpose of the Convention:

En effet, ce que caractérise une nation, ce n'est pas seulement une communauté politique de destin, mais avant tout une communauté qui se caractérise par des liens ou des traits propres d'ordre historique et culturel. Par contre, un lien "territorial" ou "étatique" (avec l'Etat) ne nous semble pas essentiel. La race signifie une catégorie d'hommes qui se distinguent par des signes caractéristiques communs et constants, donc héréditaires. La notion 'ethnique' a une signification plus large, elle désigne une communauté d'hommes liés par les mêmes us, la même langue et la même race (du grec *ethnos*-peuple).²⁹

One writer associates the word "ethnic" with the physical characteristics³⁰ or skin colour of an individual, giving the word a meaning broad enough to accommodate various cultural traits.³¹ The words "ethnic" and "racial" mean the same thing to some but carry different meanings for others.³²

The people protected by the Genocide Convention are national, ethnic, racial and religious groups. Political groups do not receive protection. This exclusion was controversial, even though political groups were included in G.A. Res. 96(1) of 1946.³³

A number of arguments were put forward against the inclusion of political groups. First, their composition is variable; as groupings they depend on the will of individual members.³⁴ Second, the inclusion of political groups in the Convention would allow the United Nations to intervene in the internal political conflicts of individual nations.³⁵ Third, it would create problems for those governments wishing to take action against internal subversive activists, who would likely resort to the Convention in response.³⁶ Fourth, the inclusion of political groups might prompt groups such as former General Manuel Noriega's Panama Defence Force or former Romanian dictator Nicolai Ceausescu's security forces to plead the protection of the Convention.³⁷ Finally, most political and other groups are already protected under their particular national constitutions and other human rights instruments.³⁸

Nevertheless, it has been argued that political groups deserve to be treated like "religious groups"³⁹ since both are guided by a "common ideal."⁴⁰ As one writer has stated,

[t]he methods of persecution in genocide and political mass murder are not all that different ... There were many executions of families in the Indonesian anticommunist massacres and in other political mass murders, such as in Soviet Russia under the Stalinist regime, in Democratic Kampuchea under the Pol Pot regime, and in Equatorial Guinea under Macias. And past political affiliation can be as ineradicable a stigma, and as irrevocable a warrant for murder, as racial or ethnic origin.⁴¹

There are situations in which the ethnic and political elements coincide and it becomes difficult to separate one from the other.⁴² In the Bangladeshi crisis, for instance, the conflict was political at first, but later turned ethnic. Under Amin's rule in Uganda, even though large-scale political murders were carried out in order to consolidate his political power, a number of ethnic groups were targets for

extermination mainly because they were political rivals.⁴³ In Iran, approximately seventy thousand political killings have taken place since the Islamic Revolutionary Government came to power.⁴⁴ Moreover, the Baha'i minority in Iran is not only a religious force but also an important political force that has become a "hostage group" of the regime.⁴⁵ The exclusion of political parties from the Convention has thus permitted governments to commit genocide against such groups under the pretext of executive action for public security.⁴⁶ Thus, political groups should also receive protection under the Convention.

Also missing from the Convention is protection against cultural genocide, meaning "efforts to destroy groups over time by attacking specific aspects of their culture, not their physical existence."⁴⁷ Culture is as important to a group for its survival as life, because attacks on a group's culture can result in the dissolution of its unity.⁴⁸ The Nazis not only tried to exterminate the Jews physically, but also committed cultural genocide by burning their libraries and destroying their places of worship.⁴⁹ Acts of cultural genocide are directly connected to the intention to commit physical genocide.⁵⁰ Arguments were put forward, however, that cultural genocide is an unworkably vague term that could lead some States not to ratify the Convention.⁵¹ Therefore, instead of referring expressly to cultural genocide, the Convention has incorporated into Article II(e) language that clearly refers to an aspect of cultural genocide: "[f]orcibly transferring children ... to another group."⁵²

Another major flaw of the Convention is that it makes intention an element of the crime of genocide, something that is often very difficult to prove. However, the term "intention" is closely associated with the term "deliberately" in Article II(c).⁵³ There have been many instances of governments accused of genocide denying the allegations on the ground that there was no intention to carry out the act. For example, when Paraguay was accused of genocide against the Guayaki Indians in 1974, her Defence Minister pleaded that the government had no intention to destroy the Indians.⁵⁴ When Brazil was charged with committing genocide against the

Amazon Indians, the Brazilian Permanent Representative to the United Nations defended his government by saying that "there was lacking the special malice or motivation necessary to characterize the occurrence of genocide."⁵⁵ It has also been argued that the American bombing of Hiroshima and Nagasaki did not constitute genocide because it was not done with a view to annihilating the Japanese as a race, and because the killing stopped as soon as the war ended.⁵⁶

The words "as such" in the opening language of Article II of the Convention refer to the motive behind the act, meaning having in mind the ultimate object of the crime. The two elements of intent and motive are so closely connected in the case of genocide that they have been jointly referred to as "intent-motive."⁵⁷ Therefore, the issue of intention may be successfully dealt with by referring to the use of the word "deliberately" in Article II(c) of the Convention. If it can be determined that acts have been carried out with the intention of ultimately eliminating the targeted group, then it may safely be said that those acts are genocidal.

Article II(b) refers to "serious bodily ... harm," meaning the crippling of members of the group through torture, as coming within the definition of genocide.⁵⁸ Barabara Harff states in this context:

Whenever a number of people are fatally tortured as part of a country's policy of coercive control over actual or potential opposition groups, then the government practises genocide. Torture to constitute a genocidal act, has to be a more general policy aimed at the destruction of a target group.⁵⁹

In order to come within the term "genocide," then, there must be systematic torture of members of an identifiable target group. What Harff has neglected to discuss, however, is whether an unofficial State policy of torture and killings may be considered genocide. This omission is particularly important because States are likely to deny that the torturing of opposition groups is official policy. Unofficial policy

refers to the use of paramilitary forces (or, in some cases, the armed forces of the State acting in an unofficial capacity) to carry out torture on behalf of the ruling party. In recent years, and mostly in developing countries (like Panama under Noriega, Chile under Pinochet, Pakistan under Zia ul-Haq, El Salvador under Duarte, Tibet under the Chinese occupation, South Africa under apartheid, and some other African countries under various dictatorships), members of opposition political parties have been, and still are, the victims of systematic but unofficial oppression -- including torture -- by the ruling party.

Article II(b) of the Genocide Convention lists the infliction of "serious ... mental harm" as an act that could constitute genocide. This probably means that the shock must be so severe as to prevent the group from functioning properly. It has even been interpreted as meaning that the harm must be so serious that it would destroy the targeted group.⁶⁰ The harm need not be of a permanent nature or cause "immediate physical injury."⁶¹ As a result, brainwashing and the use of narcotics are arguably covered by the Convention.⁶² Such acts must, however, be done "deliberately"⁶³ and with a view to exterminating the group "in whole or in part."⁶⁴

Article II(d) speaks of measures that would stop the growth of a group by preventing procreation. Forced sterilization and separation are the primary methods used to carry out such a policy. The article is clear, though, that it does not apply to cases of wilful acceptance of such treatment. However, an interesting question is raised by China's policy of discouraging procreation as a means of controlling overpopulation. In this scenario, the government is a part of the whole people and its policy is applied to all Chinese Communist Party. It is arguable whether it would be considered an act of genocide if it is not directed against a particular group.

The Convention is seriously flawed and lacking in innovation. It has been stated that:

[t]he whole Convention is based on the assumption
of virtuous Governments and criminal individuals.

a reversal of the truth... In any event if this assumption were correct, the criminal law of every civilized State provides sufficiently against individual acts of the kind which are enumerated in the Convention.⁶⁵

Moreover, the act of genocide was proscribed by international law long before the Convention came into force. The International Court of Justice stated:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(1) of the General Assembly, December 11th, 1946). The... consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation....⁶⁶

Despite its flaws, the Genocide Convention reflects general agreement on some serious issues. Its most important contribution was to clearly denote genocide as a crime under international law both in peacetime and wartime.⁶⁷ It also provided, for the first time, for the creation of an international penal tribunal with jurisdiction over the Contracting Parties.⁶⁸ Unfortunately, no such tribunal has yet been established⁶⁹ because of a lack of support from the great powers. Consequently, Pol Pot, charged with the commission of genocide in Kampuchea, is still at large,⁷⁰ and the 195 army officers accused of killing three million people in Bangladesh never faced trial "for serious crimes, which include[d] genocide, war crimes, crimes against humanity, breaches of Article 3 of the Geneva Conventions, murder, rape and

arson,"⁷¹ despite the Bangladeshi Government's announcement in April 1973 that it intended to bring them to justice.⁷²

This section, then, establishes that the act of genocide is a "crime against humanity" as set out in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. While the Convention is a huge step in the right direction, there is a significant gap in its provisions that excludes political groups from protection. Political groups are routinely the object of acts that the Convention deems genocide, yet these groups receive no protection. The right to life or existence is at the core of human rights; all others flow from it. A person who is deprived of this right is deprived of all other rights. When an identifiable group of people is the victim of torture and genocide, international law now authorizes that group to assert its right to survival by claiming the right to self-determination. This right should be extended to political groups as well. It may be exercised either by overthrowing the ruling government, by seceding from the State in question, or by creating a system of full self-government.

Racial Discrimination and Forceful Separation

Racial discrimination is often the first step towards the commission of the crime of genocide, i.e., genocide may emanate from the hatred of one race by another. In the contemporary world order, discrimination on the basis of race, age, sex, colour or religion is strictly prohibited, and the principle of non-discrimination has become "a rule of customary international law."⁷³ In the Namibia Advisory Opinion, the International Court of Justice stated:

To establish ... and to enforce distinctions, exclusions, restrictions, and limitations exclusively on grounds of race, color, descent or national or

ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.⁷⁴

The Court also condemned, in the Barcelona Traction Case,⁷⁵ genocide, slavery and racial discrimination. It stated that States' obligations with respect to human rights

derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁷⁶

Besides slavery, the caste system (as it still exists in many parts of India among orthodox Hindus) and apartheid (as it exists in South Africa) are the quintessence of racism. Under the caste system, an individual's status is determined at birth by his parents' station in life. This high or low status is imposed for life and "especially the 'untouchables' or equivalents, are condemned in perpetuity to low position, potential, and expectancy in relation to all values."⁷⁷ Even though the caste system has been abolished constitutionally⁷⁸ and in various other instruments,⁷⁹ it is so deeply ingrained⁸⁰ in Indian social life that it still plays a decisive role in who may be what in Indian society.⁸¹ Kane has summed up the characteristics of the Indian caste system as follows:

(1) heredity (i.e., in theory a man is assigned to a particular caste by birth in that caste); (2) endogamy and exogamy (i.e., restriction as to marrying in the same caste and not marrying certain relatives or other persons, though of the same caste); (3) restrictions as to food (i.e., what food and water may be taken or not taken and from whom); (4) occupation (i.e., members of most castes follow certain occupations and no others); (5) gradation of castes, some being deemed to be so low that they are untouchables.⁸²

The Hindu caste system is rooted in the concepts of Karma and Dharma.⁸³ Karma teaches that the caste into which a person is born depends upon his or her activities in a previous life: the better one's performance in this life, the higher one's caste in the next;⁸⁴ the worse one's performance this time around, the lower one's caste the next.⁸⁵

Apartheid is a system of racial discrimination under which a person's status is determined at birth exclusively on the basis of skin colour. It is also known in white South Africa as "separate development," or the Bantustan policy. Apartheid is "both a policy and a way of life for whites as a single preferred tribe over blacks as an inferior collection of tribes."⁸⁶

The history of separate development in South Africa dates back to the beginning of this century when the Land Act of 1913 defined a Bantu area and prohibited blacks from purchasing land outside it. This resulted in the creation of two South Africas, one for blacks and one for whites.⁸⁷

The creation of "homelands," and the granting of homeland "citizenship," facilitated the stripping of South African citizenship from blacks. This policy resulted in the denationalization of 1.3 million members of the Xhosa tribe when Transkei was granted its "independence."⁸⁸ A report published by the United Nations Economic and Social Council states:

The homelands are an instrument of the manpower policy which has accompanied apartheid and buttresses it in a number of different ways. They provide a means of reducing the proportion of Africans to whites within the White-controlled 87 percent of South Africa; at the same time their existence is the basis for excluding Africans from the acquisition and enjoyment of the rights which are enjoyed by Whites in those areas. Thus, the official view that Africans are to be regarded as

temporary residents outside the homelands has enabled the Government to suggest that restrictions on basic rights are not imposed on grounds of race but because African workers are foreigners who are present as migrants in White areas.⁸⁹

In 1958, the white South African Government, under Prime Minister Verwoerd, removed from Parliament those white Members who represented black constituencies, in order to permit unopposed Parliamentary approval of the policy of separate homelands.⁹⁰ This policy was then executed by the enactment of the Promotion of Bantu Self-Government Act of 1959, which stated that "the Bantu peoples of South Africa do not constitute a homogenous people."⁹¹ This legislation created eight different national units, on the basis of language and colour: the Northern Sotho, Southern Sotho, Swazi, Tsonga, Tswana, Xhosa, Venda and Zulu.⁹² These were all declared "independent States" by the South African government, although no other nation has recognized them as such.

The situation in South Africa is unique: institutionalized, State-sponsored racial discrimination does not exist anywhere else in the world. Apartheid has, however, sometimes been compared with the Indian caste system. As Thompson has stated:

The primary ingredients of South African society are a dominant white group and three subordinate nonwhite groups. Since the white group is wholly endogamous by law and the nonwhite groups are almost wholly endogamous by custom, we shall call South Africa a caste society, and the Whites, the Coloureds, the Asians, and the Africans the four South African castes, even though not all the ingredients of the classic Indian caste system are present in South Africa.⁹³

Racism is despicable because it denies people those rights to which they are entitled by virtue of being human. It has, therefore, been argued that "[i]nternational

prescriptions have developed a peremptory norm of non-discrimination which embodies a wide range of impermissible grounds for differentiation.⁹⁴ Article 2(1) of the International Covenant on Civil and Political Rights reads:

Each State Party to the Present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁵

A similar provision is found in Article 2(2) of the Covenant on Economic, Social and Cultural Rights.⁹⁶ It reads:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁷

However, the two most important Conventions dealing with discrimination are the International Convention on the Elimination of All Forms of Racial Discrimination⁹⁸ (the Convention on Racial Discrimination) and the International Convention on the Suppression and Punishment of the Crime of "Apartheid"⁹⁹ (the Apartheid Convention). The Convention on Racial Discrimination elevated the issue of racial discrimination from one of solely national concern to one of international concern. Article 1(1) states that "racial discrimination"

shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition,

enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁰⁰

The use of the word "descent" has been interpreted as denoting the concept of caste.¹⁰¹ This reasserts the Convention's condemnation of the caste system.¹⁰² Moreover, the Convention spoke of the creation of a Committee on the Elimination of Racial Discrimination,¹⁰³ which was to have dealt with those acts described in Article 5 of the Convention.¹⁰⁴

The effect of the Convention has been three-dimensional.¹⁰⁵ This is because the Convention provides three avenues for the resolution of disputes concerning racial discrimination: "(1) nation vs. nation; (2) citizen vs. nation; and (3) reports to the General Assembly."¹⁰⁶ These are discussed in Articles 11(1), 14(1) and (2), and 9 of the Convention, respectively.¹⁰⁷

The General Assembly expressly recognized, in the Apartheid Convention, that apartheid or separate development constitutes a "crime against humanity,"¹⁰⁸ since it contains the "identifiable elements of both slavery and caste."¹⁰⁹ Apartheid survives because of the assistance and express approval it receives from the State apparatus.¹¹⁰

In many ways, the provisions of the Apartheid Convention resemble those of the Genocide Convention.¹¹¹ For this reason, and because the Convention on Racial Discrimination already encompassed all types of discrimination covered by the Apartheid Convention, it has been argued that the Apartheid Convention is redundant.¹¹² It has also been argued that it would be unwise to extend the broad international criminal jurisdiction of the Apartheid Convention when the Genocide Convention already covers racial offences.¹¹³ Nevertheless, Professor Reisman has stressed the importance of the Apartheid Convention declaring apartheid to be a

crime:

On the symbolic level, the characterization "crime" should convey maximum deterrence. Hence it is no surprise that the word "crime" is reserved for that pattern of behavior which is considered either the greatest challenge to elite objectives or most deleterious to group life.¹¹⁴

The rule against racial discrimination has also found expression in many national constitutions.¹¹⁵ This was recognized by Judge Tanaka in the South West Africa Case (Second Phase)¹¹⁶ when he stated:

The principle of equality before the law, however, is stipulated in the list of human rights recognized by the municipal system of virtually every State no matter whether the form of government be republican or monarchial and in spite of any differences in the degree of precision of the relevant provisions. The principle has become an integral part of the constitutions of most of the civilized countries in the world.¹¹⁷

Why is apartheid so detestable? It is because it makes racial classification the main determining factor in the job, status, and financial and personal success a person can aspire to in life. Apartheid has rolled back centuries of advancements in human civilization, taking South African society back to the dark ages.¹¹⁸ It has created a quasi-slave society. Its State-sponsored discrimination has resulted in the forceful denationalization of millions of black South Africans. This process of denationalization contravenes the law of nations. Moreover, since the right to nationality is enshrined in various international documents,¹¹⁹ forceful denationalization is contrary to basic human rights.¹²⁰

Sometimes a State effects a forceful separation by ceding territory to another State

against the will of the territory's inhabitants. This is often done under the guise of maintaining the "sanctity" or "purity" of the more powerful group in the society.

What is the status of a treaty of cession between two States that lacks the consent of the inhabitants of the territory ceded? Although States are generally free to enter into treaties of their own choosing, in international law, if two States agree that territory is to be ceded from one to the other, this must be done through the due process of constitutional and international law.¹²¹ In particular, such a cession must not violate any peremptory norm with respect to basic human rights. If the transfer denies the right to self-determination of the inhabitants of the ceded territory, then it is illegal under the law of nations.¹²² This is because of the principle, often cited in domestic law, nemo dat quod non habet. Since a people that possesses a right to self-determination has, by definition, the right to determine its own political destiny, the State cannot exercise this right. Therefore, the State does not have the authority to transfer territory to another State without the consent of the inhabitants. Examples of this kind of unlawful treaty are the 1897 annexation treaty between the U.S.-installed President of Hawaii and the United States,¹²³ and South Africa's proposed cession of Kangwane to Swaziland in 1982.¹²⁴ Likewise, any treaty entered into between South Africa and any of its Bantu homeland governments is ipso facto void because of the forceful separation that created the homelands.¹²⁵

The difference between the inhabitants of North American Indian reservations and those of Bantu homelands is that only the former may come and go as they please and may choose to lead a free life in any part of their State's society with equal access under the law to all places therein. The treatment of blacks in South Africa, which denies non-whites this right, is therefore not only morally reprehensible, but contrary to the law of nations. Racial discrimination is the negation of equality, and freedom from discrimination is rooted in the right to self-determination and human dignity.

Denial of the Right to Preserve a Separate Identity

One of the most important attributes of any group of people is their heritage or identity. In Canada, which is a multicultural society, and even in the United States, which is considered a "melting pot," people still identify themselves as French-, Chinese-, Italian-, Indian- or Spanish-Americans or Canadians even after several generations of life in North America. Each transplanted community has its own distinct set of values. It has been argued that an individual's connection to his or her identity or heritage has two facets: the shared expectations of the society and the group's or individual's ties with its/his/her past history, or roots.¹²⁶ According to Rose and Rose,¹²⁷ such ethnic ties most often have a "positive orientation":

It involves not only a recognition that because of one's ancestry one is a member of a racial or religious group, and a recognition that the majority group defines one as belonging to that racial or religious group; it also involves a positive desire to identify oneself as a member of a group and a feeling of pleasure when one does so.¹²⁸

This feeling of belonging can be found among ethnic groups with a common bond of traditions such as language or religion, quite apart from commonality of ancestry or ethnic origin.¹²⁹ Article 27 of the Covenant on Civil and Political Rights¹³⁰ ensures minority or ethnic groups the right to maintain their separate identities by prohibiting the "forced assimilation"¹³¹ of minority groups.¹³²

The right of a group to maintain a separate identity also found expression in Article 5(1)(c) of the 1960 Convention Against Discrimination in Education, which reads:

It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools.¹³³

Today, countries like Canada and the United States recognize the right of ethnic minorities to maintain their own schools subject to the standards set by the States. This right was the source of the central dispute in the Minority Schools in Albania Case of 1935.¹³⁴ In 1921, Albania had issued the Declaration Concerning the Protection of Minorities in Albania, of which Article 6 stated:

Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein¹³⁵

In 1933, Albania amended her constitution to give the State control over the educational system and banned the operation of all private schools.¹³⁶ The Permanent Court of International Justice held that minorities could not be deprived of their institutions, the existence of which was one of the conditions of true equality,¹³⁷ and that these institutions constituted part of what was for an ethnic group "the true essence of its being as a minority."¹³⁸ The Court went on to say that:

[t]he abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State.¹³⁹

The judgment in the Minority Schools in Albania case was a landmark decision with far-reaching international repercussions. Through the application of judicial craftsmanship, the Court was able to recognize the right to minority institutions as a collective right necessary for the preservation of a group's separate identity. This right has since been recognized in both the Universal Declaration of Human Rights¹⁴⁰ and the Algiers Declaration.¹⁴¹ The first paragraph of the preamble to the Universal Declaration speaks of the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."¹⁴² Article 26(3) speaks of parents having "a prior right to choose the kind of education that shall be given to their children."¹⁴³ This article also implicitly recognizes the right of minority groups to maintain their cultural heritage. Article 2 of the Algiers Declaration states that "[e]very citizen has the right to respect of its national and cultural identity."¹⁴⁴

What happens if a government fails to respect this right, especially a provincial or state government in a federal State? For example, what if Québec does not allow commercial speech in languages other than French, despite the Supreme Court of Canada's decision declaring Bill 101 ultra vires?¹⁴⁵ Section 33(1)¹⁴⁶ of the Canadian Charter of Rights and Freedoms -- also known as the "notwithstanding" clause -- empowers both the Canadian Parliament and the provincial legislatures to override most of the Charter's rights and freedoms -- the fundamental, legal and equality rights (Section 2 and sections 7 to 15). The democratic, mobility and minority language rights may not be overridden. Can the plea be made that Québec was forced to resort to the "notwithstanding" clause in order to protect her unique cultural heritage within the Canadian Confederation? Would the acceptance of such an argument not seriously undermine Section 15 of the Canadian Charter, and thus violate the sanctity of the Canadian Constitution and the norms of international law? The results of this opting-out provision are already being felt in the country. Certainly when authority is given to a Parliament or provincial legislature to override constitutionally-guaranteed fundamental rights, this weakens the

Confederation and could even lead to its break-up. If the Québec government can successfully establish that the right to the preservation of Québec's separate identity is being flagrantly denied, then it will have compiled a valid case for self-determination. Otherwise, the Province's use of the "notwithstanding" clause weakens the structure of Canada.

Annexation through Unequal Treaties

One of the most contentious issues in contemporary international law is the unequal treaty doctrine, which is rooted in the juridical equality of States. The question it raises is this: if States are equal in international law, how can they enter into unequal treaties?¹⁴⁷ The answer lies in the fact that legal and political equality are two very different things.¹⁴⁸ At the same time, as Vattel argued, "[a] dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom."¹⁴⁹ Sometimes this equality is expressed in the form of affirmative action, i.e., by giving preferential treatment to less developed countries in international treaties, as was done, for example, in the 1982 United Nations Convention on the Law of the Sea.¹⁵⁰ That is why, with the development of the law of nations, "the notion of formal equality has been modified to a degree... [--] an exception to the principle of equality and non-discrimination ..."¹⁵¹ This gulf between the legal and political equality of States has given rise to the concept of unequal treaties.

One of the main elements of an unequal treaty is that the consent of the weaker State is merely formal.¹⁵² In most cases such treaties are drafted by the stronger State or the State victorious in war.¹⁵³ It is sometimes contended that most unequal treaties were entered into during the period of colonization, the colonial relationship of dominance and subservience giving the colonial powers the necessary leverage to conclude such treaties. In the case of formerly colonized Asian and African States,

the result has been that

[o]n becoming independent, these States increasingly rely on the argument that "unequal" or "inequitable" treaties thus extracted, and treaties imposed by duress, are invalid ab initio. Accordingly, they declare that it is the right of the State which was obliged to enter into such treaties to terminate them by denunciation.¹⁵⁴

"Unequal treaties are not nature's remedies; they are more productive of abuses than of advantages."¹⁵⁵ They usurp the freedom and sovereignty of the exploited people, placing them in a form of bondage. Today, there is a legitimate demand for the invalidation of unequal treaties entered into decades and even centuries ago. This has fostered claims to the right to self-determination. Newly decolonized States, in order to rid themselves of their inherited burdens,¹⁵⁶ have applied the principle of rebus sic stantibus. By pleading this doctrine, "a state may lawfully rescind a valid treaty if there has taken place such a change of circumstances that, in its opinion, the fulfillment of the treaty would affect its vital interests."¹⁵⁷ Lauterpacht, commenting on Spinoza's concept of the doctrine, noted that a treaty

lasts so long as the cause which produced it. When this inducement disappears, there is a perfect right, vested in either contracting party, to disengage itself from the obligation. For in the state of nature it is clearly understood by both parties from the very beginning that fear of a threatened injury or hope of gain are the bases, and the sole bases, of contractual relations. In addition -- and here we have what appears to be perhaps the first modern formulation of the clausula rebus sic stantibus in international law -- "No one makes a contract for the future except on the hypothesis of certain preceding circumstances. But when these change, the reason underlying the whole position also changes; accordingly every contracting party

retains the right to consult its own interests."

Curiously enough he [Spinoza] found it advisable -- quite unnecessarily from the point of view of the formal requirements of his method -- to prove the compatibility of this principle with ethical and religious considerations. In the Political Treatise he appeals to reason and religion in support of the assertion that the obligation to keep promises is not an absolute one. Thus, he says, faith need not be kept with a thief who has entrusted stolen property to another's custody.¹⁵⁸

However, the concept of unequal treaties is nothing new in international law, and is found in the writings of Grotius,¹⁵⁹ Vattel¹⁶⁰ and Pufendorf.¹⁶¹ Generally, the provisions of any treaty must be carried out in good faith (pacta sunt servanda). However, this is not the case with an unequal treaty.¹⁶²

Professor Verdross, of the University of Vienna, argued that treaties that are contra bonos mores are void because they "restrict the liberty of one contracting party in an excessive or unworthy manner or ... endanger its most important rights."¹⁶³ One of the most striking examples of a treaty contra bonos mores is the Annexation Treaty of Hawaii of 1897.¹⁶⁴ Another example is the "17-Point Agreement for the Peaceful Liberation of Tibet" forced upon an independent Tibetan Government by China after eighty thousand troops stormed into the country in 1949-50.¹⁶⁵

What usually follows annexation is a systematic program of population transfer from the dominant State, together with a campaign to undermine the native culture and society, in order to discourage any possible resistance. These were the tactics used by Germany when she occupied and annexed Alsace-Lorraine.¹⁶⁶ The applicable rules in this context were formulated by the International Commission of Jurists:

Insofar as there existed only doubt about it in the period preceding World War II, the Charter of the United Nations in 1945 unambiguously rejected the "right to conquest." It

was on the basis of this purported right that colonial powers throughout history invaded other territories and settled part of their own population in them. With the right to conquest, the right to create settlements has also disappeared, and what is left is the bare right of temporary military occupation where necessary in lawful self-defense. This does not include a right to establish settlements of a permanent character.¹⁶⁷

Obviously, forceful annexation and population transfer give rise to a legitimate claim of self-determination on the part of the inhabitants of the annexed territory. International law now imposes a duty on third States not to give military assistance to an occupying force. The Declaration on Friendly Relations provides:

Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence.¹⁶⁸

Conclusion

Thus far, the crucial elements that give rise to a valid claim to the right to self-determination have been discussed. Of these, genocide and racial discrimination are regarded as crimes against humanity, and the forceful annexation and the denial of the preservation of separate identity can be described as crimes against peace.

When a group of people with a distinct identity claims the right of external self-determination and opts for secession, it often leads to civil war with the central power. International law neither supports civil wars nor discourages them. That is why it has been said that international law "may be said to permit them,"¹⁶⁹ but strictly prohibits external interference in deciding their outcome.¹⁷⁰ Unfortunately,

those who merely ask for their fair share of their nation's wealth often become the victims of State-sponsored terrorist attacks resulting in mass murder and genocide.¹⁷¹

Genocide is never an accidental event, for by definition it is a premeditated "political decision."¹⁷² In a genocidal society, such as South Africa, lives are taken away arbitrarily either directly by, or with the assistance or acquiescence of, the State. The victims are usually political dissidents.¹⁷³ Target groups are usually victims of the frustration and anger of the dominant group(s).¹⁷⁴ Sometimes economic gains by a minority are responsible for ethnic persecution.¹⁷⁵ This was true in the case of the Turkish genocide against the Armenians,¹⁷⁶ and in the case of the Holocaust. In both these cases, the right to maintain a separate identity was denied.

The near-unanimous international disapproval of Iraq's annexation of Kuwait and widespread support for the right of the Kuwaiti people to self-determination is strong evidence that the presence of aggression and forceful annexation alone is sufficient to trigger the right to self-determination.

Finally, the issue of how a State treats its own citizens is no longer an internal matter. When "a people" is denied the right to life or to racial equality, or is deprived of its political rights, then a legitimate claim to the right to self-determination arises. This is also true of "a people" that is forcefully separated from a State because of race, or whose territory is forcefully annexed either without their consent or as a result of war. The international community has an obligation to assist those peoples who attempt to free themselves from genocidal persecution, racial discrimination, forced assimilation, or exploitative relations under an unequal treaty, if the right to self-determination is to be anything more than a theoretical abstraction.

Endnotes

1. Dickinson, *The Equality of States in International Law*, at 4 (1920).
2. YU-HAO, *THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW* 1 (1931). [Hereinafter cited as Yu-Hao, *The Termination of Unequal Treaties*].
3. *Id.*, at 10.
4. Buell, in *PROC. AM. SOC'Y INT'L L.* 91 (1927). Also cited *id.*, at 10-11.
5. Malawer, *A NEW CONCEPT OF CONSENT AND WORLD PUBLIC ORDER: "COERCED TREATIES" AND THE CONVENTION ON THE LAW OF TREATIES*, at 4 *Vanderbilt J. Transnat'l L.* 1 (1970); SINHA, *NEW NATIONS AND THE LAW OF NATIONS*, at 84 (1967); FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, at 206 (1964); MALAWER, *IMPOSED TREATIES AND INTERNATIONAL LAW* (1977); NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* (1971); Talalayev and Boyarshinov, *UNEQUAL TREATIES AS A MODE OF PROLONGING THE COLONIAL DEPENDENCE OF THE NEW STATES OF ASIA AND AFRICA*, *SOVIET Y.B. INT'L L.* 169 (1961). In its report, the International Law Commission stated:

The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes.... The commission considers... that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is lex lata in the international law society.

Report of the Commission to the General Assembly, 61 *A.J.I.L.* 408-409 (1967), U.N. Doc. A/6309/Rev.1.

6. KUPER, *Genocide: Its Political Use in the Twentieth Century* 11 (1981). [Hereinafter cited as Kuper, *Genocide*].

7. Id. at 11-12.

8. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (Ch.IX, 1973). [Copyright 1944 by the Carnegie Endowment for International Peace]. Lemkin used the word "ethnocide" the same way as "genocide," which consisted the Greek word "ethnos," meaning nation, and the Latin word "cide," meaning killing.

9. Id.

10. Id.

11. Horowitz, *TAKING LIVES: GENOCIDE AND STATE POWER* 15 (1980). [Hereinafter cited as Horowitz, *Taking Lives*].

12. Kuper, *Genocide*, supra, note 6, at 14.

13. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (London, H.M. Stationary Office) 52. Also see UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, *STUDY OF THE QUESTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE*, UN Doc. E/CN.4/Sub.2/416, 7 (July 4, 1978). [Hereinafter cited as *Study of the Question of the Prevention and Punishment of the Crime of Genocide*].

14. Id.

15. The indictment of October 8, 1945 described and used the word "genocide" and stated that:

[The defendants] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups

1 Trial of the Major Criminals before the International Military Tribunal, 14 November, 1945 - 1 October, 1946, Nuremberg, 43-44 (1947). Also cited in *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, supra, note 13, at 6.

16. KUNZ, THE UNITED NATIONS CONVENTION ON GENOCIDE, in 43 A J.I.L. 742 (1949). [Hereinafter cited as Kunz, Convention on Genocide].

17. Id. Oppenheim stated that

[a] state is entitled to treat its own citizens at discretion and that the manner in which it treats them is not a matter with which international law, as such, concern itself.

Oppenheim, 1 International Law 583 (7th ed. 1948).

18. YEARBOOK OF THE UNITED NATIONS 1946-47, at 255. [Hereinafter cited as Y.B.U.N.].

19. Cited in Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 10.

20. Id.

21. Id.

22. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, adopted by the U.N. General Assembly, December 9, 1948; entered into force, January 12, 1961. 78 U.N.T.S. 277. [Hereinafter cited as Genocide Convention].

23. Id.

24. Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 11, at 14.

25. GLASER, DROIT INTERNATIONAL PENAL CONVENTIONNEL 112 (1970). [Hereinafter cited as Droit International].

26. DINSTEIN, COLLECTIVE HUMAN RIGHTS OF PEOPLES AND MINORITIES, in 25 Int'l & Comp. L. Q., 106 (1976). Dinstein states:

The murder of a single individual may be categorized as genocide if it constitutes one of a series of acts designed to attain the destruction of the people to which the victim belonged.

Id. [Hereinafter cited as Dinstein, Collective Human Rights].

27. Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 15.

28. Id.

29. Glaser, Droit International, supra, note 25, at 111.

30. Blanc, GENOCIDE AND POLITICAL GROUPS, at 8 (Paper prepared for presentation at the 25th Annual Convention, International Studies Association, Atlanta, Georgia, March 27-31, 1984). Department of Political Science, Marquette University, Milwaukee, Wisconsin. [Hereinafter cited as Blanc, Genocide and Political Groups].

31. Id.

32. Id.

33. Y.B.U.N., supra, note 18.

34. Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 21.

35. Id.

36. Id.

37. Id.

38. Id. Also see Blanc, Genocide and Political Groups, supra, note 30, at 10-13.

39. Id.

40. Id.

41. KUPER, The Prevention of Genocide 127 (1985) [Hereinafter cited as Kuper, The Prevention of Genocide].

42. Id.

43. Id.

44. CBC 10 O'Clock Television News (Ottawa), December 4, 1988.

45. Kuper, The Prevention of Genocide, supra, note 41, at 152.

46. DROST, The Crime of State: Book II, Genocide 122-123 (1959).

47. Blanc, DEFINING GENOCIDE: SELECTED PROBLEMS WITH THE UNITED NATIONS CONVENTION, at 4 (paper prepared for the 26th Annual Convention, International Studies Association, Washington, D.C., March 5-9, 1985). [Hereinafter cited as Blanc, Defining Genocide].

48. Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 122.

49. Lemkin, Axis Rule in Occupied Europe, supra, note 8, at 84-85.

50. Id. Article III of the Draft Ad Hoc Committee on Genocide defined genocide as

any deliberate act committed with intent to destroy
the language, religion or culture of a national,
racial or religious group on grounds of national or
racial origin or religious belief such as:

1. Prohibiting the use of the language of the group
in daily intercourse or in schools, or the printing
and circulation of publications in the language of
the group;

2. Destroying, or preventing the use of, libraries,
museums, schools, historical monuments, places of
worship or other cultural institutions and objects of
the group.

U.N. Doc. E/794, at 6-7. Also reproduced in Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 121. An amendment to the Ad Hoc Committee's draft stated that genocide also includes:

any of the following acts committed with the intent to destroy the religion or culture of a religious, racial or national group:

1. Systematic conversions from one religion to another by means of or by threats of violence.
2. Systematic destruction or desecration of places and objects of religious worship and veneration and destruction of objects of cultural value.

Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 83rd meeting, at 23, also reproduced in Study of the Question of the Prevention and Punishment of the Crime of Genocide, *id.*, at 122. Also in this context, Kuper states:

The inclusion of cultural genocide became an issue of controversy.... The issue was rather the protection of culture should be extended through the Convention on Genocide or in Conventions on human rights and rights of minorities. This conflict of views was not sharply ideological, but presumably the representatives of the colonial powers would have been somewhat on the defensive, sensitive to criticism of their policies in non-self-governing territories.

Kuper, Genocide, *supra*, note 6, at 31.

51. Study of the Question of the Prevention and Punishment of the Crime of Genocide, *id.*, at 123.

52. Genocide Convention, *supra*, note 22.

53. Article II(c) of the Genocide Convention states that "[g]enocide means... Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." *Id.*

54. Kuper, Genocide, *supra*, note 6, at 33.

55. Kuper, The Prevention of Genocide, *supra*, note 41, at 13. Also see Kuper,

Genocide, id. In respect of the conditions of Brazilian Indians, Norman Lewis states:

The huge losses sustained by the Indian tribes in this decade were catalogued. Of 19,000 Munducurus believed to have existed in the thirties, only 1,200 were left. The strength of the Guaranis had been reduced from 5,000 to 300 Some, like the Topaiunas -- in this case from a gift of sugar laced with arsenic -- had disappeared altogether. It is estimated that between 50,000 and 100,000 Indians survive today ...

Lewis, "Genocide," A Documentary Report on the Conditions of Indian Peoples in Brazil, at 9-10. Also cited in Horowitz, *TAKING LIVES: GENOCIDE AND STATE POWER*, 59 (1980). [Hereinafter cited as Horowitz, *Taking Lives*].

56. New York Times Book Review, at 9, 18 and 19 (28 March, 1982). Also see Kuper, *The Prevention of Genocide*, Id.

57. Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 26.

58. Harff, 20 *GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL AND POLITICAL ISSUES* 11-12 (Book 3, 1984). [Hereinafter cited as Harff, *Genocide and Human Rights*].

59. Id., at 12.

60. Blanc, *Defining Genocide*, supra, note 47, at 12.

61. Id.

62. Id.

63. See Article II(c) of the Genocide Convention, supra, note 22.

64. Id.

65. Study of the Question of the Prevention and Punishment of the Crime of Genocide, supra, note 13, at 118.

66. RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Advisory Opinion, ICJ, 23 (May 28, 1951).

67. Article I of the Genocide Convention, supra, note 22.

68. Article VI, *Id.*

69. Kuper, *The Prevention of Genocide*, supra, note 41, at 16.

70. *Id.*, at 17.

71. Paust and Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 *Vanderbilt J. Transnat'l L.* 1-38 (1978). Also see Kuper, *The Prevention of Genocide*, supra, note 41, at 17.

72. *Id.*

73. South West Africa Case (Second Phase), ICJ Report, 6 (1966). [Hereinafter cited as *South West Africa Case (Second Phase)*].

74. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ 58 (1971).

75. Case Concerning the Barcelona Traction, Light and Power Co. ICJ Report, 3 (1970).

76. *Id.*, at 32.

77. McDUGAL, LASWELL & CHEN, *THE PROTECTION OF RESPECT AND HUMAN RIGHTS: FREEDOM OF CHOICE AND WORLD PUBLIC ORDER*, in 24 *AM. UNIV. L. REV.* 980 (1974-75). [Hereinafter cited as *McDougal, The Protection of Respect and Human Rights*].

78. Article 15(2) of the Indian Constitution prohibited discrimination on the basis of caste and stated that there shall be no

restriction or conditions with regard to:

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The Indian Constitution (1949), reprinted in 2 PEASLEE, CONSTITUTIONS OF NATIONS (3d. ed. 1966). Article 17 reads:

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Id.

79. See the Untouchability (Offenses) Act, No. 22, May 8, 1955, reprinted in UNITED NATIONS YEARBOOK ON HUMAN RIGHTS FOR 1955, at 120-122.

80. MYRDAL, ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS 278 (1971).

81. Id.

82. KANE, 2 HISTORY OF DHARMASASTRA (Ancient and Medieval Religions and Civil Law) 23 (1941).

83. Srinivas, The Caste System in India, in Beteille (ed.), SOCIAL INEQUALITY 267 (1969).

84. Id.

85. Id. Also see DOBZHANSKY, MANKIND EVOLVING: THE EVOLUTION OF THE HUMAN SPECIES (1962). Dobzhansky discusses the consequences of the class system in India as follows:

A man of low caste could only hope that good behavior in his present life might let him be reincarnated in a higher caste. Class differentiation is, however, less rigid. Even the most rigid class society allows some individuals of humble birth to climb and others of privileged birth to slide down

the social ladder.

Id. at 242.

86. Richardson, Self-Determination, International Law and the South African Bantustan Policy, in 17 Col. J. Int'l L. 191-192 (No. 2, 1978). [Hereinafter cited as Richardson, Self-Determination].

87. WENTZEL, Legislation for Separation, in 19 Black Sash Magazine 2-3 (No. 3, 1977).

88. Richardson, Self-Determination, supra, note 86, at 188.

89. United Nations Economic and Social Council. Commission on Human Rights. Violations of Human Rights in Southern Africa, 31 January, 1978. U.N. Doc. E/CN.4/1270.

90. Dugard, Human Rights and the South African Legal Order 90 (1978).

91. Bantu Self-Government Act, cited id.

92. Per Dugard, id.

93. THOMPSON, POLITICS IN THE REPUBLIC OF SOUTH AFRICA 96 (1966).

94. McDougal, The Protection of Respect and Human Rights, supra, note 77, at 987.

95. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16) 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967). [Hereinafter cited as Covenant on Civil and Political Rights]. Article 24(1) of the Covenant provides that every child shall have "the right to... measures of protection" that shall be "without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth." Id. Article 25 of the Covenant speaks of the right of citizens "to take part in the conduct of public affairs," the right "to vote and to be elected" through "universal and equal suffrage" and the right "to public service." Id. Also see Article 1 of the Convention Concerning Discrimination in Respect of Employment and Occupation (1958). U.N.T.S. 31 (I.L.O. General Conference); entered into force June 15, 1960.

96. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 360 (1967). [Hereinafter cited as Covenant on Economic, Social and Cultural Rights].

97. Id.

98. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION. Opened for signature, March 7, 1966. Entered into force, January 4, 1969; 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966). [Hereinafter cited as Convention on Racial Discrimination].

99. INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF "APARTHEID". Adopted by the U.N. General Assembly, November 30, 1973. Entered into force, July 18, 1976. U.N.G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No.30) 75, U.N. Doc. A/9030 (1974), reprinted in 13 I.L.M. 50 (1974). [Hereinafter cited as Convention on Apartheid].

100. Convention on Racial Discrimination, supra, note 98.

101. Schwelb, The International Convention on the Elimination of All Forms of Racial Discrimination, in 15 Int'l & Comp. L. Q. 1003 (1966). Also see McDougal, The Protection of Respect and Human Rights, supra, note 77, at 993.

102. McDougal, The Protection of Respect and Human Rights, id.

103. Article 8(1) of the Convention on Racial Discrimination, supra, note 98.

104. Article 5 of the Convention on Racial Discrimination states:

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment...

(b) The right to security of the person...

(c) Political rights...

(d) Other civil rights [e.g., the right to freedom, the right to leave the country, the right to nationality, etc.] ...

(e) Economic, social and cultural rights...

(f) The right of access to any place or service intended for use by the general public...

Id. Also see Newman, International Control of Racial Discrimination, in 56 Cal. L. Rev. 1561 (1968). [Hereinafter cited as Newman, International Control of Racial Discrimination].

105. Id., at 1562.

106. Id.

107. Regarding nation-vs.-nation disputes, Article 11(1) of the Convention reads:

If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Convention on Racial Discrimination, supra, note 98. Regarding citizen vs. nation disputes, Article 14(1) reads:

A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this

Convention

Id. Article 14(2) reads:

Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

Id. Regarding the reports to the General Assembly, Article 9 reads:

(1) States Parties undertake to submit to the Secretary General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention...

(2) The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties.

Id.

108. Convention on Apartheid, supra, note 99. Article 1(1) of the Convention reads:

The States Parties to the present Convention declare that apartheid is a crime against humanity...

Id.

109. McDougal, The Protection of Respect and Human Rights, supra, note 77, at 994.

110 *Id.* at 996.

111. Compare Articles 1, 2(b), 2(c), 3, 4, 5 and 6 of the Genocide Convention with Articles 1(1), 2(a)(ii), 2(b), 3, 4, and 5 of the Convention on Apartheid. See Genocide Convention, *supra*, note 22, and the Convention on Apartheid, *supra*, note 99. Also see McDougal, *id.* at 1016, note 566.

112. See, e.g., McDougal, The Protection of Respect and Human Rights, *supra*, note 77, at 1016.

113. See, *supra*, note 111.

114. Reisman, Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination, 1 DEN. J. INT'L L. & POL'Y 34 (1971).

115. Article 15(1) of the Canadian Charter of Rights and Freedoms states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Enacted by the Canada Act 1982 (U.K.) c. 11; proclaimed in force April 17, 1982. [Hereinafter cited as Canadian Charter]. Article 1 of the Constitution of the Netherlands reads:

All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.

Constitution of the Kingdom of the Netherlands. Published by the Ministry of Home Affairs and prepared by its Legislative and Constitutional Affairs Division in collaboration with the Translations Branch of the Ministry of Foreign Affairs (February, 1983).

Article 3 of the basic Law of the Federal Republic of Germany reads:

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights.
- (3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.

BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY, promulgated by the Parliamentary Council on 23 May, 1949. Translation published by the Press and Information Office of the Federal Government, Bonn.

Article 34 of the Constitution of Soviet Union reads:

Citizens of the USSR are equal before the law, without distinction of origin, social or property status, race or nationality, sex, education, language, attitude to religion, type and nature of occupation, domicile, or other status.

The equal rights of citizens of the USSR are guaranteed in all fields of economic, political, social, and cultural life.

CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS, Adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation, on October 7, 1977.

Probably all the constitutions of the world have now constitutionally guaranteed racial equality. The only exception is the South African constitution, which has institutionalized discrimination. For example, the South African Parliament consists of three Houses -- the House of Assembly for the Whites, the House of Representatives for the Coloureds, and the House of Delegates for the Indians. There is no representation in Parliament for the black majority.

116. South West Africa Case, (Second Phase), supra, note 73, at 4 (Tanaka, J. dissenting).

117. *Id.* at 299. Also see CRUZ, RACIAL DISCRIMINATION, U.N. Doc. E/CN.4/Sub.2/307/Rev.1, at 28 (1971).

118. See UNITED NATIONS, APARTHEID AND RACIAL DISCRIMINATION IN SOUTHERN AFRICA, OPI/335, at 6 (1968). The General Assembly, in its Resolution 2627 proclaimed:

We strongly condemn the evil policy of apartheid, which is a crime against the conscience and dignity of mankind and, like nazism, is contrary to the principles of the Charter.

U.N.G.A. Res. 2627, 25 U.N. GAOR, Supp. 28, at 3, U.N. Doc.A/8028 (1970).

119. Article 15 of the Universal Declaration of Human Rights reads:

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality...

UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter cited as Universal Declaration of Human Rights]. Article 5(d)(iii) of the Convention on Racial Discrimination states that States Parties guarantee "[t]he right to nationality". Convention on Racial Discrimination, *supra*, note 98. Article 24(3) of the Covenant on Civil and Political Rights states that "[e]very child has the right to acquire nationality." Covenant on Civil and Political Rights, *supra*, note 95.

120. Mann, The Present Validity of Nazi Nationality Laws, in 89 L. Q. Rev. 199 (1973).

121. Brownlie, Principles of Public International Law, 631-652 (2d. ed., 1973); Schwarzenberger, International Law 303-304 (3d. ed., 1957).

122. Richardson, Self-Determination, *supra*, note 86, at 214. Article 53 of the Vienna Convention reads:

A treaty is void if ... it conflicts with a peremptory norm of general international law.

