Chapter VIII

THE RIGHT TO INTERNAL SELF-DETERMINATION IN INTERNATIONAL LAW

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During the peace process of 2001 – 2004, at the conclusion of the Third Round of talks between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), the statement of the Royal Norwegian Government facilitators outlined the principles and parameters along which the parties would explore the substantive elements of a future constitutional settlement to Sri Lanka's ethnic conflict. This remarkable statement, pregnant with meaning and possibilities, has since been downplayed by both parties. However, it contains to-date the most principled articulation of the basis of a negotiated settlement, and it is not unlikely that it would be resurrected in some form at a future date. Despite its historic nature, the process itself faltered soon after, and a more detailed and deeper exploration of its principles has never taken place.

The passage in question reads as follows:

> *"Responding to a proposal by the leadership of the LTTE, the parties agreed to explore a solution founded on the principle of internal self-determination in areas of historical habitation of the Tamil-speaking people, based on a federal structure within a united Sri Lanka. The parties acknowledged that the solution had to be acceptable to all communities."*

As anyone remotely familiar with the Sri Lankan conflict and efforts at its resolution will readily see, the Oslo Communiqué refers to all of the substantive issues that require to be addressed in a constitutional settlement. The present discussion focuses on one element of the Oslo formulation, that of internal self-determination, to see what guidance can be obtained from the development of this principle as a matter of international law, for any future efforts at

institutionalising the principle in a constitutional settlement in Sri Lanka. Moreover, some of the more exciting applications of this principle have been in the context of negotiated settlements of self-determination conflicts elsewhere, out of which in this discussion, we deal with the case of the Southern Sudan. The chapter does not draw any direct lessons for Sri Lanka, and is meant primarily as a short exploratory overview of the possibilities inherent in the principle of internal self-determination as a right available at international law, for the peaceful resolution of the conflict in Sri Lanka.

Introduction

The Issues

In a standard text on the subject, Hannum observes, "Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles."[1] With respect, it is submitted that it is possible to be more specific than that.

This chapter argues that there is, as a matter of international treaty and customary law and of *jus cogens*, a right to internal self-determination in the form of a general principle and a corpus of specific rules[2]. However, despite the transmutation of the concept of self-determination from a purely political postulate to an international legal standard in the post-World War II era, it can be argued that the full normative potential of internal self-determination (from a liberal democratic perspective) has not been realised. Perhaps ironically, the very political forces responsible for the former, also accounts for the latter[3].

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[1] H. Hannum (1990) ***Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*** (Univ. of Penn. Press): p. 27

[2] A. Cassese (1995) ***Self-Determination: A Legal Appraisal*** (CUP): Chs. 3-7

[3] Ibid; for a pre-World War II historical account: Ch. 2

Nevertheless, there are clear signs following the end of the Cold War and advances in the discourses of human rights and democratic values, that the notion of self-determination is being reoriented with an emphasis on its relatively neglected internal dimension. This is evidenced by trends in State and UN practice where old shibboleths of international law dictated by bi-polar world politics are increasingly being challenged. These challenges are fed by the perception that the intrinsic assumptions of international law and practice relating to self-determination have dramatically changed, including in related concepts such as the subject of international law, State sovereignty, equal rights, and non-interference. It is, however, misleading to overstate this point, and many aspects of the State-centric international system clearly have much life left in them. But it is undeniable that human rights concerns in particular are raising questions of a fundamental nature about the established rules and assumptions of the international legal order and the hitherto reified State[4].

The reform impulse is also demonstrated in the fields of conflict resolution and constitution-making in such experiences as South Africa, East Timor, Nepal and the Southern Sudan, where constitutional settlements of (internal[5]) self-determination problems may indicate new directions for international law[6]. Unlike in a

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[4] See generally, C. Tomuschat (1993) ***Modern Law of Self-Determination*** (Nijhoff): esp. P Allot, 'Self-Determination: Absolute Right or Social Poetry?', pp. 177-210; T. Musgrave (1997) ***Self-Determination and National Minorities*** (OUP); R. A. Falk (1997) '*The Right of Self-Determination under International Law: The Coherence of Doctrine versus the Incoherence of Experience*' in W. Danspeckgruber & A. Watts (Eds.) (1997) ***Self-Determination and Self-Administration: A Sourcebook*** (Lynne Reinner); M. Koskenniemi (1994) '*National Self-Determination Today: Problems of Legal Practice and Theory*' 43 ICLQ 241; J. Klabbers (2006) '*The Right to be Taken Seriously: Self-Determination in International Law*' 28 HRQ 186; M. Moore (Ed.) (1998) ***National Self-Determination and Secession*** (OUP)

