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# International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma\*

CHINEDU REGINALD EZETAH\*\*

## I. INTRODUCTION

On November 10, 1995, the Nigerian military government, led by General Sanni Abacha, executed internationally acclaimed environmentalist and human rights activist Ken Saro Wiwa and eight other Ogoni citizens. The government performed the executions because criminal charges were purportedly proved against these Ogoni people. The real issue, underlying the summary executions, or brutal murders, however, was the Ogoni struggle for self-determination in the face of environmental devastation and egregious human rights violations. By demonstrating the inherently revolutionary character of the basic right of self-determination and by underlining its susceptibility to political, economic, social, and environmental considerations, the Ogoni experience indicts the narrow restrictions on the contemporary doctrine of self-determination.

The international law concept of self-determination is on trial in Nigeria, but not for the first time. The Ogoni struggle is analogous to Biafra's unsuccessful secession bid from Nigeria in 1967. The Ogoni share the Biafrans' liberation grounds—political domi-

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\*\* Member, Nigerian Institute of International Affairs, Lagos. I am grateful to Professor Maurice Copithorne, UNHRC Special Representative in Iran, and my good friends Virtus Igwokwe and Amir Attaran for their support and encouragement. I also thank Professors Douglas Sanders and Karen Mickelson for useful comments on initial drafts of this Article. I dedicate this Article to the memory of Kenule Saro Wiwa who lived and died for a noble cause.

nation, economic exploitation, and egregious human rights violations. Such ethnic conflict, however, is not peculiar to Nigeria. It is the primary cause of state disintegration in Africa as a whole.<sup>1</sup>

In 1967, international law did not support the Biafran struggle.<sup>2</sup> Does it support the cause of the Ogoni today? How practical is secession or autonomy for the Ogoni when they exist among 250 Nigerian ethnic groups that harbor loyalty to the Nigerian state? If the link between self-determination and the colonial Uti-Possidetis principle<sup>3</sup> is unbreakable, perhaps international law should expand self-determination rights to include loose federation rights based on ethno-cultural autonomy.

This Article aims to stimulate intellectual debate on the deficiency of self-determination law in small helpless territories like Ogoniland and, more generally, in post-colonial Africa. This Article analyzes the Ogoni experience as a prelude to a discussion of the law of self-determination and its inadequacy in the African context. Part II tells the Ogoni story. It discusses the basis for the Ogoni as a "people," the impact of the devastation of the Ogoni environment on the Ogoni, and the Ogoni struggle for political and economic independence. In particular, it examines the Nigerian Government's violent repression of the Ogoni, and the response of the international community to such action. Part II concludes with a preliminary comment on the legitimacy of the Ogoni claims. Part III reviews the law of self-determination as es-

1. See Ali Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, INT'L J. OF REFUGEE L. 27 (1995). The patch-up work currently taking place in Rwanda means nothing if the autonomy of both the Tutsis and Hutus is not guaranteed. South Africa also faces this problem with its share of Zulu nationalism. Similarly affected are Burundi, Uganda, Kenya, Zaire, Angola, Mauritania, Mali, Chad, Senegal, Liberia (currently in civil war), Sudan, and Somalia. Rwanda's genocide perhaps foreshadows future possibilities. See D. Binder & B. Crossette, *Ethnic Conflicts: Hot Spots*, GLOBE AND MAIL, Feb. 20, 1993, at D5.

2. See *Secretary General's Press Conference*, U.N. MONTHLY CHRON., Mar. 1970, at 36.

3. The Uti-Possidetis principle was conceived in Latin America and prescribes the preservation of the territory demarcations under colonial regimes corresponding to each of the colonial entities that constituted a state. Africa adopted the principle through the O.A.U. Resolution on Border Disputes, July 21, 1964, reprinted in 21 International Organisation 102-27 (1967). The International Court of Justice applied and upheld the principle in the Frontier Dispute Case (Burkina Faso-Republic of Mali), 1986 I.C.J. 554, 565-67 and the Guinea-Guinea (Bissau) Maritime Delimitation Case, 1985 I.L.R. 77, 636, 657.

poused by both legal principles and state practice. Part IV addresses the Ogoni right to self-determination, highlighting the inadequacy of the law of self-determination in Africa. Finally, Part V analyzes the African dilemma and concludes that a solution lies in an expansion of the law of internal self-determination to include a right to confederal autonomy for African states.

## II. THE Ogoni STORY

### A. Background

In 1914, Nigeria, the largest African state, emerged from the British amalgamation of 250 diverse ethnic groups.<sup>4</sup> Since its independence in 1960, Nigeria's political leadership has remained a troublesome issue echoing the country's contrived nature and poverty of national consciousness.<sup>5</sup> Amidst a paradox of astounding wealth, Nigeria, with its enormous natural endowments, has continually faced economic poverty. Worst hit in this debacle are those communities from which the wealth is being bled. Ogoniland is one such community. Closely linked to the exploitation and neglect of the Ogoni is the ethno-cultural fragmentation of the Nigerian political body, sometimes crudely described as "tribalism." Tribalism dictates zero sum political and economic policies and systems that are manifest in the institutionalized domination and exploitation of ethnic minorities such as the Ogoni.

### B. The Ogoni People

The Ogoni People comprise an ethnic minority group in the Rivers state of Nigeria. Ogoniland is made up of 6 kingdoms: Eleme, Tai, Gokana, Babbe, Khenkhana and Nyokhana.<sup>6</sup> A leading traditional chief, the *Gbenemene*, heads each kingdom.<sup>7</sup>

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4. See ECONOMIC INTELLIGENCE UNIT, EIU COUNTRY PROFILE-NIGERIA 1996-97, 17 (1996).

5. See *id.* at 3.

6. See Obiora Okwu-Okafor, *Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon Kataf and Ogoni Problems*, 6 ASICL PROC. 114 (1994).

7. See *id.*

All other chiefs owe allegiance to the Gbenemene in Council.<sup>8</sup>

Approximately 500,000 Ogoni occupy roughly 1000 square kilometers of ancestral lands.<sup>9</sup> The Ogoni nation is located in the Niger Delta area, which has vast crude oil deposits as well as very fertile land. The Delta area has been characterized as Nigeria's "food-basket."<sup>10</sup> The residents in the Delta are traditionally farmers, fishermen and hunters. Despite the poverty in Ogoniland, which is extreme even under Nigeria's internationally low standards, the Ogoni are a proud and politically well-informed people.<sup>11</sup>

Ogoni occupation of the Niger Delta dates back beyond the eighteenth century.<sup>12</sup> They are one of the many ethnic groups in Nigeria that have zealously preserved their traditional political structures despite the incursions of Western civilization. The Ogoni have a distinct culture, language, and history, and have traditional religious and political systems that are different even from the Andonis and Okrikas, their close neighbors.<sup>13</sup>

### C. Ogoni Oil and Environment

In 1958, Shell Petroleum Development Company of Nigeria (SPDC), a multinational company owned by the British and Dutch, and incorporated under Nigerian law as a limited liability company, struck oil in Ogoniland.<sup>14</sup> Thereafter, the SPDC discovered 5 oil fields yielding over 100 oil wells in Bomu, Korokoro, Yorla, Bodo West, and Ebubu.<sup>15</sup> In 1973, oil production in Ogoniland peaked at about 108,000 barrels per day, representing 25% of Nigeria's total production.<sup>16</sup> By early 1993, however, Ogo-

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8. *See id.*

9. *See The Ogoni Issue: An Official Statement, issued by SPDC* (Jan. 1995) (manuscript on file with author) [hereinafter SPDC].

10. *See Comment, THE NEWS* (Nig.), May 17, 1993, at 18-19.

11. *See Collins Obibi, A People Divided by Death, GUARDIAN* (Nig.), Nov. 28, 1995, at 11.

12. *See Okwu-Okafor, supra* note 6, at 144.

13. *See id.*

14. *See Oteri Akomeno, Concerning Oil Production, GUARDIAN* (Nig.), Dec. 15, 1995, at 12.

15. *See id.*

16. *See Emeka Achebe, Shell in Nigeria* (Jan. 1996) (paper presented to the Commission for Development and Cooperation of the European Parliament at Brussels)

niland's oil production potential had fallen to 28,000 barrels per day, less than 1.5% of Nigeria's total oil production.<sup>17</sup> Since its inception, total oil production in Ogoniland has officially been stated as 634,000,000 barrels.<sup>18</sup>

The Ogoni complain that they have lost vast expanses of land to oil prospecting and, consequently, have been forced into smaller land areas. This has resulted in population density peaking at about 500 people per square kilometer. This is an astounding number when compared to the Nigerian national average of 270 people per square kilometer.<sup>19</sup> The population density has exacerbated hunger, disease, and has made the absence of basic social amenities such as piped water, electricity, and good roads more pronounced. Additionally, the Ogoni allege that the new oil wells, extensive pipeline networks, and oil spills have destroyed arable land necessary for agriculture, one of their main sources of income.<sup>20</sup> Oil spills have affected what little land remains. The Ogoni complain that food production has declined due to the environmental pollution and pressure on the land. The pollution is said to result from daily gas flaring, and resultant emissions of carbon monoxide, carbon dioxide, soot, methane, and other substances that reduce soil fertility and pollute the water used for drinking and fisheries.<sup>21</sup>

The Ogoni believe that they are being subjected to a slow, but steady process of environmental genocide, forcing them to move to neighboring areas.<sup>22</sup> The increased migration of the Ogoni to Cameroon and Gabon in search of a better life is said to threaten the Ogoni cultural identity.<sup>23</sup> Dr. G.B. Leton, an Ogoni leader, articulated this passionate feeling of deprivation in his preface to the Ogoni Bill of Rights:

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(manuscript on file with author).

17. *See id.* at 3.

18. *See* SPDC, *supra* note 9.

19. *See Comment, supra* note 10.

20. Official government statistics show that, between 1976 and 1991, there were 2976 oil spills. *See* Okwu-Okafor, *supra* note 6.

21. *See id.* Daily gas flaring is the method of oil production used throughout Nigeria. *See id.*

22. *See id.*

23. *See* Ateri Emmanuel, *When Ogoni Got a U.N. Hearing*, *GUARDIAN* (Nig.), Sept. 14, 1993, at 7.