VIENNA CONVENTION ON THE LAW OF TREATIES, done at Vienna, May 22, 1969; opened

for signature, May 23, 1969. U.N. Conference on the Law of Treaties, First and Second Sessions, March 26-May 24, 1968 and April 9-May 22, 1969, U.N. Doc. A/CONF.39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969).

123. Treaty of Annexation. Wiktor (ed.), *UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1883-1904*, at 268. [Hereinafter cited as *Treaty of Annexation*].

124. THE COMMISSION OF INQUIRY INTO KANGWANE. (THE RUMPF COMMISSION). IN RE THE MATTER OF THE CESSION OF KANGWANE TO SWAZILAND. BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C. 5-7 (1984).

125. Richardson, *Self-Determination*, *supra*, note 86, at 217-219.

126. See Dashefsky and Shapiro, *ETHNICITY AND IDENTITY*, in Dashefsky (ed.), *ETHNIC IDENTITY IN SOCIETY* 5 (1976). [Hereinafter cited as *Dashefsky and Shapiro and Shapiro, Ethnicity and Identity*].

127. *Id.*

128. Rose and Rose (ed.), *Minority Problems* 247 (1965). Dashefsky and Shapiro states:

Ethnic group identification occurs when the group in question is one with whom the individual believes he has a common ancestry based on shared individual characteristics and/or shared sociocultural experiences. Such groups may be viewed by their members and/or outsiders as religious, racial, national, linguistic, or geographical.

Dashefsky and Shapiro, *Ethnicity and Identity*, *supra*, note 126, at 8.

129. VOS, *ETHNIC PLURALISM: CONFLICT AND ACCOMMODATION*, in VOS and ROMANUCCI-ROSS (ed.), *Ethnic Identity: Cultural Continuities and Change* 11 (1975). [Hereinafter cited as *Vos, Ethnic Pluralism*].

130. *Covenant on Civil and Political Rights*, *supra*, note 95.

131. Dinstein, *Collective Human Rights*, *supra*, note 26, at 118.

132. Id.

133. Convention Against Discrimination in Education (1960), 429 U.N.T.S. (UNESCO General Conference); entered into force May 22, 1962.

134. MINORITY SCHOOLS IN ALBANIA, PCIJ Ser. A.1B -- FASC. No. 64, at 1 (1935) [hereinafter cited as Minority Schools in Albania].

135. "DECLARATION concerning the Protection of Minorities in Albania," made at Geneva, October 2, 1921, in HUDSON (ed.), 1 INTERNATIONAL LEGISLATION (1919-1921), at 735-736 (1931).

136. Minority Schools in Albania, supra, note 134.

137. Id., at 17.

138. Id.

139. Id., at 20.

140. Universal Declaration of Human Rights, supra, note 119.

141. UNIVERSAL DECLARATION OF THE RIGHTS OF PEOPLES (Algiers Declaration) adopted by the participants in an international conference of jurists, politicians, sociologists, and economists in Algiers, July 1-4, 1976. Reprinted in 3 Alternatives -- A Journal of World Policy 280 (1977) [hereinafter cited as Algiers Declaration].

142. Universal Declaration of Human Rights, supra, note 119.

143. Id.

144. Algiers Declaration, supra, note 141.

145. See, FORD v. QUEBEC (A.G.) 2 SCR 712, 718 (1988). Also see O.C. 1130-89, 12 July, 1989, 121 GAZETTE OFFICIELLE DU QUÉBEC 2779 (July 26, No. 31, 1989).

146. Section 33(1) of the Canadian Charter states:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the

legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Canadian Charter, supra, note 115.

147. Nozari, UNEQUAL TREATIES, in INTERNATIONAL LAW 79 (1971) [hereinafter cited as Nozari, Unequal Treaties].

148. See e.g., Detter, The Problem of Unequal Treaties, in 15 Int'l & Comp. L.Q. 1070 (1966). [Hereinafter cited as Detter, The Problem of Unequal Treaties].

149. Vattel, Le Droit des Gens, Chap. 1, S. 18 (1758, trans. Fenwick 1916), cited by CRAWFORD, ISLANDS AS SOVEREIGN NATIONS, in 38 Int'l & Comp. L.Q. 284 (part 2, 1989). [Hereinafter cited as Crawford, Islands as Sovereign Nations].

150. E.g., UNCLOS, Articles 69(4), 70(5), 140, 144 and 148. Also see Crawford, Islands as Sovereign Nations, id. at 286.

151. Id.

152. SCHWARZENBERGER, PEACE TREATIES BEFORE INTERNATIONAL COURTS AND TRIBUNALS AND TRIBUNALS, in 8 INDIAN J. INT'L L. 2 (1968).

153. See, e.g., id.

154. SINHA, PERSPECTIVE OF THE NEWLY INDEPENDENT STATES ON THE BINDING QUALITY OF INTERNATIONAL LAW, in 14 Int'l & Comp. L. Q. 123-124 (1965). [Hereinafter cited as Sinha, Perspective of the Newly Independent States].

155. Yu-Hao, The Termination of Unequal Treaties, supra, note 2, at 44.

156. Sinha, Perspective of the Newly Independent States, supra, note 154.

157. Yu-Hao, The Termination of Unequal Treaties, supra, note 2, at 57.

158. Lauterpacht, Spinoza and International Law, in The Brit. Y.B. Int'l L. 89-107 (1927). Also cited in Yu-Hao, The Termination of Unequal Treaties, id. at 59.

159. Grotius said that:

Conventions which add something beyond the rights based on the law of nature are either on equal or on unequal terms. Those are on equal terms which are of the same character on both sides, "which are equal and common on both sides"...

GROTIUS, II DE JURE BELLI AC PACIS LIBRI TRES, 394-395 (Kelsey trans. 1925). But it has been argued by Tooke that Grotius vindicated the validity of unequal treaties imposed on vanquished peoples. TOOKE, JUST WAR IN ACQUINAS AND GROTIUS 231 (1965).

160. Vattel described unequal treaties as "those in which the allies do not reciprocally promise to each other the same things, or things equivalent." VATTEL, THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 199 (Chitty ed. 1852).

161. Pufendorf, however, conditionally accepted the validity of unequal treaties, provided they did not give birth to any kind of conflict or war. PUFENDORF, LAW OF NATURE AND NATIONS 849 (Kennett trans. 4th ed. 1729).

162. See, e.g., Nozari, Unequal Treaties, supra, note 147, at 79-80.

163. Verdross, Forbidden Treaties in International Law, in 31 A.J.I.L. 571 (1937).

164. Article 1 of the Treaty of Annexation of June 16, 1897 reads:

The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii.

Treaty of Annexation, supra, note 123.

165. POPULATION TRANSFER AND THE SURVIVAL OF THE TIBETAN IDENTITY: Summary of Conclusions, published by the CANADA-TIBET COMMITTEE, Montreal, Quebec, at 5 (1989). [Hereinafter cited as Population Transfer].

166. Sartre, On Genocide, 63 (1968).

167. Cited in Population Transfer, supra, note 165, at 4-5.

168. DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, October 24, 1970, U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970).

169. Dinstein, Collective Human Rights, supra, note 26, at 108.

170. Id. Article 2(4) of the United Nations Charter reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

CHARTER OF THE UNITED NATIONS, done at San Francisco, June 26, 1945; 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043.

171. It is interesting to note here that Charny introduced a Genocide early warning system, involving three stages of data collection used for the development of the system. These are:

a) Data collection on genocide and analyzing those datas.

b) Gathering datas on informations on the large scale violations of human rights such as torture, murder, unlawful imprisonment, concentration camps and so on. These informations will give premonition about the momentum for mass murder.

c) The third point in the system is to analyze other

social and cultural factors relevant to the understanding of the tendencies toward mass killing or genocide.

CHARNY, HOW CAN WE COMMIT THE UNTHINKABLE? GENOCIDE: THE HUMAN CANCER 287-288 (1982).

172. Horowitz, *Taking Lives*, supra, note 11, at 38.

173. Id., at 43-45.

174. Dadrian, FACTORS OF ANGER AND AGGRESSION IN GENOCIDE, in 19 J. Hum. Rel. 406 (No. 3, 1971).

175. Id., at 413.

176. See Morgenthau, *Ambassador Morgenthau's Story* 311-320 (1918). Also see Bryce, *The Treatment of the Armenians in the Ottoman Empire* 16 (1916).

CHAPTER IV

Self-Determination and the Right of Resistance

Introduction

The term "self-determination" is closely related to the term "resistance": self-determination is a right and resistance is a corresponding remedy. The relationship between the terms can be traced to two concepts: (1) the people are the sovereign source of all power, and (2) when the peoples' sovereignty is denied, they may resort to resistance to stop any injustices perpetrated against them. It was in the wake of the events of the Second World War that resistance gained wide recognition as an appropriate response to gross violations of human rights, particularly genocide and the denial of the right to self-determination.¹

Resistance occurs when laws conflict with human morals or conscience. Ethics plays an important role here. It is sometimes argued that an individual is under no obligation to obey a law that is contrary to a common standard of ethics. The fact that immorality can be a crime in and of itself found expression in the case of Shaw v. Director of Public Prosecutions,² where the Court quoted from Lord Mansfield's judgment of 1774:

Whatever is contrary, bonos mores et decorum, the principles of our law prohibit and the King's Court, as the general censor and guardian of the public manners is bound to restrain and punish.³

Morality, one of the most influential factors in the creation of law, depends upon the situation. There are certain situations in which an individual claims that, even though an act he or she has committed is against the law, it should not be considered illegal when the surrounding circumstances are taken into account.⁴ Examples include the use of sit-ins or freedom rides to protest laws that perpetuate racial segregation,⁵ or a doctor performing an illegal abortion in order to save the life of the mother.⁶

At the same time, it is dangerous to leave decisions as to what is right and wrong entirely up to individual citizens. Wasserstrom struck the following balance: "It is surely not inconsistent to assert both that indiscriminate disobedience is indefensible and that discriminate disobedience is morally right and proper conduct."⁷

Resistance can be violent or non-violent and can take the shape of civil disobedience, terrorism, armed struggle or insurgency. Bard E. O'Neil has classified insurgencies into six types: "secessionist, revolutionary, restorational, reactionary, conservative ... and reformist."⁸ He cites the Eritrean civil war as an example of a secessionist insurgency. Struggles to impose new ideologies that would effect radical societal change (e.g., Marxist revolutions or the pro-democratic revolution in China) are classified as revolutionary. Insurgencies seeking to re-establish oligarchical regimes are restorational. Those aimed at replacing an existing regime with one based predominantly upon religious values are reactionary. Insurgencies that cling to existing political values are conservative. Those that struggle for more political, social and economic power are classified as reformist.⁹

This chapter will explore the various aspects of resistance as it relates to the right to self-determination. It will differentiate between the two concepts and establish the basis for resistance in international law. Through an investigation of the historical origins of resistance, the chapter will make it clear that the very nature of the social contract as the basis of government provides for resistance in the event of the contravention of that contract. The various stages of resistance will then be discussed, from civil disobedience to actual armed insurgency. The chapter will conclude with an examination of the responsibilities of those engaged in resistance movements, both towards their nation and towards the international community, and of the legal constraints on the use of force by resistance movements. What this chapter will establish, then, is the causal link between self-determination and resistance, and the ways in which resistance movements work towards self-determination. Finally, it will establish the circumstances under which

resistance in its various forms is justifiable under international law.

Resistance: Past and Present Approach

In the fourth century B.C., Aristotle attempted to develop a theory of resistance and revolution. However, his vague formulation "leaves one without moral guidance through the maze of conflicting loyalties and preferences that necessarily arise during civil strife."¹⁰ By the fifth century A.D., two theories of resistance had emerged: one upheld the divine rights of Kings as God's representatives and therefore denied any right to resistance; the other led to the sixteenth century "monarchomachs,"¹¹ who basically denied the existence of any divine right to rule.

The seventeenth century saw the birth of a new conception of responsibility for tyranny: individual kings should no longer be considered responsible for the ills of society; rather, the very institution of society itself should accept the blame.¹² A movement was underway to limit the authority of individual monarchs through constitutional devices that would make governments responsible for any arbitrary actions they might take.¹³ On the other hand, the idea that the "tyrant" was the system itself, and not the individual despot, paved the way for a radical reformation of the system, one that recognized the need for resistance and ultimately gave rise to various forms of revolution.¹⁴

In the religious arena, both St. Augustine and St. Thomas Aquinas played key roles in shaping the theory of the just and unjust exercise of authority. According to Aquinas, unjust laws could be divided into two groups -- those that were contrary to the human good and those that were contrary to the divine good.¹⁵ He believed that people were morally justified in resisting only the former. The teachings of Aquinas ultimately formed the basis of the Catholic Church's policy of encouraging resistance.

As Pope Pius XI said in his Encyclica Firmissimam constantiam (1937), by violating justice and truth authorities weakened the very basis of their power.¹⁶ The acts of citizens to overthrow their rulers in order to remedy their grievances were surely no more reprehensible than the acts of rulers who abused their power.¹⁷

St. Augustine looked at peoples' resistance with skepticism and regarded the sufferings and punishments imposed upon people by their rulers not as "punishment of crime" but as a "test of virtue."¹⁸ He set a somewhat passive political example for Christians, teaching that respect for authority should be maintained under any and all circumstances, even at the cost of one's life. To him, life after death was more important than one's earthly existence.¹⁹

From the thirteenth century onward, European political and ideological thinking started to change. This resulted in a number of uprisings against tyrants, finally leading to the formulation of different theories of social contract by Hobbes, Locke and Rousseau.²⁰

Hobbes based his theory of resistance on notions of duty and obligation. According to him, any political resistance that involved the taking of human life violated the laws of nature. Any group of people who wanted to live together in a society had no alternative but to make killing a crime. However, until a government had been established by social contract there was no moral duty to refrain from killing, since people had no duty whatsoever towards one another. To Hobbes, killing was wrong only when it violated an agreement not to kill.²¹ Moreover, for Hobbes, State laws could never be unjust.²² The only time that resort to resistance was permissible, in Hobbes's view, was when a person's survival was at stake, the very purpose of the social contract being self-preservation.²³ The only other situation in which he regarded resistance as justified was when obeying State laws would result in grave disobedience of God.²⁴

Locke saw things in a somewhat different light. He argued that when a ruler became a tyrant, he forfeited his authority to rule and could be resisted. Such resistance was subject to limitations, without which the existence of any government would be impossible.²⁵ Locke justified resistance only as a last resort, i.e. after all reasonable attempts to achieve justice had been made through an "Appeal to the Law."²⁶ He held that there must be evidence of widespread tyranny and abuse of power for an unreasonably long period of time after a protest has been lodged, since this revealed that the tyrant intended to cause suffering among the people. If this condition was not met, any person who attempted to overthrow the government would be guilty of the greatest crime.²⁷

Locke also sought to differentiate a just revolution from a criminal rebellion. He left the power to decide which was which to the discretion of the people. Otherwise, he said, the issue would be decided through an armed struggle in which God would determine who was right.²⁸ Here Locke was clearly speaking of popular resistance:

Must men alone be debarred the common privilege of opposing force with force, which Nature allows so freely to all other creatures for their preservation from injury? I answer: Self-defence is a part of the law of Nature; nor can it be denied the community, even against the king himself... Wherefore, if the king shall shew an hatred, not only to some particular persons, but sets himself against the body of the commonwealth, whereof he is the head, and shall, with intolerable ill usage, cruelly tyrannize over the whole, or a considerable part of the people; in this case the people have a right to resist and defend themselves from injury...²⁹

Locke supported resistance in the form of self-defence against oppression, but regarded it as a part of the law of nature only when tyranny was directed against the whole people or a considerable part thereof.

Rousseau, on the other hand, based his theory on the "general will" of the people. While Locke believed that a monarch could be a sovereign source of power as long as he or she did not oppress the people, Rousseau's concept of the general will dismissed the idea of a monarch as the sovereign source of power and held that sovereignty resided with the people at all times. This was the famous principle upon which the French Revolution was based.

The first legal document to recognize the right of resistance was the Act of Secession of the Netherlands from Spain in 1581. This document stated that citizens were "duty bound" to defend the lives and liberty of the people, and of their children, with their blood and with their goods, if the ruler ever became a tyrant.³⁰ This right subsequently appeared in the Virginia Bill of Rights of 1776. Section 3 of the Bill stated:

When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.³¹

The section was referring to the promotion of the "common benefit, protection, and security of the people, nation, or community"³² by the government. One finds the importance of this concept of the popular will echoed in the writings of Thomas Jefferson:

I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical. Unsuccessful rebellions, indeed, generally establish the encroachments on the rights of the people, which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions, as not to discourage

them too much. It is a medicine necessary for the sound health of government.³³

Jefferson believed that rebellion could never threaten the stability of the institution of government, but rather that the possibility of rebellion would keep individual governments from abusing their power.

The American Declaration of Independence went even further, recognizing the right to rebel and to form a new government as an inherent right of the people. It stated that "[g]overnments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive ... it is the right of the people to alter or abolish it, and to institute new Government ..."³⁴ Article 2 of the French *Déclaration des Droits de l'Homme et du Citoyen* of August 26, 1789 proclaimed the right as follows:

Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la sûreté, la propriété, et la résistance à l'oppression.³⁵

This Declaration characterized the right to resist oppression as one of the four pillars of "the rights of man," the other three being liberty, security and property.

It was only after the Holocaust and other German atrocities of World War II that the neglected right of resistance experienced a revival. Thus, one can find an implicit recognition of this right in the preamble of the French Constitution of April 19, 1946 (rejected by referendum on 5 May 1946) and the Constitution of 27 October 1946,³⁶ which simply reiterated the *Déclaration des Droits de l'Homme et du Citoyen* of 1789:

Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine...³⁷

Elliot M. Zashin has formed the following important doctrinal conclusions from the foregoing:

(1) a social contract theory of the state does not preclude legitimate disobedience to political authority -- that is, not all acts of disobedience are inconsistent with the idea of a government established voluntarily by a body of men to protect their liberties; (2) the consent of the individual is the source of the obligation to obey constituted political authority; (3) when governors commit acts which subvert the ends for which government was established, popular resistance is justified; (4) popular willingness to resist can serve to keep governors responsible and less likely to infringe on the people's liberties.³⁸

Zashin has attempted to identify the foundations of representative government. When a government deviates from the purpose for which it was established, that government loses its authority to govern and resistance is justified. Thus, the right to resist accrues from a denial of the peoples' right to liberty, security of the person and the pursuit of happiness. These have often been the goals of most human beings. In order to ensure that they were met, people needed government and therefore entered into implicit social contracts with each other under which they gave up certain individual rights for the sake of the collective or common interest. This is what is meant by the people being the source of all sovereign political power.

Proving that recognized legal principles exist that authorize resistance is a challenging task. Is active resistance -- "a right implied a fortiori in the ius resistendi but exercised in practice quite independently of it (and mostly in ignorance of its very existence)" -- justified under international law?³⁹

T.H. Green, in his lectures on the Principle of Political Obligation,⁴⁰ reasons that the right to resist may be invoked in furtherance of justice or the public good. He bases

this conclusion on the existence of a "higher law."⁴¹ Unfortunately, such a rule would give the people carte blanche to resort to resistance, since justice and the public good are relative notions, prone to subjective interpretation. Asbjorn Eide offers the following explanation:

The premise here is that fundamental human rights have become the criteria for the legitimate exercise of authority. Violations or non-realization of human rights represent an illegitimate or insufficient exercise of authority; this gives ground for resistance or opposition in order to bring the exercise of authority into conformity with the human rights requirements.

... When the domestic power structure in a given state is such that human rights are violated, individuals and peoples are entitled to make use of the rights they have, under international law, to oppose or resist the violations carried out by governments. The resistance or opposition is rightful so long as it is based on the requirements of the human rights system.⁴²

Thus, one of the criteria for determining whether a course of action, such as resistance, would promote justice and the public good, is the extent to which a government has fulfilled its duty to protect citizens' and human rights. It was with the emergence of the United Nations Charter that human rights issues first received international recognition and impetus. Eide is thus referring to Article 1(3) of the United Nations Charter, which describes one of the purposes of the Organization as follows:

To achieve international co-operation in solving international problems of an economic, social and cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...⁴³

The Charter affirmed, for the first time in a multilateral international legal document, that issues of human rights transcend national boundaries. Moreover, it can be argued that by placing the principle of self-determination in Article 1(2),⁴⁴ the drafters of the Charter implicitly recognized a people's right to engage in armed struggle in the pursuit of political objectives. This is because Article 1(2) stipulates that equal rights and self-determination of peoples form the basis of friendly relations among nations. It follows that these ideals must be upheld at all costs, through the use of force if necessary.

This recognition was followed by the Universal Declaration of Human Rights,⁴⁵ the third preambular paragraph of which reads:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.⁴⁶

The preamble was the first direct vindication in an international instrument of the right to resist tyranny and oppression. Resistance against oppression in a colonial situation was recognized in the Declaration on the Granting of Independence.⁴⁷ This was the argument upon which the South West Africa Peoples' Organization (SWAPO) based their case of a just war against South Africa.⁴⁸ First, SWAPO based their resistance on the theological view of tyranny espoused by St. Thomas Aquinas.⁴⁹ Second, they based their struggle on the right to self-determination of peoples recognized in the Declaration on the Granting of Independence.⁵⁰ SWAPO also relied upon Article 51 of the United Nations Charter,⁵¹ arguing that the right to self-defence -- understood as applying to States in cases of armed attack by other States -- may be invoked by "a people" under colonial rule. As Professor Dugard has noted, this is not an easy argument to make:

A sine qua non for such a right is an "aggressor State" and a "victim State." In the case of

self-defence this necessary requirement is absent. It is possible to identify the aggressor State (the colonial power) but it is not possible to identify the victim State. The victim of colonial or racist aggression is not a State, but the nationals of the aggressor State, and they are attacked within the boundaries of the aggressor State.... As there is no unlawful use of force against another State by the colonial aggressor the question of self-defence does not arise.⁵²

Should an exception be made for a nascent State such as pre-1990 Namibia?⁵³ Dugard argues that it should, and that SWAPO'S plea of self-defence was justified.⁵⁴ It is submitted that the same plea should, a fortiori, be available to those "floating nations" that were once fully independent but fell victim to aggression and annexation, such as Hawaii, Tibet and the Baltic States.

Sometimes it is alleged that Chapter XI⁵⁵ of the United Nations Charter recognizes colonialism. The truth is that the text of the Charter as a whole recognizes colonialism. It was, after all, authored primarily by the Western colonial powers. However, as Professor Dugard has noted, the adoption of the Declaration on the Granting of Independence⁵⁶ rendered this interpretation questionable.⁵⁷ Moreover, subsequent developments in State practice indicate that all international efforts have been directed towards ending colonialism, by force if necessary.⁵⁸ Especially noteworthy in this regard is the Declaration on Friendly Relations,⁵⁹ which reads, in part:

Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of

the United Nations.⁶⁰

It may be argued that the Declaration on Friendly Relations expressly recognized the right of resistance by validating national liberation movements, and even imposed an obligation on the international community to assist liberation fighters in their struggles.⁶¹

In non-colonial situations, Eide suggests, the conditions for resistance arise where there have been either (a) systematic or (b) aberrational violations of people's rights.⁶² Systematic violations often occur where there has been a military takeover of a constitutional government and/or a suspension of constitutional rights. They include such things as indiscriminate arrests, bans on political activities, torture and the convening of military tribunals.⁶³ The practice of the South African government falls within the category of the systematic denial of human rights.⁶⁴

Aberrational violations, on the other hand, are those committed by certain State officials notwithstanding that rights are guaranteed by the constitution and other domestic legal instruments.⁶⁵ Domestic legal remedies are usually available to the victims of aberrational violations, unless such violations are carried out in pursuance of unofficial State policy. For this reason, the right of resistance is exercised most often in response to systematic human rights violations.⁶⁶ Thoreau is of the opinion that when a government perpetrates major injustices upon its citizens, the citizens should not only refrain from any action that contributes to the injustice, but should opt for secession.⁶⁷ This principle is derived primarily from three propositions: (a) that a person should not be expected to commit a wrong, (b) that support for any kind of injustice is wrong, and (c) that failure to challenge a government's authority to implement an unjust policy lends support to that policy and may even be interpreted as tacit approval of it.⁶⁸

Finally, the argument that there exists a right of resistance when human rights are violated has been strengthened by the response of the international community to

repeated atrocities by governments against their own citizens. It has reached the point where one may now speak of a "supernorm" in favour of a right of resistance -- including armed resistance -- when the State engages in, or directly or indirectly assists in, the violation of fundamental human rights. Nelson Mandela, in a meeting with U.S. President George Bush on June 23, 1990 in Washington, D.C., had this response to the President's call for the African National Congress to renounce violence in its fight against apartheid: "If we ... resort[ed] to violence, it is because we had no other alternative whatsoever."⁶⁹ This idea was reflected long ago in Article 33 of the French Declaration of 1793, which stated that "[r]ebellion is a holy and indefeasible right which is superior to the law.... It was through rebellion that we broke our chains in 1789; and it was again by such means that tyranny was overthrown in 1792."⁷⁰

The origin of the right to resistance is difficult to pinpoint, but St. Thomas Aquinas and St. Augustine provide a logical starting point. Proceeding through the writings of Hobbes, Locke, Rousseau and Jefferson, the right of resistance in the service of human rights has evolved to the point where it is now enshrined in the Universal Declaration of Human Rights. Its use in the cause of self-determination is now recognized as permissible wherever human rights violations occur, in colonial and non-colonial situations alike. What we must now determine are the forms of resistance permitted in various circumstances under international law.

The Stages of Resistance

(a) Civil Disobedience: Justification Under International Law

Civil disobedience is very different, in its essence, from the mere violation of petty laws. A person who engages in civil disobedience does so in order to make known his or her disapproval of an unjust law, with a view to changing that law, when this does not seem possible through any democratic process.⁷¹ For example, members of peace movements in Western non-nuclear-weapon States faced with government plans to permit the installation of nuclear weapons might well engage in civil disobedience in order to prevent it. Similarly, in countries where the military has seized power from a civilian government against the will of the people, one would expect to see acts of civil disobedience to protest the move.

The moral authority underlying civil disobedience arises from two factors: (a) its exclusive reliance upon non-violent methods and (b) the willingness of individual participants to undergo great hardship and suffering, including incarceration, in support of the cause.⁷² These factors place civil disobedience squarely within the realm of civilized behaviour. The relationship between civil disobedience, non-violence, passive resistance and pacifism was summarized by George Woodcock as follows:

I think that only one among these three concepts is consistently linked with Civil Disobedience, and that is non-violence. Passive resistance, as Gandhi suggested, is a weapon of the weak; it implies the obstinate endurance of suffering without giving in, but it implies very little else, whereas Civil Disobedience seeks to take the initiative in exposing and bringing an end to unjust conditions. When we go on to Pacifism, we find that it involves the total rejection of violence as a matter of principle...⁷³

In practising civil disobedience, an individual makes no attempt to hide the fact that he or she is breaking, and intends to break, the law.⁷⁴ Passive resistance, on the other hand, is characterized by a refusal to break the law. Thus, Socrates, by choosing to drink hemlock rather than disobey the laws of the State, was engaging in an extreme form of passive resistance.⁷⁵

Civil disobedience is used to expose injustice so as to bring it to an end.⁷⁶ Even in democratic societies, minority groups are often forced to endure countless injustices that "place their victims in such pain, humiliation and moral peril that the minority group afflicted by them has not merely a right but conceivably a duty to bring them to public attention by some dramatic event or spectacular conduct."⁷⁷ In a society governed by majority rule, it is often difficult for minorities to achieve redress of legitimate grievances, since they are outnumbered at the polling booth. Are such minorities morally bound by all decisions of the majority?⁷⁸ The answer is "no." In fact, minorities have a moral obligation to disobey any majority decisions that impinge in any way on their fundamental human rights.

For example, the 1987 Meech Lake Accord recognized English- and French-Canadians as the founding peoples of Canada, ignoring the fact that the aboriginal peoples were the country's first founding peoples. Had the Accord been ratified and incorporated into the Canadian Constitution, many members of the Canadian aboriginal community might have had to live with this slight of their peoples' historical role for the rest of their lives. Whether Manitoba MLA Elija Harper was justified in killing the Accord, given that in doing so he frustrated the wishes of the representatives of over ninety-six percent of the population, is open to question. However, it should be borne in mind that minority groups get very few chances to decisively influence the democratic process in their favour. This is why such groups are forced, in most cases, to resort to civil disobedience.

Another problem arising from majority rule in a multicultural society is that if a minority group conforms to the wishes of the majority, it can end up losing its culture and tradition through assimilation. As Thoreau said, once this happens that group of people ceases to be a minority.⁷⁹

It is sometimes argued that a particular act of civil disobedience should not be considered illegal because the law violated is ultra vires the body that enacted it.⁸⁰ Can people disobey a law on the grounds of its possible constitutional invalidity? Can they ignore a law because they strongly believe that it should be declared unconstitutional, though no court has yet declared it so?⁸¹ Many would argue that if an individual or group strongly believes in the unconstitutionality of a statute, that the statute should be disobeyed while others say the law should be challenged in Court and obeyed in the interim. Unfortunately, there is no clear answer to this question.

The situation is quite different in States where human rights violations are systematic. Civil disobedience can be justified in such cases not under domestic State law, but because the State laws are in conflict with the law of nations. For example, those people who defied State laws and helped Jews to escape from Nazi Germany or Armenians from the Ottoman Empire were certainly justified in doing so -- both morally and legally under international law.⁸²

It is submitted that it is acceptable for individuals to break the law, in the greater interest of humanity or justice, as a means of protesting laws that are contrary to the general conscience or expectation of the community as a whole. This would be the case, for example, if a group of mothers, one of whose children has been killed by a drunk driver, were to illegally block traffic in order to protest lenient penalties for impaired driving.⁸³ Some would argue that, in a democracy, such groups should first try to make their voices heard through their elected representatives, and are justified in resorting to civil disobedience only if that approach produces no satisfactory result. Others, such as Abe Fortas, believe that "civil disobedience -- the deliberate

violation of law -- is never justified where the law being violated is not itself the focus or target of the protest.⁸⁴ Fortas distinguishes between two types of civil disobedience: (a) the direct breach of an allegedly unjust law, and (b) the breach of one law as a means of protesting another. He regards only the former as permissible. According to Fortas then, the mothers in the above example would not be justified in blocking traffic since they would be violating a law other than the one they claim is unjust and would be creating a threat to the general law and order in the city. One of the most important aspects of civil disobedience is that it is never designed to bring about the complete breakdown of law and order. As Morris Keeton stated:

Civil disobedience... is not aimed toward overthrow of law and order. On the contrary, it works within the framework of the legal system to rectify specific wrongs. Where the wrongs pertain to the process of that system itself, the civil disobedient intends not to render the overall system imperative with respect to his own act. He may, in fact, want by his act to render their absurdity and injustice more patent.⁸⁵

Hugo A. Bedau goes a step further and supports acts of violence. He asserts that laws of some kind must be violated and that, in order to achieve the desired end, the protest must be directed at the government, otherwise it is not an act of disobedience.⁸⁶ Bedau carefully differentiates between civil acts, on the one hand, and criminal acts, such as anti-state or subversive activities,⁸⁷ on the other, and, in the realm of civil acts, between "direct resistance" and "direct action." He defines "direct action" as any non-violent method of protest in which "the dissenter uses his own body as the lever with which to pry loose the government's policy."⁸⁸ "Non-violent direct action" may be either "non-violent obstruction" or "non-violent interjection."⁸⁹ Non-violent obstruction involves some kind of physical force and coercion, such as "climbing into construction equipment and sitting there."⁹⁰ A good example of Bedau's concept of non-violent interjection is the recent hunger strike and demonstration by Chinese students in support of political reforms.⁹¹ An example of direct resistance is the

protest, demonstration and violence employed by South Korean students to oust President Kim, or the violence used by the leftist guerrillas in the Phillipines.

Bedau argues that one does not have to do something just because it is the law.⁹² Even Jesus Christ disobeyed various State and ritual laws with a view to radically transforming the society in which he lived. His actions have been described as ones of rebellion rather than of civil disobedience.⁹³ Resistance, rebellion and insurgency challenge the authority of the State, while civil disobedience is merely a temporary challenge of a particular norm.⁹⁴ Prophet Mohammed's actions were also rebellious. The difference between resistance and civil disobedience was stated as follows at a National Study Conference on Church and State:

In a state in which redress for wrong exists, and legal and organizational means for change are normally available, the Christian may nevertheless find certain laws and customs intolerably unjust. When the governmental processes are not realistically adequate to correct them, resistance to civil authority is a valid cause for Christians to take. Such action includes the willingness to accept the consequences. While affirming his responsibility to obey civil authority generally, a Christian may well serve justice by disobeying a particular unjust law. Disobedience to civil authority in this context is intended to serve the government ...⁹⁵

James Adams made some interesting comparisons between civil disobedience and the doctrine of a just war. First, civil disobedience, like war, must be just. Second, like war, civil disobedience must be treated as a last resort, i.e., all negotiations and peaceful processes must fail before it is resorted to. Third, like war, civil disobedience may only be undertaken under lawful authority. Adams states that in a democratic society, the lawful authority to pursue civil disobedience would be the citizens with the conscience to make decisions. Fourth, as in war, there must be some hope of victory. Fifth, neither civil disobedience nor just war may be motivated by revenge

or greed. Sixth, like just war, civil disobedience must be proportionate to the law or action objected to. Finally, like just war, civil disobedience may only be conducted by humane and proportionate means.⁹⁶

Even when these rules are applied, it is difficult to decide when civil disobedience is justified. Adams gave no easily applied test, nor did he clearly define what he meant by "lawful authority" constituted by citizens possessed of the conscience to make decisions. However, it would seem that, at a minimum, due consideration must be given to the possible consequences of any action taken.

Civil disobedience is not always directed towards the State. It may also be directed towards those corporate authorities that are responsible for much of the evil in the society and whose interests the State protects.⁹⁷ In such situations, disobedience is directed toward both the State and the corporate body.⁹⁸ As Michael Walzer puts it, "[w]hen revolution is justified in the corporation, then certain limited kinds of resistance, even violent resistance, may be justified against state officials protecting corporate property."⁹⁹ Walzer warns that such resistance should be regarded as a last resort.¹⁰⁰ Unfortunately, he fails to indicate under what circumstances he regards such rebellious activities as justified.

In a democratic society, the legislature is endowed with the power to make laws. However, this does not guarantee that those laws will treat minority groups fairly. Injustices to minority groups arouse either "submission or resistance."¹⁰² When the response is submission, the situation may take a turn for the worse, since submission can be mistaken for consent, thus encouraging continued or even greater oppression.¹⁰³ When the response is resistance, the first step the oppressed minority must take is to register that resistance through acts of civil disobedience. Civil disobedience is one of the most important methods by which minority groups can make their dissatisfaction felt by the ruling party.¹⁰¹ In a country like South Africa, where there are systematic violations of human rights, civil disobedience often turns

violent and is transformed into resistance when no other remedy is available.

One may ask what it means to say that a particular law is unjust or whether there exist any criteria for identifying unjust laws. Martin Luther King listed four potential features of a law, any one of which would render it unjust. These are:

1. [i]f it degrades human personality;
2. [i]f it binds one group and not another;
3. [i]f it is enacted by an authority not truly representative;
4. [i]f, though just in itself, it is unjustly applied.¹⁰⁴

Former U.S. Supreme Court Justice Charles E. Whittaker rejected the concept of civil disobedience in its entirety. Like Abe Fortas, he believed that such action amounted to the "taking of the law into [one's] own hands."¹⁰⁵ He stated:

The avowed purpose of such demonstration is to force direct action outside the law and hence is lawless, and of course, inherently disturbing to the peace of others. The pattern of forcing demands by mass or mob actions, outside the law and the courts, has proved -- as certainly we should have expected -- to be tailor-made for infiltration, use and takeover by rabble-rousers and communists who are avowedly bent on the break-down of law, order and morality in our society, and hence, on its destruction.¹⁰⁶

Mr. Justice Whittaker's description of civil disobedience as "tailor-made for infiltration, use and takeover by rabble-rousers and communists" is an affront to all those people who have fought for freedom and racial equality, and who regarded civil disobedience as the only means of achieving these goals. These people are not

necessarily "rabble-rousers" or "communists." As Alexander Bickel put it, "[e]ven violence is not to be condemned for all time and in all circumstances merely because it is illegal and terribly costly.... It conforms to the highest traditions of a free society to offer resistance to bad laws, and to disobey them."¹⁰⁷

The case against civil disobedience can be traced back to the days of slavery: since slaves had no rights, their masters owed them nothing. But minorities are composed of citizens, not slaves, and the State has a duty to see that they receive justice.¹⁰⁸ The pressure minorities can exert upon the political system through elections alone is often negligible.¹⁰⁹ Racial minorities such as native Hawaiians, North American native peoples and South Asians have always faced white majority rule in both the U.S. and Canada.¹¹⁰ Walzer calls this "democratic oppression."¹¹¹ In such situations, the racial discrimination that exists is often very subtle and has been called "polite discrimination." Even though they enjoy the formal benefits of citizens,¹¹² such discrimination makes minorities feel inferior and, thus, less able to realize their aspirations "within the system."¹¹³ Finally, if people are the victims of continuous oppression then they have the right to "organize ... in the struggle against oppression."¹¹⁴

It is therefore clear that even in a democratic society, occasions can arise that justify civil disobedience. Civil disobedience is one of the necessary checks and balances in a democratic society that ensure justice in government. It is only when civil disobedience has failed to achieve redress of the grievances of a minority that further, more drastic action, such as violent resistance, may be taken.

(b) Revolution: Terrorism vs. National Liberation

Terrorism is most often a reaction to oppression. It can also be a means of expressing a political ideology. The terrorist activities of the Red Brigades or the Bader-Meinhoff Group fall within the latter category. A terrorist group is generally an extremist movement that directs acts of violence or coercion against the institutions or agents of States that practise or condone oppression. In the contemporary period, those acts are usually directed against the government, institutions, agents or citizens of a particular country in order to convey a political message. Terrorism is arguably the fastest way of drawing international attention to a cause.

Liberation movements that have resorted to terrorism -- such as the Mozambique Liberation Movement, the African National Congress (ANC), the South West Africa Peoples' Organization (SWAPO), the Eritrean Liberation Movement, the Arabian Gulf Movement (Dhofar), the Palestine Liberation Organization, the Afghan Resistance Movement, the Irish Republican Army (IRA) and the Kurdish Guerrilla Movement -- have always claimed to be pursuing political goals. The Afghan, Eritrean and Arabian Gulf movements are trying to change existing national systems by challenging their respective authorities; the rest are fighting against either colonial or settler regimes.¹¹⁵ Abu-Lughad described the reasons behind such violence as follows:

The onset of the colonial system and its perpetuation have been accomplished largely through the use of brute force. The Indian poet Tagore once addressed the European colonizers in the following terms: "You build your kingdom on corpses." The dismantling of the colonial system almost everywhere in the world was possible only through systematic pressure, violence, and ultimately the waging of wars of national liberation conducted by the colonized To Afro-Asians, the following statement issued in 1926 by Ho Chi Minh is an authentic expression: "The 'refined' European

bourgeoisie had terrified by its cruelty those whom it considered 'savages.' When one has a white skin one is automatically a 'civilizer' and ... can commit the acts of a savage while remaining most civilized."¹¹⁶

This describes the current situation of black South Africans, and of aboriginal peoples and other minorities all over the world. However, there is a big difference between the terrorist activities of representative national liberation organizations fighting for freedom and independence and those of Marxist terrorist organizations who employ terror for purely ideological purposes without representing any national cause or platform. To be classified as a national liberation organization, a group must pursue objectives connected with a specific territory. Organizations such as Bader-Meinhoff and the Red Brigades promote no national platform and have no apparent association with a particular people or territory. Therefore, they cannot be classified as national liberation groups.

It is not only national liberation groups that engage in terrorist activities. There is State-sponsored terrorism as well: Germany under Hitler, the Soviet Union under Stalin, South Africa under the white minority government. Liberation movements employing guns and guerrilla warfare often arise in response to State terrorism, which is usually directed towards "challengers," i.e. opposition parties or minority groups that threaten the existing government and its policies.¹¹⁷ Most regimes resort to terrorism primarily in times of heightened tension or conflict.¹¹⁸

Ted Gurr has identified the conditions that breed State terrorism. One is the provocative acts of opposition or guerrilla groups.¹¹⁹ Another is a weak regime or one that came to power through violence. Such a regime is likely to use more violence in the future.¹²⁰ Also, the more social stratifications and heterogeneity that exist in a society, the more a regime is likely to use violence to maintain full social control.¹²¹ Finally, a regime is more likely to use force against domestic opposition if it faces external threats.¹²²

It is difficult to formulate a completely satisfactory definition of a national liberation movement. Heather Wilson has defined a war of national liberation as a "conflict waged by a non-State community against an established government to secure the right of the people of that community to self-determination."¹²³ This formulation challenges the traditional conception that only States may resort to the use of force under international law. It recognizes that non-State entities may also legitimately resort to the use of force and that participants in armed conflicts involving such entities have the same rights and obligations as those involved in international wars.¹²⁴ However, the question must be addressed whether national liberation organizations that resort to violent acts, such as blowing up bridges or severely punishing alleged collaborators, should be regarded as terrorist groups if innocent civilians are harmed in the process. This is one of the most difficult questions the international community has ever faced, and it remains divided on this issue.

The idea of just war is also encountered in the inter-state law of the ancient Greeks. 'No war was undertaken without the belligerents alleging a definite cause considered by them as valid and justification therefore.' ...¹²⁵ The peoples of developing countries base their struggle for national liberation on a philosophy akin to the Western theory of "just war." To them, a liberation fighter, inspired by political objectives, is regarded as something of a crusader: "right and justice are on his side and he is absolved from the customary restraints on the use of violence employed in his struggle."¹²⁶ Those who view the members of national liberation struggles as heroes defend such violent acts on the ground that "[b]loody work is done to prevent bloodier consequences,"¹²⁷ and that national liberation movements are carried out for "virtuous ends."¹²⁸ In other words, they argue that the end justifies the means. This kind of rationale, however, does not further the interests of either universal peace or human rights, as it leaves the determination of justice and the allowable limits of violence entirely at the discretion of individuals, a wholly unsatisfactory state of affairs.

International law has now "conferred a political legitimacy on wars of national liberation"¹²⁹ by virtue of the Declaration on the Granting of Independence¹³⁰ and the Declaration on Friendly Relations.¹³¹ The reality is that struggles for self-determination against foreign domination and undemocratic government have now become a fact of life. Even so, what is just and unjust is highly debatable, since one person's terrorist is another's freedom fighter.

Let us now discuss terrorism in terms of just and unjust wars. Even though the distinction was put aside after the Peace of Westphalia in 1648, the attitude of just war was well developed in the nineteenth century.¹³² The twentieth century even saw the concept enshrined in Chapter VII of the United Nations Charter, particularly Article 51, which reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations ...¹³³

Article 51 is an exception to the general rule set out in Article 2(4) whereby member States agree to "refrain in their international relations from the threat or use of force against the territorial or political independence of any State."¹³⁴ As Professor Dugard says:

Wars waged other than in self-defense or under the authority of the United Nations can now be categorized as unjust or unlawful, with the result that international law once again discriminates against the "unjust" belligerent.¹³⁵

Since it recognizes a right to self-defence for States only, the Charter, strictly construed, would seem to classify wars initiated by national liberation movements as unjust wars.

What will happen to those territories that were the victims of unjust wars and annexation long before the United Nations Charter came into being, but when the concept of just and unjust war prevailed in the nineteenth and early twentieth centuries? If self-defence or defence of "self" were available only to States that are currently independent, then the inherent meaning of the concept would never be realized. With the rapid development of international law, the concept of self-defence should be interpreted to include the right of liberation groups to fight for self-determination. In addition, territories that once enjoyed the status of independent States but were forcefully annexed without their consent, such as Hawaii, Lithuania, Latvia and Estonia, should be given the status of quasi-States for the purposes of Article 51 of the Charter. Any force used by an occupier should ipso facto be considered an armed attack within the meaning of Article 51. This argument is rooted in the fact that the people of these territories still wish to regain their lost independence, and in many cases maintain pronounced cultural differences from their occupiers. Article 7 of the United Nations Resolution on the Definition of Aggression¹³⁶ clearly recognizes that such people have the right to self-determination, including resistance. It reads:

Nothing in this Definition ... could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.¹³⁷

Thus, the resistance campaigns of national liberation movements are, by definition,

not terrorist activities under international law but prima facie legitimate activities that should be judged by the tactics they employ. Such conflicts fall under Protocols I and II Additional of the Geneva Conventions.¹³⁸ The former, in Article 1(4), provided that it shall apply, inter alia, to:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹³⁹

Article 1(4) thus placed national liberation struggles against racist, colonial or other alien regimes under the same rules that govern international armed conflicts. A code of conduct for States and insurgent movements was believed to be in the interest of the international community in part because any internal armed conflict has the potential to threaten international peace and security.¹⁴⁰

As between States and liberation movements, the former are usually more powerful and better equipped to conduct warfare. That is why it is sometimes argued that liberators need not always comply with the laws of warfare, while States must strictly adhere to the jus in bello at all times.¹⁴¹ Such an argument would give liberation fighters carte blanche to resort to unconventional methods of political violence, including some that take place, or whose effects are felt, outside the borders of the State -- acts that arguably constitute international criminal offences. Mr. Joewono of Indonesia has attempted to rationalize such political violence as follows:

It was unacceptable for acts committed by common criminals to be identified with acts committed by those who resisted oppression and injustice by all possible means in order to achieve independence

and regain their dignity. Such acts could not be classified as terrorism; on the contrary, they were to a certain extent to be regarded as anti-terrorist acts aimed at combatting a much more repulsive kind of terrorism, namely colonialism and other forms of domination. These forms of violence were legitimate, being founded on the right to self-determination proclaimed in the Charter and often reaffirmed by the United Nations.¹⁴²

Joewono distinguishes between acts committed by opponents of oppression and injustice and those committed by common criminals. According to him, violent resistance is necessary for the emancipation of peoples from oppression by colonial powers, racist regimes and dictators. Mr. Loncar of Yugoslavia also regards resistance as a political reality and believes that it will always be available to those who oppose oppression.¹⁴³ He thinks that a campaign of resistance that employs terror and violence is not terrorism.¹⁴⁴ However, while resistance is often necessary to combat the injustice of colonial situations, terrorism is certainly not (although distinguishing between the two is not always easy). To excuse resistance movements from the constraints of civilized society is irresponsible in the extreme. Freedom fighters must be required to exercise discretion in their activities according to the law of nations. Their ends cannot be permitted to justify their means.

The United Nations has tried to formulate a satisfactory definition of "terrorism" and "terrorist." In 1972, after a heated debate in the Sixth Committee of the General Assembly, an American resolution calling for a Convention on the Prevention and Punishment of International Terrorism was rejected.¹⁴⁵ Instead, the General Assembly adopted Resolution 3034 (XXVII),¹⁴⁶ which showed more concern for national liberation struggles than for containing terrorism. The third paragraph of this resolution reaffirms

the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination

and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.¹⁴⁷

Professor Dugard draws two important conclusions from the debates of the Sixth Committee in 1972-73. The first is that a number of States did not want to limit the discussion to a specified territory, even though the Palestinian question and the actions of the PLO were what triggered the debate. Second, this refusal to address the issue directly was politically motivated.¹⁴⁸

Most developing countries made it clear that they consider acts of violence to be justified when directed at the representatives of colonial or racist regimes or of countries collaborating with such regimes.¹⁴⁹ The United States and her allies, on the other hand, did not consider motive to be relevant when deciding whether a violent act should be regarded as terrorism or as part of a just war of national liberation in cases of attacks against diplomatic or other civilian targets.

