SOVEREIGNTY IN ABEYANCE: Self-Determination and International Law

NATHANIEL BERMAN*

TABLE OF CONTENTS

*Mellon Lecturer in Law and Social Order at Amherst College. J.D. Harvard Law School, 1985. I would like to thank Gerald Frug and David Kennedy for their comments on earlier drafts of this article.

> 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.
>
> — General Assembly Resolution 1514 (1960)

I. Self-Determination as a Form of Argument

A. Introduction

"Self-determination" refers to the right claimed by a "people" to control its own destiny — despite the fact that such a people has not yet achieved the status of "statehood" under international law. Traditionally, only statehood could confer international legal personality and its attendant rights and duties upon a group. A group seeking self-determination is, by definition, one which feels that it has been excluded, albeit unjustifiably, from the community of legal individuals recognized by international law. Hence the paradox involved in the notion of a legal right to self-determination: how can international law recognize a right accruing to an entity which, by its own admission, lacks international legal existence?

As generally conceived by international law, the international community is composed of already-constituted and commonly recognized states.[1] To be sure, there may be no universally accepted definition of statehood.[2] Nonetheless, there is general agreement with the criteria for statehood given by the Convention on Rights and Duties of States: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States.[3] In the traditional view, claims of legal right by non-state groups and their members, "being internationally unrecognised . . . must be clothed in the garb of state rights before they can be put forward internationally."[4]

---

[1] *See, e.g.*, U.N. Charter art. 4, para. 1: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

[2] *See, e.g., Western Sahara*, 1975 I.C.J. 12, 43-44.

[3] Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

[4] W.E. Hall, A Treatise on International Law 53 (A.P. Higgens ed. 8th ed. 1924). Hall condemns the "dangerous vagueness" of the principle of self-determination. *Id.* at 54 n.2.

The "traditional view," as I have sketched it above, has, of course, been criticized from various perspectives in recent decades. To cite a notable example, Kelsen has declared that the traditional theory that only states are the subjects of international law is no longer tenable. H. Kelsen, Principles of International Law 180 (1972). Instead, Kelsen analyzes the specific differences between the ways that states, individuals and others may be considered to be subjects of international law. *See*

Such a vision of international society conforms to the rationalist liberal vision of formally equal individuals united in states, each governed by domestic law; these formally equal states, in turn, constitute the legal community governed by international law. An applicant for membership in the United Nations "must *be* a state";[5] those who present their credentials to sit in such international fora claim to *represent states*; states, in turn, purport to represent a particular population and territory. Groups seeking self-determination assert that they have been excluded from this system.

Such claims pose a twofold challenge to the purportedly seamless system of representation. On the one hand, the claim may be garbed in the language of cultural particularism, asserting that a given state is *incapable* of representing a group of people because of their cultural difference. Such a particularist claim must appear as irrational to a formal conception in which homogeneous individuals are represented by states.

On the other hand, the claim may be articulated as simply a corrective to the failures of representation, asserting only that a given state does not, *as a matter of fact*, represent a particular group. Rather than objecting to the concept of formal representation, the group would assert that the state has failed to live up to its neutral representative function. In either case, such claims of invidious exclusion pose a profound challenge to the integrity of the international legal community.[6]

---

generally C.A. NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962) (summarizing opposing theoretical positions).

In this essay, however, I focus solely on the challenge to the traditional view posed by the idea of self-determination. The complex conceptual and historical relationship between the development of the idea of self-determination and other revisions in the traditional concept of international law lies beyond the confines of this analysis.

[5]Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 62 (emphasis added).

[6]For a discussion of the relationship between the formal and particularistic elements in self-determination, sometimes associated, respectively, with democracy and nationalism, or with "subjective" and "objective" approaches, see *infra* text accompanying note 129. *See also* B. NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA (1986), ch. 2: "Democratic Determination or National Determinism?"

The inextricability of these two elements in modern self-determination claims renders problematic attempts at inclusion through reforms of a "due process" variety. Thus, France attempted to evade the demands of self-determination by incorporating its colonies on the basis of formal equality. *See* the Preamble to the 1946 French Constitution:

> France forms with the peoples of its overseas territories a union based upon equality of rights and duties, without distinction of race or religion.
>
> . . . [R]ejecting any system of colonization based upon arbitrary power,

The existence of a legal right of self-determination continues to be hotly disputed, from logical, jurisprudential and practical perspectives. Nevertheless, the contention that such a right has come into being in the period following World War II rests on strong grounds. Such a contention may be defended by reference to decisions of the International Court of Justice (I.C.J.), resolutions of the U.N. General Assembly, state practice and the writings of commentators. These same sources allow for a description of the content of such a right — although no such description could be free from controversy even if couched in highly flexible terms. A description of the subjects, methods and content of the right of self-determination might run as follows: a) self-determination is a right of peoples that do not govern themselves, particularly peoples dominated by geographically distant colonial powers;[7] b) the identity and desires of such

---

she guarantees to all equal access to public office and the individual or collective exercise of rights and liberties.

This attempt was rejected by the U.N. General Assembly in its call for "self-determination and independence" for the Algerian people "on the basis of respect for the unity and territorial integrity of Algeria. . . ." G.A. Res. 1573, 15 U.N. GAOR Supp. (No. 16) at 3, U.N. Doc. A/4684 (1960). The states who requested the inclusion of Algeria on the agenda of the General Assembly had stated that "[t]he position in Algeria is the direct result of colonial conquest, and the people of Algeria cannot be said to have exercised their right to self-determination. . . ." 10 U.N. GAOR Annex 1 (Agenda Item 64) at 2, U.N. Doc. A/2924 and Add. 1 (1955).

[7]The United Nations Charter declared that the establishment of international relations on the "principle" of self-determination was one of its central purposes. U.N. CHARTER art. 1 para. 2. The General Assembly subsequently recognized self-determination as a "right" in countless resolutions, perhaps the most important of which were G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960) and G.A. Res 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970). Both the *International Covenant on Economic Social, and Cultural Rights and the International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), recognize the right to self-determination in their first articles. The International Court of Justice (I.C.J.) has recognized the right to self-determination in, for example, *Namibia*, 1971 I.C.J. 16, 31 and in *Western Sahara*, 1975 I.C.J. 12, 31. *See generally* A. CRISTESCU, THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS 17-24 (1981).

Although many of these sources state that the right applies to "all peoples," it has generally been interpreted as limited to those subjected to certain forms of domination, especially colonialism. I discuss the rationale for this limitation below. The legal source for such a limitation may be found in the recurrent linkage of the right to self-determination with a condemnation of colonialism. General Assembly Resolution 1514, generally recognized as the turning point in the inter-

peoples may be ascertained through several means, including plebiscites, international commissions of inquiry and reference to the relevant historical and political facts, such as the actual struggles of a people to assert its identity;[8] and c) while self-determination may take various forms, including continued association with an existing state, a strong preference is placed on the bestowal of statehood on the people in question.[9]

In this essay, I attempt neither to prove the existence of a legal right to self-determination nor to advocate a particular position with regard to the many ambiguities in my preceding description of the meaning of such a right. Rather, I seek to understand the terms and the structure of con-

---

national acceptance of self-determination as a right, was entitled, "Declaration on the Granting of Independence to Colonial Peoples." G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). As I discuss below, this resolution condemned secession, implicitly limiting self-determination to decolonization. In the *Western Sahara* case, the I.C.J. referred to the "*principle* of self-determination as a right of peoples, and its *application* for the purpose of bringing all colonial situations to a speedy end. . . ." 1975 I.C.J. 12, 31 (emphasis added).

[8]The method used to determine the application of self-determination to a particular case depends, in part, on the underlying conception of self-determination. *See infra* text accompanying note 21. For a review of the various methods used in the post-World War II period, see A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 294-324 (1973). The I.C.J. has recognized the validity of a flexible approach in determining the "freely expressed wishes of the territory's peoples," holding that an actual consultation with the population may not always be necessary. *Western Sahara*, 1975 I.C.J. 12, 33.

[9]General Assembly Resolution 1541 provided for three legitimate methods of decolonization consistent with the principle of self-determination: independence, free association or integration with an existing state. G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960). *See also Western Sahara*, 1975 I.C.J. 12, 32; G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970). Most sources, however, manifest a strong presumption for independence - for example, in the constant coupling of the terms "self-determination and independence" as though they were synonymous. General Assembly Resolution 1514 specifically condemns any "pretext" for the delaying of independence for colonial peoples. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). The I.C.J. has stated that the "ultimate objective of the sacred trust [of League of Nations Mandates] was the self-determination and independence of the peoples concerned." *Namibia*, 1971 I.C.J. at 31. As a matter of international practice, many commentators would agree with the substance of Roger Fisher's view that the U.N. Special Committee of Twenty-Four on decolonization "appeared to act as an international lobby for absolute independence regardless of the consequences." Fisher, *The Participation of Microstates in International Affairs* 1968 PROC. AM. SOC'Y INT'L L. 164, 168. *See also* Rapoport, *The Participation of Ministates in International Affairs, Id.* at 155, 157 (U.N. views independence as the "preeminent," though not exclusive, form of decolonization). *But see* Esfandiary, *Comments, Id.* at 170. *See also infra* notes 104–117 and accompanying text.

temporary discussions of the issue. Specifically, I will examine the two central elements of the paradox of self-determination: 1) the nature of the competence of law to bypass the state system in order to reach questions of self-determination; and 2) the nature of the entities, the "selves," which may be entitled to this extraordinary legal right to become a full-fledged right-holder.

In analyzing these two major themes, I will seek to understand: first, the broad conceptual and historical paradoxes which form the background of contemporary discussions of these issues; second, the ways in which the genesis of the principle has facilitated the development of certain characteristic forms of argument about self-determination; and third, the manner in which those arguments may be marshaled to justify a particular form of self-determination. In short, I attempt to show how, far from remaining an abstraction to be denounced or canonized, the idea of self-determination has evolved into a richly textured form of argument, providing a fruitful framework for discussion of some of our most basic jurisprudential dilemmas.

B. Between Law and Sovereignty

Self-determination appears, at first, to be a contemporary example of ideas that challenge legal thought by posing the problem of law's relationship to sources of normative authority lying beyond the normal rules of a functioning legal system. Such challenges may confront positive law with its presumed source in natural law or may urge legal discourse to look to the realms of morality or politics when fundamental issues arise. The difficult issues raised by self-determination, moreover, call to mind the impasses into which these traditional debates have led. It is my thesis, however, that, in its contemporary form, the discourse of self-determination provides a novel framework in which these quandaries may be discussed and a useful perspective on those impasses. In self-determination, legal discourse has developed a doctrine with an extraordinary status: a legal doctrine which, within certain exceptional situations or domains, discusses the limitations of the conceptual basis of law and outlines the conditions for the temporary suspension of the ordinary legal framework.

The extraordinary quality of self-determination lies in its position between the concepts of international law and state sovereignty. In its normal functioning, international law may be seen as complementing state sovereignty: law restrains sovereigns from abusing their prerogatives and thereby protects an international society based on the state system. Critical reflection, however, reveals the conceptual instability latent in this functional balance. Very different conceptions of international society result depending on whether, and to what extent, law or sovereignty is granted ultimate primacy. We are familiar with the vicissitudes of such reflections

from the historical debates between various versions of positivism and naturalism.[10]

These debates may be recalled quickly, if somewhat schematically. Thus, on the one hand, one may privilege sovereignty, relegating law to the role of servant of state prerogatives. In such a conception, law's limits would be determined by reference to sovereign consent; depending on the historical form of such a conception, law would be excluded from such domains as would interfere with the basic elements of sovereign will. From this perspective, international law would derive the justification for its powers from its subordinate position in relation to sovereigns and its legitimacy would derive from its ability to serve their goals.

Alternatively, international law may be viewed as resting on a source of legitimacy independent from sovereign will. Some holding this view have even claimed that a system based in sovereign consent is logically incompatible with a stable legal system. International law would be required to look elsewhere for its normative basis — a transcendental source of a religious, ethical or philosophical nature.

In recent decades various schools of thought have arisen seeking a way out of the law/sovereignty conundrum. Functionalism, integration theory, transnational law, regime theory and global policy studies have all sought a framework which would bypass the traditional dichotomy.[11] It is my thesis that, from within international legal doctrine itself, a discourse has developed which provides a nuanced manner of thinking about the dichotomy in surprising ways. This discourse — that of self-determination — does not pretend to do away with the traditional dichotomy, but rather, offers a new and fruitful manner of setting its polar terms in relationship to each other.

Groups claiming a right of self-determination ask international law to assert that the adjudication of legal rights to population and territory cannot always be based on sovereignty. On the contrary, they seek legal confirmation of the idea that sovereignty over people and territory must itself be derived from another source, that of the "people" it claims to

---

[10]The vast literature on the debate between positivism and naturalism need not be reviewed here. For a well-documented, if partisan, summary of the conceptual debate, see T.C. CHEN, THE INTERNATIONAL LAW OF RECOGNITION 17-29 (1951).

[11]The work of Myres McDougal and his associates, of course, represents the most sustained legal effort to transcend an abstract opposition between law and sovereign power by expanding the frame of analysis to include a multiplicity of decision-makers, institutional commitments and procedures. For a concise statement of this position, see McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952). *See generally* M.S. MCDOUGAL AND F.P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). For a description of alternatives to "political realism" in the study of international relations, see M.S. SORROS, BEYOND SOVEREIGNTY: THE CHALLENGE OF GLOBAL POLICY 10-19 (1986).

represent. This claim presents a dual jurisprudential challenge corresponding to the two articulations of self-determination I outlined above. On the one hand, claims of self-determination confront a positivistic acceptance of sovereignty's claims of representation with a transcendental criterion of legitimacy — the "people" — which would play the role traditionally occupied by ethics or reason in naturalistic jurisprudence. On the other hand, they challenge the rationalistic conception of representation with a claim for power based on group identity. The former challenge confronts mere sovereign power with its failure to meet the criteria of impartial reason; the latter challenges neutral legal reason with a claim for group power.

In the modern discourse of self-determination, these seemingly incompatible challenges function together as a unified form of argument. Rather than taking one side in the age-old debate between positivism and naturalism, sovereignty and law, the discourse of self-determination provides an arena in which they may contend. As we shall see, self-determination is viewed in the literature as an "exceptional" doctrine and it is this quality which enables it to serve this function.

Issues of self-determination arise in unusual temporal or spatial gaps in the legal system. These gaps arise when, as a result of a set of circumstances — be they political, historical, ideological — sovereignty has been called into question and, with it, the functioning of normal law. The "exceptional" quality of self-determination signifies that the ensuing confrontation between normative bases of law constitutes a *limited suspension* of the usual legal norms. The situation is ultimately directed back towards the quotidian complementarity of law and sovereignty. In discussions of self-determination, consequently, arguments that privilege either legal or sovereign authority are constantly met by those that privilege the other.