[5] Except East Timor

[6] See C. Sunstein (2002) ***Designing Democracy: What Constitutions Do*** (OUP); A. von Bogdandy et al (2005) '*State-building, Nation-building and Constitutional Politics in Post-Conflict Situations*' Max Planck UNYB 9, p.1579 et seq.; M. Sunder (2004/5) '*Enlightened Constitutionalism*' 37 Connecticut LR 891

previous era when conflict was primarily between States, the present is characterised by the large number of intra-State conflicts across the world, most of them centring on claims of self-determination in one form or another. Regardless of their intra-State nature, these conflicts also usually have regional and international implications, most notably with regard to the potential for the territorial disintegration of conflict-affected States through successful secession or more likely, through State failure. In this context, the role and relevance of the concept of internal self-determination assumes great significance: firstly, as an international standard encouraging internal political and legal practices that guarantee constitutional democracy, participation and pluralism (and thereby territorial integrity through rights-based political unity); secondly, and consequentially, as an instrument of international peace.

Structure of Argument

The scope and nature of internal self-determination will be discussed in relation to Article 1 (2) of the UN Charter (1945) and common Article 1 of the ICCPR and the ICESCR (1966); the effect of the proviso to the principle on self-determination in the Declaration on Friendly Relations (1970); and the formation of customary rules around these instruments. There is also the arguable development of self-determination into a peremptory norm with implications for internal self-determination.[7]

This affords an opportunity to identify the limitations of the right to internal self-determination as it has hitherto evolved, and to set out the challenges and legal problems to which it has to address itself in the present and the future. The latter set of issues fall into roughly four categories: (a) anchoring the future development of internal self-determination in the burgeoning human rights discourse; (b) broadening the classes of recipients entitled to the right; (c) strengthening the link between (the arguably artificially separated) minority rights protection and self-determination solutions; and (d)

[7] The *jus cogens* argument is not canvassed here, but see, Cassese op cit. fn 2: p. 133 et seq.

developing the methods and mechanisms of implementing internal self-determination.[8]

The essay will also briefly outline the emerging trends with respect to internal self-determination, in particular, the ideas of *pouvoir constituant* and constitution-making, possibilities for personal and territorial autonomy arrangements within existing States, consolidating self-determination in the international law of human rights and the emerging right to democratic self-government, and as an international legal principle of democratic legitimacy (as opposed to sovereign State effectivity).

Finally, the conceptual discussion on the issues delineated above will apply its conclusions to the concrete experience of the self-determination conflict in the Sudan (that is, the conflict – and now relative peace – between the Khartoum regime in the North and Southern Sudan; not the ongoing conflict in Darfur, or the instability in the Upper Nile / Northern Jonglei region). The Sudan is a fascinating case study for the application of internal self-determination. Many of its political and constitutional characteristics and the nature of its conflict, both in terms of root causes as well as its conduct, speak directly to the problems self-determination seeks to address. Even allowing for contextual specificities, there is no doubt that the Sudanese experiment with internal self-determination under the Comprehensive Peace Agreement (CPA) and the new Interim Constitution of 2005 will provide valuable insights into the way the concept develops in the future.

[8] Discussion of these issues will be interwoven with that on the principles and rules mentioned above, rather than separately.

Internal Self-Determination as an International Legal Principle[9]

The Charter of the United Nations (1945)

Self-determination found expression in an international legal instrument for the first time in Article 1(2) of the Charter of the United Nations (1945). Article 1, which concerns the Purposes of the United Nations provides in sub-section (2) as follows: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"[10]. The report of discussions by the rapporteur of Committee I of Commission I which drafted the provision sheds light as to what it was meant to contain, and more importantly, what was sought to be excluded.

For present purposes, what is important to note is that States were unable to give a concrete definition to self-determination, with the result that negative inferences as to what it does *not* include have to be drawn. In Cassese's view, the reference to self-determination in Article 1(2) *did not mean* the following things: (a) the right of a minority or an ethnic or national group to secede from a sovereign country; (b) the right of a colonial people to achieve political independence – only 'self-government' was available[11]; (c) the right of the people of a sovereign State to freely choose its rulers through regular, democratic and free elections; (d) the right of two nations belonging to separate sovereign States to merge together to form a State (an extension of the rule against secession).