Article 2 of the Convention to Prevent and Punish Acts of Terrorism, sponsored by the Organization of American States, reads:

For the purpose of this convention, kidnapping, murder, and other assaults against the life ... of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive.¹⁵⁰ [Emphasis added]

Article 1 of the Convention refers specifically to those persons whose "life or physical integrity" are to be specially protected by States "according to international law."¹⁵¹ The Convention recognizes no political or ideological rationale as justifying.

or mitigating the severity of, the cruel acts that it proscribes.¹⁵² Motive was also rejected as an exculpatory factor in the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (XVIII)¹⁵³ (hereinafter cited as the Convention on Crimes against Internationally Protected Persons). Article 2(1) of this convention, which outlaws the international commission of certain acts, reads as follows:

The international commission of:

(a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;

(c) a threat to commit any such attack;

(d) an attempt to commit any such attack; and

(e) an act constituting participation as an accomplice in any such attack

shall be made by each State Party a crime under its internal law.¹⁵⁴

At the same time, Article 4 of Resolution 3166 (XXVIII) states that Article 2(1) of the Convention

could not in any way prejudice the exercise of the legitimate right to self-determination and independence ... by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid.¹⁵⁵

Article 4 of Resolution 3166 arguably supersedes Article 2(1) of the Convention because of its sweeping character. The reverse could also be argued, as the Convention on Crimes against Internationally Protected Persons has more legal weight by virtue of being a convention. This latter view could unduly hamper the efforts of those involved in national liberation.

The Soviet Union and its allies have traditionally found the justification for their support of armed national liberation struggles in Article 1(2) of the United Nations Charter, which lists as one of the purposes of the United Nations "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."¹⁵⁶ The East Bloc has always argued that failure to observe the principles of "equal rights and self-determination of peoples" would create a threat to international peace, and that the two principles complement one another in the maintenance of universal security and peace.¹⁵⁷

Finally, it is submitted that if violent resistance is justified against a colonial or other alien power, then it should also be justified against a racist or other oppressive regime. Economic exploitation, political repression and the violation of human rights are often more widespread and brutal in States with homegrown autocratic regimes than in territories ruled by colonial powers. Therefore, resisters seeking to overthrow such regimes by force should also have the right to seek and receive external support. Article 2(4) of the United Nations Charter, which speaks of respect for the political independence and territorial integrity of States, must, in such cases, be interpreted with due regard for universal humanitarian considerations.

To summarize, liberation movements should be entitled to seek and receive support and recognition from the international community whether their oppressor is of foreign or domestic origin. It is clear that while resistance is justifiable under international law, terrorism as such is not. No matter how noble or quixotic their

struggles, national liberation movements must not engage in acts of indiscriminate violence against internationally protected persons or non-combatants. Otherwise, international law will be seen to be extremely limited in its ability to ensure that human beings respect one another's humanity in such highly explosive international situations as wars of national liberation.

Resistance: International and National Responsibilities

When one speaks of the national and international responsibilities of resistance, one means the responsibilities of the resisters both towards their own State and towards the international community. The first duty of resisters is to exhaust all peaceful means of effecting change before resorting to any kind of violent resistance. These include negotiation, the electoral process, passive resistance such as sit-ins, and civil disobedience. It is not, however, acceptable to break the laws of the State for some petty reason. Every situation must be judged on its own merits. For example, in a communist State, or one ruled by a military dictator, the principal means of peaceful struggle is usually massive non-violent street demonstrations, because in such countries there is little scope for negotiations or a free electoral process. The events of 1989 in East Germany and China are good examples of this. In order to be successful, resisters in these situations must be very careful not to give the State an excuse to use its armed forces to oppose their struggle.

The responsibility of resisters extends to those engaged in struggles against colonial powers. Such struggles may take the form of a demand for more equitable colonial laws, a claim for self-government or, in extreme cases, total independence. The right of resisters to engage in such violent actions when all peaceful means have failed is derived from the internationally recognized right to oppose colonial oppression and

exploitation.

The terms "self-government" and "independence" have sometimes been used interchangeably.¹⁵⁸ As Ginsburgs states:

Though a few Soviet commentators admit that the drafters of the Charter intentionally distinguished between "self-government" and "independence," reserving the use of the second expression in conjunction with the régime of trust territories, all nevertheless completely reject the thought of self-government meaning anything inferior to independence. To them -- and, one should add, not to them alone -- genuine self-government logically leads to, and culminates in, total independence; and the whole process must not stop short of having reached this, its natural, objective.¹⁵⁹

In fact, however, self-government does not always lead to independence. Even though self-government is one aspect of self-determination, contemporary international law recognizes a right of limited sovereignty. For example, the form of self-government demanded by the aboriginal peoples of Canada does not usually mean complete independence.

It is the duty of resisters to adhere to the principle of proportionality when deciding whether to resort to armed force. This means that their actions must be proportionate to the severity of the human rights violations that spawned the resistance. As Eide suggests, "[a]rmed action should be used only as a defence against those who, on behalf of the colonizer or occupier, resort to violent means in order to prevent the liberation efforts from succeeding."¹⁶⁰

What this means, in essence, is that no action may be taken that does not further the cause of human rights. Therefore, resisters must proceed prudently and exhaust all

reasonable, peaceful means at their disposal before turning to violence as a means of achieving their goals.

Limitations

The primary objective of resistance movements is to establish justice and human dignity. Where only economic rights are guaranteed, efforts should be made to secure civil and political rights, and vice versa. Both resistance movements and the governments they oppose are subject to limitations. In the case of armed liberation movements, the parties to the conflict must abide by the norms of international law. According to the four Geneva Conventions of 1949,¹⁶¹ wars of national liberation fall under the category of internal conflict and not under the definition of war or international armed conflict.¹⁶² It should be realized that the failure of these four Geneva Conventions to include national liberation struggles resulted in the adoption in 1977 of Protocols I and II Additional to the Conventions¹⁶³ and that Article 1(4) of Protocol I Additional extends the coverage of the Conventions to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination ..."¹⁶⁴ Article 96 entitles a national liberation movement to become a party to the Conventions and to Protocol I Additional by depositing a unilateral declaration to that effect with the Swiss Federal Council.¹⁶⁵

The African National Congress (ANC) claims that both it and the South African government are bound by the provisions of the Geneva Conventions on the ground that they are engaged in an international war rather than an internal armed conflict.¹⁶⁶ Moreover, ANC President Oliver Tambo, in a declaration addressed to the President of the International Committee of the Red Cross, stated that:

{the ANC of South Africa hereby declares that it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts. Wherever practically possible, the ANC will endeavor to respect the rules of the four Geneva Conventions of 1949 for the victims of armed conflicts and the 1977 additional Protocol I relative to the protection of victims of armed conflicts.¹⁶⁷

Neither the ANC nor the South African government has signed the Protocol I Additional, and the ANC has not made the unilateral declaration under Article 96 necessary to formally make it a party.

Article 48 of Protocol I Additional requires combatants in wars of national liberation to distinguish between military and civilian persons and property while prosecuting hostilities:

In order to ensure respect for and protection of civilian objects, the Parties to the conflict shall at all times distinguish between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.¹⁶⁸

There will always be the problem of the indiscriminate use of governmental power to round up members of opposition parties under the pretext of apprehending miscreants or preventing so-called subversive activities. However, this may not be used by the soldiers of national liberation movements as a justification for the use of force against unarmed civilians or civilian property. Asbjørn Eide makes this point from the perspective of positive morality, stating that

the opposition group, when involved in armed struggle, should be obliged to respect all principles of human rights. It is no more legitimate for a Tamil, a Misquito, or a member of the IRA to resort

to extra-legal execution, torture, kidnapping, or similar methods than it is for the government side The international community cannot continue to criticize governments while remaining passive about violations carried out by armed opposition groups.¹⁶⁹

Thus, national liberation movements must exercise restraint, even if the governments they seek to overthrow do not. Those that resort to extra-legal tactics in the furtherance of their cause risk becoming nothing more than another oppressive regime.

Conclusion

The international community has finally come to recognize the misdeeds of the colonial powers and the atrocities of countless homegrown dictators. Over the years, world public opinion has gradually shifted towards acceptance of the legitimacy of democratic struggles around the globe. Widespread international support for the Chinese student pro-democracy movement¹⁷⁰ and the awarding of the Nobel Peace Prize to the Tibetan leader, the Dalai Lama, confirm this shift. No elaborate justification is required under international law for the right to resist oppressive, racist or colonial regimes. This sentiment is being echoed more and more by world leaders. For example, President Bush (ironically) called on the Panamanian people to overthrow General Noriega and establish a democratically elected regime. It is axiomatic now that the resistance movements in South Africa, Tibet and the West Bank have gained almost universal international support. As Fanon observed, colonialism is "violence in its natural state, and it will only yield when confronted with greater violence The colonized man finds his freedom in and through violence."¹⁷¹ Much of Asia and Africa has been decolonized without violence, so this

pessimistic view has not always proved to be correct.

This chapter has established that resistance is the internationally recognized tool used to exercise the right to self-determination. Resistance can take many forms, from civil disobedience aimed at challenging a specific statute within a constitutional framework, to armed insurgency designed to achieve full independence. What has also been made clear, though, is that there are limits to the degree of violence that national liberation movements may lawfully employ. The tactics of terror employed by such groups as Bader Meinhoff and the Red Brigades are never acceptable, even when used to further a cause that is truly just. In all cases of resistance, the action taken must conform to the norms of international law, including the principle of proportionality. Only then can a resistance movement properly be said to have advanced the cause of human rights and international peace.

Whether revolution is gradual or abrupt, peaceful or violent, meticulously planned or spontaneous, the participation of the people is essential. By definition, revolution aims to topple the existing political system and machinery.¹⁷² It differs from a coup d'état in that the latter, usually carried out by ambitious army officers, has no mass participation.¹⁷³ Coups may be violent¹⁷⁴ or bloodless.¹⁷⁵ They are often justified on the ground that they are necessary to save the country from the oppression and corruption of the ruling power. The irony is that history has a way of repeating itself. Army officers who take power in coups in the name of greater democracy often end up ruling the country by decree themselves.

Whether a government is military or civilian, an important issue is whether people who break the law as a means of protesting unjust policies or legislation must be willing to accept jail terms or other punishment without protest. As Howard Zinn rhetorically asked, "Does quiet acceptance in such a case not merely perpetuate the notion that transgressions of justice by the government must be tolerated by citizens?"¹⁷⁶ Accepting unjust punishment without raising one's voice in protest

does not further the cause of resistance.

It has been established that the inhabitants of a colonial territory have the right at any time to engage in a war of national liberation, should that become necessary for the achievement of national self-determination. Provided that all non-violent means have been exhausted, the right of resistance in the service of self-determination has gained recognition as a super norm in international law. As Soviet writer Sharmanazashvili has stated:

The national liberation war of a dependent people against the colonial power will always be a just, defensive war from the political as well as the legal standpoint, independently of who initiated the military action. The whole thing is that in the given instance the fact of initiation of a national-liberation war by a dependent colonial country has no significance for the determination of the aggressor, since the state of dependency and disenfranchisement of the colonial peoples is the result of an imperialist aggression committed earlier, expressing itself in the annexation of these territories.... At any moment the oppressed people, living on the territory annexed by the imperialist state, have the right to launch a national-liberation struggle against this imperialist state. Such a struggle will be just and legitimate, since, in the first place, neither aggression nor annexation enjoy the benefits of a statute of limitations, and, in the second place, international law forbids aggression and consequent annexation puts them outside the law.¹⁷⁷

Thus (a) all wars waged against colonial powers are just wars, both politically and legally and (b) it is immaterial in wars of national liberation against colonial powers which side initiated the armed conflict, because the colonial power committed the

first act of aggression decades or centuries earlier by conquering and annexing the territory in question. Examples of this are not rare, even in the current world order. A very important one lies at the doorstep of the United States, namely Hawaii. The American role in Hawaii in the nineteenth century was the picture of naked aggression by a major power against a weak and peaceful independent State. In Part II of this study, there will be a detailed discussion of the validity of the Hawaiian annexation treaty of 1897 and its impact on the Hawaiian islands and their original inhabitants.

Endnotes

1. Tomuschat. The Right of resistance and human rights, in Violations of human rights: possible rights of recourse and forms of resistance. (Meeting of experts on the analysis of the basis and forms of individual and collective action by which violations of human rights can be combated, held at Freetown, Sierra Leone, March 3-7), at 33 (1981). Tomuschat states:

Genocide puts in jeopardy the highest in the hierarchy of values protected by human rights, namely human life. To a lesser extent, but still quite markedly, the denial of self-determination also constitutes a basic attack on human dignity.

Id., at 24. [Hereinafter cited as Tomuschat, The right of resistance].

2. Shaw v. Director of Public Prosecutions 2 A.E.R. 446 (1961).

3. Jones v. Randall, 23 April, K.B. (1774), reprinted in XCVIII E.R., K.B. 706, 707 (1909).

4. WASSERSTORM, DISOBEYING THE LAW, in J. PHIL. 647 (1961).

5. Id.

6. Id., at 648.

7. Id., at 650.

8. O'Neill, Insurgency: A Framework for Analysis, in O'Neill, Heaton and Alberts (eds.), Insurgency in the Modern World 3 (1980).

9. Id.

10. Bell, RESISTANCE AND REVOLUTION 18-19 (1973). [Hereinafter cited as Bell, Resistance and Revolution]. Aristotle dealt both with the methods of stabilizing a constitution and with the causes of the overthrow of constitutions. According to him, the main cause of civil strife in a society is a belief by the people that they are being deprived of their fair share of the community's resources. Lintott, Violence, Civil Strife and Revolution in the Classical City 244-245 (1982). [Hereinafter cited as Lintott, Violence, Civil Strife and Revolution].

11. It means a group of French Resistance theorists. Janzi, Lewis, and Oscar. *Against the Tyrants* 15 (1957). See also Bell, *Resistance and Revolution*, id., at 19-20.

12. Id., at 21.

13. Id.

14. Id.

15. COHN, THE RIGHT AND DUTY OF RESISTANCE, in 1 Hum. Rts. J. 492 (1968).

16. Id., at 493-494.

17. Id.

18. Eide, in collaboration with Barlaug and Chihana, The right to oppose violations of human rights: basis, conditions and limitations, in *Violations of human rights: possible rights of recourse and forms of resistance*, supra, note 1, at 36. [Hereinafter cited as Eide, The right to oppose violations of human rights].

19. Id.

20. Id., at 37-38.

21. COMMENTARY. Thomas Hobbes, *Against Disobedience -- Why the Laws of the State Cannot Be Unjust*, in CURTIS CRAWFORD (ed.), *CIVIL DISOBEDIENCE: A CASEWORK* 55 (1973).

22. Id., at 56.

23. Id.

24. Id.

25. Bell, *Resistance and Revolution*, supra, note 10, at 26.

26. Id.

27. Id., at 27.

28. *Id.*

29. Locke, Second Treatise on Civil Government, in BARKER (ed.), SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, and ROUSSEAU 135-136 (1962).

30. Cohn, The Right and Duty of Resistance, *supra*, note 15 at 497-498.

31. VIRGINIA BILL OF RIGHTS. Adopted June 12, 1776. Reprinted in SMITH (ed.), The Constitution of the United States: With Case Summaries 21 (1979). [Hereinafter cited as Smith, The Constitution of the United States]. Also see Cohn, The Right and Duty of State, *supra*, note 15, at 497. Also the Maryland Bill of Rights of 1776 states the same principle, as follows:

The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Cited in Cohn, *id.*, at 498.

32. Smith, *id.*

33. Written to James Madison. Paris, Jan. 30, 1787. Reprinted in KOCH & PEDEN(ed.), THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 412, 413 (1944).

34. See A DECLARATION by the Representatives of the United States of America in General Congress Assembled, July 4, 1776 (Declaration of Independence). Reprinted in Smith, (ed.), The Constitution of the United States, *supra*, note 31, at 24.

35. Déclaration des Droits de l'Homme et du Citoyen du 26 août 1789. Reprinted in DUVERGER, CONSTITUTIONS ET DOCUMENTS POLITIQUES 17 (1986).

36. See Projet de Constitution du avril, 1946. Reprinted in Duverger, *id.*, at 226; Constitution du 27 Octobre, 1946. *Id.*, at 240. Also see Cohn, The right and Duty of Resistance, *supra*, note 15, at 499-500.

37. *Id.*

38. ZASHIN, CIVIL DISOBEDIENCE AND DEMOCRACY 72-73 (1972).

39. Cohn, The Right and Duty of Resistance, *supra*, note 15, at 501.

40. Green, Lectures on the Principles of Political obligation, reprinted in III Green's Works (1941).
41. Id., at 111.
42. Eide, The right to oppose violations of human rights, supra, note 18, at 39.
43. CHARTER OF THE UNITED NATIONS. Done at San Francisco, June 26, 1945. 59 Stat. 1031. T.S. No.993. 3 Bevans 1153. 1976 Y.B.U.N. 1043. [Hereinafter cited as United Nations Charter].
44. Article 1(2) of the Charter states that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace..." Id.
45. UNIVERSAL DECLARATION OF HUMAN RIGHTS, December 10, 1948, U.N.G.A. Res. 217A (III), U.N. Doc.A/810, at 71 (1948).
46. Id.
47. DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, Dec.14, 1960, U.N.G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No.16) 66, U.N. Doc.A/4684 (1961). [Hereinafter cited as Declaration on the Granting of Independence].
48. DUGARD, SWAPO: THE JUS AD BELLUM AND THE JUS IN BELLO, in 93 SOUTH AF. L. J. 144 (1976). [Hereinafter cited as Dugard, SWAPO]. Also see Conf. Dakar (ND*76) IVa. Published by the Institute of Human Rights, Strasbourg, at 9. (1976).
49. Dugard, SWAPO, id.
50. Id., at 144-145.
51. Id.
52. Id., at 149.
53. Namibia is a nascent State because G.A. Res. 2145 and Security Council Resolution 303 terminated South Africa's mandate over it. The International Court of Justice in

1971 declared South Africa's presence in Namibia as illegal and called upon South Africa to withdraw from Namibia immediately.

54. Dugard, SWAPO, supra, note 48, at 150.

55. Chapter XI of the United Nations Charter deals with the Declaration Regarding Non-Self-Governing Territories. United Nations Charter, supra, note 42.

56. Declaration on the Granting of Independence, supra, note 47.

57. Dugard, SWAPO, supra, note 48, at 147-148. Also see U.N.G.A. Res. 2945 (XVIII); 2923E (XXVII); 2965 (XVII).

58. Id.

59. DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No.28) 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970). [Hereinafter cited as Declaration on Principles of International Law Concerning Friendly Relations].

60. Id.

61. Professor Dugard has a different view of the Declaration:

There can... be no suggestion that the United Nations, even acting through the General Assembly (which is not the body empowered to authorize the use of force), has given its authority to the use of force by "liberation movements" and their allies in an international war against colonial or racist regimes.

Dugard, SWAPO, supra, note 48, at 148.

62. Eide, The right to oppose violations of human rights, supra, note 18, at 47.

63. Id.

64. Id.

65. Id., at 47-48.

66. Id., at 48.

67. Thoreau, The Citizen's Responsibility for the Crimes of Government: COMMENTARY, in CRAWFORD, CIVIL DISOBEDIENCE: A CASEWORK, at 152 (1973). [Hereinafter cited as Thoreau, The Citizen's Responsibility].

68. Id.

69. CTV (Television) News, Channel 13, Ottawa, June 25, 1990. Moreover, it is also argued that: "If human rights are universal, then the action taken to combat violations of these rights should also be universal.... [F]or a long time the right of resistance to oppression was invoked in the name of natural law[. T]oday it is claimed in the name of the principle of human rights which have been unanimously adopted by the international community." UNESCO, Final Report, in Violations of human rights: possible rights of recourse and forms of resistance. (Meeting of experts on the analysis of the basis and forms of individual and collective action by which violations of human rights can be combated, held at Freetown, Sierra Leone, March 3-7), 226-127 (1981).

70. Cited in Minh, Political and judicial sanctions against violations of human rights, in Violations of human rights: possible rights of recourse and forms of resistance. Id., at 164.

71. Woodcock, CIVIL DISOBEDIENCE 3 (1966).

72. Id.

73. Id., at 5.

74. Id. See also BROON, JR., CIVIL DISOBEDIENCE, in 58 THE JOURNAL OF PHILOSOPHY 669 (1961); Acton, POLITICAL JUSTIFICATION, in BEDAU (ed.), CIVIL DISOBEDIENCE: THEORY AND PRACTICE 222 (1969).

75. Woodcock, Civil Disobedience, supra, note 71, at 8. See also Cohn, The Right and Duty of Resistance, supra, note 15, at 492.

76. Id., at 5.

77. Drinan, *Lawyers & Non-violent Demonstrations*, in *The Catholic Worker*, at 7 (June, 1964).

78. For example, if a person says that even though he is allowed to vote but is willing to overthrow the "corrupt society" by violent means, it is pretty hard to imagine how his vote "represents consent to the authority of the winner of the election." GREENWALT, *A CONTEXTUAL APPROACH TO DISOBEDIENCE*, in PENNOCK and CHAPMAN (eds.), *POLITICAL AND LEGAL OBLIGATION* 344 (1970).

79. Thoreau, *CIVIL DISOBEDIENCE*, in BEDAU (ed.), *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* 37 (1969).

80. Greenwalt, *A Contextual Approach to Disobedience*, *supra*, note 78, at 335.

81. *Id.*

82. *Id.*, at 357.

83. *Id.*

84. Fortas, *Concerning Dissent and Civil Disobedience* 63 (1968).

85. KEETON, *THE MORALITY OF CIVIL DISOBEDIENCE*, in 43 TEXAS L. REV. 509 (1964-65). Keeton made a distinction between civil disobedience and civil rebellion. To him, a government can be overthrown either by a violent or non-violent civil rebellion. *Id.*

86. Bedau, *ON CIVIL DISOBEDIENCE*, 58 THE JOURNAL OF PHILOSOPHY 653. (1961).

87. *Id.*, at 656.

88. *Id.*, at 657.

89. *Id.*

90. *Id.*

91. 11 P.M. News Broadcast, CTV, Ottawa, May 17, 1989.

92. Bedau, *On Civil Disobedience*, *supra*, note 86, at 662.

93. Jesus and Paul. The Claim of One to Be Above the Law -- Advice to the Early Christians, COMMENTARY, in CRAWFORD (ed.), CIVIL DISOBEDIENCE: A CASEWORK 37 (1973).

94. Id.

95. Cited in Adams, Civil Disobedience: Its Occasion and Limits, in PENNOCK and CHAPMAN (eds.), POLITICAL AND LEGAL OBLIGATION 298 (1970).

96. Id., at 302-308.

97. Walzer, Civil Disobedience and Corporate Authority, in Walzer, Obligations: Essays on Disobedience, War, and Citizenship 43 (1970). [Hereinafter cited as Walzer, Obligations].

98. Id.

99. Id.

100. Id., at 43-44.

101. Rawls, THE JUSTIFICATION OF CIVIL DISOBEDIENCE, in BEDAU (ed.), CIVIL DISOBEDIENCE: THEORY AND PRACTICE 246 (1969).

102. Id., at 251.

103. Id.

104. King, Jr., The Criteria of an Unjust Law, COMMENTARY, in CRAWFORD (ed.), CIVIL DISOBEDIENCE: A CASEWORK, supra, note 21, at 226. Also see Taylor, CIVIL DISOBEDIENCE: OBSERVATIONS ON THE STRATEGIES OF PROTEST, in BEDAU (ed.), CIVIL DISOBEDIENCE: THEORY AND PRACTICE 102 (1969). In 1965 Martin Luther King addressed a meeting of lawyers and said:

From a purely moral point of view an unjust law is one that is out of harmony with the moral law of the universe. More concretely, an unjust law is one in which the minority is compelled to observe a code that is not binding on the majority.

Address by Martin Luther King on "The Civil Rights Struggle in the United States Today," reprinted in 23 The Record of the Association of the Bar of the City of New York, at 15, (supp. to No.6, 1968).

105. Whittaker, The Dangers of Mass Disobedience, in Reader's Digest 121 (December, 1965).

106. Id., at 122-123.

107. Bickel, POLITICS AND THE WARREN COURT 88 (1973).

108. Walzer, The Obligations of Oppressed Minorities, in Walzer, Obligations, supra, note 97, at 48.

109. Id.

110. Id., at 49.

111. Id., at 62.

112. Id., at 62.

113. Id., at 63.

114. Id., at 69.

115. See, e.g., Abu-Lughod, UNCONVENTIONAL VIOLENCE AND INTERNATIONAL POLITICS, in 67 A.J.I.L. 102 (No. 5, 1973).

116. Id.

117. Gurr, The Political Origins of State Violence and Terror: A Theoretical Analysis, in Stohl and Lopez (eds.), GOVERNMENT VIOLENCE AND REPRESSION: An Agenda for Research 51 (1986).

118. Id.

119. Id., at 51-52.

120. Id., at 53-54.

121. Id. at 58.

122. Id. at 60.

123. WILSON, *International Law and the Use of Force by National Liberation Movements* 1-2 (1988).

124. Id. at 2.

125. Kelsen, *Principles of International Law* 29-30 (Rev. ed., 1966). For a more detailed discussion of the concept of just war, see Elbe, *The Evolution of the Concept of Just War in International Law*, 33 A.J.I.L. 665 (1939); Brownlie, *International Law and the Use of Force by States* 4 (1963); Nussbaum, *Just War -- A Legal Concept?*, 42 MICH. L. REV. 453 (1943).

126. Dugard, *International Terrorism and the Just War*, in Rapoport and Alexander (eds.), *The Morality of Terrorism: Religious and Secular Justifications* 77 (1982). [Hereinafter cited as Dugard, *International Terrorism and the Just War*]

127. LOUCH, *Terrorism: The Immorality of Belief*, in RAPOPORT and ALEXANDER (eds.), *THE RATIONALIZATION OF TERRORISM* 13 (1982).

128. Id.

129. Dugard, *TOWARDS THE DEFINITION OF INTERNATIONAL TERRORISM*, in 67 A.J.I.L. 96 (No. 5, 1973).

130. *Declaration on the Granting of Independence*, supra, note 47.

131. *Declaration on Principles of International Law Concerning Friendly Relations*, supra, note 59.

132. Dugard, *International Terrorism and the Just War*, supra, note 126, at 79. For example:

**Treaty of Friendship, Commerce and
Navigation, Peru and Venezuela, April 1,
1859**

Art. 39. ... Fifthly. Neither of the contracting parties

shall declare war against the other. ... except in case the other shall make impossible a settlement through diplomatic channels or the arbitral decision of a friendly government [in which case a war will be a just war].

Reproduced in RIGHTS AND DUTIES OF STATES IN CASE OF AGGRESSION, in 33 A.J.I.L. 859 (Supp., 1939).

**Boundary Treaty. Argentina and Bolivia,
July 9, 1868**

Art. 19. if, ... war should break out, hostilities will not commence between the countries without previous reciprocal notification six months before a rupture, accompanied by a manifesto indicating the causes of the declaration of war [and failing to do so, a war will be an unjust war].

Id. at 860.

**Treaty of Friendship, Commerce and
Navigation, Columbia and Peru, February
10, 1870**

Art. 32. ... in all cases of controversy ... neither of them shall declare war or authorize acts of reprisal against the other, except in the event of a refusal to submit to the decision of a friendly power, or to fulfill the sentence which may be issued. [Emphasis added].

Id.

**Convention respecting the Limitation of the
Employment of Force for the Recovery of
Contract Debts, October 18, 1907**

Art. 1. The Contracting Powers agree not to have recourse to armed force for the recovery of

contract debts claimed from the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any "Compromis" from being agreed on, or, after the arbitration, fails to submit to the award. [Emphasis added].

Id., at 858.

133. United Nations Charter, supra, note 43.

134. Id.

135. Dugard, International Terrorism and the Just War, supra, note 126, at 79.

136. RESOLUTION ON THE DEFINITION OF AGGRESSION, December 14, 1974, U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974).

137. Id.

138. 72 A.J.I.L. 457 (OFFICIAL DOCUMENTS, 1978).

139. Id., at 458.

140. Higgins, International Law and Civil Conflict, in Luard (ed.), INTERNATIONAL REGULATION OF CIVIL WARS 169 (1972).

141. This idea is a Soviet concept. Engels wrote in 1857 that:

[i]n a popular war the means used by the insurgent nation cannot be measured by the commonly recognized rules of regular warfare, nor by any other abstract standard, but by the degree of civilization only attained by that insurgent nation.

Engels, Persia and China, N.Y. Daily Tribune, June 5, 1857, reprinted in MARX & ENGELS, ON COLONIALISM 115 (Moscow, no date). Also see GINSBURGS, 'WARS OF NATIONAL LIBERATION' AND THE MODERN LAW OF NATIONS -- THE SOVIET THESIS, in BAADE (ed.), THE SOVIET IMPACT ON INTERNATIONAL LAW 73 (1965). [Hereinafter cited as Ginsburgs, The Soviet Thesis].

142. U.N. Doc. A/C.6/SR. 1368 (1972).

143. Mr. Loncar (Yugoslavia), U.N. Doc. A/C.6/SR. 1357 (1972).

144. Id.

145. Text of Draft Convention, 67 DEPT STATE BULL. 433 (1972).

146. G.A. Res. 3034 (XXVII), U.N. Doc. Supp. No.30, A/8730 (1972).

147. Id.

148. Dugard, International Terrorism and the Just War, supra, note 126, at 86.

149. Id., at 87.

150. ORGANIZATION OF AMERICAN STATES: CONVENTION TO PREVENT AND PUNISH ACTS OF TERRORISM. (Done at Washington, February 2, 1971). 10 I.L.M. 236 (1971). The Convention was approved by the O.A.S. General Assembly by a vote of 13 to 1, with 2 abstentions.

151. Id.

152. O.A.S. GENERAL ASSEMBLY RESOLUTION ON ACTS OF TERRORISM. Resolution adopted at the Sixth Plenary Session, held on June 30, 1970, reproduced 9 I.L.M. 1084 (1970).

153. U.N. General Assembly Res. 3166 (XXVIII), U.N.G.A. Doc. A/RES/3166 (XXVIII) of Feb. 5 (1974) (ANNEXED CONVENTION). Reprinted in 13 I.L.M. 43 (1974).

154. Id., at 44 (ANNEXED CONVENTION).

155. Id., at 42.

156. United Nations Charter, supra, note 43.

157. Ginsburgs, The Soviet Thesis, supra, note 141, at 83. Also see Osnitskaya, The Downfall of Colonialism and International Law, in 1 INT'L AFFAIRS 39 (Moscow, 1961).

158. The Soviet Thesis, id., at 79.

159. Id., at 79-80.

160. Eide, The right to oppose violations of human rights, supra, note 18, at 58.

161. The four Geneva Conventions are:

(a) CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD. Done at Geneva, August 12, 1949. 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

(b) CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA. Done at Geneva, August 12, 1949. 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.

(c) CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR. Done at Geneva, August 12, 1949. 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

(d) CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR. Done at Geneva, August 12, 1949. 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

162. Dugard, Human Rights, Humanitarian Law and the South African Conflict, in 2 HARV. HUM. RTS. Y.B. 104 (1989). [Hereinafter cited as Dugard, South African Conflict].

163. Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature December 12, 1977, 16 I.L.M. 1391, U.N. Doc.A/32/144. [Hereinafter cited as Protocol I

Additional) Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Opened for signature Dec. 12, 1977, 16 I.L.M. 1442, U.N. Doc. A/32/144. Also see Dugard, South African Conflict, supra, note 162.

164. Protocol I Additional, supra, note 163. Art. 1(4). Also see Dugard, Id.

165. Protocol I Additional, id., Art. 96.

166. Dugard, South African Conflict, supra, note 162, at 105.

167. Cited in Dugard, id. Also see Borrowdale, The Law of War in Southern Africa: The Growing Debate, in 15 COMP. & INT'L L.J. S. AF. 41 (1982).

168. Protocol I Additional, supra, note 163.

169. Eide, Internal Conflicts under International Law: Focus on Ethnic Conflict, Minority Rights and Human Rights, in 18 Bulletin of Peace Proposals 522 (No. 4, 1987).

170. "CHINA'S Struggle for democracy," published by THE OTTAWA CITIZEN, Col. 1, at B1, Saturday, May 27, 1989.

171. Fanon, The Wretched of the Earth 86 (1968).

172. Rejai, THE STRATEGY OF POLITICAL REVOLUTION 8 (1973).

173. Id. Rejai distinguishes between riot and rebellion as follows:

A riot is a non-legal, non-routine, generally spontaneous group action, transitory in time, indefinite in place, voluntary or semivoluntary in membership, undertaken to express specific grievance and frustration. A riot does not have a well-defined membership; the participants... are momentarily drawn together to redress a felt injustice.

A rebellion is a fairly short-lived, sometimes spontaneous group action... involving a relatively small but fairly well-defined segment of the

population. Examples include slave rebellions in the United States and peasant rebellions in China and Russia. Like a riot, a rebellion merely seeks to redress certain injustices, not to bring about political and social change. The rebels are prepared to accept constituted authority once their demands are met.

Id., at 17-18.

174. The 1974 coup in Bangladesh resulted in the death of President Sheik Mujibur Rahman and his entire family.

175. Bloodless coups occurred in Egypt in 1952, Algeria in 1965, Ghana in 1966 and Bangladesh in 1981. See, e.g., Rejai, *The Strategy of Political Revolution*, supra, note 172, at 18.

176. ZINN, *Disobedience and Democracy: Nine Fallacies on Law and Order* 29-30 (1968).

177. Sharmanazashvili, Kolonialnaya voyna -- grubec narushenie mezhdunarodnogo prava 60 (1957), quoted in Ginsburgs, *The Soviet Thesis*, supra, note 141, at 76-77.

Part II

Chapter V

The American Annexation of Hawaii as a Case of Agression

Introduction

If one looks at the present state of the world, it does not take long to see that many of its ongoing conflicts are the direct or indirect result of colonial rule. For decades, and in some cases centuries, the colonial powers altered the social, economic and political history of these places by direct colonization, annexation, division or separation. During the period of colonization, colonizers took full advantage of the powerlessness of indigenous peoples in the face of superior weapons technology and firepower, implementing shrewd and lucrative profit-making policies and schemes. Colonizers everywhere had essentially the same modus operandi: using military power to further their own interests. Economic and political aggression, backed by military might, was used to obtain crippling concessions from the weaker States, mostly in the form of "peace" treaties. The colonial powers would then slowly usurp the sovereign independence of the colonized States, turning them into vassal States.

It is important to note that the techniques of colonization varied from place to place. In some regions creeping colonization began as purely commercial activity (e.g., on the Indian Sub-Continent); in others it was carried out in the name of spiritual salvation (e.g. in Africa and Latin America). By the time the colonized peoples understood the motives of the colonizers it was too late, their "salvation" having already become a nightmare. Good examples of this are the preaching of Protestantism, and the manipulation of the sugar trade, by Americans in Hawaii and the Catholicization of Latin America and New France. In most of these places any protest against the colonizers was met with unprecedented brutality and, where possible, the replacement of uncooperative local rulers with more accommodating ones.

At the end of the nineteenth century, Hawaii became the victim of unprovoked aggression and annexation by the United States, aided and abetted by the American

Minister Plenipotentiary and a group of American residents of Hawaii whose forebears had come to the Islands to preach religion. This chapter examines the legality of American activities leading up to the annexation of Hawaii and asserts that such activities constituted aggression and, as such, were illegal under the international law of the day. This will be established by means of an overview of Hawaiian history, paying special attention to the period directly preceding the American annexation, together with a discussion of the concept of aggression as understood in the nineteenth century. What this chapter will demonstrate, then, is that the sovereign State of Hawaii fell victim to a conspiracy -- one that included a clear breach by the American Minister Plenipotentiary of his duties under existing U.S.-Hawaiian bilateral treaties -- to carry out an act of aggression that culminated in the annexation of Hawaii by the United States of America.

Hawaii: from Tribal Island State to American Possession

More than a thousand years ago, the ancestors of the present Polynesian inhabitants of Hawaii settled in the islands.¹ The first Europeans to visit gave the Islanders the Greek name "polynesians," meaning "people of the many islands,"² but the Hawaiians refer to their ancestors as "Ka poe Kahiko, the people of the past."³ These people settled in Hawaii and Kauai around 700 A.D.⁴ The legal definition of the term "native Hawaiian" used by the U.S. Congress is "any individual whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778."⁵

The Chiefs of the Hawaiian Islands engaged in intermittent but fierce warfare with one other in a struggle for supremacy. The eight principal islands were divided into several kingdoms, each represented and ruled by a high chief (ali'i nui or moi).⁶ When Captain Cook arrived, Kalaniopu'u was the ruler of the Island of Hawaii; the principal ruler of Maui was Kahakili.⁷ The events leading to the consolidation of the

island chain into one kingdom began within forty years of Cook's first visit.⁸ Various factors contributed to the creation of the kingdom, including the political advice and arms provided by foreigners, and intermarriage between the ruling families of the different islands.⁹ However, the most important factor was the forceful personality and courage of Kamehameha I.¹⁰ He ended the conflicts between rival Islanders and brought all the Islands except Kauai under his control with the help of Western friends and their guns.¹¹ In order to keep the various chiefs under control, he adopted two interesting methods. First, he divided the lands among the subchiefs according to the prevailing custom. Second, he appointed his most loyal chiefs governors of the individual islands.¹²

Upon the death of Kamehameha I in 1819, his son Liholiho ascended the throne as Kamehameha II, ruling until 1824. He essentially continued the arrangements established by his father and, in particular, made no changes in the distribution of lands to the subchiefs.¹³ Although these lands had been parceled out on the understanding that they would eventually be returned to the King, the subchiefs, and foreigners who had been granted land, felt that it was only reasonable that these lands should pass to their heirs upon their death.¹⁴ Kamehameha II and his wife died of measles in 1824 while visiting King George V to discuss Hawaiian security.¹⁵ When Kamehameha III took power, at age 12, the Council of Chiefs convinced him to adopt a law permitting "hereditary succession," later known as the law of 1825.¹⁶

In 1840, during the rule of Kamehameha III, the first Constitution of Hawaii was adopted. It solemnly declared that "KAMEHAMEHA I was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other ..."¹⁷ The Constitution of 1840 outlined some of the basic elements of the government structure. It created a House of Nobles and a democratically elected Legislative Body, but the King retained the right to veto all legislation and had sweeping executive powers, especially in foreign relations. In 1852 Kamehameha III unveiled a new constitution, which was drafted by American Judge William Lee and reflected his country's system

of democracy.¹⁸

It was during the reign of Kamehameha III that Hawaii began to develop a foreign policy and take part in international affairs. For example, on November 11, 1843 Britain and France signed a joint declaration recognizing Hawaiian independence.¹⁹ In 1846, Hawaii signed a treaty with Denmark.²⁰ Most notable was the first formal agreement concluded between the independent Kingdom of Hawaii and the United States in 1826. Even though it was never ratified by the U.S. Senate, it was clearly "an international act, signed as such by the authorities of the then independent Hawaiian government, and by a representative of the United States, whose instructions ... must be regarded as sufficient authority for his signature ..."²¹

The earliest American contacts between the United States and Hawaii were in the area of trade and commerce. This economic relationship began when Captain Robert Gray's small trading craft Columbia arrived at the Islands on August 24, 1789.²² By 1800, New England merchants monopolized the trans-Pacific fur trade, for which Hawaii was a popular way station.²³

Between 1812 and 1829, three Bostonians -- Nathan Winship, Jonathan Winship and William Heath Davis -- dominated a flourishing trade in sandalwood with the Hawaiian Islands.²⁴ The sandalwood trade was the "beginning of American interest in the islands and of American concern for the fate of the archipelago."²⁵ By 1840, the Islands had become a commercial frontier and, in fact, "an outpost of New England."²⁶ Meanwhile, the Hawaiian Islanders had gotten their first taste of a new religion, Christianity, when the first group of missionaries arrived from Boston in 1820.²⁷ Soon these missionaries had begun -- consciously or unconsciously -- to influence many aspects of native life through the introduction of American customs.²⁸ These missionaries traveled to the Islands under the auspices of the American Board of Commissioners for Foreign Missions.²⁹

The return of missionary couples in the late 1840's to the United States for their children's education, combined with the movement of population... created in 1848 a "grand crisis" for the Sandwich Islands [former name of Hawaii] Mission. The problem was finally resolved by the American Board's revision of its original policies of property, and citizenship. Mission property, including herds, was divided, and the missionaries were encouraged to become naturalized Hawaiians and remain in the Islands. As a further inducement, provision was made for the college education of mission children at Punahou, for which the Hawaiian Government agreed to grant land. These decisions changed the course of the Kingdom's history and brought the nation more and more under American influence.³⁰

Of the original seventy-seven missionary families, forty-two settled permanently in the Islands. Two descendents of missionaries -- Lorrin Thurston, the grandson of Rev. Asa Thurston and Sanford Dole, the son of Rev. Daniel Dole -- would later play crucial roles in the political history of Hawaii.³¹ In the beginning, the missionaries acted as amici curiae, i.e., they influenced and guided the rulers from behind the scenes.³²

The influence of the missionaries resulted, in December 1827, in the adoption of laws providing for punishment in cases of murder, theft and adultery.³³ The Hawaiian Declaration of Rights, Both of the People and the Chiefs, promulgated during the reign of Kamehameha III, clearly betrayed the enormous influence of both the United States Declaration of Independence and the Bible.³⁴ It stated, for example, that "God has ... bestowed certain rights alike on all men and all chiefs, and all people of all lands."³⁵ Moreover, of the eight foreign officials who worked for Kamehameha III, seven were Americans and, of these, four were connected with the mission.³⁶

The increasing influence of the Americans was felt in the economic sphere as well. Around the middle of the nineteenth century, sugar cane became the predominant

crop in Hawaii,³⁷ particularly after Prince Alexander Liholiho, the nephew of Kamehameha III, took the throne as Kamehameha IV in December 1854.³⁸ Kamehameha IV felt that the Constitution of 1852 was unacceptable, since it imposed a number of limitations on his royal prerogatives.³⁹ His reign was a very important one because he sought to develop a more assertive foreign policy vis-a-vis France, Britain, Japan and, in particular, the United States.⁴⁰ His reign was also marked by great economic upheaval, due to the decline of whaling and the growth of the sugar industry.⁴¹ The owners of Hawaiian sugar plantations, most of whom were Americans, were highly dependent on the availability of a secure market for their product. Because they resented the heavy American import duties on sugar,⁴² the question of annexation was always uppermost in their minds.⁴³

Even though the United States made no formal proposal for the annexation of Hawaii, the idea was nurtured by the leaders of the American Congress beginning in 1852.⁴⁴ Mackenzie described such factors as

the expansionist sentiment in the United States which reached its peak with the annexation of Texas, the settlement of Oregon and the acquisition of New Mexico and California; the gold rush in California and the influx of gold-seeking Americans into Hawaii during the winter months... the expansion of American commerce in the Pacific; [and] increasing dependence in Hawaii on the American market for sale of its goods...⁴⁵

In the spring and summer of 1854, the United States concluded a treaty of annexation with Hawaii but due to the illness of Kamehameha III it was not ratified and was subsequently rejected by Kamehameha IV.⁴⁶ Under the terms of the treaty, the United States was to have paid \$300,000 annually to the royal family as compensation for the loss of their status.⁴⁷

Kamehameha V ascended the throne in 1863 and refused to take oath under the existing constitution.⁴⁸ In 1864, he convened a convention to draft a new constitution, but the process broke down over the issue of universal (male) suffrage, which the King himself opposed.⁴⁹ As a result, the convention was called off and the old constitution was dissolved.⁵⁰ A week later, Kamehameha V signed a new constitution, one that reasserted the monarch's power.⁵¹ In 1873 Lunalilo became king, but made no changes to the Constitution of 1864.⁵²

The desire of the planters and their descendants to obtain a stable and secure market for their sugar continued to grow, and they saw America, because of its proximity and great size, as the best place to establish such a market. This choice was buttressed by the fact that most of these people had retained their American citizenship. The planters saw two ways of realizing their objective -- by obtaining a more advantageous reciprocity agreement or by annexation.⁵³ There was already a treaty in force between the two countries: the Treaty of Friendship, Commerce and Navigation and Extradition of 1849,⁵⁴ but it did not prohibit American tariffs on Hawaiian sugar. Article II stated:

There shall be reciprocal liberty of commerce and navigation between the United States of America and the Hawaiian Islands. No duty of customs, or other import, shall be charged upon any goods, the produce or manufacture of one country, upon importation from such country into the other, other or higher than the duty or impost charged upon goods of the same kind, the produce or manufacture of, or imported from, any other country ...⁵⁵

The treaty of 1849 was significant because articles of arrangement negotiated between Hawaii and the United States in 1826 were not regarded as a valid treaty.⁵⁶ It remained in force until annexation in 1898.⁵⁷

Around 1872, Hawaii was hit by an economic disaster brought about by a decline in the sugar crop coupled with a lower average price for sugar than had been obtained in previous years. This increased the Islands' economic dependency on the United States.⁵⁸ Despite the Treaty of 1849, Lunalilo, a cousin of Kamehameha V who had become king in 1873,⁵⁹ wanted another commercial reciprocity, believing that it would bring prosperity to Hawaii.⁶⁰ He was willing to lease the harbour at Pearl River to the United States in exchange for such an agreement.⁶¹ A public outcry, however, even among white Hawaiians, caused the idea to be dropped.⁶² King Lunalilo died of tuberculosis in February 1874.⁶³

King Kalakaua succeeded Lunalilo in 1874 and it was during his reign that the Treaty of Reciprocity of 1875 was negotiated.⁶⁴ Article I of the Treaty read:

For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands the United States of America hereby agree to admit all the articles named in the following schedule, the same being the growth and manufacture or produce of the Hawaiian Islands, into all the ports of the United States free of duty.

SCHEDULE

Arrow-root; castor oil; bananas, nuts, vegetables, dried, and undried, preserved and unpreserved; hides and skins undressed; rice; pulu; seeds, plants, shrubs or trees; muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands and now known in the markets of San Francisco and Portland as "Sandwich Island sugar;" syrups of sugar-cane, melado, and molasses; tallow.⁶⁵

Article IV of the Treaty of Reciprocity read:

No export duty or charges shall be imposed in the Hawaiian Islands or in the United States, upon any of the articles proposed to be admitted into the ports of the United States or the ports of the Hawaiian Islands free of duty, under the first and second articles of this convention⁶⁶

Under the treaty of 1849, the United States and Hawaii granted one another most favoured nation status with respect to tariffs. The treaty of 1875 abolished export duties on certain products, including most sugar products. It is evident from events during and after the negotiation of the latter treaty that Kalakaua entered into it under pressure from the sugar planters. As Queen Liliuokalani, Kalakaua's sister and successor to the throne, stated:

[y]ielding to the wishes of those residents of his domain who were from American or missionary stock, my brother had organized the negotiation of a treaty of closer alliance or reciprocity with the United States ... It secured that for which the planters had gained endorsement of the king, it resulted in the reciprocity treaty of January 30, 1875.⁶⁷

The Treaty of Reciprocity of 1875 demonstrated the dangers of permitting the sugar planters, or any other group of American nationals, to exert such tremendous influence over, and even actively participate in, the negotiation of treaties with the United States. Even this treaty, however, was not enough for the sugar planters of American descent because it was of limited duration. Annexation remained much more attractive to them, because only it would ensure the American domestication of Hawaiian sugar.⁶⁸ The Treaty had facilitated the amassing of enormous wealth by sugar planters in Hawaii, but had failed to guarantee their fortunes in the long term because of the possibility of its expiry or abrogation. Annexation offered an opportunity to avoid the application of new American legislation designed to curb the

profits of Hawaiian sugar planters, such as the 1889 McKinley Tariff Bill.⁶⁹ It also offered a means of escape from the perceived unfair taxation to which sugar planters were subject in Hawaii.⁷⁰ Thus, the best way sugar planters could see of protecting their investments in Hawaii was through annexation by the United States.