The discourse of self-determination flourishes in the conceptual and real hiatuses in international society. Rather than being positioned on one side or another in the law/sovereignty dilemma, it weaves a textured discourse between them. In this way, its very marginality to normal international law enables it to occupy a privileged conceptual role in international law, illuminating law's basic conceptual dilemmas.

This privileged conceptual role may not be minimized through reduction to specific historical circumstances or to a particular political stance. One might be tempted today to view the significance of self-determination as lying in a specific historical experience — the massive wave of decolonization that swept the globe after World War II.[12] This historical period, the argument might go was shaped by a particular conjuncture of circum-

[12]Thus, in 1973, with the elimination of most forms of classic colonialism, S.P. Sinha posed the question: *Is Self-Determination Passé?*, 12 COLUM. J. TRANSNAT'L L. 260 (1973).

stances in which the idea of self-determination played an important role. Now that this period is past, law should resume its ordinary framework without reflecting on the conceptual implications of self-determination. Self-determination, from this perspective, would seem like a noble idea that was put into practice but is now essentially irrelevant.

Nevertheless, many of the key conflicts in the world continue to be framed in terms of claims of self-determination. From the Middle East to New Caledonia, such claims, and the passions they evoke, are at the center of the urgent concerns of more than one great power. Many contemporary disputes involving assertions of self-determination pose exceptionally "hard cases": unusual competing claims of two arguably non-European peoples (Palestine), areas where the indigenous people constitutes an electoral minority (New Caledonia), etc. Yet is it not true that close examination reveals that most particular cases, in the area of self-determination as in other legal fields, are "hard cases" in their own unique way? The stubborn persistence of certain struggles for self-determination and the recurrent cropping-up of new claims and new struggles testify to the seeming inevitability of confronting the conceptual and practical riddles posed by the idea. The story of self-determination appears destined to be played out anew in ever-changing contexts.

Nor can our ambivalent relationship to the idea be resolved through political contextualization. Self-determination has been the rallying cry of various sides of the political spectrum during the course of its history. The idea that would come to be called the right of self-determination during World War I may be traced to the French Revolution and the European response to the Napoleonic Wars.[13] Over the course of two centuries, however, it has been adopted by the forces of the political left and right, by liberals and reactionaries, by Bolsheviks and Nazis, by centrists and Third World revolutionaries.[14] A history of the vicissitudes of the idea of self-determination could, in fact, provide a useful perspective from which to write a general history of Europe in the nineteenth century and of the world in the twentieth.

The conceptual challenge posed by self-determination, then, transcends any particular political or historical context. Rather, whatever its occasion, the idea of self-determination poses a general challenge to international law's normative foundation, questioning the unreflective ac-

---

[13]*See* A. COBBAN, NATIONAL SELF-DETERMINATION 4-7 (1945).

[14]*See* W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 39-66 (1977); Sinha, *supra* note 12; R. Emerson, *Self-Determination Revisited in the Era of Decolonization*, 9 HARVARD UNIVERSITY CENTER FOR INTERNATIONAL AFFAIRS: OCCASSIONAL PAPERS (1964); A. COBBAN, *supra* note 13, at 4-15, 35-43; E. HULA, NATIONAL SELF-DETERMINATION RECONSIDERED (1945); E.H. CARR, THE FUTURE OF NATIONS: INDEPENDENCE OR INTERDEPENDENCE? (1971).

ceptance of the complementarity of law and sovereignty. Self-determination confronts international law with the latent conflict between these principles — and between the jurisprudential conceptions that would accord primacy to one or the other. If modern international law may be viewed as oscillating between these competing conceptions of the relationship between legal and political authority, the doctrine of self-determination may be understood as a hinge upon which this oscillation turns. It belongs neither to one conception nor the other; rather it discusses the conditions and limits of the oscillation between the two. The debates over whether self-determination may be considered as a legal doctrine or as a mere moral principle stem from this intermediate position of this idea between competing conceptions of the foundation of legal legitimacy. Self-determination is, indeed, marginal to both systems; its discourse flourishes in their hostile encounter and its strategy consists of playing each off against the other.

II. International Legal Competence Over Claims of Self-Determination

A. Introduction

Given the troublesome nature of the idea of self-determination, it is not surprising that its role in contemporary international law has received radically different appraisals from those deeply involved in thinking about the international legal system. An authority such as Sir Gerald Fitzmaurice, a former member of the International Court of Justice, finds the concept of self-determination incompatible with international law. To be sure, he acknowledges some "sympathy" with the "principle . . . politically considered."[15] "[J]uridically," however, Fitzmaurice finds that "the notion of a 'legal right' of self-determination is nonsense."[16]

On the other hand, some view self-determination as the cornerstone of the international legal system, rather than as a moral or political curiosity. A study prepared by a U.N. Special Rapporteur declared that the principle of self-determination underlies the other fundamental principles of international law, including that of the equality of states.[17] From this perspective, self-determination is "the most important of the principles of international law concerning friendly relations and cooperation among states."[18] Moreover, this principle "entails international legal rights and

---

[15]Fitzmaurice, *The Future of Public International Law and the International Legal System in the Circumstances of Today* in Institut de Droit International, Evolution et Perspectives du Droit International 196, 233 (1973).

[16]*Id.* at 233.

[17]A. Cristescu, *supra* note 7, at 25.

[18]*Id.* at 117, 119.

obligations";[19] self-determination, for this U.N. study, is a "universally recognized right under contemporary international law"; a right of a "general and permanent" character.[20]

Nor does the vigorousness of this debate find resolution in the writings of those who seek to ground such conceptual disputes in the realities of modern international practice. Some commentators feel that the idea of self-determination, though somewhat empty as an abstract idea, has slowly acquired content through years of adaptation to particular situations by states and international organizations.[21] In contrast to repeated statements by the U.N., however, another commentator who examined state practice concluded: "All peoples do *not* have the right to self-determination: they never have had it, and they never will have it."[22]

Such widely varying views suggest that general assertions about self-determination generate more controversy than insight on the matter. Rather than simply rejecting such general statements, however, I will attempt to discover the specific ways in which the articulation of such views can lead us into a more textured understanding of self-determination. I will do so by examining two extreme examples of such views, a rigorously legal-formalist rejection of self-determination and a valorization of it as the legal arm of a political struggle.

1. A Formalist Rejection

As though insisting stylistically as well as conceptually on the marginality of the concept, Sir Gerald Fitzmaurice relegates the bulk of his arguments against self-determination to a footnote in a long essay devoted to the contemporary state of international law.[23] Nevertheless, his reflections afford much insight into the paradoxical nature of the idea of a legal right of self-determination. Before proceeding to a detailed analysis, I would like to quote the core of Fitzmaurice's argument:

> The initial difficulty is that it is scarcely possible to refer to an entity as an entity unless it already is one, so that it makes little juridical sense to speak of a claim to *become* one, for in whom or what would the claim reside? By definition, "entities" seeking self-determination are not yet determined internationally, or the case

---

[19]*Id.* at 18.

[20]*Id.* at 22.

[21]*See, e.g.*, W. OFUATEY-KODJOE, *supra* note 14, at 11, 19. Ofuatey-Kodjoe rejects the views of writers who present "definitions of self-determination derived from political theories or ideological principles." He advocates, instead, focusing attention on the "wealth of diplomatic practice" that has "provided a consensual nexus among states as to the scope of the principle."

[22]R. EMERSON, *supra* note 14, at 64.

[23]Fitzmaurice, *supra* note 15, at 233 n. 85.

> would not arise. Can they therefore possess "rights" under international law, and in what way, juridically, could the corresponding obligations be postulated? Alternatively, if they do possess such rights, they are entities which are already determined internationally, and the case has passed beyond, and is no longer on, the self-determination plane. The logical impasse involved can really only be avoided by assuming the existence of something to which international law is still a stranger, namely rights residing not in particular entities, but in the international community at large. . . .[24]

Fitzmaurice's discussion of self-determination comes in a section of his essay devoted to outlining rigorously the formal notion of "equality before the law." His terse analysis of the "logical impasse involved" is impressive and seemingly irrefutable on its own terms. Fitzmaurice assumes an international system composed of already-constituted states. Such a system must be viewed as always already functioning. All references to the origin of the system can only be viewed as irrelevant, indeed logically impossible: "[i]t is scarcely possible to refer to an entity unless it already is one, so that it makes little juridical sense to speak of a claim to *become* one, for in whom or what would the claim reside?"[25]

All entities that have a *right* to membership in such a system *are already* members. Membership in the international community is grounded, at one and the same time, in the sheer fact of an entity's existence as a state *and* in the legal sanction given by international legal recognition. By contrast, this same logic tells us that " 'entities' seeking self-determination are not yet determined internationally." Thus, the very condition of not being "determined internationally" which gives rise to claims for self-determination puts such claims outside the pale of international law. Conversely, if those putting forth such claims were able to obtain international jurisdiction, their claims to self-determination would no longer be pertinent; they would be "entities which are already determined internationally and the case [would have] passed beyond, and [would] no longer [be] on, the self-determination plane." Nor, as we shall see, would the admirable logic governing such a view of the international legal system be incapable of accommodating such established doctrines as those governing recognition and state succession.[26]

---

[24]*Id.*

[25]*Id.*

[26]*See, e.g., id.* at 224-26, *infra* notes 81–103 and accompanying text. The complementarity between fact and law found in the passage on self-determination may be viewed as consistent with Fitzmaurice's general desire for a synthesis between positivism and naturalism. He views international law as based on both "a positive quality and a root in the nature of man," a view he finds embodied in the formula, "general principles of law recognized by civilized nations." *Id.* at 310-11.

In Fitzmaurice's conception of the membership of the international community, then, factual and legal existence cannot be separated. There is no legal instance that has the power to confer a legal right to self-determination — a right which is tantamount to a legal right of an extralegal entity to acquire legal status. A legal instance asserting such a power would, by definition, be overreaching the limits of legal discourse. An instance asserting such a power would, in effect, be claiming that it is the repository of that "something to which international law is still a stranger, namely rights residing not in particular entities but in the international community at large." Nor could an extra-legal entity such as a people, prior to the conferral of legal status, lay claim to any right to such status: the "logical impasse involved" is a Catch-22 for would-be self-determiners.

In this way, both international law, as an abstract conceptual power, and concrete peoples, as merely factually existing entities, lie beyond each other's reach prior to the acquisition of the legal and factual indica of statehood by the people. The accession to such indicia must lie outside the sphere of legal rights. Only states, grounded both in fact and law, can lay claim to "rights" under international law.

For Fitzmaurice, the story of how such states came into being must be bracketed when one comes to analyze a functioning legal system. By contrast, a story about the genesis of states would inevitably focus on the ways in which factual realities and claims of moral or legal right interacted in the turmoil of the state's political and cultural birth. We need look no farther than the history of the American Revolution to verify this insight.

Fitzmaurice, however, in his demonstration of the logical impossibility of the idea of self-determination from the standpoint of juridical logic makes implicit reference to the seeming irrepressibility of the idea in legal discourse. I refer to his distinctive use of the phrase "determined internationally," as in his discussion of entities that are or are not "already determined internationally." In Fitzmaruice's view, only states are "determined internationally"; peoples, the potential "subjects" of self-determination, are not. The puzzle inherent in the phrase, "determined internationally," is that the past participle, "determined," necessarily refers back to a *process* of determination: a moment when an entity, that had not yet been "determined internationally," had had that "determination" conferred upon it by a "determiner." Yet, both the existence and validity of such a process is explicitly excluded from legal discourse by Fitzmaurice's argument: Fitzmaurice excludes the possibility that international law allows of an instance, a "something," which could dispense rights that do not already adhere to a legally recognized entity. For legal discourse, the process of determination, the attainment of the indicia of statehood, has always already occurred; if it has not, the entity in question does not exist in the eyes of the law.

Nevertheless, Fitzmaurice's use of the past participle implies the inescapability of talking about the past, whether real or mythic. It is as though a description of the "logical impasse involved" in a jurisprudential contradiction inevitably leads to a discussion of that which lies outside the system of concepts creating that "impasse": as though a clear articulation of such logical impasses inevitably leads to opening the system of concepts to an alternative history or logic. The articulation of Fitzmaurice's seemingly unassailable logical opposition to the idea of self-determination points to the ever-present possibility of challenging a functioning legal system to justify its legitimacy by telling the story of its founding moments. In responding to such a challenge, law's limits expand beyond the bounds of its formal logic.

2. A Substantive Endorsement

I now turn to a perspective which lies, at least from a jurisprudential point of view, at the opposite end of the spectrum from that of Fitzmaurice. Such a perspective would reject the idea that the validity and limits of the concept of self-determination could be discovered through formal criteria of legal logic. On the contrary, this second approach would seek to understand self-determination by rooting it in a particular political and historical context. The right of self-determination, in this view, would be neither embodied in an abstract, universal legal norm nor left to the discretion of the international community. Rather, the right accrues to those groups who have been subject to domination, indeed, to a particular historical form of domination, that of colonialism.

Such a conception is a variant of what has been called the "equality theory" of self-determination.[27] One may give the name of "equality theories" to those theories which view the right of self-determination as the right of dominated peoples to achieve equality in relation to those who dominate them.[28] Such theories would look at the relationship of force

---

[27]*See* W. OFUATEY-KODJOE, *supra* note 14, at 29.

[28]*See id.* at 156. *Cf.* Bassiouni, *"Self-Determination" and the Palestinians*, 1971 PROC. AM. SOC'Y INT'L L. 31, 33. " 'Self-determination' becomes a right whenever: a given collectivity is prevented or seriously impeded from freely adhering to or exercising its values, beliefs and practices on the indigenous territory which they inhabit (or from which have been removed) by another collectivity by coercive means." The Kenyan delegate to the 1963 OAU Summit offered another formulation of this theory, in the context of the debate over secession: "The principle of self-determination has relevance where FOREIGN DOMINATION is the issue. It has no relevance where the issue is territorial disintegration by dissident citizens." L.T. FARLEY, PLEBISCITES AND SOVEREIGNTY: THE CRISIS OF POLITICAL ILLEGITIMACY 17 (1986).

The equality theory thus responds to the argument, advanced by the critics of

existing between two entities, be they "peoples" or "states," to determine which of the entities may claim a right of self-determination. Thus, the right is never a universal legal abstraction but, rather, may only be discovered on the basis of a substantive analysis of a particular situation.

This theory was originally identified with the Bolsheviks' claim of self-determination for the subject peoples of Eastern Europe and the overseas colonies of Western European countries.[29] In the post-World War II era, the equality theory was applied to what we now know as the Third World. Despite the equality theory's origins, it now governs the common understanding of self-determination. The massive postwar decolonization is usually understood in terms of an equality theory of self-determination as applied to the relationship between Europe, on the one hand, and Africa and Asia, on the other.