Cumulatively therefore, it can be seen that recognition of self-determination as a legal principle did not correlate to much in terms

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[9] See F. Kirgis, Jr. (1994) '*The Degrees of Self-Determination in the United Nations Era*' (Editorial Comment) 88 AJIL 304; M. Freeman (1999) '*The Right to Self-Determination in International Politics: Six Theories in Search of a Policy*' 25 Rev. of Int'l. Studies 355

[10] Note also Article 21 of the UDHR (1948): right to participate in governance and right to democracy

[11] See Cassese, op cit. fn. 2: Ch.2 for discussion on Atlantic Charter and Churchill's restrictive interpretation in subsequent Commons speech

of its substantive articulation. The subversive implications of the political notion of self-determination, and indeed the wider ramifications of the Wilsonian doctrine[12] were carefully circumscribed so as to preserve the interests of States in the international legal order without too much disruption. This was clearly the case in respect of the internal dimensions of self-determination. States did not concede a general right of a population to democratically choose their governments, and in respect of minorities and other groups, not only was there a hostility to secession, but even the possibilities of sub-national autonomy or other power-sharing arrangements were excluded from the Charter formulation of self-determination.[13]

Nevertheless, as Cassese reminds us, "In spite of all these limitations and shortcomings, the fact remains that this was the first time that self-determination had been laid down in a multilateral treaty...it signals the maturing of the political postulate of self-determination into a legal standard of behaviour."[14]

Internal Self-Determination in the Human Rights Covenants (1966)

The provision germane to this discussion is Article 1(1) which states: "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." There are several elements of importance in this textual formulation, the first of all being that self-determination is expressed as a continuing right. That is, it is not a 'one off' exercise as suggested by the debates around the Charter provision which is extinguished, for instance, once a colonial people have achieved political independence from a metropolitan power.

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[12] See e.g. M. Pomerance (1976) '*The United States and Self-Determination: Perspectives on the Wilsonian Conception*' 20 AJIL 1

[13] However, a much broader concept of self-determination informed the drafters of the 1966 Covenants, see below

[14] Cassese, op cit. fn. 2: p.43

Secondly, by the reference to 'peoples'[15] and not States, the universality of the principle of self-determination has been established.

Thirdly, the provision deals with what is clearly the democratic form of government whereby people have the freedom of choice to elect their officials and also decide the policies under which they would be governed. The use of the term 'freely' is conclusive of the guarantee that the ongoing and permanent right to make these choices is free of manipulation or undue influence. Clearly therefore, this is a right exercisable by people in relation to their own governments (States). "In short, there is no self-determination without democratic decision-making"[16]

Moreover, as Cassese argues, "Internal self-determination presupposes that all members of a population be allowed to exercise those rights...which permit the exercise of the popular will. Thus internal self-determination is best explained as a manifestation of the totality of rights embodied in the [ICCPR]...Only when individuals are afforded these rights can it be said that the whole people enjoys the right of internal self-determination."[17] Therefore, it is to be seen that Article 1(1) is a major development of the internal aspect of self-determination whereby an umbilical connection is established between (internal) self-determination and respect for civil and political rights.

To recapitulate: under international treaty law there is a permanent and ongoing right to internal self-determination which involves the guarantee of all peoples to freely choose the government and policies under which they will be governed. Moreover, this right is closely connected to the other rights established in the ICCPR, which together constitute the exercise of internal self-determination.

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[15] The concept of 'peoples' raises its own issues to which we shall return presently

[16] Cassese, op cit. fn. 2: p.54

[17] Ibid, p.53. Cassese further discusses the impact both of treaty reservations and of derogations from rights. See also R. Burchill (2005) '*When does an Emergency Threaten the Life of the Nation?*' Yearbook of New Zealand Jurisprudence, vol. 8 (1), p. 99

Customary Law: Who are the 'People' entitled to internal self-determination?

The concept of the 'people' as the subject or unit to which the rights denoted by internal self-determination attach under treaty has raised several issues, the answers to which are not always conclusive. There are broadly two dimensions in which the 'people' become relevant for the purposes of internal self-determination: (a) the rights to democratic self-government of the whole population of a sovereign State; and (b) in plural, heterogeneous polities which most modern States encompass, rights of sub-national groups, howsoever defined, to participate in government through autonomy or other power-sharing arrangements.[18]

The latter category includes on the one hand ethnic, religious or linguistic groups, or indigenous peoples in existing States as well as national groups living in federal States, and on the other, racial or religious groups living under conditions of oppression or gross discrimination in States that do not allow them participation in government. As will be seen, this is an important distinction under current international law for the availability of rights associated with internal self-determination.