Meanwhile, a general hostility towards foreigners, particularly Americans, began to develop among the Hawaiian natives. The Hawaiian Gazette reported on July 30, 1873 that the natives, imbued with a sense of patriotism, did not appreciate the idea of ceding any part of the Islands to the United States.⁷¹ Patriotic feeling was so intense that even the King's soldiers mutinied in September 1873, undermining Lunalilo's prestige.⁷² After Kalakaua became King in 1874, the situation got out of hand. He was faced with a riot by anti-reciprocity forces led by Queen Emma, the widow of Kamehameha IV.⁷³ forces he ultimately succeeded in winning over.⁷⁴

Walter Gibson, a private American citizen who was extremely pro-Hawaiian, proposed that Kalakaua seek to establish a Polynesian Empire and become "Emperor of Oceania."⁷⁵ General Comly, the U.S. Minister to Hawaii, viewed Gibson as a troublemaker with great influence over the natives.⁷⁶ Gibson won a seat in the Hawaiian House of Representatives in 1878. In 1882 Kalakaua made him Premier of Hawaii.⁷⁷

At this time, the Treaty of Reciprocity of 1875 was about to expire. Article V provided that "the Convention shall remain in force for seven years, from the date at which it may come into operation...."⁷⁸ The status of the Treaty came into question between 1883 and 1887 when it was neither terminated nor renewed by the United States.⁷⁹ The United States Senate wanted to scrap the Treaty, but refrained from doing so because of the high level of British and German interest in the Pacific.⁸⁰ This time, when a demand was made by the United States for formal cession of Pearl Harbor, Kalakaua, plagued by internal chaos and dissatisfaction, agreed to it.⁸¹ As a result, a supplementary Reciprocity Convention was entered into in 1884 and ratified in 1887.

Essentially an extension of the 1875 Treaty, the United States agreed to it in exchange for the "exclusive right to enter the harbor of Pearl River in the Island of Oahu ..." ⁸² This treaty remained in effect until June 1890. ⁸³ This treaty has been described as a step towards "economic annexation." ⁸⁴

Reform members in the Hawaiian House of Representatives, consisting principally of pro-annexationist descendants of American settlers, wanted changes in the government's policies. Voted into the House in 1886, one of their most notable members was Lorrin A. Thurston. ⁸⁵ Prime Minister Gibson was under constant attack from the reform members. These reformers, who considered themselves "morally righteous" people, ⁸⁶ opposed Gibson's plan to establish an Empire of Polynesia, with Kalakaua as ruler. ⁸⁷ They also opposed the King's lavish over-spending.

In December 1886, the Hawaiian League was formed. The members of this secret opposition League included reformers and part-Hawaiians. ⁸⁸ "The conservative members simply wanted to force Gibson out of Office, while the radicals wanted to overthrow the monarchy and establish a republic or seek annexation to the United States." ⁸⁹ The radicals were led by the "Committee of Thirteen," whose leaders included Sanford Dole, Lorrin Thurston and W R. Castle. ⁹⁰

Mounting opposition to Gibson's policies -- which included making Kalakaua ruler of a Polynesian Empire, reckless government spending, and official support for such patriotic sentiments and slogans as "Hawaii for the Hawaiians" -- resulted in a partial coup d'état on June 30, 1887, planned and executed by the secret Hawaiian League. The coup stripped Kalakaua of his direct control of the government. ⁹¹ After the coup, Kalakaua gave in to the demands of the revolutionaries and agreed to draft a new constitution, which took only five days and nights, assisted by a few people, including Albert Francis Judd, Justine Edward Preston and Sanford Dole. ⁹² The Constitution of 1887 reduced the King's stature to that of a figurehead: it "made his military powers subject to legislative control, placed executive powers in the hands of a cabinet

appointed by him but responsible to the legislature, and made the House of Nobles an elective office."⁹³ Under the 1840 Constitution, membership in the House of Nobles had been constitutionally guaranteed for sixteen named individuals, who also sat in the government councils.⁹⁴ Their main function was to assemble annually "for the purpose of seeking the welfare of the nation, and establishing laws for the kingdom."⁹⁵ Under the 1887 Constitution, all of their privileges were terminated. This is partly why the document became known as the "Bayonet Constitution."⁹⁶ The 1887 Constitution also gave voting rights to foreign residents of white American and European heritage (Germans, Norwegians, Portugese and Frenchmen), many of whom had found naturalization undesirable or difficult.⁹⁷ These men could now retain their foreign citizenship while enjoying the same privileges as native and naturalized Hawaiians, thus increasing the number of white voters.⁹⁸ Male residents of all other nationalities were not granted the same benefits.⁹⁹ Article 39 of the Constitution of 1887 read:

Every male resident of the Hawaiian Islands, of Hawaiian, American or European birth or descent, who shall have attained the age of twenty years, and shall have paid his taxes, and shall have caused his name to be entered on the list of voters for Nobles for his District, shall be an elector of Nobles, provided:

First: That he shall have resided in the country not less than three years ...

Second: That he shall own and be possessed, in his own right, of taxable property in this country of the value of not less than three thousand dollars over and above all encumbrances, or shall have received an income of not less than six hundred dollars during the year next preceding his registration for such election ...¹⁰⁰

The Constitution of 1887 denied political rights to persons other than those of native Hawaiian, American or European heritage. Two classes of voter were created by the Constitution: one could only vote for Representatives; the other could vote for both Representatives and Nobles.¹⁰¹ The property requirements were so high for both classes that a large number of native Hawaiians lost their voting rights.¹⁰² In order to vote for Nobles, a man had to own "taxable property in this country of the value of not less than three thousand dollars over and above all encumbrances" or have received "an income of not less than six hundred dollars during the year next preceding his registration for such election."¹⁰³ The qualifications for voting for Representatives were more modest. For example, Article 62 of the Constitution of 1887 read:

Every male resident of the Kingdom, of Hawaiian, American, or European birth or descent, who shall have taken an oath to support the Constitution and laws in the manner provided for electors of Nobles; who shall have paid his taxes; who shall have attained the age of twenty years; and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall know how to read and write either the Hawaiian, English or some European language (if born since the year 1840), and shall have caused his name to be entered on the list of voters of his district as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that district; provided, however, that the requirements of being domiciled in the Kingdom for one year immediately preceding the election, and of knowing how to read and write, either the Hawaiian, English, or some European language, shall not apply to persons residing in this Kingdom at the time of the promulgation of this Constitution, if they shall register and vote at the first election which shall be held under this Constitution.¹⁰⁴

This Constitution placed the House of Nobles squarely in the control of the Reform Party, which was made up of Hawaiian-born persons of European and American heritage and foreign residents from Europe and the U.S.A.¹⁰⁵ The new Constitution gave the House of Nobles the power to exercise full control over the King's Cabinet. The Cabinet controlled the King, but the House of Nobles controlled the Cabinet.¹⁰⁶ The new Constitution also placed the armed forces under the control of the Legislature.¹⁰⁷ As Paul Bailey has drily noted, "[i]n return for this drastic housecleaning, [Kalakaua] was allowed to keep his job as king."¹⁰⁸ After the sudden and mysterious death of Kalakaua in San Francisco in 1891, his sister Liliuokalani became the Queen of Hawaii.¹⁰⁹

Constitutional reform was a major issue in the elections of 1892.¹¹⁰ The main participants were the Reform Party, the National Reform Party and the Liberal Party. No party was able to win a majority of seats in the Legislature.¹¹¹ The Queen had always felt impeded by the 1887 Constitution, since it severely curtailed the powers of the monarch. Having marshalled enough support to do so, she therefore set in motion a plan to revise the Constitution, something she had been considering since early 1892.¹¹² A draft had already been prepared in October 1892 and a copy was now submitted to Attorney General Arthur Peterson for his recommendation.¹¹³ The new Constitution was modelled on the Constitution of 1864, which had placed more power in the hands of the monarch.¹¹⁴ Queen Liliuokalani, under pressure from native Hawaiians and Hawaiian citizens of various other races, decided to promulgate the new constitution on January 14, 1893. It would have radically restructured the voting pattern in Hawaii, and increased the powers of the Legislature.¹¹⁵ The impending constitutional changes caused great excitement and met with much opposition in the missionary community. The proposed Constitution of 1893 had the following features:

- (1) Cabinet ministers were to serve "during the queen's pleasure," but also subject to impeachment and to removal by legislative vote of want of confidence; (2) nobles were to be appointed for life by the queen instead of being elected for a term of

years; (3) only male subjects (i.e., Hawaiian born or naturalized) were to be allowed to vote; (4) justices of the supreme court were to be appointed for a term of six years instead of life; (5) article 78 of the constitution of 1887 was dropped out: this was the article that required all official acts of the sovereign to be performed "with the advice and consent of the Cabinet."¹¹⁶

Opposition from the missionary community forced the Queen to issue a proclamation that no changes would be made to the Constitution except in accordance with the procedures provided therein.¹¹⁷ In the meantime, in January of 1893, a handful of disgruntled people met with W.O. Smith, a prominent lawyer, to form the "Committee of Safety." The Committee, which included Lorrin A. Thurston and Sanford Dole, asserted that the Queen's decision to proclaim a new constitution threatened the peace, security, lives and property of the people.¹¹⁸ It is important to note here that Thurston had already discussed Hawaii's takeover and annexation with American officials in 1892. In fact, he had been assured by the U.S. Secretary of the Navy that the Harrison Administration would give the matter favourable consideration.¹¹⁹ He then met with John L. Stevens, the American Minister Plenipotentiary, to draw up a plan to overthrow the Queen.¹²⁰

Stevens had been appointed Minister Plenipotentiary in June 1889. By virtue of his position, he was also in charge of the American armed forces stationed in Hawaii. Immediately upon his arrival in Hawaii, it became very clear that his mission was to deliver sovereignty over the the Islands to the United States.¹²¹ On August 20, 1891, he wrote:

The best security in the future, and the only permanent security, will be the moral pressure of the business men and of what are termed "the missionary people," and the presence in the harbor of Honolulu of an American man-of-war.¹²²

In a letter sent to Secretary of State Blaine on March 8, 1892, about ten months before the Queen was overthrown, he asked the following questions of the Department of State:

If the Government here should be surprised and overturned by an orderly and peaceful revolutionary movement ... and a provisional or republican government organized and proclaimed, would the United States minister and naval commander here be justified in responding affirmatively to the call of the members of the removed Government to restore them to power or replace them in possession of the Government buildings? Or should the United States minister and naval commander confine themselves exclusively to the preservation of American property, the protection of American citizens, and the prevention of anarchy?... I desire to know how far the present minister and naval commander may deviate from established international rules and precedents in the contingencies indicated ...¹²³

On November 20, 1892, Stevens wrote a long letter to Secretary Foster in the Harrison Administration, in which he said:

Directly and indirectly, the palace probably costs the little kingdom \$150,000 per year. A governor, at \$5,000 a year, acting in harmony with the responsible men of the Legislature, would be far better for the islands than the present monarchical Government. In truth, the monarchy here is an absurd anachronism. It has nothing on which it logically or legitimately stands.¹²⁴

Finally, under the pretext of protecting American lives and property, and in response to a letter from the Committee of Safety to Stevens that asserted, *inter alia*, that due to the "revolutionary acts of Queen Liliuokalani ... the public safety is menaced and lives

and property are in peril, and we appeal to you and the United States forces at your command for assistance...."¹²⁵ over 160 Marines armed with sophisticated weapons landed at Honolulu on January 16, 1893 and took control of the Islands. The Queen's protests went unheeded.¹²⁶ The following day, Henry Cooper, a resident of Hawaii for less than a year, together with seventeen others, declared a Provisional Government of Hawaii, to exercise power until the annexation was completed, thereby satisfying the political ambitions of a few powerful men.¹²⁷ The Queen surrendered to the superior forces of the United States. In her protest she stated:

I, Liliuokalani, by the grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.

That I yield to the superior force of the United States of America, whose minister plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu, and declared that he would support the said Provisional Government.

Now, to avoid any collision of armed forces, and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative, and reinstate me in the authority which I claim as the constitutional Sovereign of the Hawaiian Islands.¹²⁸

The Queen recalled an incident in 1843, when she was only five, in which England had refused to accept Lord Paulet's takeover of the Kingdom and had returned it to Kamehameha III. She strongly believed that this time as well truth and righteousness

would prevail.¹²⁹ However, immediately after her surrender, a commission on behalf of the Provisional Government was sent to Washington, D.C. to negotiate a treaty of annexation.¹³⁰ Once negotiated, the treaty was sent by President Harrison for Senate approval on February 13, 1893.¹³¹ Harrison requested prompt and favourable Senate action and denied any involvement by the United States in the overthrow of the monarchy.¹³²

Before the U.S. Senate could ratify the treaty, however, Harrison was replaced by President Cleveland, who had just won the Presidential election of November 1892. Cleveland was sworn in on March 4, 1893.¹³³ This time, the Queen sent her representatives to meet with officials of the U.S. administration directly. They rested their case on the fact that the Queen had lost her sovereignty as a direct result of collusion between Stevens and the so-called revolutionists, and that without direct interference by American troops there would have been no overthrow.¹³⁴ President Cleveland, after learning the facts, withdrew the treaty from the Senate's consideration and ordered James H. Blount, former Chairman of the Foreign Affairs Committee of the House of Representatives, to undertake a full investigation into the matter.¹³⁵ By July 1893, the report was completed. Blount summarized it as follows:

The leaders of the revolutionary movement would not have undertaken it but for Mr. Stevens' promise to protect them against any danger from the Government. But for this their mass meeting would not have been held. But for this no request to land the troops would have been made. Had troops not been landed no measures for the organization of a new Government would have been taken.

The American minister and the revolutionary leaders had determined on annexation to the United States and had agreed to the part each was to act to the very end....¹³⁶

Another point intrigued Blount: if the annexation had been put to the Hawaiian

voters, it would have been rejected. He therefore concluded that without the intervention of the American troops, the Queen could not have been overthrown.¹³⁷

Blount's findings enraged President Cleveland. He addressed the Joint Houses of Congress and declared:

The military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawaii or for the bona fide purpose of protecting the imperilled lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the de facto and de jure Government. In point of fact the existing Government, instead of requesting the presence of an armed force, protested it Therefore the military occupation of Honolulu by the United States ... was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property

The lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.

But for the notorious predilections of the United States minister for annexation the committee of safety, which should be called the committee of annexation, would never have existed

By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government

of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair

The law of nations is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized state are equally applicable as between enlightened nations. The consideration that international law is without a court for its enforcement and that obedience to its commands practically depends upon good faith instead of upon the mandate of a superior tribunal only give additional sanction to the law itself and brand any deliberate infraction of it not merely as a wrong, but as a disgrace

She [Queen Liliuokalani] surrendered, not to the Provisional Government, but to the United States. She surrendered, not absolutely and permanently, but temporarily and conditionally until such time as the facts could be considered by the United States.¹³⁸

President Cleveland then proposed to restore to Hawaii the status it possessed before the landing of the American troops, in exchange for clemency for the conspirators. The Queen accepted the proposal.¹³⁹ The conspirators, after learning of the President's intentions, refused to restore the Queen to power. On the contrary, they argued that the President had no authority to interfere in Hawaii's internal affairs. In order to give the Provisional Government the appearance of legitimacy, the conspirators called for a Constitutional Convention.¹⁴⁰ Sanford Dole, the President of the Provisional Government, announced that the Convention would be attended by thirty-seven delegates. Nineteen were named by Dole in order to secure his position. The rest were elected by the people. One of the principal requirements for becoming an eligible voter in this election was a declaration of allegiance not to the Queen, but

to the Provisional Government. Less than 20% of qualified voters turned out for this sham election.¹⁴¹ Sanford Dole unilaterally proclaimed the new Constitution, thereby creating the Republic of Hawaii. He became its first President.¹⁴² The new constitution also expropriated crown lands without compensation, declaring that "[t]hat portion of the public domain heretofore known as crown land is hereby declared to have been heretofore, and now to be, the property of the Hawaiian Government..."¹⁴³ Dole then settled in to wait for a change of leadership in America.

In 1896, Democratic President Grover Cleveland was replaced by William McKinley and the conspirators gained confidence. They were soon able to negotiate a treaty of annexation with the new Republican administration.

With the Spanish-American War, the navy needed Pearl Harbor as a permanent, full-time, American-governed mid-Pacific coaling station. The navy's demands and the expansionist pressure of Congress and the press forced mild, peaceably inclined President William McKinley to approve the annexation that became a reality...¹⁴⁴

The treaty of annexation between the United States and Hawaii was negotiated in Washington on June 16, 1897. It was ratified by the Hawaiian Senate later that year.¹⁴⁵ It was submitted to the United States Senate the same day but the Republican Senatorial leadership delayed action on the ground that it lacked a clear majority.¹⁴⁶ Article 1 of the Treaty reads:

The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii.¹⁴⁷

The annexation treaty thus violated Article 1 of the Treaty of Friendship, Commerce and Navigation of 1849 calling for peace and friendship between the two nations, which stated that "[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors."¹⁴⁸ The annexation was implemented by a Joint Resolution of Congress on July 7, 1898.¹⁴⁹ The Resolution read, in part:

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.¹⁵⁰

A joint resolution was chosen because there was considerable concern that a treaty would not be supported by the two-thirds majority required for ratification by the Senate.¹⁵¹ There were other reasons as well. First, there was a protest from Japan

that annexation would be detrimental to the interests of her nationals, who formed the majority of Hawaii's manual labor force.¹⁵² The possibility of Japan taking possession of Hawaii before the United States could annex it was of significant concern to President McKinley,¹⁵³ who

[reportedly told Senator Hoar:] "We cannot let the islands go to Japan... Japan has her eye on them. Her people are crowding in there. I am satisfied they do not go there voluntarily, as ordinary immigrants, but that Japan is pressing them in there, in order to get possession before anybody can interfere."¹⁵⁴

As Morgan noted:

McKinley from the first acted on the basis of his new policy with a consciousness of American defense, an appreciation of the desirability of Pacific possessions, and an awareness of the designs of other powers. That consciousness would settle into a hardened conviction that America must assume her destiny in the Philippines as well as Hawaii.¹⁵⁵

President McKinley, "fear[ing] interminable delays, ... replaced the treaty ... with a simple resolution which could be adopted by a simple majority."¹⁵⁶ The Constitution of the United States prohibits the federal government from exercising any authority not expressly delegated to it, but is silent on the issue of territorial expansion.¹⁵⁷ The annexationists compared the proposed annexation of Hawaii with the Texas annexation in 1845. Senate Report No. 681 stated:

This joint resolution [on Texas] clearly establishes the precedent that Congress has the power to annex a foreign State ... either by assenting to a treaty of annexation or by agreeing to articles of annexation or by act of Congress based upon the consent of

such foreign Government obtained in any authentic way.¹⁵⁸

There are several important differences between the annexation of Texas and the annexation of Hawaii that prevent the former from being a precedent for the latter. First, the joint resolution annexing Texas contained no words like "annex" or "annexing." Instead, it set out "the terms on which Congress will admit Texas into the Union as a State."¹⁵⁹ Statehood was never proposed for Hawaii.¹⁶⁰ Second, a plebiscite was held in Texas approving the joint resolution. No such plebiscite was ever held in Hawaii;¹⁶¹ the Hawaiian people were never given a chance to vote on the annexation. Third, Texas was never recognized by the community of nations as an independent State. Fourth, in Texas there was no overthrow of a prior legitimate government. The steps taken with respect to the Republic of Hawaii were a "new departure" in the policy of the U.S. government.¹⁶²

On June 15, 1898, the House of Representatives approved the Newlands Resolution to annex Hawaii by a vote of 209 to 91,¹⁶³ and on July 6, the Senate passed the measure by a bare two-thirds majority of 42 to 21, with 26 senators abstaining.¹⁶⁴ A joint resolution required only a simple majority of the Congress. The voting pattern shows how close it would have been had the measure gone to the Senate alone, where any of the abstaining senators could have prevented ratification with a negative vote. President McKinley signed it the next day. According to the terms of the Joint Resolution of Annexation, the Republic of Hawaii ceded its sovereignty on August 12, 1898.¹⁶⁵

The annexation of Hawaii has been clearly shown to be devoid of any moral or legal justification, for several reasons. Hawaii's sovereignty was ceded by an unlawful, unrecognized, unrepresentative government. The "Republic of Hawaii" had been proclaimed after a coup d'état that succeeded only due to the assistance of the American Minister Plenipotentiary. President Cleveland denounced the overthrow and promised to return Queen Liliuokalani to power. Finally, the cession was carried

out without prior consultation with the people of Hawaii, who would not have consented to it.

With regard to the United States, the annexation grew out of an act of aggression carried out by the official representative of the United States Government, thereby robbing it of any legal justification. Further, it took place in direct contravention of two bilateral treaties between Hawaii and the United States. Finally, supporters of the annexation sought to justify it by invoking an inapplicable precedent, that of the annexation of Texas in 1845. Without a doubt, then, the American annexation of Hawaii was simply an act of aggression perpetrated by the United States in furtherance of her own economic and strategic interests, with no consideration given to the rightful wishes and aspirations of the Hawaiian people.

International Law in Respect of Aggression and Conspiracy

International law is constantly faced with the challenge of maintaining international peace and security by securing the mutual respect of States for each other's territorial integrity and political independence and the resolution of inter-State conflicts through peaceful means. United Nations General Assembly Resolution 3314 (XXIX) defined aggression as follows:

Article 1:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.¹⁶⁶

Article 3:

Any of the following acts, regardless of a declaration of war, shall ... qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.¹⁶⁷

It took fifty years for States to develop a definition of "aggression" that enjoyed wide acceptance.¹⁶⁸ Efforts had been made by the League of Nations, the International Law Commission and committees of the United Nations, but all of these had been in vain.¹⁶⁹ The most important aspect of the resolution is Article 7, which safeguards the rights of groups struggling for self-determination. Article 7 reads:

Nothing in this definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of those peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above mentioned Declaration.¹⁷⁰

Non-aggression has become one of the seven fundamental principles of contemporary international law.¹⁷¹ In addition, it has evolved into a peremptory norm of international law from which no derogation is permitted.¹⁷² Article 2(4) of the United Nations Charter prohibits aggression. It reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ..." The concept of non-aggression also found expression in the Basic Law of the Federal Republic of Germany after the Second World War, Article 26 of which reads:

(1) Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional. They shall be made a punishable offence.

(2) Weapons designed for warfare may not be manufactured, transported or marketed except with the permission of the Federal Government¹⁷³

The Federal Republic of Germany is perhaps the only country that has placed a constitutional ban on wars of aggression, in response to the international condemnation of the acts of Hitler.

Whether the American participation in the events leading up to the annexation of Hawaii constituted a violation of customary international law depends on whether the principle of non-aggression had crystallized into a rule of customary international law or, at least, into a regional customary rule in the Americas and in the South Pacific prior to the end of the nineteenth century.

The pioneers of the formation of customary international law, Puchta and Savigny, took the first steps towards defining a customary rule in the late eighteenth and early nineteenth centuries.¹⁷⁴ They were assisted by Hugo, Moser and Austin.¹⁷⁵ Both

Puchta and Savigny concluded that the "spirit of the people" was the basis of custom.¹⁷⁶ Professor D'Amato states, in reference to Puchta, Savigny, Hugo, Moser and Austin, that:

[i]n their view, custom was merely the immediate and spontaneous revelation of the common popular sentiments. The importance of their work to international law lay not in their conclusion but in their emphasis on the cognitive or psychological aspect of custom For in the theories of Puchta and Savigny, if 'law' is the expression of popular consciousness or will, then the overt or tangible aspect of custom dwindles in relevance and importance. So long as we can discover the popular sentiment, what need is there for an overt act or "precedent"?¹⁷⁷

It was Francois Gény who, in his Méthode d'interprétation et sources en droit privé positif, published in 1899, provided the two elements of custom. These were summarized by Professor D'Amato as follows:

usage (repeated practices) and opinio seu necessitatis, the latter meaning that the usage must amount to the "exercise of a (subjective) right of those who practice it." Usage is the "material and detectable element" in custom, and opinio juris the "immaterial and psychological element."¹⁷⁸

In order for its behaviour to constitute evidence of a rule of customary international law, a State must act under the belief that it is exercising a legal right or fulfilling a legal obligation. It is not enough for the State to engage in such practice solely for its own convenience.¹⁷⁹ As the International Court of Justice clearly stated in the North Sea Cases:

The acts concerned... must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.¹⁸⁰

Therefore, the very basis of opinio juris sive [or seu] necessitatis is a strong, widely held expectation in the international community that a certain standard of conduct will be maintained by States in their dealings inter se. In acting contrary to this expectation, a State becomes a violator of an international customary norm. As Professor McDougal points out:

There is no way that one can find out whether there is opinio juris without observing and evaluating the uniformities in the behavior of people

In order to make a realistic finding of law, an observer must be able to identify several very specific components: (1) a policy content, (2) expectations of authority, and (3) expectations of control.¹⁸¹

The psychological element in a State's actions is the "policy content" and the practice of the State includes "expectations of authority" and "expectations of control." This test reflects the general interest of the international community concerning the interaction of States. One should apply the test in order to find out the level of development of the principle of non-aggression under international law in the late nineteenth century.

Dating from the early nineteenth century, there is ample evidence of State practice in the Americas and in the South Pacific -- in the form of non-aggression pacts or treaties -- denouncing wars of aggression.¹⁸² These non-aggression pacts gave birth to the concept of the international responsibility of States in cases of unjust war by one State against another.¹⁸³ An examination of various bilateral and multilateral treaties concluded between States will demonstrate that the concept of non-aggression developed into a customary norm in the nineteenth century. Even though these treaties bind the signatories only, a treaty provision may develop into customary international law if it "constitutes the first textual statement of a custom which had not previously reached full maturity, but was ... an emerging rule, a rule in statu nascendi. As a consequence of being embodied in a treaty... that rule in statu nascendi ... crystallizes as a rule of law."¹⁸⁴

These treaties recognized at least one very important principle: that any type of armed attack by one country that threatened the territorial integrity and political independence of another was considered an evil act. In other words, the States wanted to avoid such uses of force by concluding treaties amongst themselves in which they exchanged promises not to engage in them. This gave birth to a customary rule of non-aggression. Even though the term "aggression" per se was not used, all the elements that constitute aggression according to the Definition of Aggression, i.e. an attack of one country by the armed forces of another, military occupation -- temporary or permanent -- and forceful annexation of one State by another -- in whole or in part -- were included.¹⁸⁵

In the Americas and in the South Pacific, a customary rule of non-aggression had developed by the end of the nineteenth century. Once a customary norm is created at the regional level, it may develop into a norm binding upon the international community, particularly if it represents the common interest of humanity. Tunkin, one of the most celebrated Soviet writers, suggests that it is not necessary that all States participate in the creation of a customary norm of international law, nor is any

universal practice required: "[a] customary norm of international law may be created by the practice of a limited number of states, and in fact it may become first a customary norm with a limited sphere of application."¹⁸⁶ The State practice in the Americas and South Pacific -- and binding upon the United States -- had reached the point by the end of the nineteenth century where any unprovoked military attack by one nation against another made the former a delinquent.

If the above test of customary international law with respect to aggression is applied to the annexation of Hawaii, the unquestionable result is that the United States committed an act of aggression. This determination is substantiated by the fact that Ambassador Stevens caused the armed forces of the United States to invade the territory of Hawaii. This constituted an unprovoked use of force that enabled the annexation to take place. Only the restraint shown by the Hawaiian Queen Liliuokalani prevented the outbreak of actual military conflict. Thus, the United States may accurately be said to have been in violation of international norms in its military intervention in and annexation of Hawaii.

The Invasion of Hawaii: A Breach of International Obligations

A material breach of an important international obligation occurred when the United States Marines landed in Hawaii and overthrew its legitimate Queen without a declaration of war or any other provocation from Hawaii. A similar act was described as aggression in the Charter of the Nuremberg Tribunal in the course of describing the development of the prohibition against wars of aggression. Article 6(a) of the Nuremberg Charter prohibits

Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.¹⁸⁷

The principles set out in the Nuremberg Charter were recognized by the United Nations General Assembly at its first session in 1946.¹⁸⁸

It is evident that the United States not only breached its obligations under Article 1 of the Treaty of 1849 with Hawaii, but also committed a "crime under the law of nations" by planning and implementing the use of force to overthrow the Hawaiian monarch without any provocation by her official representatives. The invasion of a peaceful country with the intent of depriving it of its independence was certainly a crime against peace. President Cleveland stated that "a candid and thorough examination of the facts will force the conviction that the Provisional Government owes its existence to an armed invasion by the United States."¹⁸⁹ This statement recognizes that the conspiracy between Ambassador Stevens and the Hawaiian annexationists was a "crime against peace."

When the American troops landed in Honolulu, a strong protest was lodged by Cleghorn, the Governor of Oahu (where Honolulu is situated) to Ambassador Stevens as follows:

... It is my duty to solemnly protest to your Excellency against the landing this evening, without permission from the proper authorities, of an armed force from the United States ship 'Boston.' Your Excellency well knows that when you have desired to land naval forces of the United States for the purpose of drill, permission by the local authorities has been readily accorded. On the present occasion, however, the circumstances are

different, and ostensibly the present landing is for the discharge of functions which are distinctly responsible duties of Hawaiian Government. Such being the case, I am compelled to impress upon your Excellency the international questions involved in the matter and the grave responsibility thereby assumed.¹⁹⁰

Gillis has stated that

[t]he landing of troops upon a foreign shore not only without permission, but even against the protest of the authorities, and in defiance of a Queen who was recognized as such by these very troops themselves, was a deliberate and flagrant act of war, unless justified by an actual necessity for the protection of American life and property, and carried out with perfect sincerity and good faith. Perhaps nothing could show Mr. Stevens's utter contempt for the Hawaiian Government more clearly than his slightest intimation as to his purpose or motives in taking so extreme an action upon the governor's own soil.¹⁹¹

Sanford Dole's Provisional Government of 1894 was established illegally under international law and was therefore completely without authority to enter into international treaties on behalf of the people of Hawaii with the United States or any other foreign power. As President Cleveland confessed in his address, "[w]hen our minister recognized the Provisional Government, the only basis upon which it rested was the fact that the committee of safety had ... declared it to exist. It was neither a government de facto nor de jure." ¹⁹²

Moreover, Stevens grossly abused his diplomatic status by conspiring with the Committee of Safety to draft and implement a blueprint for the annexation of Hawaii. His role was in violation of all ethics and principles of international diplomatic law -- a direct interference in the domestic affairs of the Republic of Hawaii. As President

Cleveland stated, "[t]o a minister... full of zeal for annexation, there seemed to arise in January, 1893, the precise opportunity for which he was watchfully waiting -- an opportunity which by timely 'deviation from established international rules and precedents' might be improved to successfully accomplish the great object in view..."-193

Conclusion

The principles that underlie international law and, indeed, human civilization, are based on considerations of simple common sense. When people, or groups of people, derogate from these principles, the common expectations of the community as a whole are affected. The basis of such expectations is mutual respect -- among individuals, between individuals and their nations or States and, at the international level, between independent States.

The events that transformed the Republic of Hawaii into an American territory were characterized by direct military, political and economic pressure exerted by officials of the United States government with no respect whatsoever shown for the sovereignty of the independent country of Hawaii. The puppet government installed by the United States was a regime completely without popular support. As such, it had no legal mandate to negotiate international treaties of any kind, let alone a treaty of annexation. As President Cleveland stated,

Fair minded people, with the evidence before them, will hardly claim that the Hawaiian Government was overthrown by the people of the islands or the Provisional Government had ever existed with their consent. I do not understand that any member of this Government claims that the people would uphold it by their suffrages if they were allowed to

vote on the question.¹⁹⁴

This chapter has thus demonstrated that the American annexation of Hawaii constituted a crime against peace. An overview of Hawaiian history clearly establishes the existence of Hawaii as an independent sovereign State, fully capable of managing its own affairs. No desire existed on the part of the Hawaiian people for any kind of political merger with the United States. The annexation was engineered by a small group of American expatriates with the direct and unlawful assistance of the official American representative to Hawaii. The purpose of this endeavour was to further the economic interests of a small group of men and to secure a significant strategic acquisition for the United States Navy. No lawful justification can be given for this act of naked aggression. In particular there was no threat to the lives or property of the American nationals, as President Cleveland himself acknowledged. Therefore, in invading and annexing Hawaii, the United States violated not only an existing customary norm against aggression, but also the legal principles of good faith and self-determination of peoples. The next Chapter will consider the right of the Hawaiian people to self-determination, and the feasibility of a liberation struggle in the Islands.

Endnotes

1. Tabrah, *Hawaii: A Bicentennial History* 4 (1980). [Hereinafter cited as Tabrah, *A Bicentennial History*].
2. *Id.* at 12. Polynesia is also described by authors as a group of easternmost Pacific Islands. These islands basically consist of Samoan-Tongan archipelagoes to the west, New Zealand to the South and the Hawaiian Islands to the North. It is comprised of a equilateral triangular area with 4,500 mile sides. Goldman, *ANCIENT POLYNESIAN SOCIETY*, at xxi (1970). The family of Austronesian- or Malayo-Polynesian-speaking peoples speaks over 500 languages and inhabits not only the islands but some of the South-east Asian mainland as well. *Id.*
3. Tabrah, *A Bicentennial History*, supra note 1.
4. *Id.*
5. Public Law 96-565, 96th Congress (94 STAT. 3321), TITLE III, Section 305, December 22, 1980.
6. MacKenzie, *SOVEREIGNTY AND LAND: HONORING THE HAWAIIAN NATIVE CLAIM* 1 (1982). (Prepared for the Office of Hawaiian Affairs). [Hereinafter cited as MacKenzie, *Sovereignty and Land*].
7. *Id.*
8. KUYKENDALL, *I THE HAWAIIAN KINGDOM: FOUNDATION AND TRANSFORMATION, 1778-1854*, at 29 (1968). [Hereinafter cited as Kuykendall, *I Hawaiian Kingdom*]
9. *Id.*
10. *Id.*
11. MacKenzie, *Sovereignty and Land*, supra note 6, at 4.
12. *Id.*
13. *Id.* at 5
14. *Id.*

15. I NATIVE HAWAIIAN STUDY COMMISSION: Report on the culture, needs and concerns of Native Hawaiians 156 (1983). [Hereinafter cited as I Native Hawaiian Study Commission].

16. MacKenzie, Sovereignty and Land, supra, note 6, at 5.

17. Reprinted in Thurston, The Fundamental Laws of Hawaii 3 (1904).

18. MacKenzie, Sovereignty and Land, supra, note 6, at 16.

19. I Native Hawaiian Study Commission, supra, note 15, at 160. Moreover, Hawaii also entered into treaties with some other independent States of Europe. For example:

**Convention concluded July 17, 1839,
between the King of Sandwich Islands,
Kamehameha III, and Captain Laplace,
commanding the French frigate Artemise,
representing his Government**

ARTICLE 1. There shall be perpetual peace and
friendship between the King of the French and the
King of the Sandwich Islands.

Senate Exec. Doc., 52d Cong. 2d Sess. No. 3062, at 34.

**Convention of commerce, navigation, etc.,
between Great Britain and the Sandwich
Islands. Signed at Lahaina, February 12,
1844**

ARTICLE 1. There shall be perpetual peace and
amity between Her Majesty the Queen of the United
Kingdom of Great Britain and Ireland and the King
of the Sandwich Islands, their heirs and successors

Id., at 61.

**Treaty of peace, amity, and commerce
between France and the Sandwich Islands,
signed at Honolulu, March 26, 1846**

ARTICLE 1. There shall be perpetual peace and
friendship between His Majesty the King of the
French and the King of the King of the Sandwich
Islands, and between their heirs and successors.

Id., at 64.

20. Id.

21. U.S. Government Printing Office, *Treaties and Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776*, at 274 (1886).

22. TATE, HAWAII: RECIPROCITY OR ANNEXATION 3 (1968) [hereinafter cited as Tate, *Reciprocity or Annexation*].

23. Id.

24. Id.

25. Bradely, *The American Frontier in Hawaii: The Pioneers, 1789-1843*, at 119-120 (1942). [Hereinafter cited as Bradely, *The American Frontier*].

26. Id., at 5.

27. Submission made by Hayden F. Burgess, Vice President of the World Council of Indigenous Peoples, before the Disciplinary Board of the Hawaii Supreme Court on September 8, 1985, in response to the charge brought against him for violating DR7-106 (c)(6) of the Hawaii Code of Professional Responsibility, i.e., for wilfully failing "to rise for the Supreme Court Justices upon their entry and departure from Supreme Court courtroom prior to and following oral argument." This submission by Hayden Burgess was addressed to Gerald H. Kibe, Chief Disciplinary Counsel, at 6 (September 8 1985). [Hereinafter cited as Burgess, *Submission*].

28. Bradely, *The American Frontier*, supra, note 25, at 5.

29. Id.

30. Id., at 7.

31. Id.

32. Tate, Reciprocity or Annexation, supra, note 22, at 8.

33. Id.

34. Id.

35. See KUYKENDALL, I The Hawaiian Kingdom, supra, note 8, at 160.

36. Tate, Reciprocity or Annexation, supra, note 22, at 12.

37. Id., at 14. By 1854, Sugar had become the most promising crop in Hawaii. Id., at 25.

38. I Native Hawaiians Study Commission, supra, note 15, at 162.

39. MacKenzie, Sovereignty and Land, supra, note 6, at 16.

40. I Native Hawaiians Study Commission, supra, note 15, at 162-163.

41. Id., at 163.

42. Id.

43. Id.

44. Mackenzie, Sovereignty and Land, supra, note 6, at 15.

45. Id.

46. Tate, Reciprocity or Annexation, supra, note 22, at 14.

47. Loomis, FOR WHOM ARE THE STARS? 2 (1976).

48. MacKenzie, Sovereignty and Land, supra, note 6, at 16.

49. Id.

50. Id., at 16-17.

51. Id., at 17.

52. Id.

53. Burgess, Submission, supra, note 27, at 7.

54. TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION AND EXTRADITION. United States -- Hawaii, reprinted in 1 U.S. TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 1776-1909, at 908. (The Treaty was concluded on December 20, 1849; ratified by the President on February 4, 1850; ratifications exchanged August 24, 1850; proclaimed November 9, 1850). [Hereinafter cited as Treaty of Friendship, Commerce, and Navigation and Extradition].

55. Id., at 909.

56. I Native Hawaiians Study Commission, supra, note 15, at 160.

57. Id.

58. Id., at 165.

59. Id.

60. Id.

61. Tate, Reciprocity or Annexation, supra, note 22, at 83.

62. I Native Hawaiians Study Commission, supra, note 15, at 165.

63. Id.

64. Id., at 166.

65. Treaty of Reciprocity, Jan. 30, 1875. United States -- Hawaii, reprinted in 1 U.S. Treaties, id. (Ratification was advised by the Senate, March 18, 1875; ratified by the President, May 31, 1875; ratifications exchanged June 3, 1875; proclaimed June 3,

1875). [Hereinafter cited as Treaty of Reciprocity].

66. Id., at 917.

67. Cited in I Native Hawaiians Study Commission, supra, note 15, at 166.

68. Burgess, Submission, supra, note 24, at 7.

69. Tate, Reciprocity or Annexation, supra, note 15, at 245.

70. Id., at 243.

71. Id., at 97.

72. Id., at 98. Also see Alexander, A Brief History of the Hawaiian People 300 (1899).

73. I Native Hawaiians Study Commission, supra, note 15, at 266.

74. Id.

75. Id., at 268.

76. Mellen, An Island Kingdom Passes 75 (1958).

77. I Native Hawaiians Study Commission, supra, note 15, at 268.

78. Treaty of Reciprocity, supra, note 55.

79. Bailey, Kings and Queens of Old Hawaii 299 (1975).

80. Id.

81. Id.

82. Burgess, Submission, supra, note 27, at 9. Also see The Reciprocity Convention, December 6, 1884, United States--Hawaii, reprinted in 1 U.S. TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 1776-1909. (Ratification advised by the Senate with amendments January 20, 1887; ratified by the President November 7, 1887; ratifications exchanged November 9, 1887). Article II of the Convention read:

His Majesty the King of the Hawaiian Islands grants to the Government of the United States the exclusive right to enter the harbor of Pearl River in the Island of Oahu, and to establish and maintain there a coaling and repair station for the use of vessels of the United States, and to that end the United States may improve the entrance to said harbor and do all other things needful to the purpose aforesaid.

Id., at 920. This Article was an amendment insisted upon by the U.S. Senate and accepted by the Hawaiian Government. Id.

83. I Native Hawaiians Study Commission, supra, note 15, at 166.

84. Russ, *The Hawaiian Revolution: 1893-1894*, at 12 (1959).

85. I Native Hawaiians Study Commission, supra, note 15, at 271.

86. Id.

87. Joesting, *Hawaii: An Uncommon History* 217 (1972). [Hereinafter cited as Joesting, *Hawaii*].

88. I Native Hawaiians Study Commission, supra, note 15, at 272.

89. Joesting, *Hawaii*, supra, note 86, at 218.

90. I Native Hawaiians Study Commission, supra, note 15, at 272.

91. Tate, *Reciprocity or Annexation*, supra, note 22, at 198.

92. Id.

93. Mackenzie, *Sovereignty and Land*, supra, note 6, at 17.

94. *The Hawaiian Constitution of 1840*. Reprinted in MacKenzie, *Sovereignty and Land* (APPENDIX A), supra, note 6.

95. Id.

96. Tate, Reciprocity or Annexation, supra, note 22, at 198. Thurston made the following statement in this regard:

Unfortunately, the constitution was not in accordance with law; neither was the Declaration of Independence from Great Britain. Both were revolutionary documents, which had to be forcibly effected and forcibly maintained.

Reproduced Id.

97. Id., at 198-199.

98. Id.

99. Id.

100. Reprinted in Kuykendall, Constitutions of the Hawaiian Kingdom (Papers of the Hawaiian Historical Society, No. 21), at 48 (1940).

101. Id., at 48-49.

102. Article 63 of the Constitution provided that the "property or income qualification of Representatives, of Nobles, and of Electors of Nobles, may be increased by law; and a property or income qualification of Electors of Representatives, may be created and altered by law." Id. at 49.

103. Id., at 48.

104. Id., at 49.

105. 1 Native Hawaiian Study Commission, supra, note 15, at 291.

106. Burgess, Submission, supra, note 27, at 9.

107. Mackenzie, Sovereignty and Land, supra, note 6, at 17.

108. Bailey, Kings and Queens of Old Hawaii 297 (1975).

109. Burgess, Submission, supra, note 27, at 9.

110. I Native Hawaiians Commission. supra, note 15. at 293.
111. Id., at 287.
112. Id., at 293.
113. Id.
114. Id.
115. Mackenzie, Sovereignty and Land, supra, note 6. at 18.
116. Kuykendall, III Hawaiian Kingdom. supra, note 103. at 585 (1967).
117. GILLIS, THE HAWAIIAN INCIDENT 13-14 (1970).
118. Id., at 14.
119. Mackenzie, Sovereignty and Land, supra, note 6, at 18. The Secretary of the Navy told Thurston that "the President ... authorizes me to say to you that, if conditions in Hawaii compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here," Thurston, *Memoirs of the Hawaiian Revolution* 230-232 (1936).
120. Gillis, *The Hawaiian Incident*, supra, note 117. at 14.
121. Id., at 5.
122. Reproduced Id., at 6.
123. Reproduced Id., at 11.
124. Reproduced Id., at 7.
125. See the letter written by the members of the "Citizen's Committee of Safety" to Mr. Stevens, which stated, inter alia :

We, the undersigned, citizens and residents of Honolulu, respectfully represent that in view of recent public events in this Kingdom, culminating

in the revolutionary acts of Queen Liliuokalani on Saturday last, the public safety is menaced and lives and property are in peril, and we appeal to you and the United States forces at your command for assistance.

The Queen, with the aid of armed force, and accompanied by threats of violence and bloodshed from those with whom she was acting, attempted to proclaim a new constitution...

This conduct and action was upon an occasion and under circumstances which have created general alarm and terror.

We are unable to protect ourselves without aid, and therefore pray for the protection of the United States forces.

Reproduced id., at 22. Five of the signatories of this letter were American citizens.
Id.

126. Burgess, Submission, supra, note 27, at 11-12.

127. Id., at 12.

128. Reproduced in Gillis, The Hawaiian Incident, supra, note 117, at 49-50.

129. Loomis, For Whom Are the Stars?, supra, note 47, at 17-19.

130. II NATIVE HAWAIIANS COMMISSION 68 (1983).

131. Id.

132. Id.

133. Id.

134. Loomis, For Whom Are the Stars?, supra, note 47, at 31.

135. Id. at 40.

136. Reproduced id. at 58.

137. Id. at 59.

138. President Grover Cleveland's Address to the Congress of the United States, December 18, 1893, in RICHARDSON, IX A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908, at 466-471 (1908). [Hereinafter cited as Cleveland's Address].

139. Id. at 472.

140. Burgess, supra, note 27, at 16.

141. Id. at 16-17.

142. Id. at 17.

143. Thurston, Fundamental Laws of Hawaii 237 (1904).

144. Tabrah, A Bicentennial History, supra, note 1, at 6.

145. I Native Hawaiians Study Commission, supra, note 15, at 301.

146. Morgan, Wm. McKinley and His America 295 (1963).

147. Wiktor (ed.), UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1883-1904, at 268.

148. Treaty of Friendship, Commerce, and Navigation and Extradition, supra, note 54, at 908.

149. Joint Resolution to Provide for annexing the Hawaiian Islands to the United States, FIFTY-FIFTH CONGRESS, SESS. II, RES. 53-55, at 750 (1898). [Hereinafter cited as Joint Resolution].

150. Id.

151. Osborne, Empire Can Wait: American Opposition to Hawaiian Annexation,

1893-1898, at 136 (1981).

152. Morgan, Wm. McKinley and His America, supra, note 146, at 295-296.

153. Julien, America's Empire 53 (1971).

154. Morgan, Wm. McKinley and His America, supra, note 146, at 295-296.

155. Id., at 296.

156. I Native Hawaiians Study Commission, supra, note 15, at 301.

157. Id., at 304.

158. Senate Report No. 681, 55th Cong., 2nd Sess., 2 (1894).

159. 31 Cong. Rec., at 6518 (1898).

160. MacKenzie, Sovereignty and Land, supra, note 6, at 34.

161. Id.

162. 31 Cong. Rec., at 5845-5846 (1898).

163. See 55 Cong. Rec., 2 Sess., at 6018 (June 15, 1898).

164. Id., at 6712.

165. Joint Resolution, supra, note 149.

166. Resolution on the Definition on Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAGP, Supp. (No. 31) at 142, U.N. Doc. A/9619 (1975), reprinted in 13 I.L.M. 710 (1974). [Hereinafter cited as the Definition on Aggression].

167. Id.

168. See the statement made by Rosside (Cyprus), U.N. Doc. A/9619, Supp. 19, (1974) at 20.

169. Id.

170. Definition on Aggression, supra, note 166.

171. The seven principles are:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

(d) The duty of States to co-operate with one another in accordance with the Charter.

(e) The principle of equal rights and self-determination of peoples.

(f) The principle of sovereign equality of States.

(g) The principle the States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970). [Hereinafter cited as Declaration on Friendly Relations]. As to the legal nature of the Declaration, Rosenstock states:

There is some difference of opinion among Members of the United Nations as to whether the Declaration represents a mere recommendation or a

statement of binding rules. The truth would appear to lie between these two extremes, but closer to the latter.... The principles involved, however, are acknowledged that the principles represent their interpretations of the obligations of the Charter. The use of "should" rather than "shall" in those instances in which the Committee believed it was speaking de lege ferenda or stating mere desiderata further supports the view that the states involved intended to assert binding rules of law where they used language of firm obligation.

Rosenstock, *The Declaration on Principles of International Law Concerning Friendly Relations: A Survey*, 65 A.J.I.L., at 714-715 (1967).