The ways in which such an approach to self-determination differ from a formalist approach, such as that of Fitzmaurice, are evident. It is important, however, to note the features which the two approaches have in common. Like the formalists, the equality theorists would deny to an international legal instance a discretionary role in the granting of full status to entities seeking self-determination. To be sure, each theory would reject such a role for its own reasons.

The equality theory would reject such a role because of the kinds of *limits* an international instance might set on the right of self-determination. For example, Article 22 of the Covenant of the League of Nations provided for mandates, rather than for self-determination, for those territories whose populations were not prepared for the "strenuous conditions of the modern world."[30] The attitude underlying that Article would be thoroughly repudiated by the equality theory. Such a repudiation was expressed in the U.N. General Assembly Resolution which rejected all alleged grounds to avoid the granting of independence: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."[31]

Thus, like Fitzmaurice, the equality theory cannot accept the international community as the repository of rights which it might dispense

---

self-determination, that a logical extension of this right would "seem to give to each individual human being a right to be an independent country" if he so desires. Eagleton, *The Excesses of Self-Determination*, 31 FOREIGN AFF. 592, 596 (1953). At the same time, it rejects the idea that an ethnic group may secede even if it has not been the victim of oppression. *See* W. OFUATEY-KODJOE, *supra* note 14, at 162-63 (discussing lack of international support for the independence of Katanga and Biafra).

[29]*See* W. OFUATEY-KODJOE, *supra* note 14, at 30.

[30]LEAGUE OF NATIONS COVENANT art. 22.

[31]G.A. Res. 1514, para. 3, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

without being strictly governed by the presence of an actual or potential sovereign. No balancing tests, no weighing of conditions, no evaluations on a case-by-case basis — for the equality theory, the right of self-determination is grounded in the political context, not in cautious adjudicatory decisions.[32] Once again, the right would adhere in entities, not in the international community. To be sure, *contra* Fitzmaurice, such entities would be precisely those which had not yet been fully "determined internationally." "Peoples" would be able to claim that they were the full and sufficient measure of legitimate authority over populations and territory.

Even the proponents of various forms of the equality theory, however, seek to gain acceptance for self-determination as a *legal* concept, a concept with reasonable limits, rather than merely a prescription for unlimited and irresponsible claims.[33] Thus, W. Ofuatey-Kodjoe, a Third World writer sympathetic to a variant of the equality theory,[34] condemns a view of self-determination which would identify it with a "right" of revolution. Such a "right," he explains, would be "illogical."[35] In his view, recognizing an unlimited "right to revolt" would "represent a negation" of a legal right of self-determination.[36]

---

[32]I have described an ideal-type of the "equality theory," rather than the full views of a particular theorist. Nothing would prevent a particular variant of this theory from according a discretionary element as a supplement to the general right of subjugated peoples. For example, Bassiouni, whose general definition of self-determination reflects an equality theory, incorporates such a discretionary auxiliary as an equitable limitation on the broad legal right. Bassiouni states that "as a remedy, the equitable application" of the right "is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate." Bassiouni, *supra* note 28, at 33.

[33]The effort to limit self-determination to a legally manageable form is, in part, a response to those who would view its uncontrolled expansion as a recipe for anarchy. The empirical question about the effects of a broad interpretation of the principle, however, is still subject to debate. *Compare* e.g., R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE ORGANS OF THE UNITED NATIONS 104 (1963) *with* Bowett, *Self-Determination and Political Rights in the Developing Countries*, 1966 PROC. AM. SOC'Y INT'L L. 129, 130.

It has also been argued, from other quarters, that the unlimited expansion of the concept would be a method of justifying colonialism. This argument was made during the debates on the "Belgian Thesis" during the early 1950's. *See, e.g.*, 9 U.N. GAOR C. 4 (419th mtg.), U.N. Doc. A/C.4/SR.419 (1954); 7 U.N. GAOR C.4 (275th mtg.) U.N. Doc. A/C/Sr. 275 (1952); 7 U.N. GAOR C.4 (255th mtg.), U.N. Doc. A/C.4/SR.255 (1952). *See also infra* note 117.

[34]"The beneficiary of the right of self-determination is a self-conscious politically coherent community that is under the political subjugation of another community." W. OFUATEY-KODJOE, *supra* note 14, at 156.

[35]*Id.* at 53.

[36]*Id.*

Rather, Ofuatey-Kodjoe insists that the existence and content of a legal right of self-determination must be gleaned from a careful study of international practice. This inquiry, he finds, shows the importance of "subjugation" as an element of the definition of groups entitled to the right. In the contemporary period, this subjugation has come to be identified largely with colonization.

Ofuatey-Kodjoe recognizes that such a limitation cannot be defended on "logical" grounds once the right of self-determination has been conceptualized and universalized as a legal norm. He contends, however, that such logic is simply "irrelevant" until groups other than colonized peoples have obtained "access to the international political arena" in order to assert their claims.[37]

With this formulation, Ofuatey-Kodjoe's attention to substantive practice rejoins Fitzmaurice's privileging of formal logic. Both assert that the only groups who may assert the right are those which have somehow already gained a status within the international community. For Ofuatey-Kodjoe, as for Fitzmaurice, that status would be indistinguishably one of fact and of right: those who may *legally* assert rights are those who are *actually* present on the international stage pressing their claims. The process of reaching that stage lies beyond law, in the realm of politics or morality.

Nonetheless, Ofuatey-Kodjoe's conception, like that of Fitzmaurice, contains a tantalizingly ambiguous formulation. In the case of Ofuatey-Kodjoe, the ambiguity lies in the idea of "access" to the international arena. For Ofuatey-Kodjoe that arena is the international political arena, rather than that of the international legal system in the formal sense. Nonetheless, "access," like "determination" implies a *process*, a founding moment, of gaining entry into the international community. Such a process, again, is not one in which fact and law are already united, but one in which claims achieve recognition through the interaction of empirical realities and the moral or legal evaluation and organization of those realities.

The idea of obtaining "access" to the international forum resembles nothing so much as familiar doctrines concerning court jurisdiction: the ways in which parties seek jurisdiction and the factors that enter into judicial assertions of jurisdiction. As has often been observed, courts who rule on their own jurisdiction are involved in a paradoxical exercise. For, whatever their decision, the mere arrogation of the right to decide the jurisdictional question already involves a jurisdictional assertion of some kind: a claim of the right to decide. Law is always present and always exerts its influence in some way — even when it only does so by ruling that the matter at hand "is not properly before the court."

---

[37] *Id.* at 128.

Self-determination involves law in a similar paradox. The idea of a right to attain the status of a right-holder lies at the very limit of legal discourse. Any attempt to exclude such a matter from law's competence must necessarily discuss that which it excludes. The attempt to avoid such discussion of the process whereby a group reaches law's threshold tends to culminate in an ambiguous formulation straddling the boundary between that which lies within the competence of law and that which lies beyond.

The best legal texts that grant law competence over self-determination do not evade the paradox of law discussing its own limits. Rather, they place it at the center of their portrayal of the exceptional character of self-determination as a legal doctrine. These writings narrate those moments in which "access" is gained and "determination" is achieved. Such moments occur in extraordinary times when sovereignty is disrupted and normally marginal legal forms and doctrines move to the center of international law. Such moments of "access" and "determination" belong neither wholly to the world of impartial law nor to that of brute fact: rather, they belong to the paradoxical province of self-determination.

B. An Exceptional Competence

The quandaries left unresolved by the two commentators discussed above become central for those texts that have focused on the critical procedural issue inherent in the idea of self-determination: the question of the source and nature of international competence over self-determination. In the preceding discussion, I highlighted the difficulty of articulating a manageable, legal right of self-determination. In the formalist view, self-determination appeared logically empty and therefore absurd; in the substantive view, the idea threatened to become a mere plaything of politics and therefore dangerously uncontrollable. Those who have focused on the question of international competence seek a way out of these dilemmas.

In his comprehensive study of the subject, A. Rigo-Sureda cites a common objection about the emptiness of the idea of self-determination, *viz.*, that self-determination is "in fact ridiculous because the people cannot decide until somebody decides who are the people."[38] In response, Rigo-Sureda explains that the openness of the concept shows its inextricable link with the issue of international competence, specifically, with an institutional framework competent to deal with such questions. Rigo-Sureda asserts that "when Pres. Wilson launched his programme of self-

[38]A. RIGO SUREDA, *supra* note 8, at 28 (citing I.W. JENNINGS, THE APPROACH TO SELF-GOVERNMENT 55-56 (1956)).

determination he had in mind an organisation capable of deciding when and to whom self-determination would apply."[39]

Placing the question of international competence at the head of a consideration of self-determination promises to illuminate the obscurities of a purely formalist or substantive approach. From this new perspective, the establishment of a competent international legal instance is at the core of any working doctrine of self-determination. The process of "determination," of the means by which groups gain "access" to the international arena, becomes an essential consideration.

Yet, the shift in emphasis to such a legal instance and its capacity as a decision maker threatens to carry with it the dilemmas that resulted when the focus was on the "people" and its capacity as a right-holder. What are the limits of international legal discretion over claims of self-determination? How much independence is to be accorded to international law's ability to inquire into the legitimacy of sovereign control of people and territory? What sanctity and stability remains for the state system as the core of international law once an international legal instance acquires the ability to extend legal rights to entities without full legal existence?

1. The Limits of Discretion

An inquiry into the source of international competence over self-determination may be usefully prefaced by a brief discussion of the uses to which this competence may be put: specifically, whether a finding that a people has a legitimate claim to self-determination necessarily entails a right to statehood. Such a discussion of what one might call the "remedies" portion of the doctrine of self-determination[40] appears to lie at the opposite end of the spectrum from a discussion of the source of legal competence; nonetheless, it is important to know what sort of power such a legal source must be able to justify.

Many of the founding documents of the right of self-determination declare that statehood does not constitute the only manner of realizing the right. For example, the U.N. General Assembly has declared that "free association or integration with an independent state or the emergence into any other political status freely determined by a people" can also constitute "modes of implementing" the right.[41] Nonetheless, U.N. practice and the language of other documents indicate a strong presumption that independence is the preferred result once a legitimate claim has been established.[42]

---

[39]*Id.* at 28. *See also id.* at 101.

[40]*See* Bassiouni, *supra* note 28, at 33.

[41]G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) Annex 1 at 124, U.N. Doc. A/8028 (1970).

[42]*See supra* note 9.

Some commentators, arguing vigorously against such a presumption, have urged a more flexible interpretation. Such arguments have arisen in the context of "mini" or "micro" states, as well as in cases where states other than the original colonial power have made claims over the territory in question.[43] Roger Fisher, for example, has contended that statehood should be viewed as only one of a "wide array of fluid arrangements to meet the varying needs of small peoples and territories."[44] Those who argue for such a range of options do not do so, as did the League Covenant, on the paternalistic grounds of the lack of preparedness of the indigenous populations. Rather, they argue on the grounds of practical considerations, such as the political difficulties that "micro-states" would face and the devalorization of international bodies some of whose members would represent such states.[45]

Thus, one commentator contends that the mere "desire, unity and territorial basis" of a group are insufficient grounds to justify the granting of statehood. Rather, various "other matters" must be considered. For example:

> Independence for an ambitious group may be dangerous for the community of nations. The new state may be weak or quarrelsome, and bring upon itself the attack of a covetous or injured or aggressive neighbor. . . The group seeking independence may be located at a strategic point which the community cannot afford to have weakly held; it may control a strategic waterway of wide importance; it may have within its area natural resources which it is incapable of developing but which the community needs. Does the mere fact that resources vital to the whole community happen to be located within an area to which a group wants exclusive title require the community to surrender control over it?[46]

Such a perspective clearly places us within an entirely different framework than that of Fitzmaurice or Ofuatey-Kudjoe. In this new framework, the international community not only possesses the authority to rule on claims to self-determination but may consider its own interests, including its own economic and political interests, in doing so.

---

[43]*Id.*

[44]Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 472 (1971) (citing Fisher, *The Participation of Microstates in International Affairs*, 1968 PROC. AM. SOC'Y INT'L L. 166).

[45]The fear that an overbroad practice of self-determination would devalorize the very concept of the state, as well as the international community formed by states, dates back to the earliest legal discussions of self-determination. *See, e.g., Report of the International Committee of Jurists on the Aaland Islands Question*, LEAGUE OF NATIONS O. J. SPEC. SUPP. 3, at 5 (1920).

[46]EAGLETON, *supra* note 28, at 601.

This perspective, however, entails certain risky conceptual implications. The desire to grant the international community such substantive power over decisions about self-determination arises, in most cases, from a desire to protect the state system. Both the political and the conceptual prestige of statehood is viewed as in danger of erosion by an indiscriminate granting of independence. Yet once the international instance is granted the considerable authority to evaluate considerations both of law and interest in evaluating claims to independence, the limits of that authority become problematic. For example, there is no logical reason for the limitation of such geopolitical considerations to the cases of "ministates" rather than to classic cases of decolonization. Nor can such an approach explain the general limitation of self-determination to the Third World — one can surely imagine definitions of global interest which would look favorably on claims to self-determination by minorities inhabiting large industrialized countries.

One may understand this issue of limits as the familiar problem of maintaining a defined sphere of law in the face of a Realist-style insertion of policy considerations. Yet in the international context, this problem has a distinctive quality because of the necessity of understanding law in relation to sovereignty. Although perhaps motivated by a desire to protect the integrity of state sovereignty through a regulatory legal regime, the "fluid arrangements" school cannot logically limit the implications for sovereignty of according such broad legal discretion in matters of self-determination. A consistent, if extreme, extension of the proliferation of "fluid arrangements" governed by an international regulatory regime would be a conception of the authority of international law over people and territory as a *substitute* for sovereignty.

The "fluid arrangements" school shows the stakes involved in the challenge posed to international law by the idea of self-determination: the questioning of source of the limits of international law. Such a questioning may come from a radical attack on the state system or from a regulatory attempt to protect it. Once law is allowed to retell and evaluate the founding narratives of states, it threatens to speak too much, raising questions that some would rather leave dormant — and that others may find echoing back to them from their supposed geopolitical and jurisprudential opponents. With its discretion thus extended, law threatens to overwhelm an unquestioning acceptance of sovereignty as well as the automatic application of self-determination even in cases of decolonization.[47]

---

[47]Thus, enlarging the discretionary power of the international law to its full extent would threaten *both* the traditional authority of states *and* the rights of "all peoples" to self-determination. Such an extension of law could perhaps be seen as correlative to an extension of the concept of the "self" of self-determination beyond particular "peoples" to the world's people as a unified whole. An unlimited concept of in-

The essential distinctiveness of international competence over self-determination lies in its novel response to this issue of law's limits. It is not a matter of a simple substitution of one ground, law, for another, sovereignty, but of providing an arena constituted by their interplay. An understanding of this arena requires a return to the direction to which my analyses of Fitzmaruice and Ofuatey-Kodjoe pointed: the need to analyze the nature and source of the competence of an international legal tribunal to treat questions of self-determination. I turn to the *Aaland Islands* case, perhaps the first legal opinion in which an international tribunal discussed the nature of its competence over self-determination, a discussion that may still be viewed as the classic source for our ideas about the subject.