All one sees and feels around is death. Death is everywhere in Ogoniland. Ogoni language is dying. Ogoni culture is dying. Ogoni people, Ogoni animals, Ogoni fish are dying because of 33 years of hazardous environmental pollution and resulting food scarcity. In spite of an alarming density of population, American and British oil companies greatly encroach on more and more Ogoni land, depriving the peasants of their own means of livelihood. Mining rents and royalties for Ogoni are seized by the Federal Government of Nigeria which offers the Ogoni people nothing in return, Ogoni is being killed so that Nigeria can live.<sup>24</sup>

In response to these charges, the SPDC responded that:

There has certainly been oil spillage in Ogoni land. And this creates a *real environmental problem*, though this is far from devastation . . . although the highest priority areas for action are those such as *over-fishing, deforestation, poor agricultural practices* and *overpopulation*, there is a need for action on oil pollution and on gas-flaring.<sup>25</sup>

The SPDC admitted that although there are environmental problems, the SPDC is not legally responsible on the grounds that its environmental performance, which it argues should be examined in the context of Nigeria's socioeconomic problems, is consistent with Principle II of the Rio-Declaration from the Earth Summit in June 1992.<sup>26</sup> The SPDC also passed the blame to the Nigerian government because, under their joint-venture partnership, the government should have used the royalties from the SPDC's oil production to support the community.<sup>27</sup>

In contrast to the SPDC's position, independent, non-African experts and organizations perceive the environmental standards in the Niger Delta as a real threat to its inhabitants.<sup>28</sup> These critics include Lord Avebury, President of the British Parliamentary hu-

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24. See *Comment, supra* note 10. Ken Saro Wiwa expressed the same sentiment: "I'm seeing soldiers, bandits, actually coming to take away this stuff [crude oil] and develop their own home while pretending to be running Nigeria. Oil has brought nothing but disaster to our people." *Id.* at 23.

25. Achebe, *supra* note 16, at 4 (emphasis added).

26. See SPDC, *supra* note 9, at 6.

27. See Obibi, *supra* note 11.

28. See THE NEWS (Nig.), June 7, 1993, at 16.

man rights group, Greenpeace International;<sup>29</sup> Aquatic Environment Consultants of U.K.;<sup>30</sup> World Bank and European Parliament;<sup>31</sup> Unrepresented Nations and Peoples Organization (UNPO) of the Hague;<sup>32</sup> and Amnesty International. The documentary, *The Drilling Fields*,<sup>33</sup> also portrays the environmental devastation and the human misery resulting from armed brutality in Ogoniland. These independent non-African assessments lend support to, if not vindicate, the Ogoni claim of environmental devastation.

#### *D. The Ogoni Struggle*

In October 1990, the Ogoni presented to the military government of General Ibrahim Babangida the Ogoni Bill of Rights, which articulated their struggle.<sup>34</sup> The Bill demanded the following:

1. Political control of Ogoni affairs by the Ogoni people.
2. The right to control and use of a fair proportion of Ogoni economic resources for Ogoni development.
3. Adequate and direct representation as of right in all Nigerian national institutions.
4. The use and development of Ogoni culture, religion and language in Ogoni territory.
5. The right to protect the Ogoni environment and ecology from further devastation.<sup>35</sup>

By December 1992, the Ogoni demands were revised to also include:

6. Political self-determination.
7. Ownership of the oil beneath Ogoni land.

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29. See TELL (Nig.), No. 6, Feb. 8, 1993, at 28.

30. See Statement issued by the Ogoni Community Association-U.K. (1995) (on file with author).

31. See *id.* at 4. The World Bank attributes the environmental devastation more to over-farming, deforestation and population than to oil production. See Paul Lewis, *Nigeria's Deadly Oil War: Shell Defends Its Record*, N.Y. TIMES, Feb. 13, 1996, at A14.

32. The UNPO conducted a physical inspection of Ogoni land in February 1995. See Adekunle Adekoya, *Ogoni: One Year Ago*, VANGUARD (Nig.), May 24, 1995, at 6.

33. THE DRILLING FIELDS (Catma Films 1994).

34. See Emmanuel, *supra* note 23.

35. See SPDC, *supra* note 9.



8. Six billion dollars in rent and royalties and four billion dollars for environmental devastation from SPDC.<sup>36</sup>
9. Secession from Nigeria.<sup>37</sup>

The Movement for the Survival of Ogoni People (MOSOP), formed in 1990 for the realization of the Ogoni Bill of Rights ideals, conveyed these demands to the international community in July of 1992, through Ken Saro Wiwa's address to the United Nations Working Group on Indigenous Populations in Geneva.<sup>38</sup> In August, 1993, MOSOP obtained a hearing before the 45th Session of the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, and the 43rd Session of the U.N. Committee for the Elimination of Racial Discrimination (CERD).<sup>39</sup>

Several international non-governmental organizations (NGOs) accredited to the United Nations also pleaded the Ogoni cause during the hearings.<sup>40</sup> Shanti Sadiq, the United Nation's rapporteur for the CERD Session on Nigeria, expressed the committee members' concern regarding the overwhelming evi-

36. *See id.*

37. *See Lewis, supra* note 31. None of the documents articulated a secession claim, however, certain activities and conduct of the Movement for the Survival of Ogoni People (MOSOP) strongly implied that there was a fight for secession. For example, the designing of an Ogoni flag, the adoption of an Ogoni national anthem, and Mr. Saro Wiwa's designation as Ogoni President in official correspondence indicated the move for an independent Ogoniland. *See id.*

38. In what became a restatement of MOSOP's commitment to a non-violent struggle, Ken Saro Wiwa noted:

First this matter was raised with the government and when they did not listen, I made it a national issue. . . . We then took the matter to the Unrepresented Nations and Peoples Organization (UNPO). The government ignored it. Now that the matter has been heard by the U.N. Commission on Human Rights and the CERD, if the government and Shell still ignore our case, I will have no alternative than to present the case of genocide to the United Nations Security Council where genocide is regarded as a very serious crime and I expect that the U.N. will then intervene in the situation directly.

Emmanuel, *supra* note 23.

39. *See id.*

40. *See id.* The NGOs included Anti-Racism Information Service (ARIS) (Geneva); Community of the Peace People (Belfast); Greenpeace International (U.K.); Support Group for Indigenous People; International Federation for the Protection of Ethnic, Religious, Linguistic and other Minorities; and the Rain Forest Action Network. *See id.*

dence of Ogoniland's ecological devastation and the government's violent repression of the Ogoni struggle. She called on the Nigerian government to reassess its activities in Ogoniland.<sup>41</sup> In a scathing indictment of the SPDC, another committee member described the Ogoni situation as "development racism."<sup>42</sup>

### *E. The Government's Reaction to the Struggle*

The Nigerian Land Use Decree of 1978 vests in the Nigerian government both land ownership and rights to subsurface resources. With these rights the government collects all accrued rents and royalties.<sup>43</sup> The federal government allocates revenue to states based on a derivation principle that considers the resources generated from the state, as well as the state's population and land mass.<sup>44</sup> The foregoing scheme, however, did not adequately protect particular communities.<sup>45</sup>

In a placatory move, the government established the Oil Mineral Producing Areas Development Commission (OMPADEC), to which was allocated three percent of oil revenue for the oil producing communities' development.<sup>46</sup> The government designated an additional 1.5% of oil revenues for an environmental fund.<sup>47</sup> As the SPDC observed, however, little of these funds actually reached the target communities.<sup>48</sup> Evidently, the 1993 expulsion of the SPDC from Ogoniland marked the turning point of the government's attitude towards the Ogoni struggle.

In 1993, Nigeria enacted Decree 107 of 1993, which suspended its 1979 Constitution by empowering the military dictatorship to rule by decrees. Thereafter, the government promulgated an anti-secession decree entitled the Treason and Treasonable Decree of 1993. This was followed by the Nigerian Lands (Title Vesting) Decree, which consolidated the government's hold on mineral re-

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41. *See id.*

42. *Id.*

43. *See* SPDC, *supra* note 9, at 3.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

sources.<sup>49</sup> The Nigerian Lands Decree reaffirmed government ownership of all land in Nigeria, including land within 100 meters of the shoreline and other land reclaimed from any lagoon, sea, or ocean on or bordering Nigeria.<sup>50</sup> Section six of the decree withholds jurisdiction from any court in Nigeria to entertain any matter in connection with the decree's validity or any government act based on the decree.<sup>51</sup> In addition, the section does not allow an inquiry into whether the decree or its implementation has contravened any of the fundamental human rights provisions in the Nigerian Constitution (1979) or the African Charter (Banjul Charter) on Human and People's Rights.<sup>52</sup> These decrees effectively deny constitutional relief to the Ogoni as well as other similarly situated communities seeking judicial review.

Based on the SPDC's request for security at their installations in Ogoniland, the Government dispatched a special armed unit comprised of soldiers and riot police called the Internal Security Task Force of Rivers State into Ogoniland. This task force, led by Major Paul Okuntimo, was allegedly ordered to execute vocal Ogoni in actions calling for "wasting targets"<sup>53</sup> under the false auspices of inter-communal clashes.<sup>54</sup>

49. *See id.*

50. *See id.*

51. *See id.*

52. *See* Laws of the Federal Republic of Nigeria, ch. 10 (1990).

53. *See* Lewis, *supra* note 31. Lewis reported that internal military documents show the government hoped that by crushing the Ogoni protests it would persuade Shell to resume operations in the region. In May 1994, the commander of an internal security task force, Major Paul Okuntimo, wrote to his superior, Lt. Col. Dauda Komo, the Military Administrator of Rivers State which includes Ogoniland. The message which dissidents later obtained said that "Shell operations were still impossible unless ruthless military operations are undertaken." *Id.* The letter called for wasting targets cutting across communities and leadership cadres especially vocal individuals. It detailed special allowances for troops and suggested applying pressure on oil companies to help pay the cost of the operation. *See id.*

In Nigeria, Adekoya reported:

Since the outset of what one may now call the Ogoni debacle, a security outfit known as Internal Security Task Force headed by Lt. Col Paul Okuntimo has held sway in Ogoniland, and from then on peace has eluded sections of remaining Ogoni leadership. Mr. Sorle Zorbani, acting president of Council of Ogoni professionals observed that troops of the task force have been carrying out periodical raids and have looted, burnt houses and raped women.

Adekoya, *supra* note 32, at 6.