172. The peremptory norms (or the ius cogens) are "accepted and recognized by the international community of States as a whole as ... norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Article 53 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969). Article 2(4) of the United Nations Charter reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

CHARTER OF THE UNITED NATIONS. Done at San Francisco, June 26, 1945; 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043.

Moreover, we also find the concept of non-aggression and an indication of its status in the Declaration on Principles of International Law Concerning Friendly Relations. It reads:

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a

violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

Declaration on Friendly Relations, id.

173. BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY, PROMULGATED BY THE PARLIAMENTARY COUNCIL ON MAY 23 1949. (As amended up to and including 23 August 1976). Translation published by the Press and Information Office of the Federal Government, Bonn. PUBLIC DOCUMENT, Printed in the Federal Republic of Germany, at 24-25 (1986).

174. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47 (1971).

175. Id. Also see note 1, Id.

176. Id.

177. Id., at 47-48.

178. Id., at 49.

179. Villiger, CUSTOMARY INTERNATIONAL LAW AND TREATIES 26 (1985).

180. North Sea Continental Shelf Cases, ICJ Rep. at 44, para 77 (1969).

181. McDougal, Law and Minimum World Public Order: Armed Conflict in Large Context, 3 UCLA PAC. BASIN L. J. 23 (Nos. 1 & 2, 1984). Also see generally Reisman, Looking, Staring and Glaring: Microlegal Systems and Public Order, 12 DEN. J. INT'L L. & POL'Y 165 (1982-83).

182. For example:

**Treaty of Peace and Friendship, Guatemala
and Salvador, July 4, 1839**

ARTICLE III. They likewise agree that they will

not declare war nor commit any positive act of hostility against each other, for any cause or pretext, not even for the alleged violation of the whole or a part of this treaty, without having previously presented claims and asked due explanations of the offense, grievance, or damage that may give rise to the complaint; and in the unexpected case that the explanations asked should be denied or should not satisfy the offended state, they shall jointly appoint another state as mediator. Should either party fail to comply with what is herein stipulated, it shall be answerable to the other for all the expenses, damages and losses that the war may occasion to the same.

Reproduced in 33 A.J.I.L. 858 (Supp. 1939). [Hereinafter cited as 33 A.J.I.L.]. Also reproduced in MANNING, *ARBITRATION TREATIES AMONG THE AMERICAN NATIONS* 18 (1924). [Hereinafter cited as Manning]. Similar provisions are found in the following treaties: Guatemala-Nicaragua (July 24, 1839); Chile-Costa Rica (June 20, 1857); Honduras-Salvador (January 19, 1895). See 33 A.J.I.L. at 19, 35, 114, 134, 221.

**Treaty of Peace, Friendship, Commerce and
Navigation, Argentina and Chile, August 30,
1855**

ARTICLE XXXIX. Both contracting parties recognize as the limits of their respective territories those which they possessed as such at the time of their separation from the Spanish dominion in 1810, and they agree to reserve the questions which have arisen, or may hereafter arise upon this matter, in order to discuss them pacifically and amicably afterwards, without ever having recourse to violent measures, and in case a complete settlement should not be arrived at, to submit the decision to the arbitration of a friendly nation.

Id., at 859. See also Manning at 33.

**Treaty of Peace and Friendship, Guatemala
and Honduras, February 13, 1836**

ARTICLE X. ... Both republics ... bind themselves to aid each other whenever their independence may so demand. Furthermore, they establish as a permanent rule of conduct, that in no event will they levy war against each other, nor consent that any hostile operations may be carried on or offense be given within the territory of one against the other under any pretext or motive; and in case any differences should occur, they will make to each other adequate explanations, and have recourse, if they should not be able to agree, to the arbitration of some government of a friendly nation.

A.J.I.L., *id.* See also Manning, *id.* Similar provisions are found in the following treaties: Costa Rica, Guatemala, Honduras, Nicaragua and Salvador (February 28, 1876); Honduras and Nicaragua (March 13, 1878); Salvador and Venezuela (August 27, 1883). See A.J.I.L., *id.* See also Manning at 109, 113, 133.

**Treaty of Friendship, Commerce and
Navigation, Ecuador and New Granada
(Colombia), July 9, 1856**

ARTICLE III. If, unfortunately, at any time the relations of friendship and good understanding, which now happily exist between the two republics and which it is the object of the present treaty to render durable, should be interrupted, the contracting parties solemnly pledge themselves not to appeal to the grievous recourse of arms before exhausting that of negotiation, explanations being required and given respecting the grievances which one party may consider it has received from the other, or respecting the differences which may arise between them; and not until the reparation shall have been expressly refused, which a neutral and friendly power, selected as arbitrator, has, in view of the allegations or explanations of motives, and the replies of both parties to the dispute,

declared to be due.

33 A.J.I.L., *id.* Also see: Treaty of Friendship, Commerce and Navigation, Peru and Venezuela, April 1, 1859. Manning at 48-49; Treaty of Peace, Friendship and Commerce, Guatemala and Nicaragua, September 20, 1862. *Id.*, at 56; Treaty of Friendship, Commerce and Navigation, Columbia and Peru, February 10, 1870. *Id.*, at 84; Treaty of Friendship, Commerce and Navigation, Ecuador and Salvador, March 29, 1890. *Id.*, at 190.

183. Compare this with the views of Kranzbuhler, who says:

The International Military Tribunal tried to find the legal basis for the crime against Peace in the Briand-Kellog Pact in the sense that this offense had already found the sanction of international law. This attempt was extremely weak and it is more honest to say in this respect, as Jackson did, "Once there must be a beginning." But here the precise question must be raised as to whether it really was a beginning or whether it was not at the same time the end of a legal concept that was applied only on one occasion and that has no chance of being applied repeatedly. To begin with, the War of Aggression is a concept which was not defined at Nuremberg and which, despite all efforts, it has not been possible to define.

Kranzbuhler, Nuremberg, Eighteen Years Afterwards, in McDUGAL AND REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1002 (1980). Also see 14 DE PAUL L. REV. 333 (1965). It is submitted that even though the Nuremberg tribunal failed to define "war of aggression," the concept existed even before the General Treaty for the Renunciation of War of August 27, 1928, known as the Pact of Paris or the Kellog-Briand Pact. The International Military Tribunal failed to take note of the existence of such a concept because it did not analyze it by applying both the psychological and material substances of customary international law.

Moreover, Bengt Broms states:

Although the first systematic efforts to define aggression were not made until the foundation of

the League of Nations, aggression was by no means a novel legal conception. Many agreements were entered into in previous centuries to create alliances either for the purpose of committing aggression or for the purpose of defence against aggression. What the parties apparently had in mind was aggressive war.

BROMS, THE DEFINITION OF AGGRESSION, 1 RECUEIL DES COURS 305 (1977). Different attempts have been made at different times to define the term "aggression." During the period of the League of Nations, through the provisions of Article 10 of the Covenant, mutual respect for "territorial integrity and political independence" were to be maintained against any external aggression. Also Resolution 14 proposing the creation of the Treaty of Mutual Guarantee by the Members of the League of Nations and the adoption by the Assembly of the League of Nations of a Protocol for the Pacific Settlement on International Disputes are the instances where the act of aggression was seen to be in close connection with war. *Id.*, at 305-308. It is submitted that the animus aggressionis or aggressive intention was well acknowledged by the international community for a long period of time.

184. Per Arechega, cited in McFADDEN, NUCLEAR WEAPONS FREE ZONES: TOWARD AN INTERNATIONAL FRAMEWORK, 16 CAL. W. INT'L L. J. 236 (No. 2, 1986).

185. See Definition on Aggression, supra, note 166.

186. Tunkin, Coexistence and International Law, 95 RECUEIL DES COURS 17-18 (1958).

187. Reproduced in Judicial Decisions, International Military Tribunal (Nuremberg). Judgment and Sentences, 41 A.J.I.L. 174 (1947).

188. U.N.G.A. Res. 95(1), U.N. Doc. A/64, at 188 (1946).

189. Cleveland's Address, supra, note 138, at 469.

190. Letter written to John L. Stevens, Envoy Extraordinary and Minister Plenipotentiary, United States of America by the Governor of Oahu, Honolulu, January 16, 1893. Reproduced in Gillis, The Hawaiian Incident, supra, note 117, at 28.

191. *Id.*, at 29.

192. Cleveland's Address, supra, note 138, at 467.

193. Id., at 464.

194. Id., at 469.

Chapter VI

Hawaiian Annexation and the Unequal Treaty Doctrine

Introduction

In international law, the doctrine of unequal treaties is derived from the principle of the sovereign equality of States. Unequal treaties exhibit a lack of reciprocity between the contracting parties. The concept was first discussed by Gentili, Grotius, Pufendorf and Vattel. It began to develop during the colonial period from the seventeenth century onward when the colonial powers were entering into unfair treaties -- mostly "peace" treaties -- with the indigenous local authorities of Asia, Africa and the Americas, with the aim of colonizing their peoples.¹

When discussing unequal treaties, China immediately comes to mind, since she has been the victim of a number of such treaties. The earliest was the Treaty of Nanking with Great Britain in 1842. Article II of which provided:

His Majesty the Emperor of China agrees that British subjects, with their families and establishments, shall be allowed to reside, for the purposes of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai; and Her Majesty the Queen of Great Britain, & C., will appoint Superintendents, or Consular Officers, to reside at each of the above-named cities or towns, to be the medium of communication between the Chinese authorities and the said merchants, and to see that the just duties and other dues of the Chinese Government, as hereafter provided for, are duly discharged by her Britannic Majesty's subjects.²

Article III stated:

... His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, & C., the Island of Hong-Kong, to be possessed in perpetuity by Her

Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, & C., shall see fit to direct.³

Thus, under the Treaty of Nanking British subjects were exempted from Chinese territorial jurisdiction. They became responsible only to their own consuls in respect of both civil and criminal matters.⁴

After the Treaty of Nanking was concluded, other nations saw that it was possible to conduct relations with China other than on the basis of sovereign equality.⁵ Thus, the Treaty of Nanking was followed by the Treaty of Wang Hiya with America in 1844, the Treaty of Whampoa with France in 1844, the Treaty of Tientsin with Russia in 1858, the Treaty of Tientsin with the States of German Customs and Commerce Association in 1861, the Treaty of Peking with Austria-Hungary in 1869, and the Treaty with Japan of August 1871, to mention just a few.⁶ These treaties were degrading to China, compromising her sovereignty and subjecting her people to exploitation.

Another example of an unequal treaty entered into during the nineteenth century is the Treaty of Annexation between Hawaii and the United States.⁷ It is particularly notable because it betrays how the economic interests of America directed her political apparatus to overthrow the legitimate government of an independent nation. The treaty was signed in Washington on June 16, 1897. Article 1 read:

The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii.⁸

Even the United Nations Charter has been held up by some as an example of an unequal treaty, since it gives permanent membership and veto power in the Security Council to the five great powers.⁹ The validity of the veto is increasingly being brought into question.

An unequal treaty achieved through the use of force is also known as a treaty contra bonos mores (against good morals). Such a treaty is illegal and void "not because of the lack of essential ingredients but because it is subversive of the law and tends to weaken the foundations of the human society."¹⁰ Arguments will also be made in respect of the legal status of the Hawaiian annexation treaty once the historical development of the unequal treaty doctrine is traced.

Hawaiians are the only native people in America who are not considered to be "Indians"¹¹ and, as such, have been neglected by the United States Government. Even the Aleuts and Eskimos are considered Indians under § 450b(b), Title 25 of the United States Code Annotated (USCA), which defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act ..."¹² § 1602(b), Title 43 of the USCA further defines a "native" as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian ... Eskimo, or Aleut blood, or combination thereof."¹³

The present chapter will also assert that Article 52 of the Vienna Convention, which states that "[a] treaty is void if its conclusion has been procured by the threat or use of force ...,"¹⁴ should be interpreted as having retroactive effect because the unequal treaty doctrine had become a rule of customary law by the time the events leading up to the Hawaiian annexation took place. Finally, it will be shown that the United States should be held responsible for the consequences of this unequal treaty under the principle of State responsibility.

The Development of the Unequal Treaty Doctrine

The "international personality" of States is at the core of the equality of States.¹⁵ From the concept of equality, Oppenheim, as cited by McNair, drew three conclusions: first, every State should have one vote concerning any particular international issue; second, the vote of the weakest and smallest State should have the same weight as that of the most powerful; and third, no State should be able to claim jurisdiction over another.¹⁶ Oppenheim also warned that legal equality is not the same thing as political equality.¹⁷ It is in situations of political inequality that States are denied their right to legal equality by being forced to enter into unequal treaties.

Grotius stated that treaties "which add something beyond the rights based on the law of nature are either on equal or unequal terms. Those are on equal terms which are of the same character on both sides, 'which are equal and common on both sides'..."¹⁸ Took, however, believed that Grotius, in fact, supported the rights of the victorious party irrespective of whose cause had been just.¹⁹ At the same time, it has been argued that Grotius never discussed the concept of the equality of States, and that the concept had its origin in natural law theory.²⁰ Some credit Pufendorf with pioneering the concept in 1729.²¹ Other writers are of the opinion that the doctrine commenced with the Peace of Westphalia of 1648.²² In the middle of the eighteenth century Vattel, Moser, and Wolff included it in their writings.²³

Vattel based his conception of unequal treaties on a lack of reciprocity or equivalence in things promised that amounts to an "unequal alliance".²⁴

... we must either pronounce sovereigns to be absolutely emancipated from all subjection to the law of nature, or agree that it is not lawful for them, without just reasons, to compel weaker states to sacrifice their dignity, much less their liberty, by unequal alliances.²⁵

Despite viewing them as contrary to natural law, Vattel believed that unequal alliances were necessary for the safety of the more powerful States.²⁶ Similarly, Pufendorf viewed unequal treaties as acceptable so long as they did not generate war or conflict.²⁷

Professor Verdross based his conception of the doctrine on a more concrete foundation, deviating from the thinking of traditional Western writers such as Oppenheim,²⁸ Hyde,²⁹ Butler and Putney.³⁰ In 1937 he wrote that treaties between sovereign States were valid so long as they did not violate any norm of jus cogens.³¹ He criticized those writers who saw "the whole international law" as based on the will or consent of States, since this did not take into account norms necessary for international treaties to come into being.³² According to Verdross, treaties that are contra bonos mores are void as they "restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights."³³ Verdross based his argument on the Oscar Chinn Case,³⁴ in which Schucking J. stated that "[t]he Court would never, for instance, apply a convention the terms of which were contrary to public morality."³⁵ The principle is derived from domestic contract law theory, which provides that a contract is void if it is concluded against public policy. For example, a contract to kill someone is void ab initio.

Does this mean that every agreement that favors one of the parties is illegal? Nozari provided the following answer to this question:

... States are free to grant, in their agreements, special advantages to a contracting party, without expecting reciprocal undertakings. If an agreement is concluded by the true consent of the legally equal parties, without exercise of power, how could such a treaty be called an unequal treaty?³⁶

However, the problem remains: how does one determine the validity of a treaty entered into when a treaty was concluded as a result of an unremitting coercion exercised by one sovereign State over the other, e.g., the Hawaiian annexation treaty?³⁷ When two States of equal power and influence enter into a treaty, common sense suggests that, in the absence of undue influence or implied threats, neither will grant concessions greater in value than those received in return. The probability of fairness is greater in cases when the two treaty partners are politically unequal States. Voluntary grants must always come from the more powerful State with no strings attached so as to remove any suspicion of unfair dealing.

Unsuccessful attempts have been made to obtain a judgment from an international tribunal concerning the status of an apparently unequal treaty.³⁸ For instance, China and Belgium concluded a treaty in 1865,³⁹ Article 46 of which gave Belgium the sole right to modify the treaty.⁴⁰ China sought to revise the treaty in 1926, arguing that Article 46 made it unequal. Belgium took the dispute to the Permanent Court of International Justice, but both governments wanted to negotiate a new treaty, so no final decision was made by the Court.

Nozari, drawing on the work of the Soviet writer Talalayev, listed the following as elements that can make a treaty unequal:

1. Restriction of sovereignty and independence in foreign policy and foreign trade;
2. Interference in matters which are within the domestic jurisdiction of States and peoples;
3. The extra-territorial operation of foreign laws and the subordination to them of the co-signatory;
4. Lack of parity in the rights and responsibilities of the contracting parties;
5. The heavy burden of financial commitments, absence of mutual advantage or in general of reciprocity or equality as regards the concessions as a result of which agreement is reached.⁴¹

Nozari has provided a comprehensive list of concrete examples readily applicable to real-world situations. One exception is the second element, interference in the domestic affairs of a State. It has become very difficult to define the parameters of the domestic jurisdiction of States under contemporary international law, such as whether the violation of the human rights of a State's own citizens is to be regarded as an internal matter. Another problem arises regarding the element of the restriction of sovereignty: every international treaty curtails the sovereignty of States to some degree. That is why McDougal and Reisman say that "[s]overeignty even in its most comprehensive conception refers only to that competence of states which international law confers."⁴²

Developing countries have been the principal proponents of the unequal treaty doctrine. They have attacked the traditional conception of international law on the ground that it was a product of the colonial powers designed for their own advantage. As Anand states:

The reasons for the present resentment against traditional international law spring from their past history and subjugation... This law not only permitted discrimination against the non-western peoples, but sanctified their exploitation and subjugation... It sanctified colonialism and accepted the unequal treaties forced upon weaker states as valid and legal... The new states are determined to annul the former law of domination as expressed in the colonial system and unequal treaties.⁴³

Such injustice and consequent resentment was also documented by Judge Padilla Nervo in his separate opinion in the Barcelona Traction case:

The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of

exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.⁴⁴

A good example of illegal interference is the Nazi-Soviet Non-Aggression Pact of 1939, which partitioned Poland between the two countries and gave Estonia, Latvia and Lithuania to the Soviet Union. These three States were then forcibly annexed in October 1939.⁴⁵

Stuart Malawer has developed an interesting typology of unequal treaties. To him, the term includes:

- 1) treaties containing formally equal treaty provisions, but in practice, unequal obligations which may occur as a result of unforeseen developments;
- 2) treaties containing formally unequal obligations, regardless of the actual effect of the treaty;
- 3) and 4) are identical to 1) and 2), except with either economic or military force threatened or used in order to conclude such agreements;
- 5) treaties not otherwise unequal, concluded through the use of economic force alone;
- 6) treaties not otherwise unequal, concluded through military force alone.⁴⁶

Malawer notes that types 1) and 2) have rarely existed, and that types 3) and 6) may be regarded as imposed treaties, since they are accomplished through the application of illegal military force. However, he does not think that economic pressure alone is enough to vitiate a State's consent.⁴⁷ This leads to the conclusion that a treaty obtained through economic duress alone is voidable but not void.

This last conclusion is too narrow. Article 38(1)(c) of the Statute of the International Court of Justice lists as one of the sources of international law "the general principles of law recognized by civilized nations."⁴⁸ One such principle is that undue economic

pressure vitiates an agreement. Thus, any treaty concluded under military or economic threat or undue influence is ipso facto void, even in the absence of the actual use of force.⁴⁹

Detter is also of the opinion that economic pressure can place a treaty within the sphere of unequal treaties. He termed these treaties "treaties of assistance" and argued that such "agreements usually implied that the former [colonial] state was given considerable influence on the economy of the latter [colonized] one; the 'assistance' that was to be given under the agreement could often be withdrawn by an arbitrary and unilateral procedure."⁵⁰

It is now clear that, when judging the status of a treaty, one must take into account that equality does not mean, as Detter says, "equality of power,"⁵¹ but legal equality. As Oppenheim stated:

States are by their nature certainly not equal as regards power, territory, and the like. But as members of the community of nations they are, in principle, equal, whatever differences between them may otherwise exist. This is a consequence of their sovereignty in the international sphere.⁵²

What Malaver did not consider was the fact that the validity of an allegedly unequal treaty should be considered from the point of view of both the political and legal equality of States. World power politics have created an atmosphere in which any treaty of "peace and friendship" is now looked at with suspicion. For example, the recent controversial Peace Treaty between Sri Lanka and India -- which paved the way for the Indian Government to mediate between the Sinhalese government and the Tamil guerillas -- bred so much animosity among the Sinhalese people for the Indian Government that when the late Indian Prime Minister Rajeeb Gandhi visited Sri Lanka after the treaty was signed, an attempt was made on his life.

Finally, each international treaty needs to be analyzed individually in order to determine the true nature of its terms and conditions. Today, the international community would be very likely to question any treaty that gave leverage to a powerful State over the internal political affairs of, or territorial changes in, a weaker country. It would not be an exaggeration to say that the concept of unequal treaties has given smaller powers the benefit of the doubt whenever any provision of a past treaty is impugned on grounds of inequality. Victimized peoples -- whether or not they possess their own State -- should also be in a position to assert such illegality against a State for any previous wrongdoings on the basis of inequality.

Thus, unequal treaties can be defined as those that have been obtained either through military or economic threat or action. They are void, regardless of whether force has actually been used. This definition is necessary in order to account for any undue pressure or influence not patent on the face of the document itself, or for any threatened action that is not taken because the weaker state has capitulated to the threat and concluded the treaty. Only in this way may the legitimate interests of weaker States be adequately safeguarded.

State Practice

The Indian sub-continent has probably seen more treaties between sovereigns -- in its case, kings and sultans -- than any other region. These treaties, described in Kautiliya's Arthasastra, were either equal (Sama Sandhi) or unequal (Asama Sandhi).⁵³ Elements of unequal treaties may also be found in the agreements made by the King of the Hittites, Hattisilus III, with his vassal States.⁵⁴ The Treaty of Madrid of 1526, between Emperor Charles V of Spain and King Francis I of France, may also be cited as an instance of a coercive treaty. It was later repudiated by Francis I.⁵⁵ The Russo-Swedish treaty of 1616, concluded through English mediation, was

described by Shafirov, then Vice Chancellor of the Russian Empire, as a "prejudicial and forced" treaty.⁵⁶ William Butler summed up Shafirov's view, stating that it was "an 'extorted treaty', and contrary to 'all equity and charity, and against so many pacifications and defensive alliances'...."⁵⁷

The Herron-Hay Treaty of January 22, 1903, between the United States and Columbia, through which America was to obtain the right to exploit the Panama Canal for a period of 100 years, was humiliating to the people of Columbia. As a result, the Columbian Senate refused to ratify it.⁵⁸ Panama seceded from Columbia with American aid on November 4, 1903, and two weeks later the United States concluded a treaty with Panama, known as the Hay-Varilla Treaty, that severely impaired the sovereignty of the new State.⁵⁹

One might also mention the Brest-Litovsk and Bucharest Treaties of 1918. The USSR considered the former an insult to her dignity, since it was imposed upon her "under military or official pressure and reduced the Bolshevik Government to a state of economic and political impotence."⁶⁰ The Bucharest Treaty "bound [Romania] hand and foot to Austria-Hungary."⁶¹

The Versailles Treaty of June 28, 1919, between the Allied Powers (Belgium, the United Kingdom, France and the United States) and Germany, was later renounced by the German government on the ground that it was unequal or coercive. It created an Inter-Allied Rhineland High Commission whose expenses were to be defrayed (Article 2), along with those of the occupying troops of the Allied Powers (Article 6), by Germany.⁶²

The validity of these treaties is still questioned under international law, since they were negotiated under circumstances of coercion.

The practice of the United States concerning unequal treaties was quite different when she was not one of the parties involved. This became quite noticeable in her attitude towards the early twentieth century agreements between Japan and China -- the Treaty Respecting the Province of Shantung⁶³ and the Treaty Respecting South Manchuria and Eastern Mongolia⁶⁴ -- negotiated under conditions of military threat by Japan against China. In 1915, United States Secretary of State Bryan sent a note to the Japanese Government through the American Ambassador to Japan raising a serious protest against the conclusion of these treaties. It stated:

In view of the circumstances of the negotiations which have taken place and which are pending between the Government of Japan and the Government of China, and the agreements which have been reached as a result thereof, the Government of the United States has the honor to notify the Imperial Japanese Government that it cannot recognize any agreement or undertaking which has been entered into or which may be entered into between the Governments of Japan and China impairing the treaty rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China, or the international policy relative to China commonly known as the open door policy.⁶⁵

The American attitude towards the Sino-Japanese treaties was extraordinary in that, for the first time, it officially brought the validity of an international treaty into question on grounds of inequality. This position was augmented by the Stimson Note of January 7, 1932,⁶⁶ which Malawer states "was a clear indication, no matter how limited, that at least one major power in the 1930's was not going to recognize an imposed treaty, for whatever reasons, political or otherwise."⁶⁷

It is beyond question that China played a very important role in the development of the unequal treaty doctrine. Although the term "unequal" was not used until the

early part of the twentieth century, the concept was prevalent in the nineteenth century.⁶⁸ The first Chinese reference to "unequal" treaties was in 1923, but at the official level the term was not used by the Peking Government until November 6, 1926.⁶⁹ Today, China insists that all the treaties of the nineteenth and the early twentieth centuries to which she was a party were unequal and, therefore, invalid.⁷⁰

Even though China was able to persuade the Soviet Union to give up her extraterritorial and consular jurisdiction in China through Article 12 of the Sino-Soviet Treaty of May 31, 1924,⁷¹ it was not until 1943 that China achieved similar treatment from the Western Powers.⁷² Moreover, the Agreement between China and the United Kingdom on the future of Hong Kong was not officially signed in Beijing until December 19, 1984. On May 28, 1985, instruments of ratification were exchanged.⁷³ Articles 1 & 2 of the Joint Declaration, which is a part of the overall Agreement, stated, respectively that:

The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.

The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.⁷⁴

The three treaties that established British rule in Hong Kong were the Treaty of Nanking of 1842, under which Hong Kong Island was ceded in perpetuity; the Convention of Peking of 1860, under which the southern part of the Kowloon Peninsula and Stonecutters Island were ceded in perpetuity; and the Convention of 1898, under which the New Territories (comprising 92 per cent of the total area of the

territory) were leased to Britain for 99 years from July 1, 1898.⁷⁵ The main reason why Britain decided to enter into negotiations with China concerning Hong Kong's future was that the New Territories were subject to a lease with a fixed expiry date.⁷⁶ The Joint Declaration thus brought to an end three century-old unequal treaties forcefully imposed upon China by Britain.

The practice of States during the twentieth century thus leads to the conclusion that unequal treaties should be repudiated and new, more equitable arrangements should be reached between the contracting parties. The experience of China provides a positive model for Hawaii, as the decidedly unequal treatment received by China at the hands of the European powers in the nineteenth and early twentieth centuries has now been put right by such agreements as the one regarding Hong Kong and the New Territories. There is no reason why a similar agreement could not be reached with respect to Hawaii.

International Law Relating to Unequal Treaties

The end of the nineteenth and the early part of the twentieth century witnessed new developments in the peaceful settlement of disputes. The 1899 and 1907 Hague Conventions were giant steps in this direction. Article 1 of both Conventions spoke in favour of the avoidance of the use of force in relations between States. It reads:

With a view to obviating as far as possible recourse to force in the relations between States, the signatory Powers agree to use their best efforts to ensure the Pacific settlement of international differences.⁷⁷

The question arises as to whether the phrase "recourse to force" should be interpreted to include resort to economic force as well. Although this is not clear, the phrase "relations between States" presumably includes the negotiation and conclusion of treaties between States. In other words, it can be argued that the Conventions shunned the use of force in the conclusion of international treaties between States. This position was supported by President Wilson who, after the First World War, spoke out against the conclusion of secret treaties of any kind.⁷⁸ Article 18 of the Covenant of the League of Nations reflects such a view. It reads:

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.⁷⁹

In the Council of the League, an important question also arose as to the extent to which the League could examine the contents of a treaty at the time of its registration.⁸⁰ In this regard, the French representative, M. Bourgeois stated that any treaty incompatible with the spirit of the Covenant should be modified.⁸¹ Also at the Second Assembly, the representative of Greece, M. Seferiades, proposed the addition of the following clause to Article 18:

Any treaty, the provisions of which in the unanimous opinion of the Council are contrary to international public order, shall not be registered, and shall, therefore, be deemed to be non-existent.⁸²

If this amendment had been accepted, the law regarding unequal treaties would probably have taken a very different course. Progress in the development of the unequal treaty doctrine was not seriously impeded by the defeat of the proposed amendment to Article 18, however. Article 19 declared:

The Assembly may from time to time advise the consideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world.⁸³

Article 19 thus recognized the practical demands of global politics, i.e., the revision of a number of previous treaties. It emerged as an important principle underlying the rule of rebus sic stantibus,⁸⁴ which some have argued is directly connected with "the right to self-preservation and the right to national existence."⁸⁵ Unfortunately, the Assembly's power was recommendatory only; it had no authority to change the terms of a treaty, either in whole or in part. That is why in 1920, when Bolivia and Peru asked the Assembly, on the basis of Article 19, to modify the Peace Treaty of 1904 between Bolivia and Chile, and the Treaty of 1883 between Peru and Chile on the ground that they were unequal, the Assembly answered in the negative.⁸⁶

In 1929 the Assembly of the League declared the meaning of Article 19 of the Covenant to be as follows:

A Member of the League may on its own responsibility ... place on the agenda of the Assembly the question whether the Assembly should give advice as contemplated by Article 19 regarding the reconsideration of any treaty or treaties which such Member considers to have become inapplicable or the consideration of international conditions the continuance of which might, in its opinion, endanger the peace of the world.⁸⁷

Article 19 briefly became a beacon of hope for those who had long been the victims of unequal treaties that had been forced upon them. It "constituted an integral and a potentially important element in the political and juridical system set up under the

League."⁸⁸ [Emphasis added].

However, because the Assembly had no power to revise any treaty provision under Article 19, it is often argued that this Article should not be regarded as an effective rule of rebus sic stantibus.⁸⁹ The importance of Article 19 is that it created a major international demand for a more effective mechanism to bring about the revision of treaties. The situation that existed at that time was described by Pitman Potter:

The demand for revision in recent times has arisen to take care of cases where the fault existed from the beginning and was ... unescapable because the treaty was forced upon the now complaining signatory -- not a situation covered by any such rule. It is very largely to deal with alleged inequities imposed by force that the demand for revision of treaties has arisen and been developed in recent years.⁹⁰

The 1928 General Pact for the Renunciation of War, commonly known as the Kellogg-Briand Pact, ushered in a new era regarding the use of force. Even though it did not specifically mention treaty law, it was nevertheless directly concerned with treaties made under coercion. Article 1 of the Pact reads:

The High Contracting Parties solemnly declare... that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.⁹¹

United States Secretary of State Stimson, in his famous Stimson Note of 1932, was the first to apply the Pact.⁹² However, it was arguable whether the Pact applied in cases of seizure or annexation concluded under the threat, but not the actual use, of force.⁹³ since the Parties agreed to renounce war as a matter of national policy and to seek peaceful solutions to their differences. The Assembly of the League of Nations

recognized the importance of the Pact in its resolution of March 11, 1932, which stated:

Part. 1. The Assembly.

Considering that Provisions of the Covenant are entirely applicable to the present dispute, more particularly as regards:

1) The principle of scrupulous respect for treaties;

...

Proclaims the binding nature of the principles and provisions referred to ... and declares that it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought by means contrary to the Covenant of the League of Nations or to the Pact of Paris.⁹⁴

With the phrase "not to recognize," the Assembly urged member States not to honour any treaty that was contrary to the provisions of the Covenant or the Pact of Paris.

The 1935 Harvard Draft Convention on the Law of Treaties put forward some interesting points. First, in Article 32, it defined "duress" as "the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State."⁹⁵ Second, it provided that if a victimized State signed and ratified a treaty knowing of the existence of coercion, the treaty would be valid and would not be treated "as having been entered into by that State in consequence of duress."⁹⁶ Third, it stated, in Article 32(b), that the power to determine the validity of allegedly coercive treaties should be entrusted to a "competent international tribunal."⁹⁷

The irony is that the term "duress" in Article 32 did not apply to the threat or use of

force by one State against another that was used to obtain acceptance of a treaty from a country that had been defeated or gone bankrupt.⁹⁸ That is why "duress" was explained as follows:

If one State addresses an ultimatum to another State demanding the conclusion of a treaty embodying the terms of a settlement which it insists upon, and accompanies the ultimatum with a threat of bombardment or occupation of territory, the demand in the last analysis is of necessity addressed to those persons or organs which are charged with the conclusion of treaties and which alone are competent to comply with the terms of the ultimatum. It is therefore argued that, indirectly at least, they are subjected to duress.⁹⁹

The 1939 Harvard Draft Convention on the Rights and Duties of States in Case of Aggression¹⁰⁰ was a significant contribution to the field of treaty law. It was more specific than the 1935 Draft Convention. Article 4 of the 1939 Convention read, in part:

(2) Situations created by an aggressor's use of armed force do not change sovereignty or other legal rights over territory.

(3) A treaty brought about by an aggressor's use of armed force is voidable.¹⁰¹

Article 4(2) was based on the maxim ex injuria ius non oritur.¹⁰² It focussed attention on the long-recognized principle that "rights flowing from acts of force would not be recognized."¹⁰³ Conquest could not be "a basis for territorial titles,"¹⁰⁴ but would be "illegal since it constitutes a violation of a treaty obligation."¹⁰⁵ By using the term "voidable" in Article 4(3), a balance was struck whereby the victim State was given the option of accepting or rejecting the treaty. If the treaty was fair and reasonably reciprocal, a victim State might prefer to honour it rather than to declare it annulled

merely to protest the more powerful State's aggressive behaviour.¹⁰⁶

The law regarding unequal treaties reached its height in 1969 with the conclusion of the Vienna Convention on the Law of Treaties.¹⁰⁷ Under Article 52 of the Convention, "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law."¹⁰⁸ It has been argued that Article 52 is the codification of an existing rule of customary international law.¹⁰⁹ The General Advisory Committee on Arms Control and Disarmament of the United States Congress noted that "the Vienna Convention is regarded by both the U.S. and the Soviet Union as a codification of customary international law on treaty obligations applicable to parties and non-parties alike."¹¹⁰ Even so, the interpretation of the Convention is not without difficulty. The major difficulty faced by the International Law Commission in drafting the Convention's provision on unequal treaties was whether the phrase "threat or use of force" should include economic and political as well as military pressure.¹¹¹ On the issue of political pressure, Judge Padilla Nervo, in the Fisheries Jurisdiction Case,¹¹² had this to say while applying Article 52 to an Exchange of Notes between Iceland and the United Kingdom:

A big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting on having its view recognized and accepted. The Royal Navy did not need to use armed force; its mere presence on the seas inside the fishery limits of the coastal State could be enough pressure. It is well known by professors, jurists and diplomats acquainted with international relations and foreign policies, that certain 'Notes' delivered by the government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force.

There are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputably real

and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of pacta sunt servanda.¹¹³

What Judge Padilla Nervo said, in effect, is that political pressure is covered by Article 52 of the Vienna Convention. Moreover, Article 52 is backed up by Article 53, dealing with "Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens)."¹¹⁴ which reads:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹¹⁵

Article 53 imposes a restriction on the capacity of States to conclude treaties,¹¹⁶ a restriction resulting from the "progressive development of international law."¹¹⁷

It might be argued that because the denial of the right to self-determination violates a peremptory norm and because Article 53 of the Vienna Convention renders void any treaty that conflicts with such a norm, the Hawaiian annexation treaty is voided by Article 53 as a matter of conventional law. However, Article 53 only voids a treaty that conflicts with a peremptory norm "at the time of its conclusion," and the rules prohibiting aggression had not yet become peremptory norms at the time of the American intervention in and annexation of Hawaii.

The voiding of international treaties, however, is not the only consequence of a finding that a norm has become peremptory. A second consequence of such a finding

is to render purely domestic activities that violate peremptory norms international delicts. Therefore, the ongoing denial by the United States of the continuing right of native Hawaiians to self-determination, now well-established as a peremptory norm, is a clear violation of customary international law.

If Article 52 is applied to current international relations, it would clearly remain incomplete unless interpreted as rendering void treaties concluded under economic pressure. This is especially so when the members of the group of industrialized States, or G-7, -- the United States, Canada, the United Kingdom, Italy, France, Japan and West Germany -- hold enormous sway, by virtue of their economic might, over the policies both of individual States and of the international community as a whole. For example, the success of Mikhail Gorbachev's domestic economic reforms may well depend upon the U.S. \$15 billion aid package proposed by France and West Germany at the Houston economic summit of 1990.¹¹⁸ The United States, Japan and the United Kingdom, however, oppose such a package unless and until more democratic reforms and a market-oriented economy are assured, and a study is done of how the money will be spent.¹¹⁹ Similarly, Japan's proposal to assist China with a multi-billion dollar aid package is opposed by Canada because of China's failure to ensure internal democratic reforms.¹²⁰ Moreover, it is an open secret that the United States controls the destinies of many developing nations through the International Monetary Fund and the World Bank, forcing them to alter their domestic and foreign policies. Therefore, the reality of economic pressure must be acknowledged if Article 52 is to serve its intended purpose of ensuring greater fairness in the negotiation and conclusion of international treaties.

One of the most important issues in the law of treaties is the question of the retroactive effect of rules of jus cogens. In this context, Schwelb has stated that:

a rule of jus cogens does not have retroactive effects unless, of course, the new jus cogens rule is created by treaty and the intention to give it

retroactive effect appears from the treaty or is otherwise established ...¹²¹

Article 4 of the Vienna Convention also clearly speaks of the non-retroactivity of the Convention. It states that "[w]ithout prejudice to the application of any rules set forth in the present Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."¹²² Article 28 also speaks of the "Non-retroactivity of Treaties." It reads

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹²³

The controlling factor in Article 28 is the intention of the parties, something not governed by any principle that may be drawn from a treaty's provisions themselves.¹²⁴ In Article 52, the use of the past tense "has been procured" evinces an unmistakable intention to give the provision retroactive effect. These words refute any argument that the scope of Article 52 is limited to treaties concluded after the entry into force of the Vienna Convention. Article 4 in its first part states that "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention." Thus, while it sets out the general rule that provisions of the Vienna Convention are not to be applied to treaties concluded prior to its entry into force, it provides an exception to this rule. That exception applies whenever a customary rule of international law contradicts the general rule. Article 28 is the codification of just such a customary rule, a rule that denies treaties retroactive effect in the absence of a contrary intention. Because that contrary intention is clearly shown by the text of Article 52, Article 28 overrides Article 4 in respect of the retroactive application of Article 52. Therefore, no provisions of the Vienna Convention preclude the retroactive application of Article 52 as a matter of

conventional law.

As noted earlier that Article 53 and the conventional rule it codifies, both limit the voiding of international treaties only when the peremptory norm with which they conflict existed at the time of their conclusion. However, as Professor McDougall has argued, that international law is

a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.¹²⁵

With this in mind, it is submitted that the rising expectations of colonized and newly de-colonized peoples have created conditions in which it is now desirable to apply retroactively the peremptory norm against denying the right to self-determination, so as to void treaties, such as the Hawaiian annexation treaty, that violate this norm, but which were concluded prior to its emergence as a peremptory norm.

In this vein, Article 103 of the United Nations Charter states that

[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail¹²⁶

An excellent analysis of Article 103 has been provided by Goodrich, Hambro and Simons.¹²⁷ They interpreted it as applying to conflicts between the Charter and (1) international agreements between member States concluded before the Charter entered into force; (2) international agreements between member States concluded after the Charter entered into force; and (3) international agreements between

member States and non-member States concluded either before or after the Charter entered into force.¹²⁸ Nozari says that "Article 103 does not consider any limits as to time and operates both retrospectively and prospectively."¹²⁹ If it is true that "[t]he facts in connection with the science of law cannot, in reality, be anything but the needs and necessities of community life, social elements, reason and logic with the consideration of justice as the final end,"¹³⁰ then the international community must acknowledge the past wrongdoing of the colonial powers and question the validity of the many treaties they extorted from colonized or newly decolonized peoples. If one takes into account that the Vienna Convention is largely a codification of the customary norms of international treaty law, then those norms, and particularly Article 52, should also be interpreted as having retroactive effect. If one reads Article 52 of the Vienna Convention, so interpreted, together with Article 103 of the United Nations Charter, then an argument may be made that pre-Charter treaties entered into under the threat or use of force became invalid upon the entry into force of the Charter. To argue otherwise is effectively to deny the right to self-determination of peoples such as native Hawaiians and to condone serious past wrongs committed by the colonial powers.

Rules are meant to serve people, and not vice versa. Those rules that strike at the root of human decency and dignity must be rejected. One can never justify a criminal act by altering the rules in one's favour just because one is capable of doing so. A crime is a crime even after a thousand years; if a society must wait that long to mete out punishment, so be it. Nazi war criminals are still being hunted and tried. The treaty of annexation between Hawaii and the United States was immoral, unethical and a crime against international peace. It was merely the realization of the dream of a few ambitious individuals who had no authority to negotiate an international treaty of any kind on behalf of the Hawaiian people. This is another reason why Article 52 of the Vienna Convention must be interpreted as having retroactive effect. Once this is done, the annexation treaty must be treated as void ab initio and the United States must be regarded as being under an obligation to return Hawaii to native Hawaiians.

This would not only permit justice to be done for native Hawaiians, but would also be in line with current State practice in this area.

The Legal Status of the Hawaiian Annexation Treaty

So long as the idea of universal community was alive, there was no need for the concept of the equality of States. However, this idea faded with the birth and rise of national States.¹³¹ Gradually, the concept of the family of States came into being. States that were independent of each other and of empires.¹³² Such States were sovereign and the idea of equality was the result of this sovereignty.¹³³ As a result, the concept that States were legally and not physically or politically equal was accepted.¹³⁴ The four characteristics of legal equality, as has been noted, were described by Oppenheim as follows:

(1) When a question arises which has to be settled by consent, every state has a right to a vote, but to one vote only.

(2) The vote of the weakest and smallest state has as much weight as the vote of the largest and most powerful.

(3) No state can claim jurisdiction over another.

(4) The courts of one state do not, as a rule, question the validity of the official acts of another state insofar as those acts purport to take effect within the sphere of the latter state's jurisdiction.¹³⁵

The third characteristic -- essentially a rule of non-intervention by one State into the internal affairs of another -- is the recognition of the sovereign equality of States. Annexation treaties usually give the impression of being unequal treaties entered into under duress. If one looks at the events leading up to the emergence of

Hawaii as a territory of the United States, it becomes clear that the annexation treaty was the result of the direct economic, political and military involvement of the United States Government through its official representatives. The puppet government put into power by the United States had no legal mandate to conclude any international treaty. By entering into a treaty of annexation with this government, the United States recognized its legitimacy and accepted the "new government as having authority to represent the state it purport[ed] to govern."¹³⁶ Moreover, the Provisional Government was accorded recognition by the American Minister, Mr. Stevens,¹³⁷ even though it exercised administrative or other control over no territory and was therefore not even a de facto government. As Charles Nordhoff has noted, "a de facto government ought to stand on its own legs, and that [it] didn't do."¹³⁸ Thus, the premature recognition of the Provisional Government by the United States was an act of delinquency that constituted interference in the domestic affairs of a sovereign State.

It is quite unusual for an independent country to willingly negotiate away her sovereignty to become part of another country. Treaties concluded as a result of coercion are not protected by the principle of pacta sunt servanda.¹³⁹ As Erickson aptly said:

Agreement not force is the logical basis of international law.... Unequal treaties are void ab initio. In contrast to the "principle" of rebus sic stantibus, which bases treaty invalidity on subsequent change in circumstances, that is, treaties become voidable but they are not initially void, "unequal treaties are legally worthless" at all times. Repudiation of an unequal treaty cannot be considered a violation of international law.¹⁴⁰

There is no doubt that the treaty concluded between the United States and the so-called Republic of Hawaii under the Dole Government was an unequal treaty, and as such void. However, an argument may be made that no duress was imposed by the

U.S. on the Dole government which signed it so that the unequal treaty doctrine does not apply to the case of Hawaii. Under this argument it would be asserted that the duress came in 1893, at the time of the overthrow of the monarchy, or even earlier, when other forms of economic and political pressures were applied, not at the time of treaty-making with the would-be successor to the monarchical government. The Dole government was never coerced into the 1898 treaty of annexation, and in fact, this government actively sought out the treaty. Therefore, it could be concluded that the treaty was valid.

It is submitted, however, that the annexation treaty must be viewed in its entirety. American conspiracy to annex Hawaii started long before the overthrow of 1893. The removal of the Queen and the installation of a puppet government supported by the American military with the clear intent of concluding a treaty of annexation was, therefore, part of a continuous coercion, and as such rendered the treaty an unequal one. The legal right to conclude international treaties on behalf of the people of Hawaii rested within the exclusive power of the previous Hawaiian government represented by the Queen.

There are alternative legal theories available to challenge the annexation treaty: (a) that it was concluded with an incompetent party, or (2) that it was concluded with a party that claimed to represent a people which had been put in an unequal relationship. The first point is that the Dole government was created as a result of direct American interference, not because the people of Hawaii wanted it. Therefore, it lacked the legitimacy to speak for the people of Hawaii. In this view, the Dole government was a legally incompetent party. Under the second view, the treaty was a treaty of unequal alliance, i.e., imposed by a very powerful country on a very weak people via its unrepresentative government. Therefore, it is submitted that the Hawaiian annexation treaty was entered into in that it was the result of unremitting American political, economic and military coercion.

Conclusion

The unequal treaty doctrine, which may be described as an extreme expression of the Western concept of duress, is now an acknowledged part of international treaty law.¹⁴¹ Even though the equality of nations was recognized long ago by Chief Justice Marshall of the U.S. Supreme Court, the United States hardly reflected this conviction in her foreign policy. As Mr. Justice Marshall stated in The Antelope case in 1823,

[n]o principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another.¹⁴²

With the passage of time, it has become imperative that Article 32 of the Vienna Convention be interpreted as having retroactive effect. Such an interpretation is, in any event, justified by Article 28 of the Convention, and by the apparent intention of the drafters of Article 32 to give the provision retroactive effect. Moreover, Article 32 is a codification of customary international law. The impact of a failure to accord the provision retroactive effect would be to force a State or nation to surrender voluntarily its claim to sovereignty. This concern was echoed by Professor Sinha when he noted:

... Asian and African states have expressed their denunciation of the traditional rule which upheld the validity of a treaty concluded by means of coercion of a state as belonging to an era when many principles of international law had been formulated and used for the benefit of a small group of powerful nations against others which happened to be weaker and smaller A treaty imposed by force is void because, not merely the contracting parties, but the entire international community is involved. The treaty may be renegotiated, but it cannot have legal validity as it stands Although

they have shown acceptance of the principle of pacta sunt servanda. ... states would like to see a rule which would enable them to terminate unilaterally a treaty involving interests of a state which are vital to it.¹⁴³

Contemporary international law imposes State responsibility for the "internationally wrongful act of a State."¹⁴⁴ Article 1 of Chapter I of the Draft Articles on State Responsibility lays down the "[r]esponsibility of a State for its internationally wrongful acts."¹⁴⁵ It reads that "[e]very internationally wrongful act of a State entails the international responsibility of a State."¹⁴⁶ Article 3 identifies the "[e]lements of an internationally wrongful act of a State,"¹⁴⁷ which occurs whenever a State engages in "conduct consisting of an action or omission attributable to the State under international law; and ... that conduct constitutes a breach of an international obligation of the State."¹⁴⁸ The word "responsibility" identifies the "criminal or tortious act in question"¹⁴⁹ in municipal law. In this sense, responsibility for a wrongful act has a substantive legal element. These draft articles have created a strong expectation in State practice and for the future course of international law.¹⁵⁰ An unequal treaty satisfies the above criteria. Moreover, Article 19(3)(b) of Chapter III states that "an international crime may result, inter alia, from ... (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples..."¹⁵¹ It is submitted that the United States Government bears the following responsibilities as the result of its forceful annexation of Hawaii by means of an unequal treaty:

a) [A] formal acknowledgment of her illegally destroying the constitutional monarch of Hawaii, and an apology to that effect;¹⁵²

2) Return of the lands to the Hawaiians and the resumption of the Hawaiian native Government;¹⁵³
and

3) Monetary compensation.¹⁵⁴

It is beyond dispute, as President Harrison himself admitted, that the Harrison Administration was extremely sympathetic to the idea of annexing Hawaii. That Ambassador Stevens in particular had strong annexationist leanings from the very beginning was well known in Hawaii.¹⁵⁵ It is also uncontroverted that Stevens ordered United States Marines from the U.S.S. Boston to land in Honolulu on January 16, 1893 in order to provide much-needed support for the revolutionists, and that he recognized the Provisional Government even before Queen Liliuokalani had yielded her authority to the American forces.¹⁵⁶ The conclusion by the majority of the Native Hawaiian Study Commission that native Hawaiians should not receive reparations because the actions of Stevens were not authorized by the United States Government were, as stated by Hon. Moses Keale, "reached without analysis or explanation and fly in the face of the factual material in the majority's own report."¹⁵⁷ Ambassador Stevens's superiors in Washington never questioned or revoked his actions. Thus, under the international law of agency, these actions were those of the United States as well.¹⁵⁸

There are two principles underlying this rule of liability. First, "the government or employer of the agent is better able to absorb the loss and spread it among the citizenry than is the victim," and second, "the government that employs the agent is in the better position to prevent the loss in the first place by more carefully selecting the agents to whom it gives authority and by better training them about their responsibilities."¹⁵⁹ Therefore, native Hawaiians deserve, at a minimum, a formal apology from the United States.