Generally, UN and State practice has been inconsistent and sadly inadequate in vindicating internal self-determination in respect of all three categories above[19]. This is as a result of the preoccupation with the external element of self-determination and the attendant rights and interests of States such as sovereign equality and non-interference being considered more important to the stability of the international system than the democratic wellbeing of people living within those States.

[18] The question whether this includes a right to secession *in extremis* will *not* be discussed here

[19] Cassese, op cit. fn. 2: pp. 102-108

Internal Self-Determination of Populations in relation to Sovereign States

Considering internal self-determination as applicable to the entire population, UN and State practice indicates that there was extreme resistance for a long time to develop customary law in line with the interpretation of Article 1 of the Covenants as set out above. A key reason for this was the reluctance to impinge on the non-interference principle, insistence on democratic rights of populations under authoritarian rule being considered a violation of that principle. This may now be changing, and the UN practice of the Human Rights Committee is instructive.[20]

In General Comment No. 12 (21st Session, 1984), the Human Rights Committee acknowledged that (para. 1) "The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights..." In para. 6, the Committee observes, "...It follows that all States parties to the Covenant should take positive action to facilitate realisation of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter...and under international law: *in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.*" What is clear from this is that self-determination as a rights-creating principle for populations against the government of the sovereign State in which they are resident, was subordinated to the principle of State sovereignty.

Contemporaneously, the Committee gave a very wide margin of appreciation in the construction of the ICCPR provisions having a bearing on internal self-determination in the sense of democratic government.[21] In this light, even one-party States could, with

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[20] See D. McGoldrick (1991) ***The Human Rights Committee*** (Clarendon; Oxford); A. Conte, S. Davidson & R. Burchill (2004) ***Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*** (Ashgate); R. Higgins (1991) '*United Nations Human Rights Committee*' in R. Blackburn & J. Taylor (Eds.) (1991) ***Human Rights for the 1990s*** (Mansell): p.67

[21] See examples in Cassese, op cit., fn. 2: p.63 note 74

minimum pretension, claim to have conformed to provisions such as Article 25 relating to participation in government. Article 1 is also not enforceable under the individual communications procedure.[22]

Recent events, however, indicate that this may be changing with the Committee now more inclined to examine issues of internal self-determination, and in doing so, to place higher standards of behaviour on States *vis-à-vis* their own populations.[23] It seems highly unlikely that the Committee would be willing to accept that States Parties to the ICCPR are in fulfilment of their obligations unless there is real democratic political choice within the overarching context of respect for individual rights guaranteed by the Covenant.

For example, in its consideration of Sudan's initial report under Article 40 ICCPR, members of the Committee questioned several aspects of Sudan's internal arrangements. "Regarding Article 25, members of the Committee asked if the one-party system could meet the requirements of that Article. They also noted that the number of political parties in a given political system was less important than the extent to which citizens took part in public affairs and were eligible to compete for all offices of the State, including the highest..."[24] Going further, "With reference to Article 27 of the Covenant, members of the Committee requested information on the composition of Sudanese society and how the Government intended to arrange for the coexistence of different groups within a federal system."[25]

In its Concluding Remarks on Sudan's initial report, the Committee, *inter alia*, made the following observation: "...[the Committee's] task was to assist all States Parties to implement the provisions of the Covenant and to promote the universal application of that instrument. With regard to the issues of a multi-party system, members noted

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[22] Goldrick op cit., fn. 19: Ch. 4; P. Alston & J. Crawford (Eds.) (2000) ***The Future of UN Human Rights Treaty Monitoring*** (CUP): Ch.1

[23] See examples in Cassese, op cit., fn. 2: p.65 note 77

[24] Annual Report of Human Rights Committee to the General Assembly (1991): para. 504

[25] Ibid, para. 505

that in the absence of a political opposition, Governments were likely to exercise their powers in a non-democratic fashion and expressed the hope that the Sudan would soon practice democracy."[26]

This and other examples (including its jurisprudence on individual communications under the ICCPR) give an indication that there is a new willingness to hold States to higher standards of democratic conduct, although as ever, the danger of overstatement should be avoided. Some States have also been more willing to discuss their obligations under Article 1 than before.[27]