54. Particularly revealing was an incident in 1994 when gunmen attacked a boat mid-

The Government's contempt for the Ogoni cause was clear. While the 1993 session of the U.N. CERD hearing on the Ogoni issue was in progress, thirty-five people were killed and an entire Ogoni village destroyed in one of the alleged inter-communal clashes between the Ogoni and Andoni.<sup>55</sup> The Nigerian Ambassador's explanation to the Committee about the killings was that "some other tribes pounced on the Ogoni to tell them they are not the only ones who have oil!"<sup>56</sup>

The government's divisive tactics are alleged to have polarized the MOSOP leadership into "liberal" and "radical" camps. The Ogoni people branded the liberals as "vultures"<sup>57</sup> while security operatives constantly harassed Ogoni leaders considered radicals.<sup>58</sup> Following a mob attack against the liberals, who were meeting at Gionkoo in Ogoniland, which resulted in the death of four prominent Ogoni on May 21, 1994, a Special Tribunal convicted MOSOP leaders of murder.<sup>59</sup>

#### *F. Reaction of the International Community*

Following the conviction, the Commonwealth of Nations suspended Nigeria's membership, while the United States and the

stream and massacred the occupants, including women and children. Although government investigation's attributed the massacre to communal clashes, some survivors identified the assailants as security operatives. See Wole Soyinka, *Why the General Killed*, in NIGERIAN CASE FILE: THE KEN SARA WIWA-OGONI HANDBOOK (Tejumola Olaniyan ed. 1996). For an example of how the government constantly portrays the Ogoni as fighting with their neighbors, the Okolomas, Andonis, and Okrikas see KEN SARO WIWA, PREFACE TO GENOCIDE IN NIGERIA: THE Ogoni TRAGEDY 103 (1992). See also Obibi, *supra* note 11.

55. See Emmanuel, *supra* note 23.

56. *Id.*

57. See Obibi, *supra* note 11. Obibi reports that:

Perhaps no one issue has contributed in unsettling the achievement of the MOSOP demands than the introduction of the words "vultures" and "deal with," words used to describe dissenting voices in the modus operandi of accomplishing the Ogoni Bill of Rights. They appear to have watered the ground for government infiltration in the ranks of Ogoni leaders and the present clampdown in the area.

*Id.*

58. See Adekoya, *supra* note 32.

59. See *id.* The tribunal, consisting of two judges and one soldier, sentenced the accused persons to death and granted them thirty days to appeal to the military ruling body. The sentences were quickly upheld and the government executed the accused merely ten days after the tribunal's ruling. See *id.*

European Union recalled their ambassadors.<sup>60</sup> Within Africa, South Africa campaigned for sanctions against the Nigerian government.<sup>61</sup> On December 15, 1995, the U.N. General Assembly passed a resolution condemning the executions.<sup>62</sup> The African Commission on Human and People's Rights expressed concern about human rights in Nigeria in its Final Communique issued on December 20, 1995.<sup>63</sup> In short, the world agreed that the trial and execution of MOSOP leaders was a travesty of justice.

### G. Preliminary Comment on Legitimacy of Ogoni Claims

The Ogoni allege that both the environmental devastation and the Nigerian Government's violent oppression are resulting in their slow and steady genocide. Although the government does not deny the killings and destruction of Ogoni villages, it attributes the devastation to inter-communal clashes.<sup>64</sup> The timing of the anti-secession decree with the expulsion of SPDC from Ogoniland in 1993, however, indicates that the government perceived the Ogoni as a threat to national unity. Furthermore, the government's use of soldiers, instead of normal police forces, to militarize Ogoniland demonstrates its intent to forcibly suppress the Ogoni rather than maintain civil order. Additionally, the documentary evidence of *The Drilling Fields*<sup>65</sup> as well as the testimony of the victims that their assailants were security operatives corroborate the allegation of the "wasting operations."

The manner of the prosecution and execution of the MOSOP leadership demonstrates the government's intent to suppress the vocal Ogoni. The government had pronounced the accused per-

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60. See Ehusani George, *Peace is Harvest of Justice*, GUARDIAN (Nig.), Dec. 7, 1995, at 27.

61. See Obibi, *supra* note 11, at 12.

62. See *White House Statement on U.N. Vote Condemning Execution in Nigeria*, U.S. NEWSWIRE, Dec. 15, 1995.

63. See Final Communique, African Communication on Human and People's Rights, Extraordinary Sess., Dec. 18-19, 1995.

64. See WIWA, *supra* note 54.

65. See THE DRILLING FIELDS, *supra* note 33. *The Drilling Fields* showed security operatives in Ogoniland, oil blowouts, devastated lands whose surface were completely covered by crude oil, destroyed villages, dismembered human bodies, and testimonies of brutalized victims. See *id.*

sons guilty even before their trials commenced.<sup>66</sup> The composition of the trial panel, included a soldier, thus placing the government in the position of both prosecutor and judge. This notion contravenes both the accused person's constitutional right to a fair hearing and the Basic Principles on the Independence of the Judiciary adopted by the U.N. General Assembly in 1995.<sup>67</sup> Further, the law under which the charges were brought unconstitutionally prohibited judicial review of the proceedings, even though the conviction resulted in capital punishment.<sup>68</sup> Notably, under the constitution and criminal laws of Nigeria, orthodox courts and not government tribunals should try murder cases. The trial law contravened the safeguards that the Economic and Social Council (ECOSOC) approved in 1994 to guarantee the protection of those facing the death penalty. Finally, the hasty executions that followed in spite of the Tribunal's thirty day reprieve to the convicts exemplified the government's illicit intentions.

The Ogoni attribute the environmental devastation to over-farming, over-fishing, and high population density. For instance, increased prospecting and production of oil is alleged to have resulted in a higher population density. Between the discovery of oil in 1958 and the abandonment of production in 1993, SPDC expanded operations to five oil fields and at least one hundred oil wells. Conservative official records showed an alarming oil spillage rate at four per week. In addition, SPDC constructed on Ogoniland a network of flowlines, pipelines, and access roads to

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66. See Adekoya, *supra* note 32. Adekoya reports that on Sunday, May 22, one day after the incident, the military administrator of Rivers State, Lt. Col. Komo, called a press conference and stated:

I got a report that Mr. Ken Saro Wiwa was to campaign in Gokana area on Saturday [the day of the murders]. It was against the election guidelines. I said he should not be arrested but should be shown the campaign program of constitutional conference elections . . . . After he had been stopped, he got news that some Ogoni leaders were holding a meeting at Gionkoo. He felt the "vultures" were planning against him. . . . *I have directed that all those involved in the killing . . . should be arrested. All MOSOP leaders are also to be arrested.*

*Id.* (emphasis added). Lt. Col. Komo himself admitted that Saro Wiwa was restrained from entering Ogoniland, much less Gionkoo, the scene of the murders. His conjecture that Saro Wiwa "felt the vultures were planning against him," stated the official position, and his non discriminatory order of arrest of the entire MOSOP leadership verified the political undertones of the entire exercise. See *id.*

67. See *id.*

68. See The Civil Disturbances (Special Tribunal) Decree No. 2 (1987) (Nig.).

facilitate production. Against the backdrop of a limited land area of 1000 square kilometers and a typical subsistence economy that depends heavily on the traditional farming methods of bush burning and shifting cultivation, the link between oil production pressures on land and over-farming readily falls into place. Thus, over-fishing and increasing population density are inevitable logical consequences.

Nevertheless, some argue that Principle II of the Rio Declaration justified SPDC's environmental standards in Ogoniland because it is the government's responsibility<sup>69</sup> to satisfy the community's economic needs.<sup>70</sup> On the one hand, the issue of who is responsible for the environmental devastation does not detract from the legitimacy of the Ogoni claim to self-determination. On the other hand, it is a deliberate misinterpretation to assert that the environmental standards in Ogoniland can be justified when international law prescribes a minimum standard of environmental protection that guarantees the healthy and productive life of its inhabitants.<sup>71</sup> The Ogoni standard falls well below this minimum.

Although the Nigerian government failed to discharge its constitutional and purported international legal responsibility, SPDC also bears an international legal responsibility. The Banjul Charter confers equal juridical status to group rights as fundamental human rights.<sup>72</sup> It elevates rights of people as *sui generis* rights,

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69. See Lewis, *supra* note 31. "Shell attributes Mr. Saro-Wiwa's success in gradually taking control of the movement and radicalizing it to the continuing poverty of the Ogoni, as promises of more federal aid never materialized. Most villagers still lack even electricity and piped water. For this, Shell blames the government." *Id.*

70. See United Nations Conference on Environment and Development Declaration (1992), reprinted in 68 THE FORESTRY CHRONICLE 430 (1992) [hereinafter Rio Declaration]. Principle II provides that "environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." *Id.*

71. See *id.*; see also Stockholm Declaration of the United Nations Conference on the Human Environment, 1972, 11 I.L.M. 1416 (1992) [hereinafter Stockholm Declaration]. Principle One provides that "man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well being." *Id.*

72. See African Charter of Human and Peoples' Rights, 21 I.L.M. 59 [hereinafter Banjul Charter]. Article 24 provides: "All peoples shall have the right to a general satisfactory environment favorable to their development." *Id.* at 63. Paragraph five of the Preamble provides: "Recognizing on the one hand, that fundamental human rights stem

which are necessary to guarantee the national and international protection of human rights. Thus, under the Charter, the Ogoni have the right to a satisfactory environment favorable to their development.

The Banjul Charter imposes a positive duty on the Nigerian government as a signatory, to ensure implementation of a healthy and productive environment. The Charter also imposes a negative duty on the world at large, including the SPDC, a corporate entity in Nigeria bound by laws applicable to the country, not to violate this right or to prevent its enjoyment. The SPDC's legal obligation, therefore, is to ensure that its activities do not infringe on the Ogoni rights. Conversely, the SPDC has a positive legal responsibility when continuing with oil production in Ogoniland to ensure preservation of the environment's healthiness and productive capacity. These obligations are independent of any joint venture agreements the SPDC has with the Nigerian government.

In addition to the Banjul Charter, other declaratory international instruments also impose responsibility on states, as well as on citizens, communities, enterprises, and institutions to protect the environment.<sup>73</sup> During its discussion of the responsibility of private and public enterprises, the U.N. World Commission on Environment and Development (WCED) noted that most agencies:

[H]ave been confined by their own mandates to focusing on the effects. Today, the sources of those effects must be tackled. . . . Environmental protection and sustainable development must be an integral part of the mandates of all agencies of governments, of international organizations and of major private-sector institutions.<sup>74</sup>

Although the Rio and Stockholm Declarations are not international law, they constitute evidence of globally accepted normative principles.

SPDC's responsibility also arises from the criminal killing of Ogoni people and the environment's devastation. The former act

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from the attributes of human beings, which justifies their national and international protection and on the other hand, that the reality and respect of people's rights should necessarily guarantee human rights." *Id.* at 59.

73. See Stockholm Declaration, *supra* note 71, at 1417.

74. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 310 (1987).



falls within Article II(a) of the U.N. Genocide Convention.<sup>75</sup> SPDC's complicity can be inferred from all of the following: its position as the instrument of the Ogoni environment's destruction; its request for and financing of the militarization of Ogoniland; its self-confessed arms importation for security operatives in Ogoniland;<sup>76</sup> and its curious participation through representation of legal counsel in the criminal trial in which Ogoni leaders were executed without effective legal representation.<sup>77</sup> On environmental

75. See Convention on the Prevention and Punishment of the Crime of Genocide, U.N. GAOR 3d. Sess., U.N. Doc. A/810 (1948), reprinted in 45 AM. J. INT'L L. 7 (1951). Article II provides that:

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

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part.