Native Hawaiians lost not only their sovereignty, but approximately 1.75 million acres of government and Crown lands, lands held by the Hawaiian government in trust for native Hawaiians.¹⁶⁰ The government lands were set aside by Kamehameha III exclusively for the Chiefs and the people.¹⁶¹ They were confiscated by the Provisional Government, subsequently transferred to the Republic of Hawaii and ultimately ceded to the United States.¹⁶² The United States is under an obligation to

return these lands to native Hawaiians.

It has long been a principle of international law that a breach of a legal obligation gives rise to a corresponding duty to make reparations.¹⁶³ The purpose of reparations is to restore the victims of an illegal act, to the greatest extent possible, to the position they enjoyed prior to the commission of that act; it is to make their situation the same as if the act had never happened.¹⁶⁴ State responsibility arises when a State is directly or indirectly involved in the commission of an international wrongful act, because, as Chief Justice Marshall said in 1814, "[t]he law of nations is a law founded on the great and immutable principles of equity and natural justice."¹⁶⁵ The doctrine of unjust enrichment is based on the same "principles of equity and natural justice." Under this doctrine, "one person should not be allowed to profit or enrich himself at another's expense." It applies whenever "a defendant has something of value at the plaintiff's expense under circumstances which impose a legal duty of restitution."¹⁶⁶ The Restatement (Second) of the Foreign Relations Law of the United States describes the effect of a violation of international law as follows:

(1) A violation of international law gives to

(a) a state or international organization adversely affected, a claim that may be adjudicated in an appropriate international forum;

(b) a state, international organization, or person adversely affected, a claim that may be adjudicated in an appropriate forum pursuant to an agreement between the state or international organization and the person;

(c) a state, international organization, or person adversely affected, such remedies or defenses in a forum of a state as are provided by its domestic law to give effect to international law.

(2) The domestic law of a state is not a defense to a violation by the state of international law....

Comment:

a. State adversely affected. For the purpose of international law, a state is adversely affected even though the party damaged by the violation of international law is an individual of its nationality. In some situations the state itself, as distinguished

from an individual, may be damaged by the

violation

f. Reparation. The satisfaction of a claim for a violation of international law, or "reparation," as this satisfaction is usually called, may take many forms. The most common form of reparation is the payment of damages.¹⁶⁷

A claim under section 1(a) of the Restatement may appear to be difficult for Hawaii to bring. As an alleged part of America, Hawaii would seem unable to be a party to an international adjudication, especially at the World Court, where only independent States may be parties. However, this in no way prevents arbitration between the federal U.S. government and native Hawaiians. This is clearly a case of unjust enrichment through which America gained military and economic advantage at the expense of Hawaiian independence. Needless to say, the United States is responsible under the doctrine of State responsibility for the damage done to Hawaii by stealing her independence, overthrowing the legitimate Queen of Hawaii and putting a puppet government in her place, with a view to entering into a treaty of cession with a government that had no authority to conclude one.

Thus, the application of Article 52 of the Vienna Convention, in conjunction with Article 103 of the United Nations Charter, to the Hawaiian situation results in the inescapable conclusion that the treaty of annexation -- an unequal treaty concluded under continuous duress -- is void. Current State practice dictates that, as in the case of Hong Kong, Hawaii should be returned to its rightful owners, the people of Hawaii, and that America should make restitution for its unjust enrichment. This would bring United States practice into agreement not only with the norms of international law, but also with the Restatement (Second) of the Foreign Relations Law of the United States. It would also see justice done to the people of Hawaii, whose inalienable right to self-determination was denied in 1898.

Endnotes

1. 7 Encyclopedia of Public International Law, at 514 (1984). [Hereinafter cited as Encyclopedia].

2. Treaty Between China and Great Britain, signed at Nanking, August 29, 1842, reprinted in PARRY (ed.), 93 THE CONSOLIDATED TREATY SERIES 467 (1842).

3. Id.

4. Encyclopedia, supra, note 1, at 515.

5. Id.

6 Id.

7. UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1883-1904 at 268 (Wiktor ed.).

8. Id.

9. Article 27(3) of the United Nations Charter reads:

Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...

CHARTER OF THE UNITED NATIONS. Done at San Francisco, June 26, 1945. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043. [Hereinafter cited as United Nations Charter]. Also see 7 Encyclopedia of Public International Law, at 516.

10. DHOKALIA, NULLITY OR INVALIDITY OF TREATIES, in 9 INDIAN J. INT'L L. 189 (1974).

11. Houghton, AN ARGUMENT FOR INDIAN STATUS FOR NATIVE HAWAIIANS -- THE DISCOVERY OF A LOST TRIBE, in 14 AM. INDIAN L. REV. 1 (Number 1, no date).

12. United States Code Annotated, Title 25, § 4506(b).

13. United States Code Annotated, Title 43, § 1602(b).

14. VIENNA CONVENTION ON THE LAW OF TREATIES. Vienna, May 22, 1969. Opened for signature, May 23, 1969. U.N. Conference on the Law of Treaties, First and Second Sessions, March 26-May 24, 1968 and April 9-May 22, 1969. U.N. Doc. A/CONF. 39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969). [Hereinafter cited as Vienna Convention]

15. Oppenheim, 1 International Law, Section 115 (3rd ed., 1920). [Hereinafter cited as Oppenheim, International Law].

16. McNAIR, EQUALITY IN INTERNATIONAL LAW, in 26 MICH. L. REV. 131 (1927).

17. Oppenheim, International Law, *supra*, note 15, § 116. Also see McNair, Equality in International Law, *id.*

18. GROTIUS, II DE JURE BELLI AC PACIS LIBRI TRES 394-395 (Kelsey trans. 1925).

19. Took, JUST WAR IN AQUINAS AND GROTIUS 231 (1965).

20. Dickinson, THE EQUALITY OF STATES IN INTERNATIONAL LAW 334 (1924); Also see Baker, The Doctrine of Legal Equality of States, in 1923-26 Brit. Y.B. Int'l L., at 6.

21. Dickinson, *id.*

22. WEINSCHEL, THE DOCTRINE OF THE EQUALITY OF STATES AND ITS RECENT MODIFICATIONS, in 45 A.J.I.L. 418 (1951). [Hereinafter cited as Weinschel, The Doctrine of the Equality of States].

23. Dickinson, The Equality of States in International Law, *supra*, note 20.

24. VATTTEL, THE LAW OF NATIONS; OR; PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 199 (Chitty ed. 1852).

25. *Id.*, at 202.

26. *Id.*, at 203-204.

27. PUFENDORF, LAW OF NATURE AND NATIONS §49 (Kennett trans. 4th ed., 1729).

28. Oppenheim stated:

A State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such treaty on the ground that its freedom of action was interfered with at the time.

OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 547 (1912). [Hereinafter cited as Oppenheim, A Treatise].

29. Hyde was of the opinion that an international treaty is different from a domestic contract and that the principle of coercion does not apply to international treaties. HYDE, INTERNATIONAL LAW -- CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 8 (1922).

30. Butler, Treaties made under Duress, in 26 PROC. AM. SOC'Y INT'L L. 43 (1932); Putney, The Termination of Unequal Treaties, in 21 PROC. AM. SOC'Y INT'L L. 87 (1927). Butler asked:

... whether a nation entering into a compact with another nation to obtain whatever advantage the execution of that compact may afford, or to avoid the dangers of its non-execution, can avoid those obligations for duress under any recognized principles of international law. I do not think so.

Id. at 46. Putney remarked:

... whatever kind of unequal treaty we refer to, I do not think that there is any principle of international law, or that any such view has ever been laid down, that on account of the inequality of the treaty the party suffering under the inequality has a right to abrogate it for this reason alone, any more than a person who has made a bad bargain is allowed to rescind his contract for that reason.

Id. at 89. Also see Buell, id. at 90-100.

31. Verdross, Forbidden Treaties in International Law, in 31 A.J.I.L. 571 (1937).

32. Id. at 572.

33. Id. at 573-574.

34. PCIJ, Ser. A/B, No. 63, at 65 (1934).

35. Id. at 150.

36. Nozari, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 111 (1971). [Hereinafter cited as Nozari, *Unequal Treaties*].

37. Id.

38. Id. at 114-115.

39. Id. at 112.

40. Id. Article 46 of the Treaty reads:

LXVI. Si dorénavant le Gouvernement de sa Majesté le Roi des Belges jugeait utile d'apporter des modifications à quelquesunes des clauses du présent Traité, il sera libre à cet effet d'ouvrir des négociations après un intervalle de 10 années revolues à partir du jour de l'échange des ratifications, mais il faut que 6 mois avant l'expiration des 6 années, il fasse connaître officiellement au Gouvernement de Sa Majesté l'Empereur de la Chine son intention d'apporter des modifications et en quoi elles consisteront. A défaut de cette annonce officielle, le Traité restera en vigueur sans changements pour un nouveau terme de 10 années et ainsi de suite de 10 années en 10 années.

Treaty of Friendship, Commerce and Navigation between Belgium and China, signed at Peking, November 2, 1865, reprinted in PARRY (ed.), 131 *THE CONSOLIDATED TREATY SERIES* 385 (1865).

41. Nozari, *Unequal Treaties*, supra, note 36, at 117-118.

42. McDougal and Reisman, Letter to the Editor, N.Y. Times, July 16, at 30, col. 3 (1976). Also reproduced in Lillich and Newman, International Human Rights: Protocol of Law and Policy 529 (1979).

43. Anand, Role of International Adjudication, in Gross (ed.), THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 7 (1976).

44. Case Concerning Barcelona Traction, Light and Power Co., ICJ Rep. at 246 (1970). We also find Chinese scholar Yin Tao criticizing Western scholars and arguing as follows:

Since bourgeois international law scholars state that treaties are the principal source of international law, may we ask where those treaties come from? By referring to the large number of treaties concluded in the period of capitalism, it may be proved that these treaties were all concluded under the guidance of the external policy of capitalist countries in accordance with the demands of the bourgeoisie and through diplomatic means and arbitrary external practices... Bourgeois international law also considers unequal treaties imposed upon weak and small countries to sources of international law. The implications of this are too obvious to everyone.

Cited in CHIN, THE PEOPLES REPUBLIC OF CHINA AND THE LAW OF TREATIES 5-6 (1972).

45. PFAFF, Truth in China cannot remain buried forever, in The Gazette, (Montreal) June 19, at B-3, col. 2 (1989).

46. MALAWER, IMPOSED TREATIES AND INTERNATIONAL LAW 9 (1977). [Hereinafter cited as Malawer, Imposed Treaties].

47. Id.

48. Statute of the International Court of Justice, 59 Stat. 1055, T.S. No.933, 3 Bevans 1153, 1976 Y.B.U.N. 1052.

49. Equality before the law is a principle honoured in virtually every country. This

principle assures the protection of the weaker against the stronger. In common law, undue influence or duress vitiate a contract. We also find the application of this principle in the domestic legal system of the United States. E.g., in the case of Henningsen v. Bloomfield Motors, Inc., the New Jersey Supreme Court stated that in the case of the purchase of automobiles, implied warranties are extended, even though the contract very much limits the manufacturer's liabilities. 32 N.J. 858, 386-389, 161 A. 2d 69, 84-86 (1960). Also see Murphy, *Economic Duress and Unequal Treaties*, in 11 Va. J. Int'l L. 62 (1970-71). In Williams v. Walker-Thomas Furniture Company, the Court observed:

Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.... [But] when a party of little bargaining power... signs a commercially unreasonable contract... in such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the Court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

350 F. 2d 445, 449-450 (D.C. Cir. 1965). Also see Murphy, *id.*, at 63.

30. Detter, *The Problem of Unequal Treaties*, in 15 Int'l & Comp. L. Q. 1082-1083 (1966).

31. *Id.*, at 1070.

32. Oppenheim, *A Treatise*, *supra*, note 28, at 23.

33. KAUTILIYA, ARTHASASTRA, BOOK VII, Ch. IX, S. 116, Sloka 4 & 5. Also see Verma, *Unequal Treaties in Modern International Law*, in 7 EASTERN J. INT'L L., at 74, note 1 (1975-76).

34. Detter, *The Problem of Unequal Treaties*, *supra*, note 30, at 1073.

35. Przetacznik, *The Validity of Treaties Concluded Under Coercion*, in 15 INDIAN J. INT'L L. 174 (1975).

36. Shafirov, *A DISCOURSE CONCERNING THE JUST CAUSES OF THE WAR BETWEEN SWEDEN AND RUSSIA: 1700-1721*, (With an introduction by Butler) 268 (1973).

57. *Id.*, at 10.

58. Nozari, *Unequal Treaties*, *supra*, note 36, at 214.

59. *Id.*, at 214-215.

60. Hershey, *Legal Status of the Brest-Litovsk and Bucharest Treaties in the Light of Recent Disclosures and of International Law*, (Editorial Comment), in 12 A.J.I.L. 819 (1918).

61. *Id.*

62. *Agreement Between Belgium, the British Empire, France, the United States and Germany with regard to the Military Occupation of the Territories of the Rhine*, in PARRY (ed.), 225 THE CONSOLIDATED TREATY SERIES 407 (1919).

63. *Treaty Respecting the Province of Shantung*, reprinted in PARRY (ed.), THE CONSOLIDATED TREATY SERIES 75-76 (1915-1916).

64. *Treaty Respecting South Manchuria and Eastern Inner Mongolia*, Reproduced *id.* at 76-78.

65. *Letter from Secretary of State to Ambassador Guthrie, May 11, 1915*, reproduced in FOR. REL. U.S., at 146 (1924).

66. The Stimson Note of January 7, 1932 read as follows:

In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative

integrity of the Republic of China, or to the international policy relative to China, commonly known as the open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States are parties. (Identical note by the United States to China and Japan, January 7, 1932).

Reproduced in Wright, *The Stimson Note of January 7, 1932*, in 26 A.J.I.L. 342 (1932). [Hereinafter cited as *Stimson Note*].

67. Malawer, *Imposed Treaties*, *supra*, note 46, at 35.

68. Chiu, *Comparison of the Nationalist and Communist China's Views of Unequal Treaties*, in Cohen (ed.), *CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES* 243 (1972).

69. *Id.* at 245-248.

70. *Id.* at 260-261. Also see *The Chinese Revolution and The Chinese Communist Party*, in 2 *SELECTED WORKS OF MAO TSE-TUNG*, at 311.

71. Malawer, *Imposed Treaties*, *supra*, note 46, at 37. Article 12 of the Sino-Soviet Treaty reads:

Article XII. The Government of the Union of Soviet Socialist Republics agrees to relinquish the rights of extraterritoriality and consular jurisdiction.

AGREEMENTS BETWEEN THE REPUBLIC OF CHINA AND THE UNION OF SOVIET SOCIALIST REPUBLICS AND ANNEXES, reprinted in 19 A.J.I.L. (Supplement) 55 (1925) [OFFICIAL DOCUMENTS].

72. Malawer, *id.*

73. See 24 I.L.M. 1185 (1985).

74. 23 I.L.M. at 1371 (1984).

75. *Id.* at 1367.

76. *Id.*

77. The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, in Scott (2d ed.), THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 42-43 (1915).

78. HUDSON, THE REGISTRATION AND PUBLICATION OF TREATIES, in 19 A.J.I.L. 273 (1925).

79. Covenant of the League of Nations. Entered into force on January 10, 1920. Reproduced in Sohn (ed.), INTERNATIONAL ORGANIZATION AND INTEGRATION: ANNOTATED BASIC DOCUMENTS OF INTERNATIONAL ORGANIZATIONS AND ARRANGEMENTS 8 (1986).

80. Hudson, The Registration and Publication of Treaties, *supra*, note 78, at 278.

81. *Id.*

82. Records of Second Assembly, Meetings of Committees, at 77, cited in Hudson, *id.* at 279. Also in 1921, a Brazilian proposal to amend the Covenant is noteworthy here, which was most direct and radical. It read:

All the Members of the League of Nations consider null and void pleno iure, the provisions of any international treaty concluded in the future which grant to a State which has made war contrary to Articles 12, 13 and 15 of the Covenant the following ... (reparations, economic benefits, annexation of territory)....

All the Members of the League recognize the competence of the Court of International Justice, in case of doubt, to determine de pleno ... which has been the aggressor State.

LEAGUE OF NATIONS, 2D ASS., Committee Meeting, at 400-401 (1921). See Malaver,

Imposed Treaties, supra, note 46, at 50-51.

83. Covenant of the League of Nations, supra, note 79.

84. This is in view of the phrase in Article 19: "reconsideration... of treaties which have become inapplicable". Id. See, e.g., VAMOUKOS, TERMINATION OF TREATIES IN INTERNATIONAL LAW 130-131 (1985). [Hereinafter cited as Vamoukos, Termination of Treaties]. In this context, also see the opinion of M. Negulesco, J. in the Free Zones Case, PCIJ, Ser. A, No. 22, (Order of August 19, 1929) at 3, 28-29.

85. Nozari, Termination of Treaties, supra, note 36, at 136-137. Also see Garner, THE DOCTRINE OF REBUS SIC STANTIBUS AND THE TERMINATION OF TREATIES, in 21 A.J.I.L. 509 (1927). [Hereinafter cited as Garner, The Doctrine of Rebus Sic Stantibus]. Garner, quoting Heffter, stated that a State may repudiate a treaty whenever it conflicted with "the rights and welfare of its people." Id. at 512.

86. For a detailed discussion, see Vamoukos, Termination of Treaties, supra, note 84, at 131; See China's efforts to apply Article 19, id. Also see Garner, The Doctrine of Rebus Sic Stantibus, supra, note 85, at 511.

87. See Vamoukos, Termination of Treaties, supra, note 84, at 131.

88. Potter, Article XIX of the Covenant of the League of Nations, 12 GENEVA STUDIES 9 (1941).

89. Vamoukos, Termination of Treaties, supra, note 84, at 132.

90. Potter, The Revision of Treaties, in 3 GENEVA SPECIAL STUDIES 8 (1932).

91. Article 1, General Pact for the Renunciation of War, August 27, 1928, 46 Stat. 2343 (1931), T.S. No. 796, 14 L.N.T.S. 57.

92. See Stimson Note, supra, note 66. Also see Wright, The Meaning of the Pact of Paris, in 27 A.J.I.L. 49-50 (1933). The Pact was ratified and as such became a source of law. Id. at 40-41. Concerning the Pact's legal nature, see id.

93. Wright, id. at 50.

94. LNOJ., Spec. Supp., at 101 (1932), Reproduced in 27 A.J.I.L. 132-133 (Supp. 1933).

95. DRAFT CONVENTION ON LAW OF TREATIES, in 29 A.J.I.L. 663-664 (Supp. Part III, 1935).

96. Id., at 664.

97. Id.

98. Id., at 1152.

99. Id., at 1154.

100. DRAFT CONVENTION ON RIGHTS AND DUTIES OF STATES IN CASE OF AGGRESSION, in 33 A.J.I.L. 828 (Supp. 1939).

101. Id.

102. Id., at 890.

103. Id.

104. Id.

105. Id.

106. Id., at 895-896.

107. Vienna Convention, supra, note 14.

108. Id.

109. The International Law Commission, in its report to the General Assembly, stated:

The Commission's work on the law of treaties constitutes both codification and progressive development of international law ...

II Y.B. Int'l L. Comm'n: Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, at 177 (1966). The Burmese Government stated in respect of the draft articles:

The... Government of the Union of Burma consider, as a matter of principle, that the draft articles on the law of treaties drawn up by the International Law Commission should be acceptable, as codification of international law ...

Transmitted by letter of 29 March, 1963 from the Permanent Mission to the United Nations, reproduced id., at 283.

110. 130 Cong. Rec. 14, 186 at note 2 (daily ed. October 10, 1984). Also see DALTON, *International Agreements in the Revised Restatement*, in 25 Va. J. Int'l L. 156-157 (1984-85).

111. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 20 (1973).

112. Fisheries Jurisdiction Case (U.K. v. Iceland), Jurisdiction of the Court. ICJ Rep. 4 (1973).

113. Id. at 47. But Briggs commented in respect of this judgment that "the Court's unhesitating acceptance as a principle of contemporary international law of the rule 'recognized' in Article 52 of the Vienna Convention... was not the traditional view under which treaties procured through coercion of a state by the threat or use of force were nevertheless considered valid in international law. Since the Court found no factual basis for the charge of duress, it found it unnecessary to consider any procedural problems raised by the wording of Article 52." Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, in 68 A.J.I.L. 62-63 (1974).

114. Vienna Convention, supra, note 14.

115. Id.

116. Nahlik, *The grounds of invalidity and termination of treaties*, in 65 A.J.I.L. 745 (1971).

117. Id.

118. CBC (Television) 10 P.M. News, Ottawa, July 10, 1990.

119. Id.

120. Id.

121. SCHWELB, SOME ASPECTS OF INTERNATIONAL JUS COGENS AS FORMULATED BY THE INTERNATIONAL LAW COMMISSION, in 61 A.J.I.L. 969 (1967).

122. Vienna Convention, supra, note 14.

123. Id.

124. ROSENNE, The Temporal Application of the Vienna Convention on the Law of Treaties, in 4 Cornell Int'l L. J. 4 (1970-71).

125. McDougal, The Hydrogen Bomb Tests and the International Law of the Sea, in 49 A.J.I.L. 356-357 (1959).

126. United Nations Charter, supra, note 9.

127. GOODRICH, HAMERO and SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, at 614 (1969).

128. Id.

129. Nozari, Unequal Treaties, supra, note 36, at 76-77. Malawer also asserts that Article 103 of the Charter "takes precedence over inconsistent treaties ... presumably, both prior and subsequent treaties." Malawer, Imposed Treaties, supra, note 46, at 116.

130. Nozari, id., at 78.

131. WEINSCHEL, THE DOCTRINE OF THE EQUALITY OF STATES AND ITS RECENT MODIFICATIONS, in 43 A.J.I.L. 417 (1951).

132. Id.

133. Id.

134. Id., at 418.

135. Oppenheim, I International Law 238-242 (7th ed., 1948).

136. Hackworth. I Digest of International Law 166 (1940).

137. COOLEY, GRAVE OBSTACLES TO HAWAIIAN ANNEXATION, in 15 The Forum 389 (June 1893).

138. NORDOFF, HAWAII NEEDS A MINISTER, NEW YORK HERALD, MONDAY, APRIL 24, 1893, at 6, Col. 5.

139. ERICKSON, INTERNATIONAL LAW AND THE REVOLUTIONARY STATE 77 (1972). The principle of pacta sunt servanda does not apply in the following situations:

1. if force or duress is used against the negotiations or the state itself...;
2. if an illegal treaty is sought to be enforced;
3. if error is found to be present...;
4. in those instances where fraud has been evident;
5. if a peremptory norm of general international law is violated...;
6. if a violation of the U.N. Charter, as to those areas involving the use of force... is found to exist;
7. if a treaty violating a higher commitment to a specialized agency, such as ILO is jus cogens and, secondly, if treaties violate the Statute of the Council of Europe Establishing Treaty of the European Economic Community (under EEC Treaty Article 5) an exception would exist;
8. If... unjust treaties exist;
9. if a void treaty, void ab initio, would in fact be held not to exist at all;
10. if a formerly valid treaty, proper when entered into, was deemed no longer in force;

11. if a treaty still technically in force but no longer valid were sought to be enforced;

12. if rebus sic stantibus could be applied; or

13. if ius cogens outranked the negotiated pactum.

GORMLEY, THE CODIFICATION OF PACTA SUNT SERVANDA BY THE INTERNATIONAL LAW COMMISSION: THE PRESERVATION OF CLASSICAL NORMS OF MORAL FORCE AND GOOD FAITH 389 (1970).

140. Erickson, International Law and the Revolutionary State, id.

141. Id.

142. THE ANTELOPE (1825), 10 WHEATON, 66, at 122. Also see PHILLIPSON (5th ed.), WHEATON'S ELEMENTS OF INTERNATIONAL LAW 261 (1916).

143. SINHA, NEW NATIONS AND THE LAW OF NATIONS 138 (1967).

144. Draft Article 1. Report of the International Law Commission on the Work of Its Thirty-Second Session, 30 GAOR Supp. (No. 10), at 78, U.N. Doc. A/35/10 (1980).

145. Id.

146. Id.

147. Id.

148. Id.

149. Allott, State Responsibility and the Unmaking of International Law, in 29 HARV. INT'L L. J. 13 (1988).

150. See id., at 1.

151. Id., at 80.

152. Matsuda, LOOKING TO THE BOTTOM: CRITICAL LEGAL STUDIES AND REPARATIONS, in 22 Harv. Civil-Rights-Civil Lib. L. Rev. 371 (No. 2, 1987).

153. *Id.* at 372.

154. *Id.*

155. STATEMENT OF HON. MOSES KEALE, CHAIRMAN, BOARD OF TRUSTEES, OFFICE OF HAWAIIAN AFFAIRS, HONOLULU, in NATIVE HAWAIIANS REPARATIONS COMMUNITY, 1989 Cong. Information Service, at 4.

156. *Id.* at 5.

157. *Id.*

158. *Id.* at 6.

159. *Id.*

160. *Id.* at 5.

161. *Id.*

162. *Id.*

163. COLLINS, *The United States Owes Reparations to the African States for the Slave Trade*, in 16 HOWARD L. J. 320 (1971). [Hereinafter cited as *Collins, The United States Owes Reparations*].

164. *Chorzow Factory Case*, P.C.I.J., ser. A, No. 17, at 4, 47. The Court stated: "[R]eparation must ... wipe out all the consequences of the illegal act and reestablish the situation which would ... have existed if that act had not been committed." *Id.*

165. Per Marshall, C.J., in a partially dissenting opinion in *The Venus*, 8 Cranch 253, 297 (U.S. 1814), reproduced in Bishop, Jr., *INTERNATIONAL LAW: Cases and Materials* 20 (1962).

166. *Collins, The United States Owes Reparations*, *supra*, note 163, at 318.

167. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 (1965). Also see *Collins, The United States Owes Reparations*, *supra*, note 163 at 321-322.

Chapter VII

Hawaiian Annexation and the Right to Self-Determination

Introduction

The annexation of Hawaii contravened the foreign policy principles established and adhered to by the founding fathers of the United States.¹ It also violated Article 1 of the Treaty of Friendship, Commerce, and Navigation between The United States and the Sandwich Islands of 1826, signed by President John Quincy Adams. Article 1 read: "[t]he peace and friendship subsisting between the United States and their Majesties, the Queen Regent and Kauikoaouli, King of the Sandwich Islands, and their subjects and people, are hereby confirmed and declared to be perpetual."² Ironically, the Hawaiian King never knew whether this treaty had been ratified by the United States. Nevertheless, he "governed himself by the regulations of that treaty in all his intercourse with citizens of the United States."³ Moreover, on December 30, 1842, President John Tyler also gave assurances concerning Hawaiian independence in an address to Congress. He stated:

It cannot but be in conformity with the wishes of the Government and the people of the United States that this community thus existing in the midst of a vast expanse of ocean should be respected, and all its rights strictly and conscientiously regarded.... while its near approach to this continent, and the intercourse which American vessels have with it ... could not but create dissatisfaction on the part of the United States at any attempt by another power, should such attempt be threatened or feared, to take possession of the islands, colonize them, and subvert the native Government. Considering, therefore, that the United States possesses so very large a share of the intercourse with those islands, it is deemed not unfit to make the declaration that their Government seeks nevertheless no peculiar advantages, no exclusive control over the Hawaiian Government, but is content with its independent existence, and anxiously wishes for its security and prosperity. Its forbearance in this respect, under

the circumstances of the very large intercourse of their citizens with the islands, would justify the Government ... in making a decided remonstrance against the adoption of an opposite policy by any other power.⁴

The "Tyler Doctrine" was reiterated by Secretary of State Daniel Webster on December 19, 1842, in his letter to Messrs. Timoteo Haalilio and William Richards, two officials of the Hawaiian King:

The United States have regarded the existing authorities in the Sandwich Islands as a Government suited to the condition of the people, and resting on their own choice ... that the Government of the Sandwich Islands ought to be respected; that no power ought ... to take possession of the islands as a conquest ...⁵

The Hawaiian annexation was challenged on constitutional grounds by George Ticknor Curtis, the plaintiff's attorney in the Dred Scott case.⁶ Article 4, Section 3 of the United States Constitution reads:

SEC. 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor shall any be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims of the United States, or of any particular State.⁷

Curtis argued that the phrase "New States" in section 3(1) does not apply to foreign States or countries, and that new states of the Union may be created, according to sections 3(1) and 3(2), in only two ways. They may be (a) "formed or erected ... by the junction of two or more States or parts of States [with] the consent of the legislatures of the States concerned as well as of the Congress" or (b) formed out of "Territory or other property belonging to the United States."⁸ Curtis maintained that in order to be incorporated into the American Union, a foreign State must satisfy two additional criteria: it must be contiguous to the American territory and there must be a "controlling public necessity for its acquisition."⁹ He further asserted that "[u]pon this [territorial] clause has been built since the year 1787 the whole system of forming States out of territory belonging to the United States, and under the first clause cited these new States have been brought into the Union."¹⁰

The annexation of Hawaii did not satisfy these criteria, thus making the Islands, in the words of Charles Nordhoff in an 1893 New York Herald article, "stolen property."¹¹ Furthermore, as Professor Thomas M. Cooley noted, the Provisional Government had only the power to act temporarily, until a permanent government was created.¹² "When therefore a commission starts out immediately upon the creation of a Provisional Government, to offer its country as a gift to a foreign nation, the very title of the government seems to negate its authority."¹³ Cooley went on to observe that even though an argument could be made that the very objective of the Provisional Government was to bring about annexation, how and where it derived the authority to pursue this objective remained unexplained. The desire of the people for whom the annexation was ostensibly effected was never expressed; rather "persons of foreign birth resident in the islands took possession of the government, and immediately started to make a tender of the islands to a foreign nation."¹⁴

The events following the overthrow of the Queen and the proclamation of Hawaii as a Republic were sad and ludicrous. The first was the tendering of American assistance to Sanford Dole to convene a mock constitutional convention. One of the last, in 1959,

was the holding of a referendum in which the "qualified" voters of Hawaii were asked whether the Islands should immediately be admitted into the Union as a state, with no mention of the alternative of restoring Hawaii's independence.¹⁵ This blatant denial of the people's right to express their opinion on this important question was completely at odds with the principles of representative government espoused by American politicians. For example, on February 11, 1918 President Wilson declared that "[n]ational aspirations must be respected; people may now be dominated and governed by their own consent. 'Self-Determination' is not a mere phrase. It is an imperative principle of action ..."-16

It is also important to note that the right to vote in the 1959 referendum was extended to American citizens who had been resident in Hawaii for only one year, thus extending voting rights to many American servicemen and women stationed in Hawaii.¹⁷ Under the law of nations, the above constitutional convention was arguably void ab initio on the ground that it violated the right of the people of Hawaii to self-determination.

After annexation, Hawaiians came into even closer contact with an alien culture, although the Christian religion and English language had been present in Hawaii since the 1830's.¹⁸ Even before annexation, foreign culture had become so dominant that an 1860 law required every person to take a Christian name in addition to his or her Hawaiian one.¹⁹ Since annexation, the toll on Hawaiian culture has been very high indeed. As Hayden F. Burgess has stated:

Every Hawaiian has a built-in inferiority complex. You can't help but have it, because you come from a culture that's no good, and nothing in it is good. You have no solid foundation. So you flounder around and you can't find a place for yourself. Everywhere you go, you get reminded of the fact that you are Hawaiian There is this emptiness that exists for a Hawaiian.²⁰

With such close contact with foreign culture, native Hawaiians lost not only their land and independence, but their self-respect, their dignity and the dominance of their native language.²¹ Poorer native Hawaiians have been the constant objects of "forced removal" from prime real estate formerly occupied in traditional ways.²² Because of the resultant humiliation, native Hawaiians may be suffering from irreparable personal trauma similar to that experienced by rape victims.²³

It is noteworthy that in 1898, immediately after the annexation, thirty-seven thousand Hawaiians (almost every man, woman and child) signed a petition to the United States Congress and the President protesting the annexation. It read, in part, as follows:

We particularly resent the presumption of being transferred like a flock of sheep, or bartered like a horde of savages, by an unprincipled minority of aliens who have no right, no legal power, no influence over us, not even a claim of conquest by fair-handed warfare, and we cannot believe our friends of the great and just American nation could tolerate annexation by force against the wishes of the majority of the population.²⁴

The present Chapter will discuss the violation by the United States of the right of native Hawaiians to self-determination, with special reference to the after-effects of the annexation. The options open to the Hawaiian people for regaining some measure of their lost sovereignty will also be examined. Finally, recommendations will be made as to how they might best proceed.

Hawaii as a Non-Self-Governing Territory

The right to self-determination is never limited to a particular time or place; it is the continuing right of a people. As Judge Dillard said in the Western Sahara case, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people."²⁵

The present distorted geographical structure of the world is the result of the arbitrary territorial divisions of the colonial era. As a result, the colonial powers are, to a great extent, responsible for the present international unrest caused by the forceful occupation, annexation, separation and division of their former colonies. The colonizers unjustly enriched themselves by engaging in rampant plundering of wealth from the colonized peoples, redefining freedom, equality and morality along the way to suit their own purposes.²⁶ The colonial powers, in line with Darwin's theory of the survival of the fittest, justified their expansionist policies as the "natural working out of an inevitable progression of conquest and colonization."²⁷ They have rarely apologized for their wrongdoing.

In a letter of February 24, 1820 to Earl Bathurst, Governor Macquarrie of New South Wales stated that

[t]he rapid increase of British population, and the consequent occupancy of the lands formerly dwelt on by the Natives, having driven these harmless creatures to more remote situations, it is my purpose to form the proposed Establishment in the distant fertile tract of country lately discovered by Mr. Thorsby, which will bring it nearer to their present place of inhabitation, and at the same time render it less subject to be disturbed by vagrants than if it were placed in the settled districts; and it will have a further advantage from the circumstance of the lands in this new country not

being appropriated, whereby I will be enabled to assign a suitable portion of land for the necessary buildings, and the great object of cultivation to which these Natives are to be instructed.²⁸

A letter of January 10, 1828 from Lieutenant Governor Arthur to Viscount Goderich stated:

On my succeeding to the government, I found the quarrel of the Natives with the Europeans, occasioned by an unfortunate step of the officer in command of the garrison on the first forming of the settlement, was daily aggravated, by every kind of injury committed against the defenceless Natives, by the stock-keepers and sealers, with whom it was a constant practice to fire upon them whenever they approached, and to deprive them of their women whenever the opportunity offered.²⁹

These letters paint a grim picture of the activities of the English colonizers in Australia. Moreover, the amount of gold plundered by the British Government from New South Wales between 1838 and 1862 was 149,504 ounces, worth £352,976.³⁰ 1,662,448 ounces of gold — worth £6,649,624 — was removed from Victoria in 1862 alone.³¹ The quantity of gold taken from New Zealand between April 1, 1837 and September 30, 1863 was 1,130,763 ounces, worth £4,377,708.³²

The colonizers met with responses ranging from outright violent resistance to complete collaboration. In fact, in many instances in which Europeans met with armed resistance from some groups, only the collaboration of others enabled them to achieve their ends.

Efforts at colonizing Africa met with responses of all kinds. "Some resisted European invasions outright and were vanquished by a single expedition. This was the fate of the centuries-old coastal kingdoms such as Dahomey, which fell to the French in

1892, and Benin, which the British sacked in 1897.³³ Other tribes, such as the Ashanti and Zulu, were able to hold out longer, but were eventually conquered as well. Some tribes employed guerrilla tactics with varying degrees of success, but "[t]he outcome in all of these cases was, nevertheless, the same: the Europeans prevailed and destroyed the old kingdoms."³⁴

However, as T.O. Ranger pointed out, Africans should not be portrayed as helpless victims in the face of European power. The strength of the Europeans and the weakness of the more significant East and Central African kingdoms has been greatly exaggerated. For the most part, Africans helped forge their own destiny.³⁵ In fact, most of the abuses of African colonialism — and they were legion — resulted from the weakness of the Europeans, and took the form of expediency and cost-cutting. Not having the strength to preserve the native structures, colonial administrations resorted to destroying all native African polities deemed strong enough to pose a threat.³⁶ The success of European colonization seems to have been largely dependent upon the collaboration of the colonized peoples.

Although the circumstances in Asia differed in many ways, one glaring similarity with the African colonial experience is that the European presence was not of an overwhelmingly powerful military nature. Rather, Westerners seem to have adroitly fashioned a niche for themselves in Asia on the basis of economic technology, using military — particularly naval — firepower only as a last resort. In India, for example, the English reacted more to the Indian situation — which they found themselves in control of almost by default — than the Indians reacted to their presence. The English presence developed more from a desire to protect the Royal Navy's sea lanes than out of any desire to establish an empire. The eventual result was that the English called the shots, but the game was played on Indian terms.³⁷

Similarly, it is difficult to find evidence of a coherent reaction to the European presence in China. Many would point to the Boxer Rebellion of 1900 and the Taip'ing

Rebellion as evidence, but neither of these events was a direct reaction to European influence. They were touched off by the European presence, but never actually came into direct conflict with it.³⁸ As Zurcher states, the "simple pattern of Western penetration plus Chinese reaction is lost in the multiplicity of complete and partial influences, innovations, convergences, assimilations and adaptations, in which anything which seems genuinely to be new suddenly appears imbedded in traditional structures."³⁹

Thus, it is difficult to produce an accurate generalization of the reaction of colonized peoples to European colonization. Schoffer has described the effects of colonization on native peoples, as follows:

Even when one accepts the fact that any modernization in any traditional society will create serious problems like those of a self-interested exploitative entrepreneurship, a proletarianization of the traditional peasant class, a creation of resistance of all groups of traditional values and customs, the fact that such modernization was to be introduced by foreign rulers created additional problems and dilemmas which remained insoluble as long as colonialism was present.⁴⁰

Recent re-evaluation of the forceful occupation and annexation of Lithuania, Latvia and Estonia by Russia and of Hawaii by America, and the domestic colonization of indigenous nations in America, Canada, Australia and New Zealand and of blacks in South Africa, has raised international legal questions concerning the past and present actions of the European colonial powers. In particular, such forceful occupations and annexations have raised the question of whether these formerly independent nations, now part of different States, can be classified as non-self-governing territories and whether these people, as a matter of right, may resort to resistance to regain their lost independence.

General Assembly Resolution 1541 summarized the characteristics of a non-self-governing territory as follows:

Territories ... known to be of the colonial type

Territories whose peoples have not yet attained a full measure of self-government.

Prima facie ... a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

... [A]dditional elements may be ... of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination they support the presumption that [the territory is non-self-governing].⁴¹

Hawaii satisfies all of these criteria. First, Hawaii is arguably a colonial territory, the people not having attained "a full measure of self-government." Second, the Islanders are still ruled by an alien people. Even though the present governor of Hawaii, John Waihee, is a native Hawaiian, Hawaii is a part of the United States and, as such, its administration is largely under federal control. Hawaii can no longer exercise her sovereign and independent power as a nation but is completely under the dictates of a foreign constitution. Third, Hawaii is geographically separate, and has a different and distinct culture, from the country governing it. Finally, Hawaiians have historically been treated as inferior. Therefore, Hawaii is a non-self-governing territory within the meaning of Chapter XI of the United Nations Charter.⁴²

Trask and Trask have argued that "since Hawaiians never surrendered their political rights through treaties, nor voted on annexation, they fall under the United

Nations category of a "non-self-governing people".⁴³ Article 73 of Chapter XI of the Charter reads:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement

...⁴⁴

The key point in Article 73 is that "[m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount ..."[Emphasis added]. The relationship that exists between the federal U.S. government and native Hawaiians is one of trust or guardianship. The origins of this trust relationship can be traced to the early nineteenth century. U.S. Chief Justice John Marshall, in Cherokee Nation v. Georgia,⁴⁵ described American Indian tribes as domestic dependent nations that were "in a state of pupillage; their relation to the United States resembles that of a ward to his guardian."⁴⁶ In Worcester v. Georgia,⁴⁷ Justice Marshall stated that

(t)he Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed ...⁴⁸

It is submitted that native Hawaiians have an even stronger case for a trust relationship with the federal U.S. Government than do mainland Indian tribes because the United States, as well as other nations, repeatedly recognized Hawaii as an independent sovereign country and because it was Americans, including agents of the American government, who overthrew the Hawaiian monarchy.⁴⁹ There was no war and no conquest as such. The United States retains a legal status in Hawaii equivalent to that of forceful occupier, and as a member of the United Nations she is under a legal obligation to assume responsibility for the administration of the territory of Hawaii and to "transmit regularly to the Secretary-General ... statistical and other information ... relating to economic, social, and educational conditions"⁵⁰ in Hawaii.

The foregoing analysis also strongly suggests that the status of the United States in Hawaii is that of a colonizer. The Declaration on the Granting of Independence⁵¹ was followed by General Assembly Resolution 1541, which spelled out the criteria for assessing when a non-self-governing territory has attained a full measure of self-government. These are: "(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State."⁵²

The principal argument made by the United Kingdom against Argentina in respect of the Falklands/Malvinas was that the right to self-determination is an absolute one for the peoples of non-self-governing territories who are identified as distinct.⁵³ In this

context James Crawford argued that

[s]o far as distinct groups inhabiting a specified territory within the State are concerned, one possibility is that these may be treated in such a way by the central government that they become, in effect, non-self-governing territories with respect to the rest of the State. This was arguably the case with East Bengal (now Bangladesh) in 1970.⁵⁴

The International Court of Justice held in the Western Sahara Case⁵⁵ that any territorial claim in respect of a non-self-governing territory is subordinate to the right of the inhabitants to self-determination, except when the population of the territory does not constitute "a people" or when, under special circumstances, consultation was unnecessary.⁵⁶ The Court, however, did not discuss what those special circumstances are.⁵⁷

In order to determine what constitutes "a people," the International Commission of Jurists offered criteria such as a common geographical area, common historical background, common cultural and linguistic ties and a sufficient population with a common economic base.⁵⁸ The Commission also stated that the absence of any of these criteria in no way affects a claim to the right to self-determination.⁵⁹

There is sometimes confusion regarding the use of the words "nations" and "peoples" in Articles 1(2)⁶⁰ and 55⁶¹ of the United Nations Charter. This was explained by the United Nations Secretariat as follows:

[t]here appears to be no difficulty in this juxtaposition since 'nations' is used in the sense of all political entities, states and non-states, whereas 'peoples' refers to groups of human beings who may, or may not, comprise states or nations.⁶²

Native Hawaiians, it is submitted, qualify as a distinct people, since they differ from the rest of the settlers of the Islands in respect of culture, race and language. They have not regained full self-government and are ruled by laws imposed by an alien people. The Hawaiians are not, however, a conquered people because there was never any war with the United States. This was made clear by pro-annexationist U.S. Senator John T. Morgan, Chairman of the Senate Foreign Relations Committee in 1894, who stated that "[i]f the Queen, or the people, or both acting in conjunction, had opposed the landing of the troops from the Boston with armed resistance, their invasion would have been an act of war."⁶³ [Emphasis added]

It is clear, then, that Hawaii satisfies all of the criteria necessary for designation as a non-self-governing territory. As such, the Islands should be accorded full rights of self-government, with the interests of the Hawaiian people no longer subordinated to those of the United States, the occupying, or colonial, power.

Self-Determination and the Residents of Annexed Territories

The aftermath of annexation saw growing American control over most significant aspects of Hawaiian life. Americans solidified their position as the leading business people in the Islands. "By 1933, exactly one-third of the directors and officers of the forty-five sugar plantations and factories in Hawaii were direct descendants of or related by marriage to the original missionary families of the Islands."⁶⁴ The missionary community, in association with the Republican Party, began to dominate the shipping, transportation and financial institutions of the Islands.⁶⁶ As well, the missionaries "contributed to the psychological demoralization of the Hawaiians. The Hawaiian language, dance, and art were degraded. The land, property, political and

religious systems were under constant attack ...⁶⁶ Because of their treacherous role in the theft of the Islanders' land and independence, many native Hawaiians continue to harbour hostile feelings towards the missionaries.⁶⁷ One important problem that persisted from the time of their arrival was that the missionaries could never bring themselves to think of their families as part of Hawaiian society. For example, they never allowed their children to learn Hawaiian, maintained their own churches and schools, and punished church members who married native Hawaiians.⁶⁸

Moreover, in order to "de-Hawaiianize" the territory, native Hawaiian children were forced to attend American schools and sing American songs.⁶⁹ Students were never encouraged to learn Hawaiian history. On the contrary, they were obliged to study American history as if it were their own.⁷⁰ Native Hawaiian children were forbidden to use, and taught to look down upon, their parents' language. Their parents were under pressure to give them anglicized names. When they refused to do so, the schoolteachers simply renamed the children themselves.⁷¹ The traditional culture and customs of Hawaii came under severe criticism and mockery. Hawaiians were derided by Americans as barbarous and uncivilized people. Dancing the hula was no longer welcomed, and the traditional Hawaiian practice of healing with herbs and prayer was labelled "pagan."⁷²

Hawaii has been rendered totally economically dependent upon the United States. Hawaiians have been forced to rely almost exclusively on imported food by the manner in which land use and fishing has been manipulated, and by massive immigration. The Bill of Rights of October 8, 1840, promulgated during the reign of Kamehameha III, granted protection to "all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."⁷³ Consistent with this principle of recognition of the rights of people over their land, interests in fisheries had been granted in a separate law.

which stated that "His Majesty the King, hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself."⁷⁴ The kind of social and economic structure developed by native Hawaiians was thus very much like that seen in modern welfare States with mixed economies.

This self-reliance was shattered by the increasing contact with and gradual takeover by an alien culture. Today, Hawaiian economic dependence upon the U.S. is so pronounced that the mere rumour of a dock strike can cause people to panic and rush to buy whatever they can.⁷⁵ No respect was paid to the traditional Hawaiian method of landholding. Consequently, much of the land came to be owned by foreign investors.⁷⁶

The above discussion briefly describes the blatant disregard shown by the United States for the economic, social and cultural rights and values, and for the dignity of native Hawaiians. Amundson has stated that

[t]he loss of dignity of a generation is an irreparable harm. The best that can come from the government concerning an irreparable harm is the admission that a wrong was done. Such an admission ought to be demanded from the government, not only by the descendants of the wronged group, but by anyone interested in fairness. The fact that this admission has no financial value doesn't mean that it is easy to get. Ironically, it is usually easier to get money from a government than to get an admission of wrongdoing, even for a hundred-year-old wrong.⁷⁷

In close to a century since she deprived native Hawaiians of their independence, and set out in earnest to overwhelm their distinct ethnic and racial character with Anglo-American culture, the United States has offered native Hawaiians neither compensation nor apology.