Finally, it is possible to argue that a general customary rule on the right of peoples in sovereign States to internal self-determination is in the process of formation (*in statu nascendi*). The evidence for this is to be found, *inter alia*, in important documents such as the Helsinki Final Act (1975)[28] and the Vienna Declaration on Human Rights (1993).[29] The Helsinki formulation is arguably one that primarily concerns, in the eyes of some, European States and Western values. But it cannot be denied that it represents an innovative contribution to the self-determination debate. In particular, it consolidates the view that self-determination is a universal principle applicable to all peoples living in sovereign States of a continuous nature, it removes the overly rigid distinction between self-determination and the legal regime concerning minority rights, and by the reference to 'full freedom' in the exercise of self-determination, it draws a strong link between it and the availability and enjoyment of civil and political rights.

No such relativist objection can be raised against the UN Vienna Declaration. This builds on the Covenants and the Declaration on Friendly Relations (1970), but significantly expands the scope of self-determination by asserting the freedom of peoples to have equal access to government "...representing the whole people belonging to

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[26] Ibid., para. 518

[27] Cassese, op cit. fn. 2: Ch.3

[28] Ibid, pp.278-296; on the Algiers Declaration on the Rights of Peoples, pp. 296-301

[29] Ibid, p.306

the territory without distinction of any kind."[30] Thus the scope of the proviso in the Friendly Relations Declaration (see below) has been substantially expanded to include a general right to representative government and respect for political pluralism. This is more resonant with the interpretation to the Covenants' provision on self-determination set out before.

Internal Self-Determination of Sub-National Groups

The failure of UN and State practice to fully realise the potential of internal self-determination is at its most palpable in this respect. Short of the most egregious forms of institutionalised racism (or religious persecution), such as that prevailed in the former South Africa and the former Southern Rhodesia which the Friendly Relations Declaration was designed to address, international law has been totally ineffectual in dealing with rights of sub-national groups to internal self-determination. Of this, as will be discussed below, the Sudan is a classic example. In other cases, the exceptions to the rule against non-interference have enabled a role for international action only in *sui generis* cases such as that of the South Tyrol/Alto Adige.[31] Indeed, it would appear that conceptual advancement of internal self-determination has been left to the province of national constitutional law to resolve through devices such as federalism. Two prominent examples of the latter are the Canadian Supreme Court's opinion on the secession of Quebec[32], and the new Sudanese Interim Constitution of 2005 (see below).

In the Friendly Relations Declaration (1970), reference is made to self-determination as a principle of peaceful international relations. In the broader reaffirmation of State sovereignty and non-interference, it is framed in highly restrictive terms not only to exclude any claim to secession, but even to preclude claims to

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[30] Ibid

[31] See esp. ibid, pp. 104-108

[32] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217; see also Cassese, op cit., fn. 2: p. 248 et seq.; D. Haljan (1999) '*A Constitutional Duty to Negotiate Amendments*. Reference re Secession of Quebec' 48 ICLQ 447; M. Walters (1999) '*Nationalism and the Pathology of Legal Systems: Considering the* Quebec Secession Reference *and its Lessons for the United Kingdom*' 62 MLR 371

democratic government. However, the proviso or saving clause to this principle allows a limited exception as Cassese persuasively argues. This is available to racial or religious groups suffering discrimination at the hands of the State, and from the preparatory work, it can be inferred that it was aimed at White minority ruled South Africa and Southern Rhodesia. In Cassese's textual construction, the provision would read as follows: "...if in a sovereign State the government is 'representative' of the whole population, in that it grants equal access to the political decision-making process and political institutions to any group and in particular does not deny access to government to groups on the ground of *race, creed or colour*, then that government respects the principle of self-determination; *consequently, groups are entitled to claim a right to [internal] self-determination only where the government of a sovereign State denies access on such grounds*."[33]

Other Emerging Trends

In a persuasive critique of the law relating to self-determination, McCorquodale avers that the predominant 'peoples' and 'territorial' approaches to self-determination do not provide clear legal rules as to its content or the obligations it entails. "What is required is a legal framework which has the necessary sensitivity to developments in international law and which can provide the 'very delicate balancing of interests' which is necessary when considering self-determination."[34] This framework, he says, is provided by international human rights law. The crux of McCorqoudale's argument is that "The right of self-determination applies to all situations where peoples are subject to oppression by subjugation, domination and exploitation by others. It is applicable to all territories, colonial or not, and to all peoples. The legal approaches to the right of self-determination which have been used so far have focused on the 'peoples' and on the 'territory' involved. These have

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[33] Cassese, op cit. fn. 2: p.112. Emphasis added.