*Id.* at 7 (emphasis added).

Article III provides:

The following acts shall be punishable:

- (a) [g]enocide;
- (b) [c]onspiracy to commit genocide;
- (c) [d]irect and public incitement to commit genocide;
- (d) [a]tttempt to commit genocide;
- (e) [c]omplicity in genocide.

*Id.* at 8.

Article IV provides that "[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals." *Id.* at 8.

76. See Lewis, *supra* note 31. Lewis indicated:

Shell [SPDC] officials fervently deny doing anything more than trying to protect company personnel and equipment and say they had no control over the actions of the Nigerian security services. They said it was not unusual for companies seeking protection to pay transportation costs and salary supplements for troops living outside their barracks.

*Id.* at A1.

Mr. Gabriel Akinluyi, a Chief Executive of SPDC, reportedly swore in an affidavit that the arms were meant for security operatives all over the country. See TELL (Nig.), Jan. 29, 1996, at 34. This defense begs the question: what is the connection between oil production and importation of arms by SPDC whose interest exist mainly in the Niger Delta?

77. See Michael Birnbaum, Q.C., NIGERIA FUNDAMENTAL RIGHTS DENIED (1995) (reporting the trial of Ken Saro Wiwa and others by the accredited representative of the Law Society of England and Wales, and the Bar Human Rights Committee of England and Wales) (on file with the author).

devastation criminality, SPDC persisted with oil production until 1993 on the ground that it was the government which had the contractual obligation to deal with the environment. Nonetheless, SPDC knew that Government measures never had any real impact. This continued production is a reckless disregard for human life sufficient to constitute environmental genocide under article 11(c).

The Nigerian government's expropriation of land and mineral resources is of equal importance to the legitimacy of the Ogoni claims. Occupation by immemorial possession is the oldest, most widely accepted, and indeed, the founding principle through which title to land is acquired,<sup>78</sup> and Ogoni ancestral title certainly suffices. Moreover, there is a positive global movement towards the protection of indigenous peoples' land ownership.<sup>79</sup>

Article 15 of the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169,<sup>80</sup> to which Nigeria is a signatory, sought to protect indigenous people's ownership rights over the natural resources of their lands. It provided for their participation in the harvesting, use, management, and conservation of such natural resources.<sup>81</sup> Mineral deposit ownership, however, continues to be

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78. See generally GORDON BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* (1978).

79. See Douglas Sanders, *Self-Determination and Indigenous Peoples*, in *MODERN LAW OF SELF-DETERMINATION* 55-70 (Christian Tomuschet ed., 1993).

80. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, June 27, 1989, 28 ILM 1382 (entered into force Sept. 5, 1991). Article 15 provides:

1. The rights of peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These are rights the rights of peoples to participate in the use, management and conservation of these resources.
2. In cases in which the state retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to the lands, governments shall establish or maintain procedures through which they shall consult these peoples with a view to ascertaining whether and to what degree their interests would be prejudiced before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

*Id.*

81. See *id.*

controversial. In the *Lubicon Lake Band*<sup>82</sup> case, Lubicon Lake Band asserted that Canada had violated its self-determination right to freely dispose of its natural resources, by expropriating part of the Band's territories in order to grant interests in gas and oil exploration to private corporations.<sup>83</sup> The Commission held the communication to be inadmissible on the ground that self-determination was not an individual right enforceable through the optional protocol procedure.<sup>84</sup> Comments on the merits of the communication conceded, however, that

[N]ot many of the claims presented raise issues under Article 27 of the CCPR (Covenant on Civil and Political Rights) historical inequities to which the state party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue.<sup>85</sup>

There is a suggestion that expropriation of ethnic minorities' lands and resources without consent may constitute a threat to their way of life and culture, and a denial of their rights under Article 27 of the CCPR.

The Ogonis' dire environmental degradation presents a similar, but much more serious situation than that in the *Lubicon Lake Band* case, as the ongoing degradation also involves a threat to their physical existence.<sup>86</sup> It is undisputed that where a government assumes ownership of lands and mineral deposits, it holds and manages the property in trust for all peoples.<sup>87</sup> In the Nige-

82. The Lubicon Lake Band Case, Communication 167/1984 U.N. Doc CCPR/38/D/167/1984 (Mar. 28, 1990).

83. *See id.*

84. *See id.*

85. *See* BENNETT, *supra* note 78.

86. *See id.*

87. *See id.* This presumption derives from the common law interpretation of ownership, which vests same on the Crown with individuals retaining mere "estates" in the land. In the Nigerian case of *Amodu Tijani v. Secretary, S. Nig.*, 2 A.C. 399 (1921), while commenting on land ownership in Southern Nigeria, to which the Ogoni belong, the Privy Council held that:

[I]n interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law . . . as a rule, in the various systems of native jurisprudence throughout the empire, there

rian case, the Land Use Decree proclaims that ownership is vested in the government in trust for Nigeria's people.<sup>88</sup> Under the law, the trustee's failure to discharge his legal duty effectively relinquishes the trust and reverts legal ownership in the beneficiary.<sup>89</sup> In Ogoniland, the Nigerian state as trustee coercively enforces its possession of the trust property where the trust has not only failed, but the trust property has been transformed into an instrument of death.

The foregoing analysis clearly portrays the Ogoni people as having suffered egregious violations of their human rights, environmental rights, and property rights. The U.N. member states by imposing sanctions on the Nigerian government, acknowledge that the trial and execution of Ogoni leadership was a travesty of justice and conceivably, a "wasting" operation. It appears then, that the United Nations tacitly endorse the legitimacy of the Ogoni claims. If so, then what is the Ogoni's right to self-determination?

### III. THE CONCEPT OF SELF-DETERMINATION

#### A. *Historical Perspective*

During the Spanish "civilizing" conquests around the world in the sixteenth century, Indians of the New World resisted the depredations of the Spanish conquistadors by asserting and defending their natural right to establish their own political societies.<sup>90</sup> So-

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is no such full division between property and possession as English lawyers are familiar with . . . Their Lordships have elsewhere explained principles of this kind in connection with the indian title to reserve lands in Canada . . . In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community.

*Id.* at 402-03.

88. See Bennett, *supra* note 78.

89. See *e.g.*, *Te Teira Te Paea v. Te Roera Tareh* [1902] A.C. 56 (expressing that use of the word trust did not affect the reversionary fee simple ownership of a Maori claimant); see also *Tito v. Waddell*, 2 W.L.R. 493, 596 (1977).

90. See L. HAWKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* (1949). The Spanish champions tried to evoke and exploit the sympathy of the dominant Christian faith by arguing that because the Indians did not know Christianity, they could not be living a life of political liberty and human dignity, that they were slaves by nature, and the Spanish conquests was a just war against infidels. See also ROGER MERRIMAN, *THE RISE OF THE SPANISH EMPIRE 656-63* (1962). Pope Paul III declared

cial contract philosophy and Thomist thought, perceived that people's individual free consent legitimized their acquiescence to the state or political system, underpinned this resistance.<sup>91</sup> Society deemed consent so sacrosanct that even positivist hard-liners such as Hobbes and Machiavelli conceded that it was an indispensable condition for a stable and effective order.<sup>92</sup> The religious doctrine of Christianity and its transcendental individualism<sup>93</sup> provided the initial condemnation of alien subjugation, which at the time, was manifested in the trade of African slaves.<sup>94</sup> The medieval notions of self-determination were an aspect of natural law. Although the natural law theory centered on individual, rather than group rights, Hugo Grotius,<sup>95</sup> Emmerich De Vattel, and Johannes Althusius<sup>96</sup> appear to have broadened its scope by propounding a natural right to secession.

By the end of the eighteenth century, the French Revolution demonstrated that the medieval notions of self-determination had been transformed into an effective political principle. A showing of human solidarity demonstrated initial formulation of state obligations to assist self-determination movements in alien states.<sup>97</sup>

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"the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or possession of their property, even though they be outside the faith of Jesus Christ." Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 45 (1947).

91. For a discussion of Thomist thought, see R. TUCK, *NATURAL RIGHTS THEORIES* (1979).

92. See Martti Koskenniemi, *The Police in the Temple Order, Justice and the U.N.: A Dialectical View*, 6 EUR. J. INT'L L. 325, 329 (1995).

93. These refer to the notion that a Christian person is a free individual in relation to God.

94. See DAVID B. DAVIS, *SLAVERY AND HUMAN PROGRESS*, 304-05 (1984).

95. See HUGO GROTIUS, *DE JURE BELLIS DE PACIS LIBRI TRES* (1964), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* 260 (James Scott ed. & Francis Kelsey trans., 1964). Grotius, a realist in the mould of Hobbes is often "credited" with the secularization of natural law. Although Grotius advocates the inviolability of the initial social contract and a lack of authority on the part of the people to repudiate the sovereign, he also contends that a segment cannot unilaterally withdraw from the state "unless it is evident that it cannot save itself in any other way." *Id.* at 261. This natural right to secession is ostensibly an aspect of the exercise of the right to self-defense. See *id.*

96. See LEE BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 46 (1978).

97. See Tom Farer & Felice Gaer, *The U.N. Human Rights: At the End of the Beginning*, in UNITED NATIONS, *DIVIDED WORLD* 242 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993). The Anglo-French intervention in the Greek war of independence

This sentiment of human solidarity ushered in the political concept of self-determination during World War I.<sup>98</sup> Viewed as a “self-determination” war, World War I initiated the legitimacy of liberation efforts of oppressed peoples.<sup>99</sup>

In the post World War I era, this concept failed to take an effective foothold as a legal right. During the Versailles Peace Conference, “self-determination” served as an instrument of formal imperialism.<sup>100</sup> In addition, the Versailles Peace Treaty created special regimes of protection for limited clusters of peoples,<sup>101</sup> which did not set a positive normative precedent. On the contrary, and to the discomfort of the allied powers, Nazi-Germany exploited minority rights to justify its expansionist goals. This marked the beginning of another World War. On the eve of the United Nations’ birth and on the former Soviet Union’s insistence, the concept of self-determination was received, at arms length, as a principle clothed with ambiguity.<sup>102</sup>

### *B. Legal Concept of Self-Determination*

Political, economic, social, cultural, and linguistic factors have dynamically altered the legal concept of self-determination.<sup>103</sup> Al-

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from Ottoman rule was justified on the basis of human solidarity. See DOUGLAS DAKIN, *THE GREEK STRUGGLE FOR INDEPENDENCE 1821-33* (1973).