2. International Law in Transition: The *Aaland Islands* Case

A dispute between Finland and Sweden over the Aaland Islands in the aftermath of World War I provided the occasion for one of the first extended legal discussions of self-determination.[48] The core of this path-breaking opinion, issued in 1920 by a distinguished Commission of Jurists appointed by the League of Nations, concerns the competence of international law to treat of such matters. Finland had objected to international legal jurisdiction, arguing that disposition over the territory was a matter of internal Finnish jurisdiction.[49] Sweden, on the other hand, sought international legal recognition of its own sovereignty over the islands.[50] Sweden argued that the Aalanders had shown their desire to be united with Sweden through their political and military struggles.[51]

---

ternational law could thus be viewed as embodying the sovereignty of an unlimited, i.e., universal, "people." *Cf.* Lansing, *Notes on World Sovereignty*, 15 AM. J. INT'L L. 13 (1921). As I shall show below, the modern discourse of self-determination depends precisely on a limitation of both legal and sovereign authority, a limitation that emerges from the critical tension between them.

[48]On the Aaland Islands affair generally, see, e.g., J. BARROS, THE AALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS (1968); F.H.A. COLIJN, LA DÉCISION DE LA SOCIÉTÉ DES NATIONS CONCERNANT LES ILES D'ALAND (1923).

[49]*Report of the International Committee of Jurists on the Aaland Islands Question*, LEAGUE OF NATIONS O.J. SPEC. SUPP. 3 (1920) [hereinafter Aaland Islands Report]. It should be noted that the League appointed a second commission whose findings differed considerably from those of the Jurists. *See* A. RIGO-SUREDA, *supra* note 8, at 111-17; J. BARROS, *supra* note 48, at 300-33. The League's decision was heavily influenced by the second commission's views. *Id.* My discussion, however, is limited to the opinion of the Jurists, which has been more significant for the future development of self-determination doctrine.

[50]Aaland Islands Report *supra* note 49, at 5.

[51]*Id.* at 3.

The Jurists rejected Finland's jurisdictional objections. They began their opinion by acknowledging that, generally, "the right of disposing of territory is essentially an attribute of the sovereignty of every state."[52] Similarly, a dispute over whether a particular group is to be granted the right to "determin[e] its own political fate" is one which, "under normal conditions . . . International Law leaves entirely to the domestic jurisdiction of the state" exercising sovereignty over the territory in question.[53] Moreover, they declared that the principle of the right of peoples to self-determination could not be considered as an established part of positive international law.

War, revolution and occupation, however, had disrupted the Aaland Islands' normal legal status. The Jurists applied an emphatic version of the distinction between fact and law to describe the way in which these events affected the islands' legal status. Such political upheavals as those endured by the islands occur "as facts and outside the domain of law";[54] they are among those "situations of fact which, to a large extent, cannot be met by the application of normal rules of positive law."[55] Extraordinary events, like those transpiring on the Aalands, overwhelm "normal" law's ability to provide guidance for political life.

The Jurists trace this suspension of ordinary legality to the disruption by political turmoil of a clearly defined sovereign authority. Sovereignty, explain the Jurists, is fundamental to international law:

> [I]f the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed [*n'a pas encore pris complètement naissance*] or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.[56]

For the Jurists, then, the "essential basis" of law is sovereignty, at least in normal times. However, in the absence of a stable sovereign, an absence that may be occasioned by the pangs of the sovereign's birth or the crisis of its death, the legal situation becomes "obscure and uncertain." This equivocal situation is one of a "transition" from fact to law, from a "*de facto* situation to a normal situation *de jure*."[57]

---

[52]*Id.* at 5.
[53]*Id.*
[54]*Id.* at 9.
[55]*Id.* at 6.
[56]*Id.*
[57]*Id.*

During the period of this "transition," where the "normal" rules of law are suspended, a new set of rules finds its appropriate context. Specifically, "[u]nder such circumstances, the principle of the self-determination of peoples may be called into play."[58] Sovereignty and the normal rules of international law, including law's limited jurisdiction, are temporarily suspended; a different kind of international legal jurisdiction, a jurisdiction empowered to apply the doctrine of self-determination, takes their place. The Jurists add that transformations in the political and cultural as well as legal spheres mark the "obscure and uncertain" period of transition: "New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects"[59] in such periods. In this turbulent period the "essential basis" of international law must be sought elsewhere than in sovereignty.

The opinion thus draws an essential connection between the questions of self-determination and that of a new kind of international legal competence. In normal times, international law finds its justification, its "essential basis," in the safeguarding of sovereignty; in extraordinary times, it grounds itself in the transformations that occur during the suspension of sovereignty. The appropriateness of the invocation of this new legal complex can only be determined on the basis of a detailed empirical analysis — specifically, a detailed investigation as to whether the situation is one of those "transitions" from a factual to a legal situation. In the case of the Aaland Islands, a determination of the appropriate basis of international law depends on the question of whether the situation prevailing on the islands "is of a definite and normal character, or whether it is a transitory or not fully developed situation."[60]

This question can only be decided on the basis of "the principal historical facts" in the birth of new nations after World War I.[61] Accordingly, the Jurists recount, at great length, the political and military events surrounding the shifting situation with regard to sovereignty over both Finland and the Aaland Islands. They conclude that stable political authority was substantially disrupted during the period of upheaval; at times, this disruption led Finland to default completely on its sovereign responsibilities and powers ["de veritables carences de souveraineté"[62]].

The travails of Finland's birth as a nation and of the Aaland Islanders as a people make appropriate the invocation of a novel international law which may competently discuss conflicting claims to population and ter-

---

[58] *Id.*
[59] *Id.*
[60] *Id.* at 6-7.
[61] *Id.* at 7.
[62] *Id.* at 13.

ritory without reference to sovereignty. International law may, under such conditions, reach beyond the state system to investigate the claims of extra-legal groups to legal status and to determine the future of the population and territory. The goal, however, is to restore a "normal" situation, to restore the complementarity of law and sovereignty.

What is at stake here are alternative forms and bases of international law, not merely opposing jurisdictional positions. The Finnish Minister Enckell, who had argued the case for Finland before the Commission, declared that the Jurist's conclusions could not be justified "[u]nless a new international law is to be called into existence" by the decision.[63] Rather than mere lawyerly hyperbole, this statement grows out of a developed conception of international law that cannot admit the jurisprudential validity of self-determination.

In support of his argument, Enckell quotes Rivier's treatise on international law for the proposition that sovereignty "originates law." Enckell comments:

> The two ideas of right and of fact are so closely bound up with that of sovereignty that one can no more understand the expression *de jure* sovereignty than the expression *de facto* sovereignty, for in sovereignty, which is the supreme power, *de facto* and *de jure* coincide.[64]

In this jurisprudential vision, international law originates upon a basis of states, sovereign in both fact and law, into whose origins in real and ideological turmoil one may not inquire. Disrupting the indissolubly legal and factual legitimacy of this basis would, in this view, result in the disruption of law itself. In the alternative view propounded by the Jurists, the disjunction of fact and law, the period of transition from one to the other during the crisis of sovereignty, is the very basis upon which a new international law can flourish.

Thus, rather than merely deciding a jurisdictional question, the *Aaland Islands* opinion recounts the birth of an alternative international law, an international law that is, in turn, competent to discuss the birth of states. With the rupture of the complementarity of law and fact, the foundations of international law become a matter for discussion. Law may now inquire into the processes by which groups come to assert their collective will, by which they begin to acquire the indicia of international "determination," by which they obtain "access" to the international stage.

---

[63] *Preliminary Observations by the Finnish Minister on the Report of the Committee of Jurists*, 2 LEAGUE OF NATIONS O.J. 66, 67 (1921).

[64] *Supplementary Statements Made to the Council of the League by the Finnish Minister*, 2 LEAGUE OF NATIONS O.J. 75, 76 (1921), *citing* 1 RIVIER, PRINCIPLES OF INTERNATIONAL LAW 55 (1896).

The arrogation of power by this extraordinary international law appears to represent a victory, however temporary, over the principle of sovereignty. Indeed, it would be tempting to borrow an image from corporate law to describe this victory: international law, in deciding questions of self-determination, "pierces the veil" of the state system to reach the underlying facts. Such an assertion of law's power would be appropriate in those stormy times when the state system goes into disarray, no longer able to provide the real and conceptual guidance demanded of it.

Such a description, however, would miss the distinctiveness of the Jurists' conception. In deciding questions of self-determination, law does not confront "facts," but rather, "transitions" between facts and law. In moving beyond sovereignty to the underlying equities, law is confronted with the striving of those concerned for sovereign power over their destinies. Those seeking self-determination wish to delegitimize the authority of existing sovereigns and to augment the authority of law *in order to* achieve sovereign status.

The complementarity of fact and law, in which one may justifiably forget the conflict between the positive and the transcendental, sovereign and legal authority, is replaced by a complex articulation of that conflict. The text of self-determination is woven through this articulation of contradictory jurisprudential urges. One discusses self-determination as long as the appeals from sovereignty to law and back again can shape a productive rhetorical form. The final shape of a particular form of the doctrine, the "holding" of a given text or period, is determined by the particular manner in which the articulation is performed.

3. "Sovereignty in Abeyance": McNair's *South West Africa* Opinion

"It may seem a far cry from the Aaland Islands to South West Africa."[65] Nevertheless, legal writings on self-determination are marked by a certain set of problems which reappear in widely varying contexts. Such writings tend to describe the extraordinary quality of self-determination and its ramifications for international law in a series of homologous, though not identical, images.

In his separate opinion in the 1950 *South West Africa* Case, Judge McNair discussed at length the system of mandates established by the League of Nations, a system that seems to differ considerably from the crisis situation that evoked the purportedly "transitory" jurisdiction in the *Aaland Islands* opinion.[66] McNair's opinion focuses on the question of the status of South Africa's League Mandate over Namibia after the dissolution of the League. McNair concludes that the Mandatory system created an

---

[65]*South West Africa* Case, 1950 I.C.J. 128, 154 (sep. op. McNair).

[66]*Id.* at 153-55.

"objective" international legal regulation governing the territories concerned. Such regulation creates "real" rights not limited to the contracting states. Such rights "acquire an objective existence which is more resistant than are personal rights to the dislocating effects of international events."[67] The Mandate created a status *in rem* for the territory.[68] The legal obligations of a Mandatory Power, therefore, survive the dissolution of the League.

In McNair's description, then, the Mandatory system seems to be the opposite of the international jurisdiction over self-determination embodied in the section of the *Aaland Islands* opinion discussed above. For McNair, the Mandates create an international jurisdiction designed to be "resistant" to change in the face of international "dislocations"; the *Aaland Islands* Jurists viewed precisely such "dislocations" as calling forth the novel form of jurisdiction that empowers law to act on claims of self-determination.[69]

Nevertheless, when discussing the nature of the relationship between the Mandatory Power and the territory over which it exercises its powers, McNair uses imagery that embodies a conception of the role of international law in the context of self-determination analogous to that of the Jurists. McNair declared that the usual concept of sovereignty was inappropriate to such a situation:

> The Mandates System (and the "corresponding principles" of the [U.N.] Trusteeship System) is a new institution — a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other — a new species of international government, which does not fit into the old conception of sovereignty and is alien to it. The doctrine of sovereignty has no application to this new system. *Sovereignty over a Mandated Territory is in abeyance*; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, *sovereignty will revive and vest in the new State.*[70]

McNair views this "abeyance" of sovereignty as analogous, though not identical, to the common law institution of the trust, "whereby the property

---

[67]*Id.* at 157.

[68]*Id.* at 156-57.

[69]It should be noted that the contrast I describe between McNair's opinion and that of the *Aaland Islands* Jurists applies only to the first part of the *Aaland Islands* decision, the section concerned with self-determination. McNair's concept of "objective" international law actually derives from the second part of the *Aaland Islands* opinion, *viz.*, that portion concerned with the 1856 Convention on the demilitarization of the islands. *See* Aaland Islands Report, *supra* note 49, at 14-19.

[70]1950 I.C.J. at 150 (sep. op. McNair) (emphasis added).

(and sometimes the persons) of those who are not *sui juris* . . . can be entrusted to some responsible person as a trustee or *tuteur* or *curateur*."[71] Among the principles central to such an institution that McNair found pertinent to the Mandate system are that the trustee "is not in the position of the normal complete owner"[72] and that he must "carry out . . . the mission confided to him for the benefit of some other person."[73] In the case of the Mandates, the trust was to be managed for the benefit of the "dependent peoples"[74] occupying the territory — specifically, for their "material and moral well-being and the[ir] social progress."[75]

There are thus two images at work in McNair's opinion, images which are not wholly compatible. First, there is the image of the common law trust for those who, "such as a minor or a lunatic,"[76] cannot manage their own affairs. McNair acknowledges that the analogy with private common law cannot wholly satisfy in the international context — presumably, because the character of sovereignty in its relation to international law does not correspond exactly to the character of the individual in relation to domestic law. He thus finds it necessary to do away with sovereignty in relation to the Mandated territory. In the absence of sovereignty, the focus shifts to the "rights and duties of the Mandatory" as defined in the "international agreements creating the system and the rules of law they attract."[77] International law thus becomes directly empowered to administer the territory and dispense "rights and duties" without regard for sovereignty; the Mandate System, as a "new institution," has apparently created a new international law which can do without sovereignty as the basis for the legal representation of people and territory within it.

Such an interpretation receives a correction with the idea of the "abeyance" of sovereignty. International law receives its new status not from the abolition of sovereignty but only from its latency. Between death and birth, sovereignty may "revive and vest" in the near future as has "already happened" in the new postwar period of decolonization. When the "inhabitants of the Territory obtain recognition"[78] — and we are reminded of the mysteries of such "obtaining" — the trust will collapse and with it this "new" international law which dispensed with sovereignty.

As in the *Aaland Islands* opinion, the paradox of self-determination — the assertion of a right to become a right-holder — finds its legal cor-

---

[71] *Id.* at 149.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 148.
[75] *Id.* at 155.
[76] *Id.* at 149.
[77] *Id.* at 150.
[78] *Id.*

relate in an exceptional "new" international competence. The establishment of such a competence rests on a lapse of sovereignty and a consequent arrogation of legal power to dispense "rights and duties" over people and territory. This extraordinary jurisdiction, however, is shaped and delimited by the "sacred trust"[79] — the goal of the eventual "revival" of sovereignty in the formerly "dependent" peoples.[80] This extraordinary international legal competence, then, is "new" not merely in a one-time historical sense; rather, it is always a freshly occurring, novel competence arising in the hiatus of legal normality.