[34] R. McCorquodale (1994) '*Self-Determination: A Human Rights Approach*' 43 ICLQ 857 at p.870; see also R. McCorquodale & R. Pangalangan (2001) '*Pushing Back the Limitations of Territorial Boundaries*' 12 EJIL 867

been shown to be too rigid to be able to be used in the present variety of applications and exercises of the right, especially to internal self-determination."[35]

This argument is attractive for the reason that it is grounded in a body of law, and even a vocabulary – that of international human rights – that has increasing universal recognition. As a framework, it focuses on rights (individual and collective), as the means of rationalising self-determination claims, and then balances that against countervailing interests such as the rights of others and the requirements of international order. It thereby circumvents the difficulties brought about by the traditional approaches, while offering a strong moral impetus of justice and fairness to the legal framework.

In another strong argument as to why internal self-determination has to be taken seriously, Rosas[36], adduces the following reasons. First, that defining self-determination purely in terms of its external dimension furthers the possibilities of secession, because intra-State conflicts arising from self-determination claims would as a matter of international law thereby only have resolution through the exercise of secession (i.e., external self-determination). Second, increasingly State practice and the practice of international human rights bodies and legal doctrine appear to be supporting a right to internal self-determination in line with the development of the human rights discourse and notions of democratic governance with a concomitant decline in the uncritical respect for State sovereignty. Thirdly, since self-determination is a right exercisable by a people, the concept of State sovereignty has to be revisited so as to make it compatible with modern notions of popular sovereignty as opposed to State sovereignty.

In this context, he distinguishes between three 'layers' of internal self-determination[37]: (a) the right or power of a people to constitute

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[35] Ibid, p. 883
[36] A. Rosas (1993) '*Internal Self-Determination*' in Tomuschat, op cit., fn. 4: p. 225
[37] Ibid, p.249

their own political system (*pouvoir constituant*)[38]; (b) the right to be consulted in constitutional amendment, including the right to resist tyranny and oppression[39]; and (c) the right to participatory self-government.[40]

To Rosas, "...all elements of self-determination are 'internal', in the sense that popular will has to be taken into account."[41] In the final analysis, his argument on self-determination is actually one about sovereignty and its displacement as a right of States in favour of notions of popular sovereignty.

Others such as Franck[42] and Salmon[43] ask whether internal self-determination can be reinvented as a new principle of international law that concerns democratic legitimacy as opposed to sovereign effectivity. In this view, "it is undoubtedly a paradox and a fundamental contradiction to recognise the right of peoples to self-determination without contemplating the situation of inside interference, where an authoritarian regime deprives the people of its right to choose its own political system."[44] In conceptualising a principle of democratic legitimacy, Salmon advances two hypotheses, expressing a preference for the second. The first concerns a compulsory principle of legitimacy which would make

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[38] This is narrower, but deeper, than the interpretation given to common Article 1, above

[39] Rosas argues that common Article 1 and Article 20 of the African Charter of Peoples' and Human Rights encompass both these elements; see also A. M. Honoré (1988) '*The Right to Rebel*' OJLS Vol.8 No.1; P. Macklem (2006) '*Militant Democracy, Legal Pluralism and the Paradox of Self-Determination*' International Journal of Constitutional Law, ICon 4 3, 488, July 2006

[40] Which he says is *not* covered by common Article 1, but by Article 25 of the ICCPR

[41] Ibid, p.250

[42] T. Franck (1992) '*The Emerging Right to Democratic Governance*' 86 AJIL 46; see also D. Shelton (1991) '*Representative Democracy and Human Rights in the Western Hemisphere*' 12 HRLJ 353; S. Tierney (202) '*The Search for a New Normativity: Thomas Franck, Post-Modern Neo-Tribalism and the Law of Self-Determination*' 13 EJIL 941

[43] J. Salmon (1993) '*Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?*' in Tomuschat, op cit., fn. 4: p. 253

[44] Ibid, p. 265

recognition contingent upon internal democracy and human rights, permit international intervention in the domestic sphere, and allow resort to force to overthrow non-democratic regimes. The second hypothesis is less subversive of the international order, and involves developing practices of recognition based on democratic legitimacy, the greater engagement of collective security doctrine in civil conflicts[45] and positing internal self-determination in a legal framework similar to that advanced by McCorquodale.