98. United States President Woodrow Wilson is credited with its articulation. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* 27-30 (1990).

99. See Farer & Gaer, *supra* note 97, at 243. Their observation that “one consequence of the war [World War I] was to enhance the perceived legitimacy of individual and group claims against the state is instructive.” *Id.*

100. See Koskenniemi, *supra* note 92, at 332.

101. See Farer & Gaer, *supra* note 97, at 243.

102. See *id.* at 292. Opposition to the recognition of minority rights in the United Nations was based on the grounds that:

[t]hey might again as during the 1930s serve as a pretext for foreign intervention; that they encouraged separatist tendencies threatening the territorial integrity of existing states; that the diversity of the condition of minorities precluded the evolution of universal standards; and that they could generate special measures of protection that would constitute reverse discrimination against majority interests.

*Id.*; see also FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES*, reprint of U.N. Doc. E/CN4/Sub.2/384 and Add. 1-7 (June 1977).

103. See Victor Segesvary, *Group Rights: The Definition of Group Rights in the Contemporary Legal Debate Based on Socio-cultural Analysis*, 3 INT’L J. GROUP RIGHTS 102

though the scope and application of self-determination is unclear, due to its inherent tension with the sanctity of the state, the legal concept of self-determination has generally restricted the political concept of self-determination to consent of the governed.<sup>104</sup> Therefore, the legal concept of self-determination has varied,<sup>105</sup> both in scope and application, in accordance with the oppression and domination, and with the exigency of power politics and prioritization of conflicting interests.

### 1. Normative Framework

The right to self-determination has been classified as a *jus cogens*, a peremptory norm of customary international law.<sup>106</sup> By virtue of this normative status, self-determination is valid and binding on all, irrespective of consent, and only a subsequent norm of similar status can abridge or set it aside.<sup>107</sup> International instruments and state practice, however, lack clarity on the exact scope

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(1995).

104. The political concept of self-determination emphasizes the basic necessity of consent of every person or group to any political arrangement. See JOHN DUNN, *POLITICAL OBLIGATION IN A HISTORICAL CONTEXT* 46 (1980). The legal concept of self-determination, on the other hand, focuses on the tension between its liberation content and the norms of territorial and political sovereignty. Consequently, legal self-determination has defied a uniform normative definition. Its meaning has oscillated from "a . . . political idea . . . preserving the character of the group," to "the freedom of a nationality to determine its own political fate and to manage its own affairs." James FAWCETT, *THE LAW OF NATIONS* 39 (1968); KULSKI, *INTERNATIONAL POLITICS IN A REVOLUTIONARY AGE* 136 (1964); see also ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 105 (1963); ISA SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 80 (1989); UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 192 (1972). Legal self-determination has also been defined as "[t]he right of a people . . . to determine their political and legal status as a separate entity" and as "embodying the quintessentially democratic concept of consent of the governed." F. PREZETACNIK, *THE BASIC COLLECTIVE HUMAN RIGHT TO SELF-DETERMINATION OF PEOPLES AND NATIONS AS A PRE-REQUISITE FOR PEACE: ITS PHILOSOPHICAL BACKGROUND AND PRACTICAL APPLICATION* 263 (1991); Michael S. Carter, *Ethnic Minority Groups and Self-Determination: The Case of the Basques*, 20 COLUM. J.L. & SOC. PROBS. 55, 58 (1986).

105. See Okwu-Okafor, *supra* note 6, at 90.

106. See HECTOR GROS-ESPIELL, *THE RIGHT TO SELF-DETERMINATION, IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 11* (1980) (study report of Gros-Espiell, Thematic Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities); see also *Legal Consequences Case*, 1971 I.C.J. 66, 69; *Barcelona Traction Case*, 1970 3 I.C.J. 304; *South West Africa Case*, 1966 I.C.J. 437; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 515 (1990).

107. See BROWNLIE, *supra* note 106, at 514-15.

and application of self-determination. Articles 1 and 55 of the U.N. Charter provide for "equal rights and self-determination of peoples" without defining the "peoples" subject to this right.<sup>108</sup> The United Nations' initial position was that this term exclusively referred to colonial peoples and territories under alien domination.<sup>109</sup>

The Declaration on the Granting of Independence to Colonial Countries and Peoples (Colonial Declaration)<sup>110</sup> confirmed this restriction. The Colonial Declaration, however, elevated the juridical status of self-determination from a mere principle to a legal right.<sup>111</sup> In 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,<sup>112</sup> often referred to as the International Bill of Rights,<sup>113</sup> restated the right to self-determination, but only listed individual minority rights exercisable *in community* with the group. Thus, it did not clearly advance the concept beyond the colonial context.

The Declaration on Friendly Relations<sup>114</sup> introduced radical

108. U.N. CHARTER arts. 1, 55; *see also* RUTH RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940-1945*, 810-11 (1958).

109. *See* GROS-ESPIELL, *supra* note 106. According to Gros-Espiell's report:

[S]elf-determination of peoples is a right of peoples, in other words of a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future . . . Under contemporary international law, minorities do not have this right. Modern international law has deliberately attributed the right to peoples and not to nations and states. The United Nations has established the right of self-determination as a right of peoples under colonial and alien domination. The right does not apply to peoples already organised in the form of a state which are not under colonial and alien domination.

*See id.*

110. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. Doc. A/4884 1960, *reprinted in* 1960 U.N.Y.B. 49 [hereinafter Colonial Declaration]. For a discussion of the history of the 1960 Declaration and its application, *see* EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 1333 (1991).

111. *See id.* at art. 1, ¶ 2.

112. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360, 993 U.N.T.S. 33.

113. KATHERINE HALL, *INTERNATIONAL HUMAN RIGHTS LAW: A RESOURCE GUIDE* 13 (1993).

114. Declaration on Principles of International Law, Concerning Friendly Relations and Cooperation Among States and in Accordance with the Charter of the United Na-



changes to colonial self-determination. The declaration provided, *inter alia*, for the preservation of the sovereign and independent states' territorial integrity but subjected them to a limitation: the state must be "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."<sup>115</sup> This clause effectively established that self-determination could be exercised in varying degrees and is not necessarily coterminous with full independence.<sup>116</sup> This concept has matured beyond the colonial context and is available to unrepresented peoples within a sovereign state.<sup>117</sup> The juridical status of the Declaration on Friendly Relations is often questioned because Declarations of the General Assembly are non-binding. The General Assembly, however, adopted the Declaration without any negative votes;<sup>118</sup> thus, the Declaration constitutes an *opinio juris* sufficient for the establishment of a customary rule of international law.<sup>119</sup>

Beyond the colonial context, the provisions of the Declaration on Friendly Relations are not free from scope and application controversies. According to Capotorti, contemporary international law only recognizes a minority's right to self-determination if "a minority has the right to be called *people*, and provided that the state to which a minority group belongs is subject to a government not representing the whole people without *discrimination of race, creed or color*."<sup>120</sup>

The problems of clarity here are twofold. First, what degree of representativeness will serve as a satisfactory test? Democracy

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tions, Annex to G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028, reprinted in 9 ILM 1292 (1970) [hereinafter Declaration on Friendly Relations].

115. *Id.*

116. See Frederic Kirgis, *The Degrees of Self-Determination in the United Nations*, 88 AM. J. INT'L L. 304, 305 (1994).

117. See A. CRISTESCU, THE RIGHT TO SELF-DETERMINATION, HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF THE UNITED NATIONS INSTRUMENT, U.N. Doc.E/CN4/Sub.2/LL04/Rev. 1 (1981).

118. See CHRISTIAN TOMUSCHAT, *Self-Determination in a Post-Colonial World*, in MODERN LAW OF SELF-DETERMINATION 2 (1993).

119. See Kirgis, *supra* note 116, at 306. Moreover, this Article will later demonstrate that state practice has confirmed the Declaration on Friendly Relations as authoritative customary rules of international law. See *id.*

120. Francesco Capotorti, *Are Minorities Entitled to Collective International Rights?*, 20 ISR. Y.B. OF HUM. RTS. 355-56 (1990).

easily offers itself as the best known representative political system. Democracy, however, is founded on the principle of majoritarian rule and cannot adequately represent minorities. Nevertheless, many scholars interpret post-colonial self-determination as the realization of a democratic government.<sup>121</sup> This perspective is criticized as being founded on the false belief that the modern democratic state is a closely knit community, which endorses compulsory assimilation of minorities into the fictional community.<sup>122</sup> In practice, the democratic test has failed as a viable solution to the problems of minorities.<sup>123</sup>

The second problem is the meaning of "people" and the restrictive content of "race, creed or color." UNESCO experts have specified that "people" in international law share one or more of the following characteristics: common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and common economic life.<sup>124</sup>

Legal scholars agree that overriding considerations in the right to be called "people" include territoriality, a common history, culture, language, and a conscious desire to maintain a distinct identity from other groups.<sup>125</sup> Talcott Parson's definition of a national group as a transgenerational group emphasizes the impor-

121. See M. POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE—THE NEW DOCTRINE IN THE UNITED NATIONS* 38 (1982).

122. See Segesvary, *supra* note 103.

123. The Canadian democracy has not prevented Quebec from seeking secession. On the other hand, the Inuit have rejected the "representativity" test as "a far too easy test for government to claim that they meet." Dietrich Murswick, *The Issue of a Right of Secession—Reconsidered*, in *MODERN LAW OF SELF-DETERMINATION* 27 (Christian Tomuschat ed., 1993). For example, the Inuit assert that the representatives of Quebec separatist movement make the claim that they, as a nation, would represent the whole people of the territory of Quebec, including the Inuit. "Our past and present experience with the Quebec government regarding such a claim leads us to believe otherwise . . . . Mere representation is inconsistent with the principles that the ICC and others have been advocating . . . namely the right to full and direct participation and the right to consent." *Id.*

124. International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris Nov. 27–30, 1989, SHS 89/CONF. 602. This description has been criticized as not accommodating diverse societies. See Patrick Thornbery, *The Democratic or Internal Aspect of Self-Determination*, in *MODERN LAW OF SELF-DETERMINATION* 101, 124–25 (Christian Tomuschat ed., 1993).