C. Related Doctrines: State Succession and "Premature Recognition"

The perspective from which I have discussed the role of self-determination in international law raises the question of the relationship between self-determination and other, more traditional international legal doctrines. I have stressed the transitional function of self-determination: both in a conceptual sense, bridging the law/sovereignty dilemma, and in a temporal sense, providing the conditions and limits for international jurisdiction in times of crises of sovereignty. Yet, transitions in international life occur constantly: the birth, death and transformation of states and governments have been features of modern history for a long time. In order to understand the distinctiveness of self-determination, we must understand its relationship to other legal doctrines developed to cope with the transformations of the shape of international society.

For purposes of comparison, the most important of these doctrines concern the succession of states and the recognition of the statehood of insurgents by third countries. "State succession" means the "replacement of one State by another in the responsibility for the international relations of territory."[81] There are two issues involved in state succession. The first, sometimes called "succession in fact," concerns the question of whether the old state has remained in existence or has been replaced by a new state; the second, sometimes called "succession in law," concerns the legal effects of succession, i.e., the determination of which of the legal respon-

---

[79]*Id.* at 147-49 (discussing the meaning of the "scared trust" in Article 22 of the League Covenant).

[80]McNair's concept of the "abeyance of sovereignty" makes the eventual reacquisition of sovereignty a somewhat contingent matter. By 1971, the I.C.J. was certain that "the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned." *Namibia*, 1971 I.C.J. 16, 31.

[81]Vienna Convention on Succession of States in Respect of Treaties, U.N. Doc. A/Conf. 80/31 (1978), Art. 2 (b). *See generally* I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 76-79 (1966); K. MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW (1954).

sibilities of the old state remain binding on the successor state.[82] These two issues are interrelated, at least in part: the stand one will take on what responsibilities should devolve on a new state cannot be separated from theories about the essence of statehood and the kinds of changes required for a state to be considered as a new entity.[83]

The relevant comparison with self-determination concerns the way in which international law treats questions of "succession in fact," i.e., those concerning the kind of transformations required for international law to decide that a succession of states has occurred. Although there has been much debate on the subject, the requirements are quite strict by all standards. Thus, according to one treatise, a "state remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory."[84] Another treatise declares that

> [e]ven when internal change takes the form of *temporary dissolution, so that the state, either from social anarchy or local disruption, is momentarily unable to fulfill its international duties*, personal identity remains unaffected; it is only lost when the permanent dissolution of the state is proved by the erection of fresh states, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable.[85]

Among the changes that affect the identity of a state and induce succession are a real union between two or more states, a loss of independence, the merger of one state into another, and the annexation and fragmentation of states.[86]

The important point here is not so much the detail of these doctrines as the perspective from which international law considers these questions. In the *Aaland Islands* opinion, temporary anarchy and dislocation provided the space for legal creativity; in the passage just cited, it mandates legal forbearance. In succession doctrine, law is concerned with identifying the sovereign to whom legal responsibility is to be attributed. The determination of whether the old sovereign has survived or whether a new sov-

---

[82]O. UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 107-9 (1972).

[83]D.P. O'Connell associates the view that successor states inherit all of its predecessor's obligations with the Hegelian view of the state and the opposite view with the Austinian view. He calls for a pragmatic approach which would lead to an intermediate case-by-case evaluation of the legal effects of succession. *See* O'Connell, *Independence and Problems of State Succession*, in THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY (W.V. O'Brien ed. 1965).

[84]L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 153 (H. Lauterpacht ed. 8th ed. 1955) emphasis added.

[85]W.E. HALL, *supra* note 4, at 21 (emphasis added).

[86]L. OPPENHEIM, *supra* note 84, at 154-6.

ereign has been born is oriented toward a determination of this attribution of legal obligations and the scope of these obligations.

By contrast, the concept of self-determination does not seek to situate itself on one side or the other of the crisis of sovereignty, but, rather, in the midst of that crisis. The question is whether other legal principles than those which seek to attribute obligations to responsible sovereigns have come into play. The discourse of self-determination thrives in the duration of the crisis rather than with a *post hoc* evaluation of whether, and with what result, the crisis has come to a decisive conclusion.

We can bring out this feature of self-determination more clearly through reference to certain aspects of debates concerning the recognition of new states by third countries. In the traditional view, the decision to grant or withhold such recognition lies outside the sphere of law. States, retaining complete discretion, could base their decision solely on policy considerations — regardless of the objective characteristics of the entity in question. In this traditional view, prior to recognition, such a community "possesses neither the rights nor the obligations which international law associates with full statehood."[87]

Legal discussions of recognition for those adhering to this traditional view concern not the decision to recognize, which lies outside the "orbit of law," but, rather, the legal consequences entailed by such decisions. Such discussions focus primarily on the debate between the "declaratory" and "constitutive" theories: whether recognition should be considered merely "declaratory" of a state which already has a legal existence on the basis of its factual nature or whether recognition by other states is actually "constitutive" of the new state's existence.[88]

The view that no duty of recognition exists appears to be consistent with the views of Fitzmaurice and others in relation to self-determination. For such views, states owe no more duty to entities that seek full legal personality prior to their attaining such status under law than they do to "peoples" who have not yet been "determined internationally." With the absence of a duty of recognition, the achievement of the indicia of statehood lies beyond the competence of legal discourse; law must remain ignorant of processes whose legal consequences it is nonetheless required to assess.

These theoretical consequences hold with greater consistency for those adhering to a strict constitutive view of recognition than for those supporting the declaratory view. Nonetheless, as Lauterpacht cogently argues, the true conceptual crux rests not on the question of whether recognition

---

[87]H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 2 (1947). In the discussion that follows, I discuss only the recognition of States and not the separate issues of the recognition of governments and belligerents.

[88]*Id.* at 1-2. *See also* I. BROWNLIE, *supra* note 81, at 82-4.

is declaratory or constitutive but on that concerning the obligatory character of recognition.[89] As long as recognition remains discretionary, it continues, for both the declaratory and the constitutive positions, to lie outside the orbit of law, and remains vested with a political, rather than a legal, character.[90]

Lauterpacht argues for a duty to recognize once an entity has reached the objective characteristics of statehood. In support of this view, Lauterpacht finds it necessary to confront the following question, which should be familiar from my discussion of Fitzmaurice: "[I]s it permissible to assert the existence of a duty in relation to an entity which is incapable of possessing and asserting rights?"[91] Fitzmaurice found the analogous dilemma jurisprudentially fatal in the context of self-determination; in the context of recognition, Lauterpacht offers two answers which he views as conclusive.

First, Lauterpacht argues, states could be said to owe such a duty not to the entity seeking recognition but to the international community as a whole.[92] A duty to recognize means that states must evaluate the situation in accordance with law rather than mere state interest; in carrying out this duty, states are thus acting in "their capacity as organs of international law."[93] Secondly, Lauterpacht suggests that an entity not yet recognized in law can nevertheless possess a right, although that right is "unenforceable and, therefore, imperfect."[94]

Lauterpacht's discussion of "premature recognition" illuminates his conception of states acting as "organs of international law." The rule against premature recognition poses issues quite close to those associated with self-determination and often arises in situations involving claims of self-determination.[95] The doctrine concerns the permissibility of the recognition by third countries of the statehood of entities or groups struggling for independence from a parent state. During such a conflict states are said to have a "duty not to recognize" the statehood of the insurgents as long as the outcome is in doubt.[96] The duty not to recognize continues unless and until a "new state has in fact come into being" as a result of

---

[89]H. LAUTERPACHT, *supra* note 87, at 76.

[90]*Id.*

[91]*Id.* at 74.

[92]*Id.*

[93]*Id.* at 6.

[94]*Id.* at 74.

[95]*See generally* J.A. SALMON, LA RECONNAISSANCE D'ETAT 36-45 (1971); R.H. SHARP, NONRECOGNITION AS A LEGAL OBLIGATION: 1775-1934 (1934); W.E. HALL, *supra* note 4, at 105.

[96]*See, e.g.*, P.C. JESSUP, A MODERN LAW OF NATIONS 52 (1948); W.E. HALL, *supra* note 4, at 105.

the insurgency.[97] This situation does not arise unless the "conflict with the parent State has been substantially won."[98] Premature recognition by another state constitutes not a neutral legal act as in other acts of recognition but as a bellicose "participation in the conflict."[99] The parent state will rightly consider such recognition to be a hostile act in relation to itself.

Lauterpacht strongly supports the rule against premature recognition and, indeed, appears to view it as a necessary complement to his theory. For Lauterpacht, premature recognition is an "act of intervention and an international delinquency"[100] because it "constitutes an abuse of the power of recognition."[101] The rule governing premature recognition gives "expression to the objective requirements which make the grant of recognition legally permissible," conditions which are identical, in his view, to those which make such a grant obligatory.[102]

The above discussion shows that the issues implicated in self-determination as a matter for legal discourse carry us well beyond doctrines about recognition. In the traditional view, the decision to recognize and thus grant legal status to a previously "undetermined" entity simply lies outside law. Yet, even when the line between law and politics is extended in the manner of Lauterpacht to the decision to recognize, recognition doctrine stops well before the domain claimed by self-determination.

For Lauterpacht, just as for the traditional view, states, acting as "organs of international law," must attend the resolution of struggles for power before they may grant any full recognition to the new entity. Premature recognition intervenes in an unclear situation, a situation whose outcome cannot be predicted. One cannot, from the perspective of recognition doctrine, assert the intervention of law in such a situation without such an intervention being considered an act of violence. A properly legal recognition of an insurgency, rather than a political assertion of power, depends on an objective evaluation of the chances for the permanent success of the insurrection.[103]

---

[97]C.C. HYDE, INTERNATIONAL LAW 152-53 (2d ed. 1945).

[98]*Id.* at 152-53.

[99]*Id.*

[100]H. LAUTERPACHT, *supra* note 87 at 8.

[101]*Id.* at 9.

[102]*Id.* at 11.

[103]W.E. HALL, *supra* note 4, at 105-7. In a related context, the *Aaland Islands* Jurists expressed the distinction between recognition as a full legal act and recognition as intervention in an unclear situation in terms of their characteristic contrast between "normal" and extraordinary times: "The experience of the last war shows that the same value cannot be attached to the recognition of new States in war time. . . as in normal times; further, neither were such recognitions given with the same object as in normal times." Aaland Islands Report, *supra* note 49, at 8.

Yet it is precisely such an intervention into an unsettled situation that is performed by self-determination. Unlike both succession and recognition doctrine, self-determination is not motivated by a desire to locate and delimit the holder of sovereign responsibility. Rather, it derives its existence from the gap in sovereignty and the opportunities that can exist only in that gap. With the doctrine of self-determination, law detaches itself from its role as an impartial arbiter between competing sovereigns.

This difference between the nature of self-determination and recognition means that the positions of Lauterpacht and Fitzmaurice are not mutually exclusive even though they give opposite answers to strikingly similar dilemmas in their respective contexts. One may agree with Lauterpacht that states are under an obligation to recognize entities that have attained the indicia of statehood *and* with Fitzmaurice that a right to self-determination is juridical nonsense. Those seeking self-determination lack some of the indicia of statehood — often, for example, that of an effective government. They seek recognition of a right to attain those indicia. This right involves a qualitative leap from Lauterpacht's right to recognition.

In the language of recognition doctrine, law in the form of self-determination would have become a "party to the conflict." From a passive role as judge, it would become an interventionist actor. It would exercise not law, but power. In the terms in which I have described it, however, this alternative, between impartial judge and interventionist participant, is inadequate to capture the role of the law in self-determination. Self-determination serves as a transition — neither crowning sovereignty as king nor replacing it with an omnipotent international law on the model of domestic law. Rather, it serves as a suspension of normal law, devoting itself to a dynamic conflict between positive and transcendental conceptions of legitimacy.

III. Law And The "Self" of Self-Determination

The problem which I posed at the beginning of this essay concerned the possibility of international law's ability to recognize the rights of those admittedly beyond its ordinary purview. In the section on international competence, I tried to show how commentators and jurists justify the right of international law to decide questions of self-determination by reference to a suspension of the normal foundations of international law. The opinions of the Jurists in the *Aaland Islands* case and of McNair in *South West Africa* provided eloquent images for the way in which certain extraordinary situations suspend the established complementarity of law and sovereignty while remaining teleologically directed towards its reconstitution. These images suggest a novel conception of the stance of international law in its adjudication of questions of self-determination. In the section on the relatively more conventional doctrines that deal with issues similar to those

implicated in self-determination, I attempted to highlight the distinctiveness of the stance found in those opinions.

If "normal" international law treats mainly of sovereigns, the extraordinary international law of *self*-determination is concerned with nonstate "selves." I turn, therefore, to examine the nature of such "selves." As in my discussion of legal competence, I will begin with a set of relatively abstract debates concerning the"self" and then proceed to an analysis of the way the opposing elements structuring these debates are woven together to produce textured forms of legal argument.

A. Historical and Conceptual Controversies

The "self" that merits the right to determine its own future has received many different definitions. I will divide these controversies into two groups, those concerned with historical changes in the definition of the "self" and those concerned with problems in the underlying conceptual framework. The terms of the historical debate do not directly correspond to those on the conceptual level; the terms of each discussion, however, are often used to explain or justify particular positions in the other. I will first discuss the way in which commentators have understood the historical changes in the bearer of the right to self-determination, changes which are often seen in conjunction with views about the evolution of international law. I will then turn to the conceptual debate, structured by a dichotomy between subjective and objective views of national selfhood. Finally, I will show the way in which two significant I.C.J. opinions employ historical and conceptual arguments in a complex justification of a particular interpretation of the "self" of self-determination.

1. Secession, Decolonization and History

Writers employ various narrative images to describe the history of self-determination, some portraying a smooth development, others describing various forms of rupture. These historical accounts focus on changing definitions of the "self" in terms of the relationship between the group seeking self-determination and the state in actual sovereign control. Specifically, these accounts discuss the issue of decolonization versus secession: does a valid assertion of "selfhood" arise exclusively from domination by geographically distant powers or may groups occupying territory contiguous to the sovereign state also assert the right on the basis of other identifying features? Commentators have drawn conflicting lessons from international legal history on this issue.