Constitutional Responses to Self-Determination Claims: The Case of Southern Sudan[46]

The case of the Sudan in respect of internal self-determination is instructive for several reasons. All of the developments in international law discussed above occurred without having any meaningful bearing on its political history and the trajectories of conflict[47], other than in the external sense embodied in the typical assertion of sovereign equality and non-interference by the Khartoum regime on the international plane. Most of its post-independence existence is characterised by military rule, or Islamist near-theocracy with a stridently advanced and idiosyncratic worldview regarding the Arabist and Islamic identity of the State[48], which has in turn been challenged (in the form of attempted secession) by those excluded

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[45] See also W. J. Werner (2001) '*War and Armed Conflict*' 6 Journal of C & S Law 171; J. Wright (1999) '*Minority Groups, Autonomy and Self-Determination*' 19 OJLS 605

[46] See A. Lloyd (1994) '*The Southern Sudan: A Compelling Case for Secession*' 32 Columbia Journal of Transnational. Law 419: Note that Lloyd's argument, which is persuasive in the circumstances of 1994, precedes the peace process of 2002-05, but may yet have validity if the Interim Constitution collapses, or if Southern Sudan opts for independence in the referendum at the end of the interim period; L. Lauro & P. Samuelson (1996) '*Towards Pluralism in Sudan*' 37 Harvard ILJ 65; More generally see, I. Gambari & M. Uhomoibhi (1997) '*Self-Determination and Nation building in Post-Cold War Africa: Problems and Prospects*' in W Danspeckgruber & A.Watts, op cit., fn. 4

[47] See esp. D. Johnson (2004) ***The Root Causes of Sudan's Civil Wars*** (Indiana UP); P. Woodward (1990) ***Sudan, 1898 – 1989: The Unstable State*** (Lynne Rienner);

[48] A. el-Gaili (2004) '*Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*' 45 Harvard ILJ 501

from this conception of the ethno-religious foundations of the State: the Christian and Animist Southerners of African lineage[49]. In these conditions of violent conflict, democratic self-government has been an illusory fantasy to Sudan's entire population[50].

Likewise, notwithstanding that Southern claims to autonomy, independence and sovereignty have been couched in the language of self-determination, neither the last peace process (circa. 2002 – 2005) nor its products the Comprehensive Peace Agreement (CPA) and consequent new Interim Constitution of July 2005, drew directly from the international law of internal self-determination. Instead, the peace and constitution-making process was an exercise in negotiating, balancing and reconciling competing constitutional claims among the adversaries according to local exigencies.[51] The resulting substantive constitutional arrangements are therefore uniquely original. In the way they address issues of internal self-determination, especially those relating to autonomy of a major sub-national group (and, it might be added, with the capacity to assert itself militarily), the constitutional arrangements of the Sudan are radically innovative in the extraordinary measure of autonomy they envisage for the South, and are striking in their contrast to the conservatism of international law[52].

In this light, some of the commentary on the Sudan from an international law perspective illustrate basic misconceptions in the diagnosis of the problem, and thereby also sheds light more generally

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[49] D. M. Wai (Ed.) (1973) ***The Southern Sudan: The Problem of National Integration*** (Frank Cass); M. O. Beshir (1975) ***The Southern Sudan: From Conflict to Peace*** (Hurst) and (1975) ***The Southern Sudan: Background to Conflict*** (Hurst)

[50] D. M. Wai (1981) ***The African-Arab Conflict in Sudan*** (Africana Pub. Co.); M. A. Mahgoub (1974) ***Democracy on Trial: Reflections on Arab and African Politics*** (Andre Deutsch); G. Prunier (1986) '*From Peace to War: the Southern Sudan (1972 – 1984)*', Occasional Paper No. 03, University of Hull Dept. of Sociology and Social Anthropology

[51] See esp. P. Dann & Z. al-Ali (2006) '*The Internationalised* Pouvoir Constituant – *Constitution-making under External Influence in Iraq, Sudan and East Timor*' Max Planck UNYB 10, p.1