125. See Okwu-Okafor, *supra* note 6, at 94.

tance of the foregoing elements, and is substantially in accord with the 1992 U.N. Declaration on Minorities' definition of "people" as national, ethnic, religious, and linguistic minorities.<sup>126</sup> The Vienna Declaration of 1993<sup>127</sup> rectified the restrictive contexts of race, creed or color by using the phrase "without distinction of any kind."<sup>128</sup>

In 1992, the U.N. Commission on Human Rights adopted the Declaration on The Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.<sup>129</sup> The Declaration's most pragmatic provision is the requirement that minority groups be granted participation in all affairs or matters related to their lives or territory.<sup>130</sup> A stipulation that such participation may be denied if it is incompatible with national legislation, however, eroded any value the Declaration might have had. The Declaration appears to adhere to the view that minorities collectively are not subjects of the right of self-determination. Based on provisions of international multilateral instruments alone, the scope and application of the self-determination concept beyond the colonial context remains an unsolved riddle.

Regional instruments have had a greater measure of clarity. The African Charter on Human and Peoples Rights (Banjul Charter),<sup>131</sup> which was intended to be "an instrument based upon an African legal philosophy and responsive to African needs,"<sup>132</sup> undoubtedly was the first regional document to recognize groups as subjects of the self-determination right beyond the colonial con-

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126. See Talcott Parsons, *Some Theoretical Considerations on the Nature and Trends of Change of Ethnicity*, in *ETHNICITY THEORY AND EXPERIENCE* 7-8 (Matthew Glazer et al. eds., 1975).

127. Vienna Declaration and Programme of Action, pt. 1, para. 2, U.N. Doc. A/CONF, 157/24 (1993), *reprinted in* 32 I.L.M. 1661 (1993).

128. *Id.*

129. Declaration on The Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135 (1992), *reprinted in* The Report of the Working Group on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities U.N. Doc. E/CN.4/992/48 16-19 (1992).

130. *See id.*

131. Banjul Charter, *supra* note 72.

132. Richard Gittleman, *Introductory Note, The Organization of African Unity: Banjul Charter on Human and Peoples' Rights*, 21 I.L.M. 58 (1982).

text.<sup>133</sup> Article 20 of the Banjul Charter provides for two distinct subjects of the right: colonized people and oppressed people.<sup>134</sup> Paragraph 9 of the preamble puts the meaning of oppressed people in proper perspective. It states that liberation struggles within the Charter are to be seen in light of peoples that “are still struggling for their dignity and genuine independence,” and obliges states to eliminate discrimination based on race, ethnic group, color, sex language, religion or political opinions.<sup>135</sup> Although territoriality circumscribes the inherence of self-determination within the Banjul Charter, the oppressed ethnic group stands out as a beneficiary of the right. Article 19 of the Charter, which prohibits domination of a people by another people,<sup>136</sup> obviously accommodates the dominated ethnic group as “peoples” within the Charter. There are also grounds for further argument that references to “foreign domination” within the Charter were intended to accommodate the pre-colonial state.<sup>137</sup>

The expressed intent of the Banjul Charter to “eradicate all forms of colonialism from Africa” may have looked beyond the 1960 decolonization process—given that this statement was in 1981, when virtually all European colonies had been liberated.<sup>138</sup>

133. Banjul Charter, *supra* note 72, at 62. Article 20 of the Banjul Charter provides:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

*Id.*

134. *See id.*

135. *See id.* at 59.

136. *See id.* at 62. Article 19 provides that: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.” *Id.*

137. *See id.* at 59–68.

138. *See id.* at 59. Paragraph 4 of the preamble, states that:

[R]eaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the

From this perspective, "all forms of colonialism" could potentially mean all the consequences and ramifications of colonialism in the post-colonial state, both internally and externally. Some of these ramifications can be obtained from paragraph nine of the Preamble.<sup>139</sup> They include external consequences of colonialism, such as: colonialism, neo-colonialism, Zionism, and apartheid; as well as internal consequences such as the struggle for dignity. The foregoing analysis is yet to be supported by state practice, but it arguably has some support from the Gros-Espiell report.<sup>140</sup>

Gros-Espiell's report appears to expand colonial or alien domination to include fictional national unity that disguises colonial or alien domination, denial of the self-determination right to the people, and absence of a people's free and voluntary submission to the state's legal order.<sup>141</sup> A practical illustration of such a situation could be Rwanda, where Belgian colonial rule led to the Tutsis' political domination of the Hutus.<sup>142</sup> Specifically in 1950, the Belgians installed the Tutsis on the pretext that they were the natural *de facto* rulers under the indirect rule system.<sup>143</sup> The Tutsis, therefore received eighty-three percent of political and strategic economic positions.<sup>144</sup> The Tutsis domination of Hutus in both Rwanda and Burundi and the resulting civil wars are the consequences of colonialism within Gros-Espiell's amplification.

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United Nations and the Universal Declaration of Human Rights.

*Id.*

139. *See id.*

140. *See* GROS-ESPIELL, *supra* note 106, at 10. Gros-Espiell reported that "If however beneath the guise of ostensible national unity, colonial and alien domination does in fact exist whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated." *Id.* Furthermore, he observed that:

[C]olonial and alien domination mean any kind of domination whatever form it may take, which the people concerned freely regards as such. It entails denial of the right of self determination to a people possessing that right by an external alien source. Conversely, colonial and alien domination does not exist where a people lives freely and voluntarily under the legal order of a state . . . provided it is real and not mere legal fiction.

*Id.*

141. *See id.*

142. *See* Makau wa Mutua, *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, 21 BROOK. J. INT'L L. 505, 521 (1995) *citing* DIXON KAMUKAMA, RWANDA CONFLICT: ITS ROOTS AND REGIONAL IMPLICATIONS 21 (1993).

143. *See id.*

144. *See id.*

Other notable regional instruments are the Helsinki Final Act,<sup>145</sup> the Proposal for a European Convention for the Protection of Minorities,<sup>146</sup> which recognizes the minority as a collectivity, and the European Charter for Regional or Minority Languages,<sup>147</sup> which presents the most comprehensive attempt to preserve the language of minority groups. These instruments do not, however, establish a consensus on the minority as a collectivity with the right of self-determination. Just like the International Bill of Rights, they portray deliberate efforts to deal extensively with minority problems, but on the basis of individual rights exercisable in a community within a group.

There has been, however, unparalleled progress in the minority group distinctly referred to as indigenous peoples. Some scholars treat this class as a special category of minorities because of their greater degree of cultural differences and vulnerability.<sup>148</sup> Experts believe that there is a need to decolonize their lingering colonial status.<sup>149</sup>

Indigenous people have been defined as:

[A] collectivity which has descent from the earliest surviving population in the part of the state where the people traditionally lives (whether still living in that area, or as a result of invol-

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145. Conference on Security & Cooperation in Europe on the Human Dimension adopted June 29, 1990, reprinted in HURST HANNUM, DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS 35 (1990). This document reformed the "individual" perspective of the International Covenant on Civil and Political Rights. Article 35 obliges the state party to ensure the national minorities' effective participation in public affairs, noting the possibility of appropriate local or autonomous administrations. See *id.*

146. See EUR. COUNCIL DOC. (CDL 91) 7 (1991). This document not only recognizes groups as subjects of rights but also seeks to place these rights on the agenda of human rights protection. Chapter 1 provides, inter alia, that "the International Protection of the rights of ethnic, linguistic and religious minorities as well as the rights of individuals belonging to those minorities, as guaranteed by the present convention, is a fundamental component of the international protection of human rights, and as such falls within the scope of international cooperation." *Id.* at ch. 1. Article 2 defines minority as "a group which is smaller in number than the rest of the population of a state, whose members who are nationals of that State, have ethical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language." *Id.* at art. 2.

147. See, HURST HANNUM, DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS 86-101 (1990).

148. See Sanders, *supra* note 79, at 71.

149. See *id.*

untary relocation in another part of the state) and which has a distinct identity associated with its history.<sup>150</sup>

International organizations consider cultural groupings in Africa to be entitled to the indigenous peoples classification.<sup>151</sup> Specifically, the U.N. Working Group on Indigenous Populations consider the Ogoni as indigenous peoples.<sup>152</sup> The history of pre-colonial Africa's "terra nullius" and classless "tribes" reveal well-established political kingdoms and empires based on ethno-cultural distinctions.<sup>153</sup> There exists substantial support for the argument that the most widespread feature of unique culturally homogenous ethnic groups, which are transgenerational with pre-colonial ancestral territoriality, is most evident in post-colonial Africa.<sup>154</sup> In other words, post-colonial Africa is largely an arbitrary amalgamation of diverse indigenous peoples in political structures of inequality.<sup>155</sup>

150. Douglas Sanders, *Indigenous Peoples at the United Nations* (manuscript on file with author). In the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, indigenous people are defined as:

[P]eoples in independent countries who are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, *supra* note 80; see also *Convention Concerning Indigenous and Tribal Peoples*, 15 OKLA. CITY U.L. REV. 237 (1990).

151. See INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, COVERAGE IN THE INDIGENOUS WORLD 1994-95 (1995) [hereinafter INTERNATIONAL WORK GROUP]; see also D. Murmur, *The Concept of Indigenous Peoples in Africa*, INDIGENOUS AFF. 52-56 (1994).

152. See INTERNATIONAL WORK GROUP, *supra* note 151.

153. See OKWUDIBA NNOLI, *ETHNIC POLITICS IN NIGERIA* (1978). In Nigeria, there were the Benin Kingdom, the Fulani Empire, the egalitarian Ibo Traditional Society, the Sultanate of Sokoto, Emirates of Kano and Katsina, and other kingdoms ruled by Obas and Chiefs in the East and West. This was a common feature of pre-colonial African landscape. See MANDANI *POLITICS FORMATIONS IN UGANDA AND CLASS* (1976).

154. See Segesvary, *supra* note 103, at 102 (observing that the African cultural group whose distinctiveness is normally a result of a created cultural environment serves as the best evidence of a cultural group entitled to sui generis rights on basis of distinctive symbolic orderings, belief and value systems, and particularly shared historical experience).

155. Professor Okwudibia Nnoli observed that the colonial administrative "divide and rule" policy translated into ethnic domination political structures, which have only become more pronounced today with the collapse of the Cold War. See NNOLI, *supra* note

The Draft Declaration on Rights of Indigenous Peoples,<sup>156</sup> presently before the U.N. Human Rights Committee, provides that "indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government."<sup>157</sup> Paragraph four, however, qualifies the scope of the self-determination by providing that:

[N]othing in this Declaration may be interpreted as implying for any state, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration on Principles of International Law concerning Friendly Relations and cooperation among states in accordance with the Charter of the United Nations.<sup>158</sup>

Paragraph four may have re-introduced the ambiguities that were created in the Declaration on Friendly Relations regarding the scope of self-determination. Professor Douglas Sanders correctly argues that if self-determination survives in a final declaration, it should, at the least, legitimize the self-government rights or autonomy for territorially-based indigenous peoples within sovereign states.<sup>159</sup> As a consequence, indigenous peoples who traverse post-colonial Africa could demand self-government or autonomy without being oppressed or dominated, as the definitions of indigenous peoples do not require this condition. Thus, evidence of domination or oppression could then be construed as an outright denial of the right to autonomy or self-government and may justify the more drastic step of secession, especially if accompanied by egregious violations of human rights. It is, however, not certain that this is the intended result of the Draft Declaration.<sup>160</sup> By and

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153 at 25; see also NGUGI WA THIONG, *Mau-Mau is Coming Back in Ngugi Wa Thiongo*, in *BARREL OF A PEN: RESISTANCE TO REPRESSION IN NEO-COLONIAL KENYA* (1983) (noting that after independence "there was a rush to Africanize the inequalities of the colonial era").