Those emphasizing continuity in the history of self-determination often link this history to a vision of international law as progressively unfolding from early modern times through the critical moment in which self-de-

termination became its cornerstone. The U.N. study[104] discussed earlier exemplifies this approach. The study traces the gradual unfolding of the principle of self-determination from its origins in the French Revolution through its consolidation in a legal right in the post-World War II period.[105]

For the study, this progressive development of international law into a system based on self-determination culminates in international law's ability to distinguish between authentic and specious claims of self-determination. The great divide between authentic and specious claims lies between self-determination, identified primarily with decolonization, and "secession." The same 1960 U.N. resolution which declared unequivocally that "all peoples have the right to self-determination," also states: "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the United Nations."[106]

The resolution, thus, unequivocally commands adherence to the two apparently incompatible goals of self-determination and national unity. The U.N. study resolves this tension through an appeal to the historical progress of international legal consciousness: "the international community is mature enough now to be able to distinguish between genuine self-determination and self-determination used to disguise an act of secession."[107] The U.N. study thus combines a description of the current state of the accepted limits of self-determination — as applying primarily to decolonization — with a teleological justification of this situation — a normative conception of the history of international law.

Shorn of this teleology, the study's account is generally accepted as a history of self-determination in the twentieth century. Thus, it is possible, with one commentator, to divide the history of self-determination into two periods according to the differential acceptance of the twin ideas of secession and decolonization. In the first period, immediately following World War I, self-determination applied to "ethnic communities, nations or nationalities primarily defined by language or culture," who "were authorized to disrupt the existing states."[108] Self-determination was brought into play as a guiding principle for administering the breakup of the Ottoman and Austro-Hungarian empires, leaving the overseas possessions of Europe generally untouched. In the second period, the decades following World War II, self-determination was applied so as to allow "the inhabitants of former European colonies, however haphazardly assembled by the colonial

---

[104]*See supra* notes 17-20 and accompanying text.

[105]A. CRISTESCU, *supra* note 7, at 17-18.

[106]G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4684 (1960).

[107]A. CRISTESCU, *supra* note 7, at 26.

[108]EMERSON, *supra* note 44, at 463.

Power, [to] take over pre-existing political units as independent states."[109] The first period was concerned with the rights of minorities to "secession"; by contrast, the second period rigorously denied the legitimacy of "secession."[110]

One manner of putting into question the teleological view would be to expand the historical span under consideration — both by moving back in time and by anticipating possible future developments of the doctrine. In this way, one commentator distinguishes four waves of accession to independence, in which secession and decolonization alternate:

1) the decolonization of Latin America during the early nineteenth century, a phenomenon inspired by the French and American revolutions;

2) the gaining of independence "par détachment ou par démembrement" of various European nations, primarily during the mid-nineteenth century and post-World War I eras — a phenomenon governed by the principle of nationality;

3) the decolonization of Africa and Asia between 1930 and the early 1960's;

4) the struggles for independence "par détachement ou par sécession" in various parts of the world, primarily from the 1960's to the present (Katanga, Biafra, Singapore, Bangledesh, etc.).[111]

According to this commentator, the current period would be primarily one of secession, a phenomenon as yet unacknowledged in legal doctrine. From this perspective, the U.N. study's historical justification of the exclusion of secession from its definition of self-determination cannot be sustained.

Above, I related the U.N. study's teleological justification of its views on secession to its conception of the history of international law; similarly, a view of the discontinuity in the history of self-determination may be associated with an analogous conception of international legal history. The idea of a discontinuous history of international law has been sharply stressed by those who have been concerned with self-determination as a disruption of the European nature of international law. There are at least two versions of this disruption. The first relates the incorporation of self-determination into international law to the story of the wresting of international law away

---

[109]*Id.*

[110]The distinction between secession and self-determination has been criticized from various perspectives. *See, e.g.*, Mojekwu, *Self-Determination: The African Perspective* in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 221, 226-36 (Y. Alexander & R.A. Friedlander, ed. 1980); L.C. BUCHHEIT, SECCESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); J.F. GUILHAUDIS, LE DROIT DES PEUPLES À DISPOSER D'EUX-MÊMES 33-35 (1976).

[111]J. BROSSARD, L'ACCESSION À LA SOUVERAINETÉ ET LE CAS DU QUÉBEC 39-42, 74-77 (1976).

from domination by the West. Thus, in justifying the invasion of Portuguese Goa by India, the Indian delegate to the United Nations characterized it as the mere return of territory to its rightful owner.[112] The Portuguese occupation, he argued, had been illegal and, therefore, the territory had never legally passed out of Indian sovereignty. The Indian delegate grounded his arguments in a certain conception of international law, a conception that gave wide latitude to the exercise of self-determination. He rejected all contrary legal arguments on the grounds that they were based on an illegitimate, because European, international law:

> If any narrow minded legalistic considerations — considerations arising from international law as written by European law writers — should arise, these writers were, after all, brought up in the atmosphere of colonialism. I pay all respect to Grotius, who is supposed to be the father of international law and we accept many tenets of international law. But the tenet . . . which is quoted in support of colonial powers having sovereign rights over territories which they won by conquest in Asia and Africa is no longer acceptable. It is the European concept and it must die.[113]

In his opinion in the 1971 *Namibia* case, the Vice President of the I.C.J., Fouad Ammoun, offered a somewhat different version of historical discontinuity. Judge Ammoun views legal history not as the story of a succession between an older, European system and a newer, Third World system, but as part of an ongoing struggle between European and Non-European concepts, a struggle with ancient roots and diverse historical phases. Judge Ammoun extensively recounts the historical origin of the concept of human equality, the concept he views as underlying the doctrine of self-determination.[114] This concept, he writes, originated with the philosopher Zeno who was not European because he came from Sidon. Ammoun further argues that the Greeks, including Plato and Aristotle, were opposed to human equality. The idea of equality was transmitted to the Age of Reason through the influence of Stoicism on Papinius and Ulpian, "the greatest of the Roman juriconsults, who were of Phoenician origin."[115] In this way, the institution of the legal doctrine of self-determination becomes the symbol of a modern triumph of the non-European position in this perennial conceptual and political contest.

Nevertheless, despite Ammoun's conception of competing European and Third World principles, he constructs his argument that self-determination has become part of international law in a traditional manner:

---

[112]For this debate, see generally 16 U.N. SCOR (987th mtg.), U.N. Doc. S/PV 987 (1961).

[113]*Id.* at 11.

[114]*Namibia* , 1971 I.C.J. 16, 77-78.

[115]*Id.* at 78.

cataloging its increasing recognition in U.N. documents, interstate treaties and state practice.[116] One may question the consistency of these two methods of analysis: if history is marked by struggle between incompatible principles, and if law must be seen in the context of those struggles, how can we retain the idea of the gradual evolution of a principle into a legal right? The idea of the incremental evolution of a legal right would seem to require a view of a continuous legal history. Ammoun's historical vision thus appears to be hopelessly contradictory.

This differential treatment of history, however, in which certain periods or phenomena are treated as continuous and others as discontinuous, is characteristic of the discourse of self-determination. As I argue throughout this essay, rather than forming a mere logical inconsistency, this feature must be seen as the effect of an historical vision in which periods of disruption alternate with those of restoration; the discourse of self-determination can only be understood in the context of a form of argument in which both elements are deployed to yield particular positions in specific cases. It is the peculiar quality of the legal discourse of self-determination to combine unconventional jurisprudential ideas, such as a radically discontinuous legal history, with more traditional conceptions in order to give prudent legal form to normally extralegal notions. I explore this characteristic of the discourse further in my discussions of Judge Ammoun's opinions in Part III.

The theme of self determination as a disruption of the European framework of international law has moved us somewhat away from the question of the particular forms of self-determination (secession, decolonization, etc.). Nevertheless, these diverse readings of history — continuity and rupture, succession and struggle — have become important for the construction of arguments about self-determination. Competing positions on the continuous or discontinuous nature of that history may be viewed as structuring the arguments over the "Belgian Thesis" in the early 1950's — arguments which opposed a view of self-determination as decolonization against a view that would extend it to indigenous peoples within metropolitan states.[117] Moreover, these diverse historical images

---

[116]*Id.* at 63-67.

[117]The debates over the "Belgian Thesis" concerned the interpretation of Chapter XI of the U.N. Charter, which provided for certain reporting requirements for states administering "non-self-governing territories." U.N. CHARTER, art. 73(e). Belgium argued that the term "non-self-governing territory" should apply to those regions of certain states, particularly those in Latin America, inhabited by indigenous peoples culturally, ethnically, and economically distinct from the ruling majorities in those countries. Latin American and other Third World states responded that the term "non-self-governing territory" applied only to traditional colonies governed by geographically distant powers. *See generally* Kunz, *Chapter XI of the*

have become an important method for structuring arguments about the "self" in which both terms of a seemingly irreconcilable conceptual dichotomy are productively deployed in particular cases. I now turn to that dichotomy.

2. Conceptions of the "Self"

The manner in which legal writers justify a particular form of self-determination, such as decolonization, depends on their manner of deploying the underlying dichotomy about the "self" of self-determination. Two main conceptions of "peoplehood" structure the debate about the "self": one focusing on relatively "subjective" factors in determining the identity of the "self", the other on relatively "objective" factors.[118] The first conception views the "self" as constituted primarily by the aspirations and efforts of a people to achieve self-determination, what one writer calls "a common subjective attachment."[119] This view is sometimes called the "political" concept of nationality: "The definition of the nation, as the

---

U.N. Charter in Action, 48 AM. J. INT'L L. 103 (1954).

Conceptually, this debate could be seen as rooted in the question of whether self-determination and related doctrines, such as those contained in Chapter XI, are universal norms of international law like all others, emerging from the traditional bases of consent and custom and neutral in application — or if, on the contrary, self-determination must be seen essentially in terms of the rupture introduced by particular historical events. Thus, the Belgian delegate argued that the obligations laid down in Article 73 were of a general nature and apply to all member states which are responsible for the progress of backward indigenous peoples living within their territories. 7 U.N. GAOR, C.4 (253rd mtg.) para. 17, U.N. Doc. A/C.4/SR.253 (1952). 7 U.N. GAOR C.4 (402nd mtg.) para. 46, U.N. Doc. A/C.4/SR.402 (1952). The Ecuadorean delegate attacked this position by asserting that "it would convert the whole world into a vast colonial system." 7 U.N. GAOR C.4 (257th mtg.) para. 5, U.N. Doc. A/C.4/SR.257 (1952). These positions could be seen not so much as contradictory as incommensurable — opposing a universal, continuous conception of self-determination applicable in all times and places to a conception stressing the emergence of the right in the context of a particular historical disruption.

To be sure, the holders of each position also attacked the other on its own terms. Thus, the Belgian delegate defended his thesis as the true anti-colonialist position — asserting that rule by Latin American governments over indigenous peoples was a direct continuation of European colonialism. 9 U.N. GAOR C.4 (419th mtg.) para. 25, U.N. Doc. A/C/SR.419 (1954). Similarly, the Guatemalan delegate challenged the Belgians' universalist pretentions; the Belgians' supposed attempt to extend the rights of non-self-governing peoples, he claimed, were simply "intended to justify colonialism and not to hasten its disappearance." 7 U.N. GAOR C.4 (255th mtg.) para. 32, U.N. Doc. A/C.4/SR.255 (1952).

[118] *See, e.g.*, W. OFUATEY-KODJOE, *supra* note 14, at 36.

[119] *Id.* at 78.

term is used in the theory of self-determination, is essentially political. The nation is a community that is, or wishes to be, a state."[120]

The opposite conception focuses on certain objective characteristics of a group of people. These characteristics may include a common territory, ethnicity, language or culture. One commentator has traced the origin of a focus on this last objective factor, that of culture, to Central Europe, where the "idea of the cultural nation . . . acquired priority over the political conception of the nation," leading to a view of nationality as an "objective rather than subjective fact."[121] The "political" conception, in this view, belongs to Western Europe.

Some writers relate the origin of the two conceptions to complexities of nineteenth century European intellectual and political history. In this way, the "subjective" conception may be traced to the democratic ideals of 1789 and the influence of Rousseau; the "objective" conception would stem from Romantcism and be more associated with the events of 1848.[122] According to Cobban, the heterogeneity of the two conceptions remained largely ignored during the nineteenth century; what we now might call struggles for self-determination were formed by their historically fortuitous synthesis in the ideology of democratic nationalism. The twentieth century, for Cobban, has seen the rupture of this synthesis: "[W]e are bound to conclude that the association between nationalism and democracy, and, therefore, the theory of self-determination itself, may have been the result, not of their innate interdependence, but of historical accident."[123]

Indeed, an exclusive focus on either the subjective or objective conception may be associated with opposite forms of self-determination and the corresponding roles for international law. An exclusively objective focus, for example, could do away with any form of consultation with the actual population that forms the "people" in question. All members of a "people" — defined by some given criterion, such as language or ethnicity — would deserve to inhabit a state governed by fellow members of their

---

[120]A. COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION 108 (1969).

[121]*Id.* at 115.

[122]*See generally* P. VERGNAUD, L'IDÉE DE LA NATIONALITÉ ET DE LA LIBRE DISPOSITION DES PEUPLES DANS SES RAPPORTS AVEC L'IDÉE DE L'ETAT (1955); 1 E.H. CARR, THE BOLSHEVIK REVOLUTION 1917-1923, 410-415 (1951).

[123]COBBAN, *supra* note 13, at 7. The various ways of linking the subjective and objective components in the theory of self-determination with the democratic and nationalistic trends in nineteenth century Europe must be understood in the context of general theories of modern nationalism. *See generally*, T.V. SATHYAMURTHY, NATIONALISM IN THE CONTEMPORARY WORLD (1983); A.D. SMITH, THEORIES OF NATIONALISM (1983); L.L. SNYDER, GLOBAL MININATIONALISMS: AUTONOMY OR INDEPENDENCE (1982); A.D. SMITH, NATIONALISM IN THE TWENTIETH CENTURY (1979); R. REDSLOB, LE PRINCIPE DES NATIONALITÉS (1931).

group. The consequences of such a conception as applied by the Nazis to neighboring territories occupied by ethnic Germans need not be reviewed here.

Nevertheless, such reliance on an objective criterion would render international law's adjudicatory task much simpler. Legal inquiry could maintain the appearance of neutrality and objectivity through a mechanical focus on a specific index of "peoplehood." However, the term "self-*determination*," with its democratic overtones, would be harder to justify.

A purely subjective conception, on the other hand, seems to be associated with an extremely passive role for international law. Law would merely be required to assist in the struggles of any group of people for an altered political status. Such a perspective raises the specter of uncontrollable secession, confirming the worst fears of chaos invoked by the critics of self-determination. To be sure, international law would still be obligated to determine what counted as the expression of a people's desire for self-determination.