[52] See esp. Cassese, op cit., fn. 2: Chs. 11 and 12

on assumptive limitations of internal self-determination in international law in dealing with real self-determination conflicts. For example, the characterisation of the problem as a religious and/or racial conflict between the Arab-Muslim North and Christian (and Animist) black Africans of the South, for purposes of compartmentalisation of the messy politics of conflict into neat international legal categories is fundamentally misleading. Applying self-determination arguments to this understanding could well sustain the sophistry of the Islamists who claim that *shari'a* applies to Muslims of the North (in fact, as a territorial law, *shari'a* also applies to the numerous non-Muslims living in the North to whom it is culturally alien), whereas the South is governed by secular law, and thereby the question of equal treatment of law and access to government by all is resolved. However, this does not answer the deeper problem at hand, which is that *shari'a* as the fount of all legal and constitutional authority prohibits believers to be ruled by *kuffar* (i.e., infidels, non-believers). As well as constitutionally privileging Muslims as a systemic feature of the legal order, this excludes any possibility of non-Muslims holding any political office of consequence, not merely as an operational consequence of *shari'a*, but as an essential legal requirement. Thus the problem is one of negation of national citizenship which presupposes equal treatment of the law and the right, quite apart from participation in government, to live anywhere in the national territory regardless of religion or ethnic origin. This raises profound questions as to whether the international law of internal self-determination is adequately equipped to deal with this type of problem.

The limitations of self-determination as presently conceived at international law are highlighted when applied to a situation like Sudan in respect of sub-national autonomy as well. In the Sudan, one group in control of the State monopolises sovereignty on the belief that "...it is culturally entitled to rule, that its culture is superior to African culture, and that God himself has sanctioned this superiority through Islam, which is both sacred and inseparable from a language,

a culture and a political system."[53] Granted this describes the Islamist ideology of the State in its most extreme form, but it has to be conceded that the differentiation of parties and actors in the Northern establishment on the question of self-determination for the South is a matter of degree, not of subscription, within that ontological spectrum. Consequently, the Southern claims to self-government (within or without the territorial boundaries of the State of Sudan, and especially if within), have to contemplate a measure of autonomy that is presently inconceivable as a standard of internal self-determination in international law. As Cassese observes, "...both customary and treaty law on *internal* self-determination...[do not] furnish workable standards concerning possible forms of realising internal self-determination, such as devolution, autonomy, or 'regional' self-government."[54] The autonomy framework in the CPA, and the process established for its implementation including through multiple referenda, therefore conceptually advances notions of internal self-determination several steps ahead of international law.[55]

The preceding critique of internal self-determination at international law by reference to the Sudan example has been undertaken not, obviously, to repudiate the concept *per se*, but to reinforce the arguments of commentators such as McCorquodale, Cassese and Franck on the need for rethinking and expanding the scope of the concept. The criticism also helps to draw attention to the notion of *pouvoir constituant* as considered by Rosas and others as an element

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[53] WRITENET Report for UNHCR (undated), '*Identity Crisis and the Weak State: The Making of the Sudanese Civil War*', <http://www.unhcr.org/home/RSDCOI/3ae6a6bb4.html>

[54] . Cassese, op cit., fn. 2: p. 332

[55] See Dann & al-Ali, op cit., fn. 50: p. 21 et seq.; A. al-Mahdi (2005) '*The Peace Agreement of January 2005 and the Draft Constitution of May 2005*', <http://www.sudaneseonline.com/epressreleas2005/ju30-69845.shtml>; A. M. Flacks (2005) '*Sudan's Transitional Constitution*', 3 Journal of International Policy Solutions 8; F. A. Kornegay, '*Regional and International Implications of the Sudan Peace Agreement*' in K. G. Adar, J. G. Yoh & E. Maloka (Eds.) (2004) ***Sudan Peace Process: Challenges and Future Prospects*** (African Century Pub.'s)

of internal self-determination[56]. There can be no more powerful assertion of popular sovereignty as in the making of a constitution.

As more and more intra-State conflicts are resolved, or more likely, transformed into institutionally managed politics through constitutional methods and devices[57], it is important that the international law of self-determination reflects the *pouvoir constituant* element in its internal dimension.

What is needed is not incremental development along established international law categories, but root and branch re-conceptualisation of the principle and its rules within a human rights framework so as to render internal self-determination normatively more meaningful in addressing the problems of the modern world.

[56] In relation to the Sudan, see Dann & al-Ali, ibid, p. 25 et seq.

[57] See e.g. V. Hart (2003) '*Democratic Constitution Making*', Special Report 107 (July 2003), United States Institute of Peace; N. Haysom (forthcoming) '*Transitions from Conflict to Peace: The Role of Interim Constitutions*' in ***Comparative Study on Interim Regional and National Constitutional Arrangements in Transition Scenarios*** (Centre for Policy Alternatives, Colombo & Berghof Foundation for Conflict Studies, Berlin)