Lâm has noted that the process of overwhelming the indigenous society and culture included the imposition of Anglo-American law and that that law did not simply grant equal individual status to both Hawaiian and foreigner before the State:

In Hawaii as elsewhere where the modern State has cannibalised primitive societies, that is only half true. Individuals have been wrenched away from their traditional corporate groups, to face other individuals sometimes, but more often than not to confront new corporate groups, based not on kinship, or residence, which all in a primitive society can claim, but on economic and political clout, to which not all have access.⁷⁸

In other words, individual Hawaiians were first legally wrenched away from their traditional corporate rights, then made to compete for those rights against the corporate America of sugar planters and ranchers.

Hawaii's adverse possession law, which developed from the Kuleana Act mainly on the basis of custom, is continually being challenged by the Anglo-American society.⁷⁹ The law of adverse possession was of two kinds. On the one hand, it imposed a statute of limitations on the true owner in reclaiming his land; on the other, it included judicial opinions that outlined the extent of legal usurpation.⁸⁰ In 1871, the law limited the true owner's right to redress 20 years after his dispossession. By 1898, this period had been reduced to 10 years, and remained so until 1973 when it went back to 20 years.⁸¹

This wholly uneven contest is in conflict with the standards set forth in Article 27 of the International Covenant on Civil and Political Rights, which prohibits a State from precluding the members of a particular ethnic group or community from practicing, "in community with other members of their group," their own culture, religion and language.⁸²

The above-quoted phrase may be said to imply that the cultural, religious and linguistic rights to be protected shall be derived from the general or common laws of the land applicable to all within the territory.⁸³ The United States has signed but not yet ratified the Covenant. Nevertheless, it is submitted that most, if not all, of its provisions have gained the status of customary international law. However, until the U.S. ratifies the Optional Protocol to the Covenant, no individual American citizen can bring a complaint before the United Nations Human Rights Committee as Sandra Lovelace did against Canada. The rules set out in Article 27 are increasingly being observed by States with pluralistic societies.

The public educational system established by the United States after the annexation made no provision for native Hawaiian children to learn about their native customs, history and language with public funding. This is in violation of Article 26(3) of the Universal Declaration of Human Rights, which reads:

Parents have a prior right to choose the kind of education that shall be given to their children.⁸⁴

Article 23 of Part VI of the ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Convention No. 107)⁸⁵ speaks expressly of the rights of the children of indigenous populations. It reads:

1. Children belonging to the populations concerned shall be taught to read and write in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong.

2. Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language ...

3. Appropriate measures shall ... be taken to

preserve the mother tongue or the vernacular language.⁸⁶

The United States has ratified neither Convention No. 107 nor Convention 169 and is therefore, arguably, not bound by it. However, she is bound by Article 26(3) of the Universal Declaration of Human Rights by virtue of its provisions having attained the status of customary international law. Also, Article 5(1)(c) of the Convention Against Discrimination in Education reads:

It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools.⁸⁷

The United States has not ratified this convention either. Provision has yet to be made for the education of Hawaiian children in their own language similar to that granted American Indians in the Indian Self-Determination and Education Assistance Act.⁸⁸ In 1980, however, Congress did at least adopt the Hawaiian Education Study Act recognizing that native Hawaiians were among the lowest-ranked native Americans in educational attainment.⁸⁹

The United States Congress has addressed some important native Hawaiian issues as well. In 1974, it recognized Hawaiians as native Americans for purposes of allowing their participation in health and other programs of the Administration for Native Americans administered by the Department of Health and Human Services.⁹⁰ In 1978, the Comprehensive Employment and Training Act was amended so as to include Hawaiians in the Indian Manpower Program administered by the Director of Indian and Native American Programs of the Department of Labour.⁹¹ In 1989, Congress, under Title VI of the Department of Housing and Urban Development Reform Act, established "the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing to formulate a plan for development of safe and affordable housing for American Indians, Alaska Natives, and Native Hawaiians."⁹²

All Government and Crown lands were returned to the state of Hawaii upon her admission to the Union as a state under section 5(f) of the Admission Act, 1959.⁹³ However, these lands reverted back to the people of Hawaii with little or no recognition of the native aboriginal title interest. The disrespect shown for traditional Hawaiian land rights is also a violation of Article 11 of Part II of the Indigenous and Tribal Populations Convention of 1957 (Convention No. 107), adopted by the ILO in 1957. It provides:

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.⁹⁴

It is worthy of mention that the companion document to this convention -- the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Convention No. 104) -- calls upon States to pursue and protect traditional land use practices.

Native Hawaiians would also qualify for protection under the most recent International Labour Conference of Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169),⁹⁵ which is a revision of Convention No. 107. Article 1(1) of Convention 169 reads as follows:

This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent

from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁹⁶

During the revision of Convention No. 107, the Working Group on Indigenous Peoples (WGIP) (a branch of the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the Commission on Human Rights of the Economic and Social Council of the United Nations) suggested that the term "peoples" should be used, rather than "populations," so as to make it clear that this was a reference to the right to self-determination. The IPWG argued that any opposition to this wording would be a threat to native rights and freedoms.⁹⁷ The United States, concerned that the use of the word "peoples" could be interpreted as supporting the right of an indigenous group to seek separation and independence from the main body of the State,⁹⁸ favoured the term "populations."⁹⁹ If the word "peoples" was to be used, the United States argued, it must be clear that the term does not refer to the right to self-determination as understood in international law.¹⁰⁰ A compromise was offered by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which would have seen Article 1 stipulate that "the use and interpretation of the term 'peoples' in this Convention shall not affect it in other international instruments or proceedings."¹⁰¹ This led to the drafting of what became Article 1(3), which states: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."¹⁰²

Article 2(1) of Convention No. 169 reads:

Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to

protect the rights of these peoples and to guarantee respect for their integrity.¹⁰³

The position of the United States was that governments, although sharing responsibility with the people directly affected, should continue to play a major role in this area, and that the term "government" should be interpreted as referring to the federal government only.¹⁰⁴ Article 2(1) was supported by Article 31, which spoke of educating the general population of the State in respect of indigenous peoples and provided that "efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and culture of these peoples."¹⁰⁵ While at the Conference, the U.S. observer made no comment concerning Article 31. The Convention was adopted on June 27, 1989 and is supposed to enter into force twelve months after its second ratification, which has not yet occurred.

The indigenous peoples of the United States are still waiting to see what their federal government is going to do to improve their respective plights. Native Indians continue to be portrayed in American film and television, as often as not, as vicious, savage and barbarous, although this is slowly changing. Convention No. 169 has been subjected to severe criticism on the grounds that it affords inadequate protection to the rights of, and perpetuates total State control over, indigenous peoples.¹⁰⁶ It has also been criticized for keeping disputes concerning the customs and institutions of indigenous peoples under the jurisdiction of the State's court system, thus leaving central governments with the final say over if and when rights to self-government will be recognized and honoured.¹⁰⁷

Article 3 of Part II of the First Revised Part of the Draft Universal Declaration on Rights of Indigenous Peoples¹⁰⁸ (Draft Universal Declaration) would afford protection to:

The [collective] right to exist as distinct peoples and

to be protected against genocide, as well as the
[individual] rights to life, physical integrity,
liberty and security of person.¹⁰⁹ [Emphasis added]

This provision corresponds to Article 3 of Part II of the Draft Declaration submitted by the Assembly of First Nations and the World Council of Indigenous Peoples.¹¹⁰ The only difference is that the latter went further, adding that "[a]ll indigenous peoples finding themselves in circumstances of emergency and armed conflict, in the defence against genocide, shall not be deprived of the right to appeal to the human rights protections and remedies under international law."¹¹¹ Through the inclusion of this sentence, the Assembly of First Nations arguably sought to obtain for each aboriginal group the status of a quasi-independent and sovereign nation with the right to maintain its own standing armed forces and to appear as a party before any international tribunal.

Although Article 3 of Part II of the Draft Universal Declaration did not incorporate the controversial sentence, the provision must be read in conjunction with Article 12 of Part III, which states that "[t]he right of collective and individual ownership, possession and use of the lands or resources which they [indigenous peoples] have traditionally occupied or used" cannot be taken away except "with their free and informed consent as witnessed by a treaty or agreement."¹¹² Canada objected to the phrase "lands or resources which they have traditionally occupied or used" and to a similar phrase in Article 14 that spoke of native peoples' ownership and control "pertaining to the territories they have traditionally occupied or otherwise used."¹¹³ Finding these phrases "unsuitably ambiguous,"¹¹⁴ Canada suggested amending them to read "lands which they traditionally occupy."¹¹⁵ Nevertheless, the elements of Article 3 are well established under the right to self-determination and the Genocide Convention.

With respect to Article 12, the aboriginal peoples of Canada are involved in an ongoing dispute with the federal government concerning their traditional use of

land. In fact, disagreement on this issue recently led to an armed blockade of a public highway by Mohawk Warriors in Oka, Québec, when it was proposed that the local golf course be expanded onto what the Mohawks regarded as a traditional Mohawk burial ground.¹¹⁶ It is interesting to note that the Mohawks' argument would have been stronger under the more inclusive language sought by native groups for Article 12 but objected to by Canada. This is because native peoples "use" a burial ground but arguably do not "occupy" it.

For the first time, the Mohawks asked to have their case heard by the International Court of Justice as a nation.¹¹⁷ The time has come, it is submitted, to amend the Statute of the Court so as to allow standing as parties to groups other than independent States, when those groups constitute distinct and separate nations or "peoples" striving for self-determination. This would help to ensure that the right to basic human decency we have extended to indigenous peoples in theory is honoured by State governments in practice.

The lives of the Hawaiian people have also come to be constantly threatened by the presence of American nuclear arms in the Islands. Hawaii has been turned into a Pacific fortress, complete with the most sophisticated arsenal in the world. Always a tempting target in the event of war (as the Americans discovered to their dismay during the Japanese attack on Pearl Harbour in 1941), the presence of U.S. strategic nuclear ballistic missile submarines and nuclear weapon command and control facilities has made Hawaii an even more valuable target than ever, creating a situation in which a human or computer error could result in the complete devastation of the Islands and their inhabitants.¹¹⁸

The introduction of nuclear weapons by the United States into Hawaii is a violation of the right of native Hawaiians to peace and to freedom from the threat of nuclear war.¹¹⁹ In the preamble to the Charter, the "peoples of the United Nations" express their determination to

save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small
... 120

The General Assembly's 1978 Declaration on the Preparation of Societies for Life in Peace¹²¹ echoed this right to life and peace. It stated that

[e]very nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life... [and] peace. Respect for that right, as well as for the other human rights, is in the common interest of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields ...¹²²

Nuclear weapons are vastly more powerful than conventional weapons and can cause unthinkable damage to living beings and to the environment.¹²³ Their use could put "an end to civilization as we know it."¹²⁴

The general feeling of the international community is that the testing or use of nuclear weapons gives rise to international responsibility.¹²⁵ The world community is undoubtedly of the opinion that "Genocide and Global Destruction Resulting From the Use of Nuclear Weapons are Illegal."¹²⁶

One school of thought holds the view that any possession or deployment of nuclear weapons violates the peremptory norms (jus cogens) of international law.¹²⁷ Ironically, even after Hawaii was admitted as a state in 1959, the U.S. Defense Department showed no interest in relinquishing control of the Hawaiian lands in its possession and this position was supported by the executive branch.¹²⁸ This position denies native Hawaiians third- and fourth-generation human rights, namely the

right to peace and the right to be free from the threat of nuclear weapons.

In order to have their grievances redressed, native Hawaiians should be represented by a nationalist political party. This political party could then take the steps necessary for the attainment of full Hawaiian self-determination as an independent sovereign State. Such a political party may take into account the following suggestions to bolster their claims. First, an attempt could be made to get the Security Council to compel the United States to negotiate Hawaiian sovereignty under Article 33 of the U.N. Charter, which reads:

(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other means of their own choice.

(2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.¹²⁹

However, native Hawaiians would not be able to invoke Article 33, since the provision uses "parties" in the sense of recognized independent States and Hawaii is widely considered to have been a part of the United States for nearly one hundred years. Moreover, even if the situation in Hawaii were to worsen, it would be characterized as a domestic problem of the United States. Finally, the American veto makes it highly doubtful that native Hawaiians could ever make successful use of the Security Council. It is of some consolation, though, that even an unsuccessful attempt to use Article 33 could have the effect of marshalling international support for Hawaiian demands.

A more promising Charter provision is Article 11(2), under which any member

nation may bring before the General Assembly for discussion "any questions relating to the maintenance of international peace and security."¹³⁰ Similarly, under Article 11(3), the General Assembly "may call the attention of the Security Council to situations which are likely to endanger international peace and security."¹³¹

It would also be wise for a native Hawaiian government-in-exile to seek observer status at the United Nations and press for the establishment of a "United Nations Council for Native Hawaiians" modelled on the United Nations Council for Namibia, which would take charge of the administration of Hawaii, including the regulation of further foreign investment.

Second, an international lawsuit brought against the United States by a hypothetical Hawaiian government-in-exile or any other nationalist organization would also be unsuccessful. Under Article 34(1) of the Statute of the International Court of Justice "[o]nly states may be parties in cases before the court."¹³² Two further barriers to success in the Hague are the withdrawal by the United States, in the wake of the Case concerning Military and Paramilitary Activities in and against Nicaragua,¹³³ of her declaration accepting the compulsory jurisdiction of the Court, and the Connally reservation,^{133.1} which withheld the original American acceptance of the Court's jurisdiction from cases that the United States, in her sole judgment, deemed part of her internal affairs. On the other hand, another State could, on behalf of native Hawaiians, request the General Assembly to ask for an advisory opinion under Article 65 of the Statute of the Court, which reads:

(1) The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

(2) Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.¹³⁴

Third, taking the United States Government before the Human Rights Committee for violations of human rights in Hawaii under the Optional Protocol to the International Covenant on Civil and Political Rights would be almost impossible because the United States has neither signed nor ratified the Optional Protocol.¹³⁵

Fourth, petitioning the United Nations General Assembly's Special Committee on Colonialism would be a very promising course of action. Any native Hawaiian organization that represented the people could take advantage of this forum. The Special Committee was created by the General Assembly for the express purpose of implementing the Resolution on Granting Independence.¹³⁶ Its main role is to encourage voluntary compliance by means of the publicity generated by the circulation of "petitions."¹³⁷ This might provide a Hawaiian organization with a stepping stone towards a peaceful revolution aimed at achieving independent Statehood.

In order to draw international attention to their struggle, native Hawaiians could take advantage of Resolution 1503 (XLVII) adopted by the Economic and Social Council (ECOSOC) in 1970. Through this resolution, the Human Rights Commission, a Commission of ECOSOC, was given the power to consider applications that demonstrate "gross and consistent" violations of human rights.¹³⁸ This Human Rights Commission may call upon its Sub-Commission on Prevention of Discrimination and Protection of Minorities for an evaluation of allegations of violations.¹³⁹ The Sub-Commission adopted Resolution 1 (XXIV) of August 13, 1971 in order to

devise appropriate procedures for dealing with the question of admissibility of communications received by the Secretary-General under Council resolution 728 F (XXVIII) of 30 July 1959 and in accordance with Council resolution 1235 (XLII) of 6 June 1967.¹⁴⁰

The Resolution is divided into five sections. Section 1 deals with "standards and

criteria," section 2 with "source[s] of communications," section 3 with "contents of communications and nature of allegations," section 4 with the "existence of other remedies" and section 5 with "timeliness."¹⁴¹

Section 1(a) of the Resolution states that the "object of the communication must not be inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of the other applicable instruments in the field of human rights."¹⁴² "A Member State ... could not ... invoke Article 2, paragraph 7 of the Charter to evade action by the Sub-Commission, in the case of a consistent pattern of gross violations of human rights."¹⁴³ Native Hawaiian leaders could attempt to make the case that their people have endured gross and consistent violations of human rights since annexation. They are over-represented in blue-collar jobs and under-represented in management positions.¹⁴⁴ The unemployment level among the native population is very high.¹⁴⁵ Moreover, an extensive study based on in-depth interviews showed the widespread belief that the poor academic performance of native Hawaiians is a consequence of a lack of family support to be a myth.¹⁴⁶ Native Hawaiian children grow up with a distinct culture of their own and unless the predominant alien culture accepts their values and accommodates them side by side with its own, the two cultures will always clash.¹⁴⁷ The initiative must come primarily from the federal government to improve the living conditions of native Hawaiians, but nothing commendable has happened yet.

The terms "gross" and "consistent" have been argued to be terms of quantity and not of quality.¹⁴⁸ Antonio Cassese argued that a single violation could be admitted "only if it is substantiated by other communications asserting similar infringements which, when considered together, reveal the 'consistent pattern' ..."¹⁴⁹

Section 4(b) states that "[c]ommunications shall be inadmissible if domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged. Any failure to exhaust remedies should be satisfactorily

established.¹⁵⁰ This exhaustion of domestic remedies is designed to save the Sub-Commission time, since it already has a large volume of complaints to deal with. A complaint may be lodged directly with the Sub-Commission when the domestic law is clear that the complainant has no standing to sue in municipal courts. If any organization or individual had good reason to anticipate becoming a victim of governmental oppression when resorting to domestic remedies, e.g., taking the government to Court, then a complaint could probably be lodged directly with the Sub-Commission.

Fifth, the contesting party may also request pressure groups to lobby in their favour to change the existing law affecting them. It would be wise for native Hawaiians to maintain a permanent lobby group in Washington, D.C.

Sixth, political negotiations with the U.S. federal government to grant increased autonomy to Hawaii should be given top priority. This would be a very difficult task indeed since the United States is unlikely to give Hawaii any more special concessions as a state than it already has. The federal government would also argue that Hawaii has all the scope she needs to achieve her local objectives under both state and federal constitutions.

Hawaiians never gave up their right to express their view as to whether or not to become a part of the United States. President Cleveland himself admitted the illegality of the U.S. military action in Hawaii and wanted to return the Islands to the Queen and the people of Hawaii. These facts would strengthen the Hawaiian claim that they, along with other native peoples, should be granted recognition as a "distinct society" within America by means of a constitutional amendment.

Seventh, raising international awareness is also an important way of strengthening a claim to the right to self-determination. This could be achieved by conducting seminars, lectures, meetings and conferences in major world cities with wide media

coverage. In addition, arrangements should be made to meet foreign political leaders who persistently oppose American foreign policy. Support might also be sought from well-respected writers and leading world religious and political figures. For example, the support of Pope John Paul II lent legitimacy to the cause of aboriginal peoples in Canada, Australia and America. The endorsement of organizations such as the International Commission of Jurists, Survival International, the World Council of Churches and Amnesty International might also prove invaluable. Such groups could be invited to hold inquiries into allegations of human rights violations, including the denial of the right to self-determination. This would be a powerful way of dramatizing the issue and providing evidence to the Committee on Colonialism, the fourth option mentioned above.

Eighth, the option of implementing strategies of non-violent resistance -- sit-ins, strikes, demonstrations, dialogues, refusing to salute the American flag in schools or stand for the national anthem, ignoring federal taxes and so on -- could be explored. Through these methods, the Hawaiian political party and other organizations could maintain continuous pressure on the federal government, although some of these actions could put them in direct confrontation with the authorities, and others might prove counterproductive in winning the support of the American public. Moreover, the success of the sixth option would largely depend on the outcome of these strategies. This could also be the first step towards an armed resistance movement that might follow.

Finally, native Hawaiians could boycott American goods and services. This strategy worked for Gandhi in leading India's struggle against British colonial rule in the 1940s. The purpose would be to put economic pressure on American companies, which would in turn put pressure on the federal government to come to terms with native Hawaiians and their supporters.

The Feasibility of a Liberation Movement in Hawaii: A Hypothesis

When discussing the feasibility of a liberation movement in Hawaii, the first question one is faced with is: how would the United States react to such a movement? Would there be another massacre like in Tiananmen Square or would Hawaiians be treated with the respect shown to those who support Québec's independence from Canada? No one can be sure. Is it possible for a Hawaiian nationalist Party to be created whose primary objective is to seek Hawaiian independence, just as the Parti Québécois and Bloc Québécois seek independence for Québec? Most probably, if such a party were created in Hawaii, the United States government would be in no legal position to stop it, since the First Amendment of the U.S. Constitution reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁵¹

However, the First Amendment in no way guarantees advocates of independence freedom from subtle government interference and harassment. A challenge may also come from the majority of non-native Hawaiians, even those who were born in the Islands. Whether the support of significant numbers of these people could be obtained is highly doubtful, and would depend upon the political dexterity of the Hawaiian nationalist leaders.

If any armed resistance movement sprang up in Hawaii, would it be entitled to receive external assistance, or would such assistance be prohibited by Article 2(4)¹⁵² of the United Nations Charter? Professor Reisman argues that "[e]ach application of Article 2(4) must enhance the opportunity for ongoing self-determination"¹⁵³ He favours extending assistance to any freedom fighters seeking to overthrow an alien

regime that governs a people against its will. Otherwise, he argues, there would be a "rape of common sense."¹⁵⁴

Professor Shachter has criticized Reisman's view on the ground that it would set a precedent allowing the more powerful States "an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination."¹⁵⁵

Lloyd Cutler has chosen a middle path, arguing that the right of third States to assist liberation movements should be limited to cases where "first, an indigenous pro-democratic insurgency is engaged in a civil war with the repressive regime; and second, some other third state has been giving military assistance to the repressive regime...."¹⁵⁶ However, while one of the five great powers is usually willing to assist the pro-democratic forces in a small country, which of them would risk incurring the displeasure of the United States by assisting forces in Hawaii to fight for independence? Neither Professors Reisman nor Cutler provide an answer to this question. Perhaps Hawaiians will simply have to help themselves.

Conclusion

There is no doubt that, even today, native Hawaiians are treated as second-class citizens in the land of their birth. Throughout the history of their contact with Europeans and Americans they have been made to feel that they are an inferior people, even though traditional Hawaiian society was more enlightened and sophisticated than its European and American counterparts at the time of Captain Cook's "discovery" of the Islands. For example, this impression of inferiority was reinforced in 1893 during public debate in the United States over the invasion and proposed annexation:

Racial arguments were also advanced in the press and in Congress. These arguments ranged all the way from diatribes against the inferiority of Hawaii's indigenous and Asiatic people to genuine concern for the self-governing rights of native Hawaiians.¹⁵⁷

It is now settled international law that the territorial integrity of a State is not absolute and unqualified.¹⁵⁸ The right of a State to govern its own territory without outside interference depends upon its human rights record.¹⁵⁹ International law now protects "individuals from the dehumanizing acts of their own governments."¹⁶⁰ Hawaiians have been subjected to a systematic deprivation of their human rights because of their race. Under the Hawaiian Homes Commission Act of 1920, the United States Congress granted Hawaii 1.43 million acres of land -- known as the "ceded lands trust" -- for use in improving the living conditions of native Hawaiians.¹⁶¹ The income generated from these lands, however, is allotted exclusively to state agencies or otherwise spent on the needs of the state's public as a whole; not a single acre or dollar is provided to any non-governmental native organization or group,¹⁶² with the sole exception of the state body for Native Hawaiians. Native Hawaiians do not have access to either state or federal courts to sue for the protection of their "trusts assets"¹⁶³ or for "monetary compensation of their losses."¹⁶⁴

This recently led to direct armed confrontation between native Hawaiians and American Government forces, especially in Sand Island, Makapuu and several other places.¹⁶⁵ Native Hawaiians have no jurisdiction or control over their natural resources, and are excluded from many of the federal programs available to other American native peoples.¹⁶⁶

Native Hawaiians have a mortality rate higher than the state and national average. They mostly succumb to chronic diseases such as cancer and hypertension.¹⁶⁷ About 15 per cent of native Hawaiian families live below the poverty line, compared to a state average of 8 per cent.¹⁶⁸ The rates of alcoholism, crime and suicide among

native Hawaiians are much higher than those of any other group in the state.¹⁶⁹

Moreover, the United States government is seeking to produce electricity for industrial development from geothermal energy on Oahu. Native Hawaiians argue that this would desecrate their religious God Pele, who is the "magma, steam vapour, heat and lava of the volcano."¹⁷⁰ A plan is also in the works for "a missile launching complex"¹⁷¹ that would arguably endanger both the religion and lives of native Hawaiians in the vicinity. Such severe deprivations of the rights of native Hawaiians give rise to a legitimate right to external self-determination.

The test to determine severe deprivation of a group's human rights involves an examination of the extent to which it suffers "subjugation, domination and exploitation," and the correlative extent to which its individual members are deprived of an opportunity to participate in the value processes of a body politic because of their group identification. Once this "human rights deprivation" test is met along with the test of legitimacy of the claim for territorial separation by its evaluation in a contextual setting, such a claim should be accorded recognition by the international community. The traditional principle of self-determination, which was primarily instrumental in the dramatic transformation of former colonies into independent states, is thereby extended to include the right of territorial separation of such people.¹⁷²

It is now widely recognized that a country's human rights record is closely associated with its treatment of distinct ethnic groups claiming the right to external self-determination, including secession. If the members of the group are subject to domination and exploitation and the test of legitimacy is met, then, according to Nanda, the group is entitled to the kind of right to self-determination once extended to colonized peoples only.

Finally, the Hawaiian situation is comparable to that of East Timor and Kuwait, occupied independent States.¹⁷³ The General Assembly has long supported the rights of the people of East Timor.¹⁷⁴ It is submitted that native Hawaiians, like the people of East Timor and Kuwait, are justified, under the Declaration on Friendly Relations, in asserting the following rights to self-determination:¹⁷⁵

1. Freedom fighters, in the event of an armed struggle, are entitled to receive material assistance from outside States and those States are under an obligation to provide it.¹⁷⁶
2. Retaliation by the United States against any State that assists such a struggle would give rise to State responsibility.
2. Neither the United States nor her allies are entitled to portray such assistance as a violation of international law.¹⁷⁷

This chapter has demonstrated that Hawaii has been the object of a forceful occupation similar to that suffered by many colonies during the period of European colonial expansion. As such, Hawaii is entitled to the status of a non-self-governing territory. The United States is, therefore, obliged to restore to Hawaii the right of self-government. It has become clear that, in order to achieve an ultimate goal of independence from the United States, if that is desired, then Hawaii must be represented by a native nationalist political party whose avowed objective is independence. It is to be hoped that this goal can be achieved peacefully, but failing that, it has been shown that an armed struggle would be justified.

People fighting for their right to self-determination are now regarded as being engaged in wars of national liberation. This includes "armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes."¹⁷⁸ The day is not that far off when the sun will set on American hegemony in Hawaii, just as it finally set on the British Empire.

Endnotes

1. MacKenzie, SOVEREIGNTY AND LAND: HONORING THE HAWAIIAN NATIVE CLAIM, (Prepared for the Office of Hawaiian Affairs by the Native Hawaiian Legal Corporation) 30 (1982). [Hereinafter cited as MacKenzie, Sovereignty and Land].
2. Reprinted in 52 Cong. 2d. Sess. Senate Executive Doc. No. 3062, at 31.
3. Letter by Messrs. Richards and Haalilio to Secretary of State Daniel Webster, December 14, 1842, reprinted id. at 38.
4. SANDWICH ISLANDS AND CHINA, Message from the President of the United States, respecting the trade and commerce of the United States with the Sandwich Islands and with diplomatic intercourse with their Government; also in relation to the new position of affairs in China, growing out of the late war between Great Britain and China, and recommending provision for a diplomatic agent. Reprinted id. at 35-36.
5. Letter by Daniel Webster to Messrs. Timoteo Haalilio and William Richards, December 19, 1842. Reprinted id. at 40.
6. Dred Scott v. Sandford, 60 U.S. (19 How.) 691 (1857). Also see CURTIS, IS IT CONSTITUTIONAL?, in 156 THE NORTH AMERICAN REVIEW 282 (1893).
7. United States Constitution, Reprinted in SMITH (ed.), The Constitution of the United States: With Case Summaries 47 (1979). [Hereinafter cited as Smith, The Constitution of the United States].
8. Curtis, Is It Constitutional?, supra, note 6.
9. Id.
10. Id., at 282-283.
11. NEW YORK HERALD, MONDAY, APRIL 24, 1893, at 6, Col 5.
12. COOLEY, GRAVE OBSTACLES TO HAWAIIAN ANNEXATION, in 15 The Forum 390 (June, 1893).
13. Id.

14. *Id.* at 391.

15. Submission made by Hayden F. Burgess, Vice President of the World Council of Indigenous Peoples, before the Disciplinary Board of the Hawaii Supreme Court on September 8, 1985, in response to the charge brought against him for violating DR 7-106 (c)(6) of the Hawaii Code of Professional Responsibility, i.e., for willfully failing to "rise for the Supreme Court Justices upon their entry and departure from Supreme Court Courtroom prior to and following oral argument," at 16-17 (1985). [Hereinafter cited as Burgess, Submission]. Also see the Admission Act of March 18, 1959, 73 Stat. 4, Section 4. [Hereinafter cited as Admission Act].

16. Address by President Woodrow Wilson (Feb. 11, 1918), reprinted in Scott (ed.), OFFICIAL STATEMENTS OF WAR AIMS AND PEACE PROPOSALS 268 (1921). Also see Suzuki, Self-Determination and World Public Order: Community Response to Territorial Separation, in 16 Va. J. Int'l L. 781 (1975-76). Michla Pomerance analyzed the Wilsonian conception of self-determination as follows:

In Wilsonian thought, "self-determination," the right of a people to determine its own fate, was clearly a composite concept involving, chiefly, the following three ideas: a) the right of a people to be free from alien rule and to choose the sovereignty under which it will live (an idea referred to as "external" self-determination; b) the right of a people to select its own form of government ("internal" self-determination); and c) continuous consent of the governed in the form of representative democratic government.

Pomerance, Self-Determination Today: The Metamorphosis of An Ideal, in 19 ISRAEL L. REV. 314-315 (1985). Also see Pomerance, The United States and Self-Determination: Perspectives on the Wilsonian Conception, in 70 A.J.I.L. 1-27 (1976). Recently, other top American officials like Senator Daniel Patrick Moynihan also stressed the importance of the right to self-determination, saying that "self-determination is a democratic idea. It is an idea based on law, on procedure, on consent." MOYNIHAN, A DANGEROUS PLACE 303 (1980).

17. Burgess, Submission, *supra*, note 15, at 16-22.

18. LOPEZ-REYES, The Demise of the Hawaiian Kingdom: A Psycho-cultural Analysis

and Moral Legacy (Something Lost, Something Owed). in 18 HAWAII B. J. 4 (1983). [Hereinafter cited as Lopez-Reyes, The Demise of the Hawaiian Kingdom].

19. Id., at 5.

20. Cited Id., at 10.

21. After Hawaii became an American territory, the Organic Act stipulated that the sessions of the legislature were to be conducted in English. Id.

22. Id., at 11-12.

23. Id., at 10.

24. Morris, Ka Loea Kalaiaina, 1896: A Study of a Hawaiian-language newspaper as a historical reference source (Honolulu: Thesis for the degree of Master of Arts, no. 1196: University of Hawaii, 1975). at 12, cited in Tabrah, Hawaii: A Bicentennial History 3 (1980). [Hereinafter cited as Tabrah, A Bicentennial History].

25. Western Sahara Case, (Separate Opinion of Judge Dillard), ICJ, 122 (1975).

26. One can find warnings against such plunderings in Article 16(1) of the Charter of Economic Rights and Duties of States for which there will be individual State responsibility. It reads:

It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of these countries, territories and peoples. It is the duty of all States to extend assistance to them.

27. II NATIVE HAWAIIANS STUDY COMMISSION 148 (1983).

28. Despatch from Governor Macquarrie to Earl Bathurst, K.G., Government House, Sydney, New South Wales. (February 24, 1820). Microfiche, National Library, Ottawa, Canada.

29. Copy of the Despatch from Lieut.-Governor Arthur to Viscount Goderich. Van Diemen's Land, Government House. (January 10, 1828). Microfiche, National Library, Ottawa, Canada.

30. IRISH UNIVERSITY PRESS SERIES OF BRITISH PARLIAMENTARY PAPERS: CORRESPONDENCE AND OTHER PAPERS RELATING TO NEW ZEALAND 1862-64, at 332 (1970).

31. Id.

32. Id.

33. Fetter (ed.), COLONIAL RULE IN AFRICA: READINGS FROM PRIMARY SOURCES 7 (1979).

34. Id., at 8.

35. Ranger, African Reactions to the Imposition of Colonial Rule in East and Central Africa, in Gann and Duignan(eds.), I COLONIALISM IN AFRICA, 1870-1960: THE HISTORY AND POLITICS OF COLONIALISM, 1870-1914 at 293-296 (1969).

36. Id., at 298-299.

37. Hoesterman, Was there an Indian Reaction?, in Wesseling (ed.), EXPANSION AND REACTION 51 (1978).

38. Zurcher, Western Expansion and Chinese Reaction -- A Theme Reconsidered, in Wesseling (ed.), EXPANSION AND REACTION 72 (1978).

39. Id., at 77.

40. Schoffer, Dutch 'Expansion' and Indonesian Reactions: Some Dilemmas of Modern Colonial Rule, in Wesseling (ed.), EXPANSION AND REACTION 99 (1978).

41. G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) 29, U.N. Doc.A/4684 (1960).

42. Chapter IX of the United Nations Charter deals with the "Declaration Regarding Non-Self-Governing Territories." CHARTER OF THE UNITED NATIONS, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043. [Hereinafter cited as United Nations Charter].

43. Trask & Trask, *Hawaiians, Self-Determination and Ethno-Development: A Native Hawaiian Perspective*, in 63 IWGIA DOCUMENT, *Indigenous Self-Government in Americas* 59 (1989). [Hereinafter cited as Trask & Trask, *Hawaiian Perspective*].

44. United Nations Charter, *supra*, note 42.

45. 30 U.S. (5 Pet.) 1 (1831).

46. *Id.* at 17.

47. 31 U.S. (5 Pet.) 515 (1832).

48. *Id.* at 539.

49. Cooley, *Grave Obstacles to Hawaiian Annexation*, *supra*, note 12, at 392.

50. Article 73(e), United Nations Charter, *supra*, note 42.

51. DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, U.N.G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961).

52. Principle VI of G.A. Res. 1541, *supra*, note 41. Also see Schwed, *TERRITORIAL CLAIMS AS A LIMITATION TO THE RIGHT OF SELF-DETERMINATION IN THE CONTEXT OF THE FALKLAND ISLANDS DISPUTE*, in 6 *FORDHAM INT'L L.J.* 451 (1982-83). [Hereinafter cited as Schwed, *Falkland Islands Dispute*].

53. *Id.* at 456-457. Schwed explained the Falkland crisis as follows:

In Argentina's view, reversion to a claimant state rather than self-determination may be the appropriate solution where historical and geographic ties antedate the colonial relationship.

...

Argentina claims that in the Falklands, the colonial entity is the territory itself, not its population....

The United Kingdom's interpretation of the decolonization process focusses on the rights of its inhabitants. While not conceding Argentina's sovereignty claim over the Islands, the United Kingdom asserts that the Falklands have an absolute right of self-determination under international law, a right which is sufficient to void even a legitimate territorial claim ...

Id. at 455.

54. Crawford, ABORIGINAL SELF-GOVERNMENT IN CANADA. (A Report for the Canadian Bar Association, Committee on Native Justice) 56 (1988).

55. Western Sahara Case, supra, note 25, at 33. Also see Schwed, Falkland Islands Dispute, supra, note 52, at 469.

56. Id.

57. Id.

58. International Commission of Jurists, East Pakistan Study, 8 Int'l Comm'n J. Rev. 47 (1972). The International Commission of Jurists is a non-governmental organization and has consultative status in the United Nations.

59. Id.

60. Article 1(2) of the United Nations Charter reads:

[The purposes of the United Nations are:]

...

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal

peace ...

United Nations Charter, supra, note 42.

61. Article 55 of the Charter reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...

Id.

62. Cited in Sureda, *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* 100 (1973). [Hereinafter cited as Sureda, *The Evolution of the Right to Self-Determination*].

63. Reprinted in II Native Hawaiians Study Commission, supra, note 27, at 76.

64. Fuchs, *Hawaii Pono: A Social History* 249 (1961). [Hereinafter cited as Fuchs, *Hawaii Pono*].

65. Burgess, Submission, supra, note 15, at 19.

66. Fuchs, *Hawaii Pono*, supra, note 54, at 12-13.

67. Id. at 9.

68. II Native Hawaiians Study Commission, supra, note 27, at 192.

69. Burgess, Submission, supra, note 15, at 19.

70. Id.

71. Id., at 21.

72. Id.

73. DECLARATION OF RIGHTS, BOTH OF THE PEOPLE AND CHIEFS, October 8, 1840.

Reprinted in MacKenzie, *Sovereignty and Land*, supra, note 1, APPENDIX A.

74. In re Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864). Also see Lām, THE IMPOSITION OF ANGLO-AMERICAN LAWS OF LAND TENURE ON HAWAIIANS 103 (Unpublished paper presented at a Symposium of the Commission of Folk Law and Legal Pluralism, IX I.C.A.E.S. Congress, Vancouver, August, 1983). [Hereinafter cited as Lām, *The Imposition of Anglo-American Laws*].

75. Burgess, *Submission*, supra, note 15, at 23.

76. Id., at 24.

77. Amundson, ISSUES OF HAWAIIAN NATIVE CLAIMS 17-18 (1980).

78. Lām, *The Imposition of Anglo-American Laws*, supra, note 74, at 124.

79. The Kuleana Act was passed in 1850. Under this Act, native commoners were allowed to acquire title in fee simple to household lots of no more than one quarter acre that they had cultivated under the feudal system. These parcels were known as kuleana. See I NATIVE HAWAIIANS STUDY COMMISSION 260 (1983).

80. Lām, *The Imposition of Anglo-American Laws*, supra, note 74, at 117.

81. Id.

82. Crawford, *Aboriginal Self-Government in Canada*, supra, note 54, at 58.

83. Id.

84. UNIVERSAL DECLARATION OF HUMAN RIGHTS, U.N.G.A. Res. 217 A (III), U.N. Doc.A/810, at 71 (1948).

85. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (CONVENTION NO. 107), reprinted in INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 838 (1982). Entered into force: June 2, 1959. [Hereinafter cited as Convention No. 107]. Also see ALSTON and SIMA, REVISION OF ILO CONVENTION NO. 107, in 81 A.J.I.L. 756 (1937).

86. Id., at 863.

87. Convention Against Discrimination in Education, Dec. 14, 1960. 429 U.N.T.S. 93 (UNESCO General Conference) (Entered into force: May 22, 1962).

88. Pub. L. No. 93-638, 88 Stat. 2203 (1975). (Codified at 5 U.S.C. Section 3371 (1976).

89. Act of October 3, 1980, P.L. 96 -- 374, 94 Stat. 1499.

90. Act of January 4, 1975, P.L. 93 -- 644, 88 Stat. 2324.

91. Act of December 28, 1973, P.L. 93 -- 203, 87 Stat. 239.

92. Act of December 15, 1989, P.L. 101 -- 235, 103 Stat. 1987.

93. Admission Act, supra, note 15. Section 5(f) reads:

The lands granted to the State of Hawaii ... and public lands ... conveyed to the State ... together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians ... for the development of farm and home ownership ...

Id.

94. Convention No. 107, supra, note 87, at 861.

95. Indigenous and Tribal Peoples Convention, 1989 (No. 169). Published by the International Labour Organization, Geneva. [hereinafter cited as Convention No. 169]. Also see the Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report IV (2B). International Labour Conference 76th Session, at 4 (1989). [Hereinafter cited as Report IV (2B)].

96. Report IV (2B), Id., at 6.

97. Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report IV (2A). International Labour Conference 76th Session, at 9. [Hereinafter cited as Report IV (2A)]. The United States Government's position was:

Adoption of the term 'peoples' could be used to argue for an interpretation of international law to include an absolute right of indigenous groups not only to self-determination in the political sense of separation from the State but also to absolute independence in determining economic, social and cultural programmes and structures ... However, 'peoples' could be accepted provided that it is appropriately qualified so as to make clear that its use in this Convention does not grant or imply rights that go beyond the scope of this Convention, such as the right to self-determination as that concept is understood in international law.

Id. at 11. [Hereinafter cited as Report IV (2A)].

98. Id.

99. Id.

100. Id.

101. See Id.

102. Convention No. 169, supra, note 95.

103. Id. Also see Report IV(2B), supra, note 95, at 6. It is noteworthy that the IPWG argued that Articles 8 and 9 were contrary to the principles enshrined in Article 2 of the Convention, since the "requirement of compatibility with national law is a licence for cultural genocide and allows assimilationist policies...." Report IV(2A), supra, note 97, at 24.

104. Id. at 15.

105. Report IV(2B), supra, note 95, at 24.

106. United Nations Economic and Social Council. COMMISSION ON HUMAN RIGHTS, Sub-Commission on Prevention of Discrimination and Protection on Minorities. Forty First Session. Agenda item 12. DISCRIMINATION AGAINST INDIGENOUS PEOPLES: Report of the Working Group on Indigenous Populations on its seventh session.

E/CN.4/Sub.2/1989/36, at 19 (August 25, 1989).

107. Id.

108. First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, as presented by the Chairman/Rapporteur, Ms. Erica-Irene Daes, in document E/CN.4/Sub.2/1989/33, Id. at 32 (ANNEX II). [Hereinafter cited as Draft Universal Declaration].

109. Id.

110. United Nations Economic and Social Council. COMMISSION ON HUMAN RIGHTS. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Working Group on Indigenous Populations, seventh session. E/CN.4/Sub.2/AC.4/1989/5 at 3 & 7 (June 15, 1989).

111. Id. at 3.

112. Draft Universal Declaration, supra, note 108.

113. United Nations Economic and Social Council. COMMISSION ON HUMAN RIGHTS. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Forty-first Session. E/CN.4/Sub.2/1989/33/Add.1, at 24 (June 20, 1989).

114. Id.

115. Id.

116. CBC 10 O'Clock Evening News, Ottawa, July 15, 1990.

117. Id.

118. Burgess, Submission, supra, note 15, at 24-25.

119. Nanda, NUCLEAR WEAPONS AND THE RIGHT TO PEACE UNDER INTERNATIONAL LAW, in 9 BROOK. J. INT'L L. 283 (1983). Also see BEER, PEACE AGAINST WAR (1981); McBRIDE, The Legality of Weapons for Societal Destruction, in Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles 401 (1984).

120. United Nations Charter, supra, note 42, para 1.

121. G.A. Res. 33/37 (XXXIII), 33 U.N. GAOR Supp. (No. 45)55, U.N. Doc. A/33/45 (1979), paras 1,4.

122. Id.

123. Stockholm Declaration of the United Nations Conference on the Human Environment, in report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14, and Corr. 1, reprinted in 11 I.L.M. 1416 (1972), principles 2 and 26.

124. Weston, Nuclear Weapons Versus International Law: A Contextual Reassessment, in 28 McGill L.J. 550 (1982-83). [Hereinafter cited as Nuclear Weapons Versus International Law]. Also see Kerzner, 'The Last Epidemic,' Miami Herald, Mar. 6, 1982, at E1: "Nuclear war could be the last epidemic our civilization will know. Hundreds of millions of people would be killed or injured, and the economic, ecological and social fabric on which human life depends would be shattered." According to a RAND Study: "[d]estruction of societies, destruction as an end itself, would appear to be directly opposed to the most fundamental principle of international law governing armed conflict." Builder & Graubard, The International Law of Armed Conflict: Implications for the Concept of Assured Destruction, at vii (1982).

125. Address by Meyrowitz, Nuclear Weapons: A Fundamental Legal Challenge, (Brooklyn Law School Symposium: Sept. 24, 1982), cited in RAGONE, THE APPLICABILITY OF MILITARY NECESSITY IN THE NUCLEAR AGE, in 16 N.Y.U. J. Int'l L. & Pol. 703 (1983-84).

126. CAMPBELL, THE NUREMBERG DEFENSE TO A CHARGE OF DOMESTIC CRIME: A NON-TRADITIONAL APPROACH FOR NUCLEAR-ARMS PROTESTORS, in 16 CAL. W. INT'L L.J. 97 and 99 (No.1, 1988).

127. McFadden, NUCLEAR FREE ZONES: TOWARD AN INTERNATIONAL FRAMEWORK, in 16 CAL. W. INT'L L. J. 229 (No. 2, 1986). Also see Gangl, The Jus Cogens Dimensions of Nuclear Technology, in 13 Cornell Int'l L. J. 63 (1980); Whiteman, Jus Cogens in International Law, With a Projected List, in 7 GA. J. INT'L & COMP. L. 609 (1977). McFadden puts forward four tests of a legal principle to become jus cogens. The legal principle must:

1) have a foundation in morality;

2) be important to international peace and order;

3) be generally accepted in the international community; and

4) serve global interests rather than those of individual States.

Id. at 230. "Jus cogens rules are grounded in morality, reflecting elementary considerations of humanity, fundamental human rights, and the dignity and worth of the human person. Nuclear weapons violate these fundamental principles of humanity because they are antithetical to any conception of human dignity." Id.

128. II Native Hawaiians Study Commission, supra, note 27, at 117.

129. United Nations Charter, supra, note 42.

130. Id.

131. Id.

132. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. Done at San Francisco, June 26, 1945. 59 Stat. 1015, T.S. No. 993. 3 Bevans 1153. 1976 Y.B.U.N. 1052.

133. (Nicaragua v. U.S.), Jurisdiction and Admissibility, 1984 ICJ Rep. 392 (judgment of Nov. 26).

133.1. The Connally reservation to the United States Declaration concerning the acceptance of the compulsory jurisdiction of the International Court of Justice excludes from that jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." The U.S. Declaration of August 14, 1946. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1982, at 23-24, U.N. Doc. ST/LEG/SER.E./2 (1983).

134. Statute of the International Court of Justice, supra, note 132.

135. OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 383 (1967).

136. DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND

PEOPLES. U.N.G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961).

137. LILICH and NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 325-326 (1979).

138. Report: *AN ANALYSIS OF THE PROCEDURES OF THE UNITED NATIONS REGARDING INDIVIDUAL PETITIONS WITH RESPECT TO HUMAN RIGHTS*, in 4 Hum. Rts. J. 217 (1974-75). [Hereinafter cited as Report]. Also see SHELTON, *Individual Complaint Machinery under the United Nations 1503 Procedure and the Optional Protocol to the International Covenant on Civil and Political Rights*, in Hanum (ed.), *Guide to International Human Rights Practice* 59 (1984).

139. Report, *Id.*, at 217-218.

140. Preamble, *QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING POLICIES OF RACIAL DISCRIMINATION AND SEGREGATION AND OF APARTHEID IN ALL COUNTRIES, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES*, Resolution 1 (XXIV) adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, August 13, 1971. Reprinted in Report, *Id.*, at 257-258. [Hereinafter cited as Resolution 1].

141. *Id.*

142. *Id.*, at 257.

143. Comment by Cassese, U.N. Doc. E/CN.4/Sub.2/SR. 620, at 88-89 (1971).

144. II Native Hawaiians Study Commission, *supra*, note 27, at 151.

145. *Id.*

146. *Id.*, at 150.

147. *Id.*

148. Report, *supra*, note 138, at 223.

149. Cassese, *The Admissibility of Communications to the United Nations on Human*

Rights Violations, in 5 Human Rts. J. 378 (1978).