156. See *Annex to the Report of the WGIP*, U.N. Doc. E/CN.4/SUB.211993/29 (1993).

157. *Id.*

158. *Id.*

159. See Sanders, *supra* note 79, at 81.

160. See *The United Nations at 50: Notes for Speakers*, U.N./D.P.I. Pub. 76-77 (1995).



large, the Declaration on Friendly Relations remains the authoritative statement on post-colonial self-determination.

## 2. State Practice

According to Professor Frederic Kirgis Jr.,<sup>161</sup> self-determination observable from state practice includes the following:

1. Freedom from colonial domination, as in certain areas in Africa, Asia, and the Caribbean.<sup>162</sup>
2. The converse of above, the right to remain dependent, as in the cases of the island of Mayotte in the Camoros, or Puerto Rico.<sup>163</sup>
3. The right to peacefully dissolve a state and to form new states on the territory of the former one, as in the former Soviet Union and Czechoslovakia.

Historical examples of pacific secessions are: the withdrawal of Norway from the Norway/Sweden union in 1905; the withdrawal of Senegal from the Mali federation in 1960; the withdrawal of Singapore from the Malaysian federation in 1965; and the withdrawal of Syria from the United Arab Republic in 1961.

According to the United Nations, "[t]here are at least five thousand indigenous groups made up of three hundred million people that live in more than seventy countries on five continents." *Id.* This apparently small number may be indicative of a U.N. policy to minimize the number of peoples who can claim the rights of indigenous peoples.

161. See Kirgis, *supra* note 116, at 307.

162. There is a global consensus that the right of self-determination includes a right of freedom from colonial domination. We have not come across any published dissenting view on this. With his characteristic persuasive and emotive force Hector Gros-Espiell, reported that:

A necessary consequence of recognition of the right of peoples under colonial and alien domination to self-determination is the rejection and condemnation of colonialism in all its forms and manifestations. *Under contemporary international law, colonialism is an international crime* expressly characterized as such, for instance in para. 1 of General Assembly Resolution 2621 (XXV) of 12th October, 1970. The criminal character of colonialism and of acts by which it is practiced calls for emphasis, because of its special significance and implications.

See GROS-ESPIELL, *supra* note 106, at 11 (emphasis added).

163. See Kirgis, *supra* note 116 at 307. The right to remain dependent is a necessary counterpart of colonial self-determination, otherwise the latter becomes an imposition. Nevertheless, the experiences of Morocco's "Green March" into Western Sahara, Ethiopia's "peasant march" into Eritrea, and the obvious territorial competition between the United Kingdom and Argentina over the Falkland Islands, underscore the need for normative safeguards of the genuine will of the true colonized peoples.

The Baltic states and Yugoslavia provide precedence for a right to secede when there is a breakdown in the machinery of the state.<sup>164</sup> The Soviet Union not only officially denounced the Baltic states' (Lithuania, Latvia and Estonia) initial declaration of independence, but also resisted it militarily.<sup>165</sup> The United States and the European Community assisted the Baltic states' liberation struggles against the consent and sovereignty of the Soviet Union by imposing sanctions on the Soviet Union.<sup>166</sup> Similarly, the international community's intervention in the Yugoslavian civil war in aid of Croatia is inconsistent with the preservation of the territorial integrity of the country, and can only be explained in the context of a post 1960 concept of self-determination.<sup>167</sup>

4. A very selective right to secede.

The contemporary view is that there is no general right to willful secession.<sup>168</sup> The experience of Bangladesh, however, suggests that a successful secession will be accepted. Additionally, there is also a right to secede where it is based on egregious human rights violations.<sup>169</sup> The case of the Iraqi Kurds presents an interesting study of the international community's attitude toward balancing the necessity of intervention to facilitate secession in instances of gross human rights violations that threaten the very existence of a minority, with the dangers of setting a precedent for eroding the territorial integrity of the sovereign state.<sup>170</sup>

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164. See Jane Stromseth, *Self Determination, Secession and Humanitarian Intervention by the U.N.*, ASIL PROC. 370 (1992).

165. See Trent Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L. 255, 262 (1995).

166. See Murswick, *supra* note 123, at 21.

167. See *id.*

168. See BUCHHEIT, *supra* note 96 at 57-59.

169. See Tomuschat, *supra* note 118, at 1. Thomas Franck believes that a minority within a state occupying a discrete territory, may have a right to secede analogous to a decolonization right, if it is persistently and egregiously denied political and social equality, as well as the opportunity to retain its cultural identity. See Thomas Franck, *Post-modern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 13-14 (Catherine Brölmann et al. eds., 1993).

170. The Anglo-French Treaty of Lausanne, which was signed on June 24, 1923, dispersed the Kurdish nation, predominantly of the Sunni stock in native religion and culture, among Turkey, Syria Iraq, and Iran. Kurdish nationalism dates back to the 1880s under the leadership of Sheik Ubaydallah. Similar to the Ogonis, central to Iraq's re-

5. The right of divided states to reunite,<sup>171</sup> as Germany has demonstrated.<sup>172</sup>

6. The right of limited autonomy, short of secession, for territorial groups or ethnic, religious and linguistic groups.

7. The right of a minority group within a larger political entity, pursuant to article 27 of the Covenant on Civil and Political Rights<sup>173</sup> and the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.<sup>174</sup>

8. The right to a democratic form of government.<sup>175</sup>

pression of the Kurdish liberation struggle is the oil revenues on Kurdish land. The history of the relationship between the Kurds and Iraq has been one of revolt, mass killings and displacement. Specifically, in 1988, perceiving that the Kurds sided with the enemy during the Iran-Iraq war, Iraq used poison gas against the Kurdish population, killing over 5000 and forcefully relocating 100,000 to "strategic hamlets." In 1991, following defeat in the Gulf War, and perceiving a Kurd uprising in the North, the Iraqi government deliberately stirred a panic among the Kurds. Tormented by memories of the chemical weapons attack in 1988, about two million Kurds fled in mass into inhabitable border mountains. Turkey refused to accept the Kurdish refugees, even though it perceived the Iraqi measure as a deliberate attempt to expel an unwanted minority in order to appropriate their lands and oil resources. The Allied forces intervened in the northern part of Iraq against the express wish of the Iraqi government. See generally Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT'L J. REFUGEE L. 4 (1992). The Allied forces justified their intervention under Resolution 688 of the U.N. Security Council, even though this resolution only authorized "humanitarian assistance." The United Nations, however, did not withdraw the Allied powers' authority. The Allied forces built camps, protected the enclave from external aggression, maintained an administration and a no-fly zone and ran an independent Kurdish state within Iraqi territory. On May 18, 1991, the fleeing Kurds were able to negotiate autonomy with the unrepentant Iraqi dictatorship. See *Kurds Reach Agreement on Iraqi Democracy Plan Differences on Autonomy Delay Signing*, TORONTO STAR, May 19, 1991, at A2. The following two observations regarding the Kurds' situation are germane to the development of self-determination law:

1. The Allied powers' administration of the temporary Kurdistan state is an endorsement of the Kurds' rights to independence.
2. The Kurds' negotiated autonomy can only be logically attributed to the U.N. intervention. The Kurds were on the run and about to lose their ancestral lands before the U.N. intervention. This endorses a normative minimum of "autonomy" for an oppressed group such as the Kurds.

See *id.*

171. See Kirgis, *supra* note 116 at 307.

172. See Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, reprinted in 29 I.L.M. 1186 (1990).

173. International Covenant on Civil and Political Rights, *supra* note 112, at art. 27.

174. Declaration on The Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, *supra* note 129.

175. See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J.

Beyond the decolonization context, all the other rights or claims are of varying juridical status. Based on both the Friendly Relations Declaration<sup>176</sup> and the Vienna Declaration,<sup>177</sup> it is clear that they are subject to *variables* that act as their normative predictors. These variables can be deciphered from the Declarations' express disclaimer of any intent to authorize the dismemberment of a state, and their overt protectiveness of governments representing all peoples within the territory. These variables are the degree of representative government and the degree of destabilization. They articulate state practice and attitudes to self-determination claims beyond the colonial context as buttressed by the experience of the Kurds of Iraq.

The consequences of an independent Iraqi Kurdistan state on the Gulf Region has always compromised the international community's willingness to enforce their right to self-determination. This supports a League of Nations Commission recommendation that Kurdish territory remain part of Iraq. Prior to the Allied forces 1991 intervention in Northern Iraq, Saddam Hussein's government could have been characterized as an absolute dictatorship that was overtly taking steps to expel the Kurds. This extreme negative end of the representative variable should have entitled the Kurds to secession. The second variable, the destabilizing effect, however, was very potent given the presence of Kurds in neighboring Iran, Syria and Turkey.<sup>178</sup> The second variable, the destabilizing effect, led to a compromise: autonomy. Autonomy, informed and guided the compromise.

Singularly however, autonomy was not destabilizing, as the Iraqi Kurds and the Kurdish nations in neighboring Iran, Syria and Turkey have all had varying degrees of autonomy. Similarly, the plight of the Basque in Spain and France, and Armenians in Tur-

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INT'L L. 46, 52 (1992).