It should be noted that the "equality theory" I discussed above may be cast either in subjective or objective terms. If all subjugated peoples merit self-determination, then a legal inquiry could proceed in relatively objective fashion — assuming, of course, one arrived at a definition of subjugation. Alternatively, one could look at a people's struggle for self-determination as evidence of subjugation, thus making the inquiry a relatively subjective matter.

Some have suggested that the two tests for "peoplehood" should be combined: a "people" would have the right to self-determination if it is characterized by certain objective indicia *and* expresses its desire, by political or military means, to change its political status.[124] This solution appeals to the desire for a moderate, nonpartisan approach and appears to offer a reasonable way for limiting self-determination to a manageable group of cases.[125]

---

[124]J. F. GUILHAUDIS, *supra* note 110 at 36-42. Guilhaudis traces the origin of this synthesis of the two conceptions to the definition of a nation given by the nineteenth century Italian jurist and statesman Mancini: "une société naturelle d'hommes amenés par l'unite de territoire, d'origine, de coutume et de langues a une communauté de vie et de conscience sociale." *Id.* at 40-41. This definition would permit an impartial adjudication of the authenticity of separatist claims. *Id.* at 42. The case, however, would only be ripe for adjudication if the people had manifested its desire for independence through political struggle. *Id.*

Guilhaudis's views thus resemble those of Ofuatey-Kodjoe whose definition of the "beneficiary" of self-determination I cited at *supra* note 34. It should be noted that, like Ofuatey-Kodjoe, Guilhaudis requires a prior political struggle to enable a group to activate international legal competence over such claims.

[125]"La conception de Mancini permet done de faire le partage entre les vrais et les faux mouvement séparatistes. C'est ce qui explique, qu'a des nuances pres, les auteurs nonengagé's s'y soient ralliés." J.F. GUILHAUDIS, *supra* note 110, at 42.

Nevertheless, one may question the possibility of simply combining the two contradictory ideas. It would be difficult for an inquiry in a particular case to avoid giving dispositive power to one of the two conceptions — often, indeed, to the conception opposed to that obstensibly being implemented. For example, one may seek to poll the population in order to fulfill the subjective component of the test; in order to do so, however, one would have had previously to define the appropriate electoral unit. Presumably such a delimitation would rely on an objective analysis of the situation. This objective analysis could thus potentially predetermine the outcome of the subsequent expression of the people's will.[126]

Similarly, the objective component of the inquiry would depend on a prior conception of which of many possible national characteristics should be viewed as critical. Presumably, if the legal inquiry wished to avoid imposing ethnocentric prejudice in this inquiry, it would choose the dispositive characteristic on the basis of a phenomenological study of the culture concerned. The objective inquiry would ultimately depend on an investigation into the cultural elements privileged by the population in question. Thus, the objective analysis would be dependent upon the prior subjective consideration.[127]

For these and similar considerations, I would conclude that, either alone or in combination, the abstract conceptual positions are inadequate to provide a determinative answer to the meaning of the "self." Rather

---

[126]In the case of the British Cameroons, for example, the U.N. Trusteeship Council asked the Visiting Mission to determine the appropriate method of consultation with the wishes of the people. The Mission declared that the population in the northern and southern sections should be consulted separately. A. RIGO SUREDA, *supra* note 8, at 163-66. The Mission declared that the "distinction to be drawn between the northern and southern sections is a question of fact." *Id.* at 164. The decision to hold separate plebiscites in the two sections decisively influenced the outcomes. *Id.* at 166-67. *See also id.* at 151-63 (the case of British Togoland).

[127]*See, e.g.*, Mojekwu, *supra* note 110. Mojekwu argues against the uncritical retention of colonial frontiers for independent African states. Those frontiers, he claims, "cut across traditional boundaries and ethnic societies," thus violating the self-determination of peoples. *Id.* at 230. Mojekwu defines a people in objective terms as "a cultural nation." His definition, however, is not universal. Rather, the manner in which self-determination is to be applied in a particular context must defer to prevailing cultural views about the definition of nationhood. In Africa, he contends, the notion of "communal rights" dictates a conception of self-determination opposed to that stemming from Western conceptions of the individual and state sovereignty. *Id.* at 231-34. *Cf. Western Sahara*, 1975 I.C.J. 12, 125-26 (sep. op. Dillard) (relationship of people to government authority in religious societies must not be evaluated according to standards appropriate to secular western-oriented societies).

than looking to these positions for dispositive guidance, we must look to their productive combination in complex legal texts. Rather than seeking to combine them in a coherent test that may be mechanically applied, we must turn to the manner in which they structure the discourse of self-determination as a form of argument.

B. Self-Determination as Decolonization: Two Exemplary Cases

1. Introduction

In my discussion of the nature of legal competence over claims of self-determination, I explored the way in which the terms of an abstract dichotomy became the basis for a textured argument for an exceptional form of legal competence. Analysis of the discussions of the "self" has also led us to an apparently irresolvable set of contradictory conceptions. The best legal texts on the "self" do not seek a way out of this impasse on the level of logical abstraction. Rather, they draw on the opposed conceptions to articulate complex arguments in particular cases. The opposed conceptions are not simply added together but are set in a critical relationship to each other in the formation of the argument. I turn, therefore, to the most important recent I.C.J. cases on the principle of self-determination, the 1971 *Namibia* case and the 1975 *Western Sahara* case; I will particularly focus on the separate opinions of Judge Ammoun in those cases, opinions which most fully marshal the range of argumentative resources in modern discussions of the issue.

The dynamics of this critical form of argument are informed by the dual stance of international law in matters of self-determination that we discovered in the analysis of the nature of legal competence. On the one hand, law must be able to assert its own power of analysis, seeking equities that transcend sovereignty. On the other hand, law is accorded this extraordinary power to dispense with the principle of sovereignty so that it may assist in the emergence of a new sovereign, thereby restoring law to a more modest role.

This dual task may produce certain ambivalent expressions analogous to those — such as "determination" and "access" — found in the procedural context. For example, in Judge Ammoun's opinion in the 1971 *Namibia* case, self-determination is viewed as rooted in

> . . . man's inevitable, irreversible drive towards equality and freedom. . . . The texts, whether they be laws, constitutions, declarations, covenants or charters do but define it and mark its successive phases. They are a mere record of it.[128]

It would be hard to know whether such a formulation should be viewed as expressing a subjective or an objective approach. The difficulty is fo-

[128]1971 I.C.J. at 73.

cused in the use of the idea of "drive," an idea as ambiguous in this legal context — where it appears to carry both political and cultural, or even quasi-natural, implications — as it has been in psychoanalytic discourse — where the term carries meanings related both to the human psyche and to animal instinct.[129]

On the one hand, the passage may be interpreted as focusing on a people's aspirations towards equality, and would thus represent a "subjective," political, conception of self-determination. It is difficult to understand the role the passage gives to "texts" in such a process. The part played by "texts" in the political development of a nation can hardly be viewed as secondary. If a nation is defined by the strength and quality of its aspiration toward autonomy, surely the role of education, study and polemical writing would be central.

On the other hand, one could focus on the "inevitability" and "irreversibility" of the "drive" as representing a relatively objective conception. In this view, self-determination is merely the legal acknowledgement of a natural force, embedded in the objective characteristics of a particular people. "Texts" would, indeed, play a secondary role in such a naturalistic conception. Yet, deference to such a mere force of nature would be hard to justify.

The ambivalence focused in Ammoun's "drive" and similar formulations resembles that found in other ambiguous expressions in the discourse of self-determination, some of which I have discussed above. The recurrence of such expressions stems from the peculiar position of self-determination as a concept bridging traditional legal contradictions and providing an arena for their deployment. Each such expression plays a specific role in its own domain. In the substantive area, such an expression directs us to rethink the classical opposition between an activist and a deferential judicial attitude toward the "facts" in a case.

In contrast with the justification of legal competence over the matter, discussions of the *application* of the right of self-determination in a particular case often seem to adopt a deferential attitude to the political forces at work. Such an attitude would appear to call for law, its competence justified, to become a simple instrument for enabling legitimate claims of self-determination to acquire the stamp of international legal approval, claims whose legitimacy and limits derive from non-legal sources.

A consistent adoption of such a deferential attitude, however, is impossible in practice for reasons essential to the idea of a right to self-determination. In discussing such a claim, law is engaged in the task of

---

[129]For similar quasi-naturalistic formulations, compare the views of Redslob that a nation has a "tendance naturelle à se constituer en état" and of Grotius, who believed that secession was justified when founded on a "nécessité vitale." BROSSARD, *supra* note 111, at 74-75.

according rights to those who lack the indicia of right-holders. Law thus always acts in a creative capacity, aiding in the birth of a new sovereign power. A situation raising an issue of self-determination is inherently uncertain, containing elements pointing towards different possible conclusions.

2. The *Namibia* and *Western Sahara* Cases

In the 1971 *Namibia* case and the 1975 *Western Sahara* case, the I.C.J. explicitly recognized the principle of self-determination as part of international law. These cases raised, among other things, issues concerning the "self" similar to those I have discussed above. In his separate opinions filed in those cases, Judge Ammoun treated these issues at great length, a treatment highlighting the creative quality of international legal argument.

In the *Namibia* case, the Court was asked by the Security Council for an advisory opinion concerning South Africa's occupation of Namibia in the face of resolutions by the U.N. revoking its League of Nations Mandate and declaring illegal its continued occupation of the territory.[130] This question depended on a prior inquiry into the propriety of those U.N. actions, specifically on whether the U.N. had the power to revoke South Africa's League of Nations Mandate and whether it had grounds for revocation. The Court's discussion of self-determination came in its interpretation of the nature of the Mandate, particularly of the concept of the "sacred trust" bestowed upon the Mandatory Power.[131] The Court's interpretation of the "sacred trust" in light of the principle of self-determination contributed to its holding that the Mandate over Namibia was revocable in the face of a material breach.

The Court agreed with the U.N. that such a material breach had occurred, *inter alia*, because of South Africa's policy of *apartheid*.[132] The Court rejected South Africa's contention that it should consider South Africa's motives for applying that policy. The Court held that, regardless of motivation, *apartheid* constituted a violation of South Africa's duties

---

[130]S.C. Res. 284, 25 U.N. SCOR (1550th mtg.) at 16, U.N. Doc. S/9892 (1970). The General Assembly had declared, in G.A. Res. 2145, 21 U.N. GAOR Supp. (No. 16) at 2, U.N. Doc. A/6316 (1966), that South Africa had conducted its administration of Namibia in violation of its obligations under the Mandate, the U.N. Charter and the Universal Declaration of Human Rights; the General Assembly, accordingly, terminated the Mandate. The Security Council reaffirmed this position in a series of its own resolutions, culminating in S.C. Res. 276, 25 U.N. SCOR (1529th mtg.) at 17, U.N. Doc. S/9620 (1970), to which S.C. Res. 284 specifically refers.

[131]*Namibia*, (sep. op. Ammoun). 1971 I.C.J. at 31-32.

[132]*Id.* at 56-57

under the Mandate, as well as its obligations under the U.N. Charter to "observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction of race."[133]

Judge Ammoun chided the Court for not going far enough in drawing the implications for international law of the principle of self-determination.[134] In his treatment of the substantive issues in the case, Ammoun's opinion asserts that the denial of the Namibian people's right to self-determination was among the key breaches of the Mandate by South Africa, whereas the Court had only discussed the general principle of racial equality.[135] For Ammoun, therefore, this case provided the opportunity for applying the principle of self-determination to a concrete case involving a dispute about "selfhood," a matter untouched by the Court.

South Africa had, in effect, presented the rather perverse argument that *apartheid* was a means to self-determination for the various subgroups inhabiting Namibia. South Africa contended that

> . . . natives in the south-west of Africa had never formed a people, and that, because of the ethnic and sociological differences which divide them and set them against each other, only the policy of separate development based upon their tribal institutions could ensure their social well-being and progress.[136]

South Africa's argument was a selective valorization of possible objective indicia of peoplehood. It rejected the idea that the mere presence in a territorially unified area can serve to form groups into a unified "people," claiming that such co-presence is merely an historical accident and has no legal significance. Rather, South Africa claimed that objective "ethnic and sociological differences" are essential attributes of the groups concerned and should govern the determination of the pertinent "selves."[137] One might summarize South Africa's position as a view of history as accidental and of sociology as essential.

In response, Judge Ammoun made several historical observations. He rejected the idea that a plurality of ethnic groups precluded the existence of a unified people by pointing to the many nations who have been composed of heterogeneous groups.[138] He extensively reviewed the history of the ancient African state system.[139] This review showed that Africa was historically structured by political organization, rather than by the merely contingent co-presence of diverse ethnic groups on neighboring lands.

---

[133]*Id.* at 57.
[134]*Id.* at 67.
[135]*Id.* at 81.
[136]*Id.* at 85.
[137]*Id.*
[138]*Id.*
[139]*Id.* at 86-87.

Perhaps most intriguingly, he noted that the Namibian people "had, before the days of the colonial regime, taken part in the making of great empires."[140]

These arguments express a complex blend of subjective and objective conceptions. Ammoun's description of the political activity characterizing African history appears at first to represent a subjective conception, rooted in the aspirations and struggles of the people. This "subjective" political activity gives unity to nations composed of objectively diverse ethnic or cultural groups. Yet, Ammoun's narrative also meets the South African argument on its own, objective terms. Ammoun is attempting to show that an analysis based on the objective historical background suffices to refute any claim based on putative "sociological differences."

This combination of subjective and objective factors is made possible by a differential treatment of distinct historical periods. The political activity valorized by Ammoun occurred in the ancient past. Thus, although references to such activity are a hallmark of a subjective approach, the place of the political events in a semi-sacred past enables them to be considered as part of the objective characteristics of the Namibian people.

This special use of history is highlighted by Ammoun's positive reference to the "making of great empires" as a political act showing the dignity of the Namibian people's objective, historical existence.[141] This reference is somewhat paradoxical because of the strong *anti*-imperialist tenor of Ammoun's text — a text rooted in the denunciation of the "plague" of European colonialism.[142] Ammoun's historical perspective, thus, is a textured one. History, including historical conquest, is alternatively revered as sacred myth and denounced as profane violence.

For Ammoun, there is an ancient political history which may become enshrined in the objective qualities of a people; there is also a relatively modern history whose effects on the unity of nations are to be viewed as contingent disruptions of the essence of those nations. In the first period of history, empire-building has the dignity of the unified activity of an ancient people; in the second period, empire-building is a "plague" rather than a human activity. Apparently objective "sociological differences" are to be attributed to the deleterious effects of that "plague."

The "plague" of colonial conquest serves as the occasion for the appropriate intervention of the international law of self-determination. This "plague" marks the dividing line between the history to which law must defer and the history which it must critically evaluate for the distorting effects of illegitimate domination. The "plague" of colonialism gives rise to the need for an international law of self-determination, a law

---

[140] *Id.* at 85.