150. Resolution 1, supra, note 140, at 258.

151. Smith, The Constitution of the United States, supra, note 7, at 48.

152. United Nations Charter, supra, note 42.

153. Reisman, COERCION AND SELF-DETERMINATION: CONSTRUING CHARTER ARTICLE 2(4), in 78 A.J.I.L. 643 (1984).

154. Id., at 645.

155. SCHACHTER, THE LEGALITY OF PRO-DEMOCRATIC INVASION, in 78 A.J.I.L. 649 ((1984).

156. Cutler, THE RIGHT TO INTERVENE, in 64 FOR. AFF. 106 (1985-86).

157. MacKenzie, Sovereignty and Land, supra, note 1, at 31. One anti-annexationist leader stated:

There is a native population in the islands of about 40,000. They are not illiterates; they are not ignorant. A very large majority can read and write both languages, English and Hawaiian, and they take a very lively and intelligent interest in the affairs of their own country....

Turpie of Indiana, 53 Cong. 2 Sess., 703-704 (January 11, 1894). Also see MacKenzie, Id.

158. Lung-Chu Chen argues that "[i]t has increasingly become apparent that the absolute adherence to territorial integrity is no virtue -- rather, it is self-defeating -- when the people who demand freedom are subject to systematic deprivations on a vast scale." Chen, Self-Determination: An Important Dimension of the Demand for Freedom, in 75 PROC. AM. SOC'Y INT'L L. 93 (1981). Also see Islam, THE PROPOSED CONSTITUTIONAL GUARANTEE OF INDIGENOUS GOVERNMENTAL POWER IN FIJI: AN INTERNATIONAL LEGAL APPRAISAL, in 19 CAL. W. INT'L L. J. 125 (No. 1, 1988-89).

159. Id.

160. Nanda, *International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms in India*, in 6 DEN. J. INT'L L. & POL'Y 20 (1976).

161. Trask & Trask, *Hawaiian Perspective*, *supra*, note 43, at 52. Also see *Hawaiian Homes Commission Act of July 9, 1921*, 42 Stat. 108, c. 42.

162. Trask & Trask, *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*, at 53.

168. *Id.*

169. *Id.*

170. *Id.*, at 57.

171. *Id.*

172. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, in 13 CASE W. RES. J. INT'L L. 278 (No. 1, 1981). Also, Heather Wilson argues that, "[a]lthough East Pakistan was never declared a non-self-governing territory by the United Nations, the cases of Southern Rhodesia and East Pakistan are similar. In both cases, the right to self-determination was not based on the colonial status of the territory, but on the denial of human rights in the territory." Wilson, *International Law and the Use of Force by National Liberation Movements* 83 (1988).

173. *Id.*, at 82, note iii.

174. *Id.*

175. DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF

THE UNITED NATIONS, U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28)121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970). According to the Declaration:

Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

Id. George Abi-Saab draws the conclusion from the above paragraph that "[a]rmed resistance to forcible denial of self-determination -- by imposing or maintaining by force colonial or alien domination -- is legitimate according to the Declaration. In other words, liberation movements have a ius ad bellum under the Charter." Abi-Saab, Wars of National Liberation and the Laws of War, in *Annales d'études internationales* 100 (1972).

176. REISMAN, THE RESISTANCE IN AFGHANISTAN IS ENGAGED IN A WAR OF NATIONAL LIBERATION, in 81 A.J.I.L. 909 (Nos. 2-4, 1987).

177. Id.

178. Article 1(4) of Protocol 1 Additional to the 1949 Geneva Convention, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Final Act, adopted June 8, 1977, reprinted in 16 I.L.M. 1391 (1977). (Entered into force Dec. 7, 1978).

Chapter VIII

Conclusion

Conclusion

In the foregoing analysis, an effort has been made to demonstrate that the right to self-determination is the ultimate objective of a people fighting for their freedom, that it has become a rule of jus cogens and, as such, has been an inherent human right from time immemorial. The struggle for self-determination stems from a desire to achieve representative democracy. In many cases, it has been directed towards freeing a people from colonial domination (external self-determination); in others, the struggle has emerged as a powerful weapon in the hands of peoples in non-colonial situations who seek to make their voices heard by their own governments (internal self-determination).

The American and the French Revolutions began the trend toward greater external and internal self-determination, respectively. A claim to the right to self-determination results when a people, inspired by the spirit of nationalism, demands to govern its own destiny. The struggle for self-determination is a continuous one. It represents an effort to achieve "participation in [a] different value process"¹ in the society, consisting of "power, respect, enlightenment, well-being, wealth, skill, affection and rectitude."²

The continuous struggle for the internal self-determination of native Hawaiians is rooted in a desire to preserve their separate identity. Their demand for external self-determination stems from a desire for racial equality coupled with the knowledge that Hawaii was the victim of an act of aggression and a non-consensual and forceful annexation by unequal treaty in the late nineteenth century.

At the same time, other human rights of native Hawaiians are being grossly violated. Native Hawaiians suffer from a collective mental despair accompanied by a sense of being a conquered people in their own land.³ They are the most neglected of North American aboriginal peoples. Present federal government policy recognizes the

right of aboriginal peoples to self-government, control over their lands, administration of tribal courts, education and other services.⁴ Unfortunately, native Hawaiians are excluded from most of these administrative procedures, the BIA regulations, the Department of the Interior regulations and the Federal Acknowledgement procedures which would provide them, to an extent, with self-governing power.⁵ However, under Public Law 100-579, the Federal Government enacted the "Native Hawaiian Health Care Act of 1988". Section 3 of the Act promises "Comprehensive Health Care Master Plan for Native Hawaiians," and section 4(a) speaks of the "Comprehensive Health Promotion, and Primary Health Services." Under Title VI of the Department of Housing and Urban Development Reform Act of 1989, Public Law 101-233 (approved December 15, 1989, H.R. 1), the Federal Government has promised to "formulate a plan for development of safe and affordable housing" for the native Hawaiians together with the American Indians and Alaska natives. In Section 106 of Title I of the Indian Health Care Amendments of 1988, Public Law 100-713 -- November 23, 1988, the promise of scholarship assistance to native Hawaiians has been made but it is only "subject to the availability of funds."

Neither the State of Hawaii nor the Federal Government maintains a roster of native Hawaiians. More importantly, native Hawaiians no longer have a tribal role.⁶ They are not allowed to plead their case in United States District Court concerning the mismanagement of ceded trust lands.⁷

This is the very sad situation currently existing in Hawaii. Beres says that

[n]otwithstanding Article 2(7) of the U.N. Charter, which reaffirms certain areas of "domestic jurisdiction," each state is now clearly obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions ... does not confer immunity from responsibility, since all states are bound by the law of the Charter and by the customs and general principles of law from which such agreements derive.⁸

There are primarily two formal entities representing native Hawaiian interests. One is the Hawaiian Homes Commission, whose Director and Commissioners are appointed by the state governor to deal with the Hawaiian Home Lands.⁹ Persons have to be of 50% native Hawaiian blood to qualify for their programs.¹⁰ The Commission is also empowered to make a determination as to the eligibility of persons with at least fifty-percent native Hawaiian blood to participate in its programs and to ensure that they receive benefits in accordance with the terms and conditions of the Hawaiian Home Commission Act, including successorship to lands.¹¹ Since the members of the Commission are appointed by the state of Hawaii, doubts may arise as to their representation of the interests of native Hawaiians. The other is the Office of Hawaiian Affairs (OHA) created by a 1978 state constitutional amendment to administer the income from the trust lands.¹² The OHA is a nine-member Board of Trustees of Hawaiian heritage.¹³ They are elected by native Hawaiians to represent their interests in the same way that a Council of Chiefs administers those of other native groups.¹⁴ The OHA has undertaken an active role in matters of Hawaiian "reparations and restitution."¹⁵

There is, at the moment, apparently no one particular organization in Hawaii that is viewed by a consensus of indigenous Hawaiians as satisfactorily representing a broad range of their political interests. A consensus of views among the peoples themselves may also not now exist. Hawaiians, in other words, seem divided to the questions of both goals and representation. The present Governor is a native Hawaiian, a State office of Hawaiian Affairs tends to certain needs of Hawaiians, yet satisfaction remains elusive, and the topics of self-determination and sovereignty continue to concern the indigenous population.

At the beginning of 1991, a coalition of indigenous Hawaiian organizations, known as "Hui Na'auao", was formed with the objective of educating indigenous Hawaiians on the subjects of self-determination and sovereignty.¹⁶ The "hui" covered the gamut of Hawaiian organizations, including entities such as the Office of Hawaiian Affairs, Alu

Like, Association of Hawaiian Civic Clubs, Ka Lahui Hawaii, the Institute for the Advancement of Hawaiian Affairs and Na 'Oiwī 'O Hawaii, many of which differ significantly in their political agendas. Hui Na 'auao functions via a Board of Directors that consists of representatives from about thirty organizations.¹⁷

According to Hayden F. Burgess of the Institute for the Advancement of Hawaiian Affairs, the Hawaiian as "self" within self-determination is seen in two ways. The first view understands it racially or biologically. In other words, Hawaiian identity is based upon "blood quantum" in accordance with the Hawaiian Homes Commission Act.¹⁸ This Act states that a Hawaiian, with at least 50% of the blood quantum of the native people who lived in the islands before the arrival of James Cook, is entitled to be considered a Hawaiian for the purposes of the Act. The second view is that a Hawaiian self must be defined in terms of political allegiance and not race.¹⁹

Mr. Burgess identifies the organizations which appear to base Hawaiian sovereignty upon racial definitions as including the Office of Hawaiian Affairs, State Council Hawaiian Civic Clubs, Ka Lahui Hawaii and Na 'Oiwī O Hawaii. Ka Lahui Hawaii, he states, is an organization which calls itself a "nation", and its members are racially defined as well. It is struggling to be recognized as the "Hawaiian nation" by the federal government. Its objective is to gain benefits in a way similar to that used by Indian nations in the continental U.S. Na 'Oiwī O Hawaii, even though it defines itself racially, takes the view that it should be an independent nation that would be beyond the jurisdiction of the United States government.²⁰

The position of Mr. Burgess' Institute for the Advancement of Hawaiian Affairs is that sovereignty must be viewed from the perspective of complete independence unless other acceptable arrangements are made through bilateral agreements.²¹

It is submitted that despite the presence of a number of divided organizations in Hawaii representing native interests, an independent national native Hawaiian

political party, with broad agenda, is important to carry on negotiations with the federal government. It may be under the banner of Hawaiian Peoples' Organization (HPO) whose sole purpose would be to lead the territory to independence. The United States recognizes a multi-party system, and native Hawaiians should have no problem in forming their own national party. Such a party would also be in a good position, both politically and legally, to represent the views and interests of native Hawaiians at the international level. In addition, such an organization would be in a position to form a government-in-exile if need be. Unfortunately, for reasons unknown, native Hawaiian leaders have not yet taken the steps to form such a party.

Chapter VII highlights some of the recommendations for a progressive, step-by-step peoples' movement by native Hawaiians and their supporters. The proposed political party would also protest against further non-native settlements. This would be quite difficult, since it would infringe upon the mobility of other Americans and would therefore place the party in direct conflict with the federal government. On the other hand, Hawaiian political leaders and their supporters would have to be highly successful in raising international consciousness of their cause, as only then would organs of the United Nations be likely to review their case under Articles 11(3)²² and 12(2)²³ of the Charter.

Finally, if all peaceful avenues are exhausted, a challenge to the American government could be made through rebellion, insurgency or belligerency. Any "sporadic challenge"²⁴ to the government would be considered rebellious. Insurgency is a serious challenge that involves the participation of a large number of people and is carried out for an unlimited period of time.²⁵ Belligerency is like insurgency but is dependent upon recognition from the international community. It is an extreme form of resistance akin to civil war.²⁶ This kind of civil war is closely associated with the concept of a war of national liberation.

Native Hawaiians, as a matter of right, can resort to armed struggle to liberate their

homeland. Participants in such a struggle would be entitled to prisoner-of-war status under international law. Article 4(A) of the Convention Relative to the Treatment of Prisoners of War²⁷ reads:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

...

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.²⁸

The crucial question a people must ask itself before resorting to armed resistance is whether all peaceful means of protest and negotiation have been exhausted.²⁹ The way international opinion is shaped,

the existence of a right of resistance of the victims of governmental oppression [both in colonial and non-colonial contexts] has not only become thinkable; it has in fact been recognized with regard to the injustices of extreme gravity, the cardinal examples of which are genocide and the denial of self-determination.³⁰

The third preambular paragraph of the Universal Declaration of Human Rights expressly states that

[w]hereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.³¹

It must also be borne in mind that the right of resistance was recognized under both the American Declaration of Independence³² and international law. This would obviously raise a lot of debate in respect of Hawaii. There is a difference between having a right and struggling to achieve it. However, the climate of world politics can be subject to rapid change. It changed in Eastern Europe and is being changed in the Soviet Union, something unthinkable even a year ago.

Native Hawaiians would have to address many questions. For example, if their right to self-determination is recognized, do they wish to restore either an absolute or constitutional monarchy? What constitutes Hawaiianness? What would be the status of non-native inhabitants of Hawaii? If a referendum on Hawaiian independence were held, who would be the eligible voters? Would it exclude non-natives, who are widely believed to oppose independence? Would these people be stripped of their citizenship and pressed to return to the United States on the ground that native Hawaiians never asked them to come in the first place? Or would they be offered some sort of "landed immigrant" status? To what extent would the traditional laws and customs of native Hawaiians be brought back into operation? How many such laws and customs would even be welcomed by native Hawaiians?

These are some of the questions to which the greater Hawaiian public -- including those sympathetic to the cause -- would want answers, and in respect of which they would demand to be consulted. Hawaii's road to freedom and independence is therefore filled with great challenges. Whichever turn it takes, it can be expected to be a very interesting journey.

Endnotes

1. Chen, cited in Obebe, THE RIGHT TO SELF-DETERMINATION: NIGERIA UNDER THE SHAGARI GOVERNMENT, in 2 TEMPLE INT'L & COMP. L. J. 55 (Number 1, 1987-88).
2. Id. Also see CALDWELL, Well-Being: Its Place Among Human Rights, in Reisman and Weston (eds.), TOWARD WORLD ORDER AND HUMAN DIGNITY 169 (1976).
3. II NATIVE HAWAIIANS STUDY COMMISSION 149 (1983).
4. NATIVE HAWAIIAN REPARATIONS COMMUNITY, 1989 Cong. Inf. Serv., Statement of Mililani Trask, Attorney at Law, at 24.
5. Id., at 25.
6. Id.
7. Id.
8. BERES, JUSTICE AND REALPOLITIK: INTERNATIONAL LAW AND THE PREVENTION OF GENOCIDE, in 33 AM. J. JUR. 127 (1988).
9. MacKenzie, SOVEREIGNTY AND LAND: HONORING THE HAWAIIAN NATIVE CLAIM 90 (1982).
10. Id.
11. Id.
12. Native Hawaiian Reparations Community, supra, note 4, at 90-91.
13. Id., at 81.
14. Id.
15. Id., at 82.
16. Letter faxed to the author by Hayden F. Burgess, First Vice President of the Institute for the Advancement of Hawaiian Affairs, Oct. 14, 1991. This information is in file of Mr. Burgess.
17. Id.
18. Hawaiian Homes Commission Act, 1920. Act of July 9, 1921. c42, 42 Stat. 108. Vol.1, H.R.S. at 167.
19. Supra, note 16.
20. Id.
21. Id.
22. Article 11(3) of the United Nations Charter reads:

The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

23. Article 12(2) of the United Nations Charter reads:

The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Id.

24. WILSON, *International Law and the Use of Force by National Liberation Movements* 23 (1988).

25. Id.

26. Id., at 26.

27. CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR. Geneva, Aug. 12, 1949. Entered into force for the United States, Feb. 2, 1956. 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 133.

28. Id.

29. Tomuschat, *The Right of Resistance and Human Rights*, in UNESCO, *VIOLATIONS OF HUMAN RIGHTS: POSSIBLE RIGHTS OF RECOURSE AND FORMS OF RESISTANCE* 22 (1981). (Meeting of experts on the analysis of the basis and forms of individual and collective action by which violations of human rights can be combated, held at Freetown, Sierra Leone, 3-7 March, 1981, in connection with UNESCO's programme for the promotion of human rights).

30. Id., at 33.

31. U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

32. A DECLARATION by the Representatives of the United States of America in General Congress Assembled, July 4, 1776. Reprinted in SMITH (ed.), *The Constitution of the United States: With Case Summaries* 24 (1979). It stated that "[W]hen a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security." Id.

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APPENDIX

THE FIRST CONSTITUTION OF HAWAII,

Granted by Kamehameha III. October 8. 1840.

DECLARATION OF RIGHTS, BOTH OF THE PEOPLE AND CHIEFS.

"God hath made of one blood all nations of men to dwell on the earth," in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands.

These are some of the rights which He has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression; the earnings of his hands and the productions of his mind, not however to those who act in violation of the laws.

God has also established government, and rule for the purpose of peace; but in making laws for the nation it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man, in a manner which is at variance with the above sentiments.

PROTECTION FOR THE PEOPLE DECLARED.

The above sentiments are hereby published for the purpose of protecting alike, both the people and the chiefs of all these islands, while they maintain a correct deportment; that no chief may be able to oppress any subject, but that chiefs and people may enjoy the same protection, under one and the same law.

Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws. Whatever chief shall act perseveringly in violation of this constitution, shall no longer remain a chief of

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the Hawaiian Islands, and the same shall be true of the Governors, officers, and all land agents.

But if any one who is deposed shall change his course, and regulate his conduct by law, it shall then be in the power of the chiefs to reinstate him in the place he occupied previous to his being deposed.

CONSTITUTION.

It is our design to regulate our kingdom according to the above principles and thus seek the greatest prosperity both of all the chiefs and all of the people of these Hawaiian Islands. But we are aware that we cannot ourselves alone accomplish such an object—God must be our aid, for it is His province alone to give perfect protection and prosperity.—Wherefore we first present our supplication to him, that he will guide us to right measures and sustain us in our work.

It is therefore our fixed decree,

I. That no law shall be enacted which is at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word. All laws of the Islands shall be in consistency with the general spirit of God's law.

II. All men of every religion shall be protected in worshipping Jehovah, and serving Him, according to their own understanding, but no man shall ever be punished for neglect of God unless he injures his neighbor, or bring evil on the kingdom.

III. The law shall give redress to every man who is injured by another without a fault of his own, and shall protect all men while they conduct properly, and shall punish all men who commit crime against the kingdom or against individuals, and no unequal law shall be passed for the benefit of one to the injury of another.

IV. No man shall be punished unless his crime be first made manifest, neither shall he be punished unless he be first brought to trial in the presence of his accusers, and they have met face to face, and the trial having been conducted according to law, and the crime made manifest in their presence, then punishment may be inflicted.

V. No man or chief shall be permitted to sit as judge or act on a jury to try his particular friend (or enemy), or one who is especially connected with him. Wherefore if any man be condemned or acquitted, and it shall afterwards be made to appear, that some one who tried him acted with partiality for the pur-

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pose of favoring his friend (or injuring his enemy), or for the purpose of enriching himself, then there shall be a new trial allowed before those who are impartial.

EXPOSITION OF THE PRINCIPLES ON WHICH THE PRESENT DYNASTY IS FOUNDED.

The origin of the present government, and system of polity, is as follows: KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

These are the persons who have had the direction of it from that time down, Kamehameha II, Kaahumanu I, and at the present time Kamehameha III. These persons have had the direction of the kingdom down to the present time, and all documents written by them, and no others are the documents of the kingdom.

The kingdom is permanently confirmed to Kamehameha III, and his heirs, and his heir shall be the person whom he and the chiefs shall appoint, during his life time, but should there be no appointment, then the decision shall rest with the chiefs and house of Representatives.

PREROGATIVES OF THE KING.

The prerogatives of the King are as follows: He is the sovereign of all the people and all the chiefs. The kingdom is his. He shall have the direction of the army and all the implements of war of the kingdom. He also shall have the direction of the government property—the poll tax—the land tax—the three days monthly labor, though in conformity to the laws. He also shall retain his own private lands, and lands forfeited for the non-payment of taxes shall revert to him.

He shall be the chief judge of the Supreme Court, and it shall be his duty to execute the laws of the land, also all decrees and treaties with other countries, all however in accordance with the laws.

It shall also be his prerogative to form treaties with the rulers of all other kingdoms, also to receive ministers sent by other

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countries, and he shall have power to confirm agreements with them.

He shall also have power to make war in time of emergency, when the chiefs cannot be assembled, and he shall be the commander-in-chief. He shall also have power to transact all important business of the kingdom which is not by law assigned to others.

RESPECTING THE PREMIER OF THE KINGDOM.

It shall be the duty of the King to appoint some chief of rank and ability, to be his particular minister, whose title shall be *Premier of the Kingdom*. His office and business shall be the same as that of Kaahumanu I, and Kaahumanu II. For even in the time of Kamehameha I, life and death, condemnation and acquittal were in the hands of Kaahumanu. When Kamehameha I, died, his will was, "The Kingdom is Liholiho's, and Kaahumanu is his Minister." That important feature of the government, originated by Kamehameha I, shall be perpetuated in these Hawaiian Islands, but shall always be in subserviency to the law.

The following are the duties of the Premier: All business connected with the special interests of the kingdom, which the King wishes to transact, shall be done by the Premier under the authority of the king. All documents and business of the kingdom executed by the Premier, shall be considered as executed by the King's authority. All government property shall be reported to him (or her) and he (or she) shall make it over to the King.

The Premier shall be the King's special counsellor in the great business of the kingdom.

The King shall not act without the knowledge of the Premier, nor shall the Premier act without the knowledge of the King, and the veto of the King on the acts of the Premier shall arrest the business. All important business of the kingdom which the King chooses to transact in person, he may do it but not without the approbation of the Premier.

GOVERNORS.

There shall be four Governors over these Hawaiian Islands—one for Hawaii—one for Maui and the Islands adjacent—one for

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Oahu, and one for Kauai and the adjacent Islands. All the Governors, from Hawaii to Kauai shall be subject to the king.

The prerogatives of the Governors and their duties, shall be as follows: Each Governor shall have the general direction of the several tax gatherers of this island, and shall support them in the execution of all their orders which he considers to have been properly given, but shall pursue a course according to law, and not according to his own private views. He also shall preside over all the judges of his island, and shall see their sentences executed as above. He shall also appoint the judges and give them their certificates of office.

All the Governors, from Hawaii to Kauai shall be subject not only to the King, but also to the Premier.

The Governor shall be the superior over his particular island or islands. He shall have charge of the munitions of war, under the direction of the King, however, and the Premier. He shall have charge of the forts, the soldiery, the arms and all the implements of war. He shall receive the government dues and shall deliver over the same to the Premier. All important decisions rest with him in times of emergency, unless the King or Premier be present. He shall have charge of all the King's business on the island, the taxation, new improvements to be extended, and plans for the increase of wealth, and all officers shall be subject to him. He shall also have power to decide all questions, and transact all island business which is not by law assigned to others.

When either of the Governors shall decease, then all the chiefs shall assemble at such place as the King shall appoint, and shall nominate a successor of the deceased Governor, and whosoever they shall nominate and be approved by the King, he shall be the new Governor.

HOUSE OF NOBLES.

At the present period, these are the persons who shall sit in the government councils, Kamehameha III, Kekauluohi, Hoapiliwahine, Kunkini, Kekauonohi, Kahakili, Paki, Konia, Keobokalole, Leleiohoku, Kekuanaoa, Kualiiahonui, Kanaina, Keoni II, Keoni Ana, and Haalilio. Should any other person be received into the council, it shall be made known by law. These persons shall have part in the councils of the kingdom. No law of the nation shall be passed without their assent. They shall

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act in the following manner: They shall assemble annually, for the purpose of seeking the welfare of the nation, and establishing laws for the kingdom. Their meetings shall commence in April, at such day and place as the King shall appoint.

It shall also be proper for the King to consult with the above persons respecting all the great concerns of the kingdom, in order to promote unanimity and secure the greatest good. They shall moreover transact such other business as the King shall commit to them.

They shall still retain their own appropriate lands, whether districts or plantations, or whatever divisions they may be, and they may conduct the business on said lands at their discretion, but not at variance with the laws of the kingdom.

RESPECTING THE REPRESENTATIVE BODY.

There shall be annually chosen certain persons to sit in council with the Nobles and establish laws for the nation. They shall be chosen by the people, according to their wish, from Hawaii, Maui, Oahu and Kauai. The law shall decide the form of choosing them, and also the number to be chosen. This representative body shall have a voice in the business of the kingdom. No law shall be passed without the approbation of a majority of them.

RESPECTING THE MEETINGS OF THE LEGISLATIVE BODY.

There shall be an annual meeting as stated above; but if the Rulers think it desirable to meet again they may do it at their discretion.

When they assemble, the Nobles shall meet by themselves and the representative body by themselves, though at such times as they shall think it necessary to consult together, they may unite at their discretion.

The form of doing business shall be as follows: The Nobles shall appoint a Secretary for themselves who at the meetings shall record all decisions made by them, and that book of records shall be preserved in order that no decrees affecting the interests of the kingdom may be lost.

The same shall be done by the representative body. They too shall choose a Secretary for themselves, and when they meet for the purpose of seeking the interests of the kingdom, and shall

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come to a decision on any point, then that decision shall be recorded in a book, and the book shall be preserved, in order that nothing valuable, affecting the interests of the kingdom should be lost; and there shall no new law be made, without the approbation of a majority of the Nobles and also a majority of the representative body.

When any act shall have been agreed upon by them, it shall then be presented to the King, and if he approve and sign his name, and also the Premier, then it shall become a law of the kingdom, and that law shall not be repealed until it is done by the voice of those who established it.

RESPECTING THE TAX OFFICERS.

The King and Premier shall appoint Tax Officers, and give them their certificates of office. There shall be distinct tax officers for each of the islands, at the discretion of the King and Premier.

When a tax officer has received his certificate of appointment, he shall not be dismissed from office without first having a formal trial, and having been convicted of fault, at which time he shall be dismissed. Though if the law should prescribe a given number of years as the term of office, it may be done.

The following are the established duties of the tax officers. They shall assess the taxes and give notice of the amount to all the people, that they may understand in suitable time. The tax officers shall make the assessment in subserviency to the orders of the Governor, and in accordance with the requirements of the law. And when the taxes are to be gathered, they shall gather them and deliver the property to the Governor, and the Governor shall pay it over to the Premier, and the Premier shall deliver it to the King.

The tax officers shall also have charge of the public labor done for the King, though if they see proper to commit it to the land agents it is well, but the tax officers being above the land agents shall be accountable for the work. They shall also have charge of all new business which the King shall wish to extend through the kingdom. In all business however they shall be subject to the Governor.

The tax officers shall be the judges in all cases arising under the tax law. In all cases where land agents or landlords are charged with oppressing the lower classes, and also in all cases

CONSTITUTION OF 1810.

of difficulty between land agents and tenants, the tax officers shall be the judges, and also all cases arising under the tax law enacted on the 7th of June, 1839.

They shall moreover perform their duties in the following manner: Each tax officer shall be confined in his authority to his own appropriate district. If a difficulty arises between a land agent and his tenant, the tax officer shall try the case and if the tenant be found guilty, then the tax officer, in connection with the land agent shall execute the law upon him. But if the tax officer judge the land agent to be in fault, then he shall notify all the tax officers of his particular island, and if they are agreed, they shall pass sentence on him and the Governor shall execute it. But in all trials, if any individual take exception to the decision of the tax officer, he may appeal to the Governor who shall have power to try the case again, and if exceptions are taken to the decision of the Governor, on information given to the Supreme Judge, there shall be a new and final trial before them.

OF THE JUDGES.

Each of the Governors shall at his discretion, appoint judges for his particular island, two or more as he shall think expedient, and shall give them certificates of office. After having received their certificates, they shall not be turned out, except by impeachment, though it shall be proper at any time for the law to limit the term of office.

They shall act in the following manner: They shall give notice before hand of the days on which courts are to be held. When the time specified arrives, they shall then enter on the trials according as the law shall direct. They shall be the judges in cases arising under all the laws excepting those which regard taxation, or difficulties between land agents, or landlords and their tenants. They shall be sustained by the Governor, whose duty it shall be to execute the law according to their decisions. But if exceptions are taken to their judgment, whosoever takes them may appeal to the supreme judges.

OF THE SUPREME JUDGES.

The representative body shall appoint four persons whose duty it shall be to aid the King and Premier, and these six persons shall constitute the Supreme Court of the kingdom.

CONSTITUTION OF 1840.

Their business shall be to settle all cases of difficulty which are left unsettled by the tax officers and common judges. They shall give a new trial according to the conditions of the law. They shall give previous notice of the time for holding courts, in order that those who are in difficulty may appeal. The decision of these shall be final. There shall be no further trial after theirs. Life, death, confinement, fine, and freedom, from it, are all in their hands, and their decisions are final.

OF CHANGES IN THIS CONSTITUTION.

This constitution shall not be considered as finally established, until the people have generally heard it and have appointed persons according to the provisions herein made, and they have given their assent, then this constitution shall be considered as permanently established.

But hereafter, if it should be thought desirable to change it, notice shall be previously given, that all the people may understand the nature of the proposed change, and the succeeding year, at the meeting of the Nobles and the representative body, if they shall agree as to the addition proposed or as to the alteration, then they may make it.

The above constitution has been agreed to by the Nobles, and we have hereunto subscribed our names, this eighth day of October, in the year of our Lord 1840, at Honolulu, Oahu.

(Signed) KAMEHAMEHA III.
KEKAULUONI.

HAWAIIAN ISLANDS.

The cession of the Hawaiian Islands to the United States having been accepted by the resolution approved by the President July 7, 1898, (U. S. Stats. Vol. 30, p. 75.), the treaties with that country terminated upon the formation of the government for the Islands.

1849.*

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION AND EXTRADITION.

Concluded December 20, 1849; ratification advised by the Senate January 14, 1850; ratified by the President February 4, 1850; ratifications exchanged August 24, 1850; proclaimed November 9, 1850.

ARTICLES.

- | | |
|--|---------------------------|
| I. Amity. | X. Consuls. |
| II. Commerce and navigation. | XI. Religious liberty. |
| III. Duties, bounties, etc. | XII. Shipwrecks. |
| IV. Tonnage duties. | XIII. Asylum for vessels. |
| V. Coasting trade. | XIV. Extradition. |
| VI. Steam vessels carrying mail. | XV. Mail arrangements. |
| VII. Whale ships. | XVI. Duration. |
| VIII. Reciprocal privileges of citizens. | XVII. Ratification. |
| IX. Reciprocal privileges in business. | |

The United States of America and His Majesty the King of the Hawaiian Islands, equally animated with the desire of maintaining the relations of good understanding which have hitherto so happily subsisted between their respective States, and consolidating the commercial intercourse between them, have agreed to enter into negotiations for the conclusion of a treaty of friendship, commerce, and navigation, for which purpose they have appointed Plenipotentiaries, that is to say:

The President of the United States of America, John M. Clayton, Secretary of State of the United States; and His Majesty the King of the Hawaiian Islands, James Jackson Jarves, accredited as his special Commissioner to the Government of the United States;

Who, after having exchanged their full powers, found in good and due form, have concluded and signed the following articles:

ARTICLE I.

There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors.

* This treaty terminated on cession of Islands to United States.

HAWAIIAN ISLANDS—1849.

ARTICLE II.

There shall be reciprocal liberty of commerce and navigation between the United States of America and the Hawaiian Islands. No duty of customs, or other impost, shall be charged upon any goods, the produce or manufacture of one country, upon importation from such country into the other, other or higher than the duty or impost charged upon goods of the same kind, the produce or manufacture of, or imported from, any other country; and the United States of America and His Majesty the King of the Hawaiian Islands do hereby engage that the subjects or citizens of any other State shall not enjoy any favor, privilege, or immunity, whatever, in matters of commerce and navigation, which shall not also, at the same time, be extended to the subjects or citizens of the other contracting party, gratuitously, if the concession in favor of that other State shall have been gratuitous, and in return for a compensation, as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

ARTICLE III.

All articles, the produce or manufacture of either country, which can legally be imported into either country from the other, in ships of that other country, and thence coming, shall, when so imported, be subject to the same duties, and enjoy the same privileges, whether imported in ships of the one country or in ships of the other; and in like manner, all goods which can legally be exported or re-exported from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, and be entitled to the same privileges, drawbacks, bounties, and allowances, whether exported in ships of the one country or in ships of the other; and all goods and articles, of whatever description, not being of the produce or manufacture of the United States, which can be legally imported into the Sandwich Islands, shall, when so imported in vessels of the United States, pay no other or higher duties, imposts, or charges, than shall be payable upon the like goods and articles when imported in the vessels of the most favored foreign nation, other than the nation of which the said goods and articles are the produce or manufacture.

ARTICLE IV.

No duties of tonnage, harbor, light-houses, pilotage, quarantine, or other similar duties, of whatever nature or under whatever denomination, shall be imposed in either country upon the vessels of the other in respect of voyages between the United States of America and the Hawaiian Islands, if laden, or in respect of any voyage if in ballast, which shall not be equally imposed in the like cases on national vessels.

ARTICLE V.

It is hereby declared that the stipulations of the present treaty are not to be understood as applying to the navigation and carrying trade between one port and another situated in the States of either contracting party, such navigation and trade being reserved exclusively to national vessels.

TREATIES, CONVENTIONS, ETC.

ARTICLE VI.

Steam-vessels of the United States which may be employed by the Government of the said States in the carrying of their public mails across the Pacific Ocean, or from one port in that ocean to another, shall have free access to the ports of the Sandwich Islands, with the privilege of stopping therein to refit, to refresh, to land passengers and their baggage, and for the transaction of any business pertaining to the public mail service of the United States, and shall be subject in such ports to no duties of tonnage, harbor, light-house, quarantine, or other similar duties, of whatever nature or under whatever denomination.

ARTICLE VII.

The whale-ships of the United States shall have access to the ports of Hilo, Kealahou, and Hanalei, in the Sandwich Islands, for the purposes of refitment and refreshment, as well as to the ports of Honolulu and Lahaina, which only are ports of entry for all merchant vessels; and in all the above-named ports they shall be permitted to trade or barter their supplies or goods, excepting spirituous liquors, to the amount of two hundred dollars ad valorem for each vessel, without paying any charge for tonnage or harbor dues of any description, or any duties or imposts whatever upon the goods or articles so traded or bartered. They shall also be permitted, with the like exemption from all charges for tonnage and harbor dues, further to trade or barter, with the same exception as to spirituous liquors, to the additional amount of one thousand dollars ad valorem for each vessel, paying upon the additional goods and articles so traded and bartered no other or higher duties than are payable on like goods and articles when imported in the vessels and by the citizens or subjects of the most favored foreign nation. They shall also be permitted to pass from port to port of the Sandwich Islands for the purpose of procuring refreshments, but they shall not discharge their seamen or land their passengers in the said islands, except at Lahaina and Honolulu; and in all the ports named in this article the whale-ships of the United States shall enjoy, in all respects whatsoever, all the rights, privileges, and immunities which are enjoyed by, or shall be granted to, the whale-ships of the most favored foreign nation. The like privilege of frequenting the three ports of the Sandwich Islands above named in this article not being ports of entry for merchant vessels, is also guaranteed to all the public armed vessels of the United States. But nothing in this article shall be construed as authorizing any vessel of the United States having on board any disease usually regarded as requiring quarantine to enter, during the continuance of such disease on board, any port of the Sandwich Islands other than Lahaina or Honolulu.

ARTICLE VIII.

The contracting parties engage, in regard to the personal privileges that the citizens of the United States of America shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and reside

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in the States of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, by sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or ab intestato, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the Government of the respective States. The citizens or subjects of the contracting parties shall not be obliged to pay, under any pretence whatever, any taxes or impositions other or greater than those which are paid, or may hereafter be paid, by the subjects or citizens of the most favored nations in the respective States of the high contracting parties. They shall be exempt from all military service, whether by land or by sea; from forced loans; and from every extraordinary contribution not general and by law established. Their dwellings, warehouses, and all premises appertaining thereto, destined for the purposes of commerce or residence, shall be respected. No arbitrary search of or visit to their houses, and no arbitrary examination or inspection whatever of the books, papers, or accounts of their trade shall be made; but such measures shall be executed only in conformity with the legal sentence of a competent tribunal; and each of the two contracting parties engages that the citizens or subjects of the other residing in their respective States shall enjoy their property and personal security in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries, respectively.

ARTICLE IX.

The citizens and subjects of each of the two contracting parties shall be free in the States of the other to manage their own affairs themselves, or to commit those affairs to the management of any persons whom they may appoint as their broker, factor, or agent; nor shall the citizens and subjects of the two contracting parties be restrained in their choice of persons to act in such capacities, nor shall

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they be called upon to pay any salary or remuneration to any person whom they shall not choose to employ.

Absolute freedom shall be given in all cases to the buyer and seller to bargain together, and to fix the price of any goods or merchandise imported into, or to be exported from, the States and domains of the two contracting parties, save and except generally such cases wherein the laws and usages of the country may require the intervention of any special agents in the States and dominions of the contracting parties. But nothing contained in this or any other article of the present treaty shall be construed to authorize the sale of spirituous liquors to the natives of the Sandwich Islands, farther than such sale may be allowed by the Hawaiian laws.

ARTICLE X.

Each of the two contracting parties may have, in the ports of the other, Consuls, Vice-Consuls, and Commercial Agents, of their own appointment, who shall enjoy the same privileges and powers with those of the most favored nations; but if any such Consuls shall exercise commerce, they shall be subject to the same laws and usages to which the private individuals of their nation are subject in the same place. The said Consuls, Vice-Consuls, and Commercial Agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers, and shall, in writing, demand the said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such deserters, when arrested, shall be placed at the disposal of the said Consuls, Vice-Consuls, or Commercial Agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessel to which they belonged, or sent back to their own country by a vessel of the same nation, or any other vessel whatsoever. The agents, owners, or masters of vessels on account of whom the deserters have been apprehended, upon requisition of the local authorities, shall be required to take or send away such deserters from the States and dominions of the contracting parties, or give such security for their good conduct as the law may require. But, if not sent back nor reclaimed within six months from the day of their arrest, or if all the expenses of such imprisonment are not defrayed by the party causing such arrest and imprisonment, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserters should be found to have committed any crime or offence, their surrender may be delayed until the tribunal before which their case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect.

ARTICLE XI.

It is agreed that perfect and entire liberty of conscience shall be enjoyed by the citizens and subjects of both the contracting parties, in the countries of the one and the other, without their being liable

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to be disturbed or molested on account of their religious belief. But nothing contained in this article shall be construed to interfere with the exclusive right of the Hawaiian Government to regulate for itself the schools which it may establish or support within its jurisdiction.

ARTICLE XII.

If any ships of war or other vessels be wrecked on the coasts of the States or territories of either of the contracting parties, such ships or vessels, or any parts thereof, and all furniture and appurtenances belonging thereunto, and all goods and merchandise which shall be saved therefrom, or the produce thereof, if sold, shall be faithfully restored, with the least possible delay, to the proprietors, upon being claimed by them, or by their duly authorized factors; and if there are no such proprietors or factors on the spot, then the said goods and merchandise, or the proceeds thereof, as well as all the papers found on board such wrecked ships or vessels, shall be delivered to the American or Hawaiian Consul or Vice-Consul in whose district the wreck may have taken place; and such Consul, Vice-Consul, proprietors, or factors, shall pay only the expenses incurred in the preservation of the property, together with the rate of salvage and expenses of quarantine which would have been payable in the like case of a wreck of a national vessel; and the goods and merchandise saved from the wreck shall not be subject to duties unless entered for consumption, it being understood that in case of any legal claim upon such wreck, goods, or merchandise, the same shall be referred for decision to the competent tribunals of the country.

ARTICLE XIII.

The vessels of either of the two contracting parties which may be forced by stress of weather or other cause into one of the ports of the other, shall be exempt from all duties of port or navigation paid for the benefit of the State, if the motives which led to their seeking refuge be real and evident, and if no cargo be discharged or taken on board, save such as may relate to the subsistence of the crew, or be necessary for the repair of the vessels, and if they do not stay in port beyond the time necessary, keeping in view the cause which led to their seeking refuge.

ARTICLE XIV.

The contracting parties mutually agree to surrender, upon official requisition, to the authorities of each, all persons who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial, if the crime had there been committed. And the respective judges and other magistrates of the two Governments shall have authority, upon complaint made under oath, to issue a warrant for the apprehension of the per-

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son so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ARTICLE XV.

So soon as steam or other mail packets, under the flag of either of the contracting parties, shall have commenced running between their respective ports of entry, the contracting parties agree to receive at the post-offices of those ports all mailable matter, and to forward it as directed, the destination being to some regular post-office of either country; charging thereupon the regular postal rates as established by law in the territories of either party receiving said mailable matter, in addition to the original postage of the office whence the mail was sent. Mails for the United States shall be made up at regular intervals at the Hawaiian post-office, and despatched to ports of the United States; the postmasters at which ports shall open the same, and forward the enclosed matter as directed, crediting the Hawaiian Government with their postages as established by law, and stamped upon each manuscript or printed sheet.

All mailable matter destined for the Hawaiian Islands shall be received at the several post-offices in the United States, and forwarded to San Francisco, or other ports on the Pacific coast of the United States, whence the postmasters shall despatch it by the regular mail packets to Honolulu, the Hawaiian Government agreeing on their part to receive and collect for and credit the Post-Office Department of the United States with the United States' rates charged thereupon. It shall be optional to prepay the postage on letters in either country, but postage on printed sheets and newspapers shall in all cases be prepaid. The respective post-office departments of the contracting parties shall, in their accounts, which are to be adjusted annually, be credited with all dead letters returned.

ARTICLE XVI.

The present treaty shall be in force from the date of the exchange of the ratifications, for the term of ten years, and further, until the end of twelve months after either of the contracting parties shall have given notice to the other of its intention to terminate the same. Each of the said contracting parties reserving to itself the right of giving such notice at the end of the said term of ten years, or at any subsequent term.

Any citizen or subject of either party infringing the articles of this treaty shall be held responsible for the same, and the harmony and good correspondence between the two Governments shall not be interrupted thereby, each party engaging in no way to protect the offender, or sanction such violation.

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ARTICLE XVII.

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate of the said States, and by His Majesty the King of the Hawaiian Islands, by and with the advice of his Privy Council of State, and the ratifications shall be exchanged at Honolulu within eighteen months from the date of its signature, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same in triplicate, and have thereto affixed their seals.

Done at Washington, in the English language, the twentieth day of December, in the year one thousand eight hundred and forty-nine.

{ SEAL }
{ SEAL }

JOHN M. CLAYTON.
JAMES JACKSON JARVES.

1875.*

TREATY OF RECIPROCITY.

Concluded January 30, 1875; ratification advised by the Senate March 18, 1875; ratified by the President May 31, 1875; ratifications exchanged June 3, 1875; proclaimed June 3, 1875.

ARTICLES.

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| I. Hawaiian products to be admitted. | IV. Export duties. |
| II. American products to be admitted. | V. Duration. |
| III. Evidence as to growth and manufacture. | VI. Ratification. |

The United States of America and His Majesty the King of the Hawaiian Islands, equally animated by the desire to strengthen and perpetuate the friendly relations which have heretofore uniformly existed between them, and to consolidate their commercial intercourse, have resolved to enter into a Convention for Commercial Reciprocity. For this purpose, the President of the United States has conferred full powers on Hamilton Fish, Secretary of State, and His Majesty the King of the Hawaiian Islands has conferred like powers on Honorable Elisha H. Allen, Chief Justice of the Supreme Court, Chancellor of the Kingdom, Member of the Privy Council of State, His Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America, and Honorable Henry A. P. Carter, Member of the Privy Council of State, His Majesty's Special Commissioner to the United States of America.

And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due form, have agreed to the following articles.

ARTICLE I.

For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands in the next succeeding article of this convention and as an equivalent therefor, the United

* Terminated on cession of islands to United States. Federal case. *Netherclift v. Robertson* (23 Blatch., 348).

TREATIES, CONVENTIONS, ETC.

States of America hereby agree to admit all the articles named in the following schedule, the same being the growth and manufacture or produce of the Hawaiian Islands, into all the ports of the United States free of duty.

SCHEDULE.

Arrow-root; castor oil; bananas, nuts, vegetables, dried, and undried, preserved and unpreserved; hides and skins undressed; rice; pulu; seeds, plants, shrubs or trees; muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands and now known in the markets of San Francisco and Portland as "Sandwich Island sugar;" syrups of sugar-cane, melado, and molasses; tallow.

ARTICLE II.

For and in consideration of the rights and privileges granted by the United States of America in the preceding article of this convention, and as an equivalent therefor, His Majesty, the King of the Hawaiian Islands hereby agrees to admit all the articles named in the following schedule, the same being the growth, manufacture or produce of the United States of America, into all the ports of the Hawaiian Islands, free of duty.

SCHEDULE.

Agricultural implements; animals; beef, bacon, pork, ham and all fresh, smoked or preserved meats; boots and shoes; grain, flour, meal, and bran, bread and breadstuffs, of all kinds; bricks, lime and cement; butter, cheese, lard, tallow, bullion; coal, cordage, naval stores including tar, pitch, resin, turpentine raw and rectified; copper and composition sheathing; nails and bolts; cotton and manufactures of cotton bleached, and unbleached, and whether or not colored, stained, painted or printed; eggs; fish and oysters, and all other creatures living in the water, and the products thereof; fruits, nuts, and vegetables, green, dried or undried, preserved or unpreserved; hardware; hides, furs, skins and pelts, dressed or undressed; hoop iron, and rivets, nails, spikes and bolts, tacks, brads or sprigs; ice; iron and steel and manufactures thereof; leather; lumber and timber of all kinds, round, hewed, sawed, and unmanufactured in whole or in part; doors, sashes and blinds; machinery of all kinds, engines and parts thereof; oats and hay; paper, stationery and books, and all manufactures of paper or of paper and wood; petroleum and all oils for lubricating or illuminating purposes; plants, shrubs, trees and seeds; rice; sugar, refined or unrefined; salt; soap; shooks, staves and headings; wool and manufactures of wool, other than ready-made clothing; wagons and carts for the purposes of agriculture or of dravage; wood and manufactures of wood, or of wood and metal except furniture either upholstered or carved and carriages; textile manufactures, made of a combination of wool, cotton, silk or linen, or of any two or more of them other than when ready-made clothing; harness and all manufactures of leather; starch; and tobacco, whether in leaf or manufactured.

HAWAIIAN ISLANDS—1875.

ARTICLE III.

The evidence that articles proposed to be admitted into the ports of the United States of America, or the ports of the Hawaiian Islands, free of duty, under the first and second articles of this convention, are the growth, manufacture or produce of the United States of America or of the Hawaiian Islands respectively, shall be established under such rules and regulations and conditions for the protection of the revenue as the two Governments may from time to time respectively prescribe.

ARTICLE IV.

No export duty or charges shall be imposed in the Hawaiian Islands or in the United States, upon any of the articles proposed to be admitted into the ports of the United States or the ports of the Hawaiian Islands free of duty, under the first and second articles of this convention. It is agreed, on the part of His Hawaiian Majesty, that, so long as this treaty shall remain in force, he will not lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privilege or rights of use therein, to any other power, state or government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States.

ARTICLE V.

The present convention shall take effect as soon as it shall have been approved and proclaimed by his Majesty the King of the Hawaiian Islands, and shall have been ratified and duly proclaimed on the part of the Government of the United States, but not until a law to carry it into operation shall have been passed by the Congress of the United States of America. Such assent having been given and the ratifications of the convention having been exchanged as provided in article VI, the convention shall remain in force for seven years,* from the date at which it may come into operation; and further, until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said term of seven years, or at any time thereafter.

ARTICLE VI.

The present convention shall be duly ratified, and the ratifications exchanged at Washington city, within eighteen months from the date hereof, or earlier if possible.

In faith whereof the respective Plenipotentiaries of the high contracting parties have signed this present convention, and have affixed thereto their respective seals.

Done in duplicate, at Washington, the thirtieth day of January, in the year of our Lord, one thousand eight hundred and seventy-five.

[SEAL]
[SEAL]
[SEAL]

HAMILTON FISH.
ELISHA H. ALLEN.
HENRY A. P. CARTER.

* Time extended by convention of January 30, 1884, p. 919.