[141] *Id.* at 86.

[142] *Id.*

whose goal would be to restore the world to its true history, free from the distorting effects of colonialism.

The 1975 *Western Sahara* case also confronted the I.C.J. with many of the central issues of the law of self-determination. Spain, which had ruled the Western Sahara since the late nineteenth century, had agreed to hold a referendum to determine the wishes of the people for the future of the territory.[143] Morocco and Mauritania each claimed sovereignty over part of the Western Sahara, claims that together encompassed the entire territory.[144] These two states based their claims on legal ties that existed at the time of colonization between the Western Sahara and Morocco and the "Mauritanian entity," a nonstate predecessor to Mauritania.[145] The U.N. General Assembly asked the I.C.J. for an advisory opinion on the legal status of the Western Sahara at the time of colonization and urged Spain to postpone the referendum until the Court's decision.[146]

The legal arguments between Spain and the two African states turned on the relationship between the two cardinal principles of G.A. Res. 1514: self-determination and territorial integrity. One can see the argument of Morocco and Mauritania as a claim for the indissociability of the two principles in the idea of decolonization. Self-determination, in this context, would mean restoring the territorial integrity of a state rent by colonial conquest.[147] Spain, on the other hand, maintained that the imminent holding of a referendum, in accordance with the self-determination principle of Resolution 1514, rendered the U.N.'s historical questions irrelevant.[148] In addition to this disagreement about the historical meaning of self-determination, the dispute also raised the underlying conceptual issue concerning the "self." For Morocco and Mauritania, a decision about the

---

[143]*See* G.A. Res. 3292, 29 U.N. GAOR Supp. (No. 31) at 353, para. 3 U.N. Doc. A/9631 (1974); *Western Sahara*, 1975 I.C.J. 12, 29; *see also* Judge Ammoun's comments on Spain's motives, 1975 I.C.J. at 100-01 (sep. op. Ammoun).

[144]1975 I.C.J. at 66.

[145]*Id.* at 26-27.

[146]*See* G.A. Res. 3292 *supra* note 143. The General Assembly asked the Court for an advisory opinion on two questions: "I. Was Western Sahara . . . at the time of colonization by Spain a [*terra nullius*]?" and, if not, "II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?" *Id.* As the Court decided the former question unanimously in the negative, *see* 1975 I.C.J. at 68-9, I focus on the answers to the latter issue.

[147]1975 I.C.J. at 29-30. In his separate opinion, Judge Petrén elaborated the concept of a "law of decolonization" which would balance the principles of self-determination and territorial integrity. *See id.* at 110 (sep. op. Petren). This conception should be viewed as analytically distinct from a view of the two principles as embodying a unitary idea of self-determination.

[148]*Id.* at 29.

pertinence and form of the subjective method of holding a referendum must be informed by a prior objective analysis of the historical facts.[149]

The Court agreed with Morocco and Mauritania that the historical issues were not moot because of the "measure of discretion" afforded the General Assembly in the decolonization process.[150] The Court reasoned that the historical analysis could have an effect on the eventual procedures adopted for decolonization, though it declined to specify its view of the nature of such an effect.[151] In its general discussion of self-determination, though, the Court had noted that "special circumstances" could render unnecessary an actual consultation with the population in question.[152]

On the substantive issue, the Court held that no ties of sovereignty existed between the Western Sahara and either Morocco or the Mauritanian entity at the time of decolonization, although both had other "legal ties" to the territory or its population.[153] The Court stressed that the "legal ties" of Morocco and the Mauritanian entity "overlapped", indicating the "difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization by Spain."[154] The Court concluded, therefore, that the ties between the Western Sahara and the other states should not affect the implementation of the principle of self-determination "through the genuine and free expression of the will of the peoples of the Western Sahara."[155]

The Court's opinion is thus based on principles similar to those I discussed in relation to the *Aaland Islands* opinion and McNair's *South West Africa* opinion. The Court views the principle of self-determination as fully applicable because the situation in the Western Sahara at the time of decolonization was entangled from a legal point of view, beset by overlapping claims falling below the factual or legal criteria of sovereignty. This ambiguous historical situation, frozen by colonization, calls for the implementation of self-determination principles, discretion over which is left to the General Assembly.

---

[149]*Id.*

[150]*Id.* at 36.

[151]*Id.* at 37.

[152]*Id.* at 33. Two judges who filed separate opinions were less reticent. Judge Ammoun declared that consultation was unnecessary in the context of a "legitimate struggle for liberation from domination." *Id.* at 99 (sep. op. Ammoun). Judge Singh stated that the holding of a referendum, which he appeared virtually to identify with the principle of self-determination, could be dispensed with only if the result would be a foregone conclusion or in the presence of some other "special feature" of the case. *Id.* at 81 (decl. Singh).

[153]*Id.* at 48-49, 63-64.

[154]*Id.* at 67.

[155]*Id.* at 68.

Judge Ammoun filed a separate opinion to object to the minimization by the Court of the legal ties between Morocco and the Western Sahara. In writing this opinion, Ammoun further elaborated upon the method of analysis for identifying the "self" in the context of decolonization that he employed in the *Namibia* case. This method consists of structuring conflicting arguments through reference to a disrupted history.

In supporting Morocco's claims over the disputed territory of Western Sahara, Ammoun cites both subjective and objective arguments. On the one hand, he refers "above all to the common aspirations which have ultimately constituted the ties which as a matter of law link the elements of one and the same nation."[156] On the other hand, he taxes the majority opinion with "disregard[ing] the notion of territory."[157]

Ammoun, however, is confronted with certain disturbing manifestations of cultural independence and separatist struggle among the inhabitants of the Western Sahara. These phenomena directly cast doubt on Ammoun's subjective argument; they also call into question the territorial argument — is the contiguity of the Western Sahara and Morocco a sign of national unity or of mere accidental location? Ammoun responds with an argument quite similar to his refutation of the South African position in the *Namibia* case:

> [T]he colonizers sought to win over the colonized peoples to their own civilization, in order to bind them more closely to themselves. . . . If this is indeed the explanation for the origin of a certain autonomous way of life on the part of the tribal populations in Western Sahara, one can similarly suppose that the present separatist tendencies . . . are also the result of a foreign presence.[158]

In contrast with his description of the distortions created by *this* "foreign presence," Ammoun declares authentic and legally binding the ties between Morocco and Western Sahara, ties created through pre-colonial, intra-African military conquests.[159] Once again, certain phases of history are valorized as authentic parts of the national heritage, others as mutations caused by a foreign, specifically a European, invader.

Ammoun restates in this opinion that legal documents — the writings of "jurists, statesmen, constitutions and declarations, and the United Nations Charter — have merely recognized and solemnly proclaimed" the right to self-determination whose sources lie in the struggles of the peoples concerned.[160] Yet, this pronouncement must be viewed in light of Ammoun's actual work in the opinion, his marshalling of an array of theo-

---

[156]1975 I.C.J. at 85.
[157]*Id.* at 101.
[158]*Id.* at 84.
[159]*Id.* at 96.
[160]*Id.* at 100.

retical and historical arguments to support the ties between Morocco and the Western Sahara. Ammoun devotes much of the opinion to describing the historical legal ties between Morocco and Western Sahara, legal ties taking the form both of domestic legal control of Western Sahara *and* of international legal recognition of those ties. Thus, law, far from "merely recognizing and proclaiming" that which was established in extra-legal political struggles, is viewed as implicated in the history underlying those struggles.

Judge Ammoun's opinions exemplify the creative quality of the legal analysis of self-determination, while appearing merely to defer to the peoples at stake. This dual quality is no mere logical inconsistency; rather, it expresses the dual character of legal authority over claims of self-determination, bypassing sovereignty in the name of sovereignty. Ammoun's critical factual investigations can only be undertaken through marshalling the entire array of argumentative stratagems developed in the discourse of self-determination. Like the Jurists' discussion of legal competence in the *Aaland Islands* opinion, these investigations are justified and guided by the idea of a disruption of the normal legal order, an order in which abstract conceptual pairs are viewed as complementary rather than as standing in seemingly irreconcilable opposition.

In the two cases discussed above, Judge Ammoun deploys the various seemingly contradictory argumentative moves to produce a cogent argument for a well-defined and limited legal doctrine of the "self." One may surely disagree with the *content* of any or all of Ammoun's historical or ideological presuppositions. Nonetheless, the method and structure of his argument are informed by the legacy of over a half-century of self-determination jurisprudence.

Ammoun elaborates a particular concept of a disrupted history as the fulcrum of his argument. This concept of a disrupted history functions, on the level of the substantive issue of the "self," in an analogous fashion to the "transitions" between law and fact, those turbulent moments of the dissolution of sovereignty, found on the level of the issue of competence. In both domains, self-determination is linked essentially with an extraordinary role for law in the face of temporary anomalies — although those anomalous periods may consist of entire historical eras.

For Ammoun, colonial conquest destroys the possibility of relying, for a true account of the identity of the population, on either the legal sovereign or the positive facts — including, at times, the empirical consciousness of the people. Accordingly, international law can intervene critically, rejecting, when necessary, the ostensible claims of the people and the sovereign. Colonization inaugurates a hiatus, a disruption of national history; the law of self-determination intervenes to restore the situation to a point at which an authentic history can again be possible.

On the level of competence, the *Aaland Islands* Jurists carved out a role for an extraordinary international law justified and shaped by the disruption of law and sovereignty. On the level of substance, Ammoun's legal analysis intervenes to critically evaluate national identity, an evaluation legitimized and formed by the disruption of the normal unity of the subjective and objective elements of that identity. The cause of that disruption — for Ammoun, colonialism — creates the need for legal analysis and guides its course. Ammoun evaluates the seeming opposition of the subjective and objective elements of national identity by linking that opposition to the colonial disruption of history. The right to self-determination is the right to overcome that disruption.

Thus, the particular form of self-determination — for Ammoun, decolonization — does not simply derive from a political decision, external to law, to limit an abstract right to certain groups and not others. Nor is the gaining of "access" to this extraordinary legal analysis merely a process by which political life furnishes law with cases for adjudication, an adjudication which would remain unaffected by that process. Rather, the very form and rationale of the legal argument emerges from the recognition of a particular, extraordinary historical dislocation. The gaining of "access" depends on the construction of an argument interpreting a particular historical situation as an extraordinary dislocation of national identity; this historically specific interpretation of the situation *as* such a dislocation will then guide the nature of the remedy proposed. Situated between the opposed subjective and objective elements of national identity, law weaves its argument by reconstituting their unity with reference to that dislocation.

Viewing self-determination as a form of argument, we see that the substance, as well as the occasion, of this legal intervention is guided by the particular nature of the historical disruption. Thus the "people" does not simply exist in brute positivity, waiting to be discovered by law. Rather, the way in which the disrupted elements will be united depends on the dynamics of the particular legal discourse. The recognition of a particular "people" is an effect of a particular form of discursive reconstruction. The "self" of self-determination emerges through the particular textual dynamics of subjective and objective conceptions, dynamics guided by the particular type of disruption giving rise to their conflict. No less than the legal competence over self-determination, the "self" is a form of argument.

IV. Conclusion

The discourse of self-determination, both in its discussion of the nature of its distinctive legal competence and of the "selves" of which it treaties, serves an essentially exceptional conceptual role in international law. In adjudicating the legal rights of extralegal entities to attain legal status, this discourse asserts that a dislocation has arisen in the legal order.

This dislocation consists of a dual rupture in the functional complementarity of law and sovereignty, posing a challenge of both a normative and factual character. On the one hand, those who should have attained legal status have remained outside law's purview: the positive legal community fails to correspond to the community as it ought to be. On the other hand factual events have rendered it impossible to look to sovereign control for dispositive guidance. This dual challenge is evoked in a series of paradoxical formulations in discussions of the origin of legal competence over claims to self-determination.

With the idea of a legal right to self-determination, law asserts that it is competent to remedy this dislocation by temporarily reaching beyond its ordinary limits. This extension of law's boundaries is justified by the disruption of the complementarity of sovereign and legal authority. For both the Jurists of *Aaland Islands* and for Judge Ammoun, this disruption occurs through the impossibility for law to rely on the existing sovereign control for dispositive guidance.

In the *Aaland Islands* opinion, this dual impossibility resulted from the factual overwhelming of sovereign control and, hence, of normal law, by extraordinary political events. These events render the situation "obscure and uncertain" from a legal as well as a factual perspective, a situation in which factual and legal components are confused, are in a state of "transition" from one to the other. In Ammoun's opinions, law can no longer trust in positive sovereign control because colonialism has caused a great divide in history, ushering in a period in which the factual situation has lost its normative authority for legal analysis. The "obscurity and uncertainty" of this period derives from the "plague" of colonialism, a factual event with a peculiar normative power to disrupt history.

For both conceptions, law must confront an anomalous situation involving inchoate claims over population and territory. On a conceptual level, this situation results from the rupture between ideas that are normally complementary: the positive and the normative elements of legal authority, the subjective and objective components of national identity. This rupture cannot be mended simply by siding with one element or the other: the goal is a restoration of their harmony.

The legal discourse of self-determination, therefore, can never consist in a mechanical application of the pertinent categories. Rather, it is essentially a form of argument: the weaving together of opposed conceptions through textual composition. Each conception is set in a critical relationship to the other, the whole ordered by the particular manner in which the idea of disruption is deployed.

The characterization of self-determination as an anomalous doctrine varies with the particular writer: Ammoun's modern opinions accord self-determination a role in positive international law inconceivable to the Jurists. Nonetheless, for Ammoun, no less than for the Jurists, the idea

of a right of groups to attain the status of right-holders must always embody the notion of an aberrant dislocation in the legal order. This dislocation provides a broad field for legal analysis, although the goal remains to achieve the constriction of that field. The work of remedying an episodic dislocation such as that of the status of the Aaland Islands may require a less stable right than when the dislocation is viewed as that accomplished by hundreds of years of colonialism. The juridic method, however, is the same: allowing the extraordinary competition of opposed conceptions, a competition occasioned and structured by a particular concept of historical disruption and aimed at the reconstitution of an unreflective harmony in a restored legal order.

I have elaborated some of the ways in which the discourse of self-determination has acquired a conceptual and historical legacy of particular resources of argumentation. The advocacy of a particular form of self-determination requires the production of complex legal texts which appropriate and rework that legacy. The terms of the debates become woven into a fabric of argument whose dynamics depend on the writer's particular conception of historical disruption. From these textual dynamics emerge both the "law" and the "self" of self-determination. Neither juridical absurdity nor sacred cornerstone, the right to self-determination has evolved into a textured form of argument, a particular logical and rhetorical practice. The moment in which sovereignty reposes in abeyance is the moment of opportunity for forms of legal creativity, forms whose full potential we perhaps cannot yet fully anticipate.