176. Friendly Relations Declaration, *supra* note 114.

177. Vienna Declaration, *supra* note 127.

178. Thomas Friedman, *After the War: Decision Not to Help Iraqi Rebels Puts U.S. in an Awkward Position*, N.Y. TIMES, Apr. 4, 1991, at A1. Friedman reported that President George Bush was initially hesitant at the prospect of "Lebanonization" of Iraq or its fragmentation. President Bush also did not want to: (1) fuel Kurdish separatism in the entire Gulf region; (2) contribute to the dismemberment of Iraq; (3) set a dangerous precedent for interference in the internal affairs of sovereign states; and (4) recommit American ground forces on Iraqi territory. See Elaine Sciolino, *After the War, How Bush Overcame Reluctance and Embraced Kurdish Relief*, N.Y. TIMES, Apr. 18, 1991, at A6.

key have largely been viewed by international community from this lens. The Russian bombardment of Chechnya received little condemnation because the international community believed that Chechnya's secession would lead to further fragmentation<sup>179</sup> of the presently unstable Russian federation.<sup>180</sup>

In the application of the above variables, states also take into account the following considerations:

1. The group's historical claim.<sup>181</sup>
2. The group's geographic location.<sup>182</sup>
3. The group's economic viability.<sup>183</sup>
4. The group's population.<sup>184</sup>
5. The secessionist group's representativeness.<sup>185</sup>

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179. See *Russia and the Mouse that Roars*, U.S. NEWS & WORLD REP., Dec. 12, 1994; see also Steven Greenhouse, *U.S. Says Russian Move Is an Internal Affair*, N.Y. TIMES, Dec. 12, 1994, at A13.

180. Following the dissolution of the Soviet Union, distinct ethnic populations emerged as isolated minorities within the new nations. See Philip Chase, *Conflict in the Crimea: An Examination of Ethnic Conflict Under the Contemporary Model of Sovereignty*, 34 COLUM. J. TRANSNAT'L L. 219, 219-54 (1995). For example, there are now roughly 25 million Russians living in "ethnic enclaves" outside of the Russian federation. See *id.* at 220 n.1.

181. See Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Kirgis, *supra* note 116 at 308 (observing that "[t]he degree to which a claimed right to secede will be destabilising may depend on such things as the plausibility of the historical claim of the secessionist group to the territory it seeks to slice off.").

182. Within the Russian federation, the regions that have successfully negotiated semi-autonomy lie within Russian territory, for example Bashkortostan and Tatarstan. See Chase, *supra* note 180, at 237.

183. The Russian federation also presents the example here as "[t]he regions that have had success in their negotiations with Russia . . . are characterized by economic prosperity, which may have created a stronger incentive in Moscow for a peaceful resolution of differences." *Id.*

184. Some commentators argue that small groups' choices are among the various modes of implementation, even though their right to self-determination is not necessarily nullified. See Otto Kimminich, *A Federal Right of Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 83, 96 (Christian Tomuschat ed., 1993). Although there is no legal basis for denying the right of self determination based on small population or territory, these considerations are important because of the difficulties that could arise from the resulting inability to form independent sovereign entities free from neo-colonialism and capable of performing the traditional functions of a state in international law. See GROS-ESPIELL, *supra* note 106, at 16.

185. See REIN MULLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS 86 (1994). For a detailed analysis of the knotty problem of a trapped minority within a secessionist

6. The consent of the nation from which the region is seceding.<sup>186</sup>

7. The degree of violence used to suppress the secession movement and the consequent threat to regional international peace.<sup>187</sup>

8. The extent to which the seceding group has exhausted all other options.<sup>188</sup>

9. The group's historical claims of independence or autonomy.<sup>189</sup>

Minority rights that have been guaranteed by Convention acquire a positive normative status that the aforementioned variables will not ordinarily abridge. It would be hasty to conclude, however, that they are entirely removed from the purview of our variables because it is what states do that generate international law. The desirability of the foregoing is an entirely different matter.

Finally, the strategic interest of the powerful members of the U.N. Security Council is a very important, albeit often ignored consideration. The experience of the Saharawi Arab Democratic Republic exemplifies a situation where the powerful states have effectively negotiated away the judicially endorsed and popularly acclaimed right of the Saharawians to independence from Morocco.<sup>190</sup> This author does not wish to be mistaken as endorsing the selectivity of the U.N. Security Council as legitimate or even lawful. This author's view is simply that it is a realistic consideration that an intending secessionist group, or any group seeking some other form of self-determination, cannot afford to ignore.

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group, see Douglas Sanders, *If Quebec Secedes from Canada Can the Cree Secede from Quebec?* 29 U.B.C.L. REV. 143 (1995).

186. See Lawrence Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 321 (1993).

187. See LEFEBER & ZIEUS BROFMAN, PEOPLE AND MINORITIES IN INTERNATIONAL LAW 19-20 (1993); see also Lea Brilmayer, *Groups, Histories and International Law*, 25 CORNELL INT'L L.J. 537, 555 (1992).

188. See Marc Weller, *The International Response to the Desolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 602 (1992).

189. See *id.*

190. See Yves Beighbeder, *Western Sahara: Self-Determination or Annexation*, in INTERNATIONAL MONITORING OF PLEBISCITES, REFERANDA AND NATIONAL ELECTIONS 191 (1994).

This speaks volumes for the effectiveness of self-determination as an enforceable norm of international law.

### 3. The Ogoni Right to Self-Determination

Part II demonstrates that the Ogoni in Nigeria have been subjected to egregious human rights violations. On this ground alone the Ogoni have a legitimate claim to self-determination.<sup>191</sup> In addition, they are entitled to their individual minority rights.<sup>192</sup> Their rights as an ethnic group, however, deserve closer examination. The Nigerian government is at the extreme negative end of our *representative* variable, and its "wasting operations" and repressive violence, ouster-clauses and publicly acknowledged contempt for the Ogoni people, even in diplomatic circles, underscore the prospects of a negotiated settlement.<sup>193</sup>

If the Ogoni have a right to self-determination, what degree can they validly claim? Can they secede from Nigeria?<sup>194</sup> Even without applying our variables, secession does not seem feasible. While their small population of 500,000 people and territory consisting of only 1000 sq. km, may not constitute obstacles to secession, the Ogoni in Nigeria are an "inland" ethnic minority and as

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191. See Franck, *supra* note 169. Dietrich Murswick captures the Ogoni situation in his observation that:

Logically, the guarantee of the right of self-determination of peoples implies the guarantee of the existence of every single people. If the extermination of a people were allowed, the people's right to decide upon its own political status or to dispose of its own natural resources would be worthless. . . . All measures aimed at depriving the people of its specific characteristics . . . for example, expulsion of parts of the population [or creation of conditions compelling mass exodus], imprisonment or execution of the group's leaders—are incompatible with the right of self-determination. A state that infringed this obligation cannot pit the principle of sovereignty or of territorial integrity against the people's right to secession.

Murswick, *supra* note 123, at 26-27.

192. See Franck, *supra* note 169.

193. It should be noted that the Ogoni Bill of Rights was presented to the military government in 1991, two years before the Ogoni came before the U.N. in 1993. Most of the Decrees that have violated Ogoni rights have removed judicial jurisdiction and cannot, therefore, be judicially reviewed.

194. Biafrans, just like the Ogoni, also sought control of mineral resources in their region. Similar to Ogonis, they suffered egregious human rights violations in the ethnic cleansing that took place in Northern Nigeria in 1966.

yet there is no authoritative precedent of a secessionist state lying entirely within the parent state. Lesotho and Gambia are clearly anomalies.

On the other hand, the *destabilizing* variable underscores any self-determination claim that seeks complicated changes to the frontiers of the parent state. For example, although the Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission)<sup>195</sup> did not deny the right of Serbian population in Croatia and Bosnia-Herzegovina to self-determination, it overruled their claim to a united Serbian state on the ground that it would necessitate changes to existing frontiers between Croatia and Bosnia.<sup>196</sup> Thus, where the minority group is located in the heart of the parent state, secession is not a practical option.

What about autonomy? Against the background of a minority group's precarious existence, autonomy seems short-ranged but consolatory. An application of our destabilizing variable, however, reveals underlying problems even with autonomy. The Biafran Ahiara Declaration of Independence which was similar to the Ogoni Bill of Rights, declared the Biafran war a struggle against ethnic domination. While the Biafran in the eastern area of Nigeria waged their war of secession, Western Nigeria also threatened to secede if the government allowed the Biafrans to leave. After losing the war, the Biafrans were compelled to return to Nigeria<sup>197</sup> where ethnic domination has continued unabated among the Ibos who formally made up Biafra.<sup>198</sup> Western Nigeria has re-echoed the secession threat in the wake of the military annulment of the June 1993 presidential election, clearly won by Chief M.K.O.

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195. See Conference on Yugoslavia Arbitration Commission Opinion No. 2, Jan. 11, 1992, reprinted in 31 I.L.M. 1497 (1992).

196. See *id.*

197. Major-General Phillip Effiong declared Biafra's surrender to Nigeria. See N.Y. TIMES, Jan. 16, 1970, at 13.

198. This is perhaps the basis upon which Dr. Alex Ekwueme, a respected Ibo elder-statesman, muted the idea of a rotational presidency between six regions in Nigeria and a multiple vice-presidency in the National Constitutional Conference of 1995. The northern section of the country resisted the idea, and a compromise of a transitional rotation between North and South was accepted. A North-South rotation, however, would not guarantee protection of a minority ethnic interest. It should be recalled that the Ogoni fought against the Biafra secession out of a fear of becoming a trapped minority. See *id.*



Abiola, a Westerner. Chief Abiola has since been detained by the government without trial for declaring himself president.

At the root of the Ogoni struggle is ownership of the oil beneath their ancestral lands. Ogoniland's potential production capacity, however, does not exceed 28,000 barrels per day, which is less than 1.5% of Nigeria's total oil production of approximately 2 million barrels per day.<sup>199</sup> Other minority ethnic communities in the Niger Delta area who have also lost their lands and resources to the government, produce most of the remaining ninety-eight percent. In considering the foregoing, the history of the Biafran civil war, the denial of the presidency to the western part of Nigeria, ethnic fragmentation in Nigeria, providence, and clear logic dictates that one should anticipate that autonomy for the Ogoni will generate multitudes of autonomy liberation struggles as well as malignant feelings of discrimination.<sup>200</sup> With a population of more than 100 million, which is sufficient to dominate the West Africa sub-region, and a strategic economy that serves as a lifeline to the sub-region, the destabilizing consequences of an internal crisis in Nigeria is better imagined than realized.

Does the foregoing deny the Ogoni a right to autonomy? It is perfectly logical to argue that the Ogoni not only have a right to autonomy per customary international law, but also a natural right based on self-defense. How willing is the international community to stir up the embedded ethnic passion of Nigeria? On the other hand, it is the willingness and activity of the international community that generates international law. This dilemma is not peculiar to the Ogoni question, it is also an African problem.

#### 4. Africa's Post-Colonial Burden

Professor Richard Falk first admitted that traditional international law was designed to serve the interests of the European na-

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199. See Collins, *supra* note 11.

200. This would vindicate Maivan Clech Lan's criticism that discrimination is a general defect in the special protection given to indigenous peoples. Such special treatments portray that "to paraphrase Orwell, some families of subjugation (blue water) are more equal than others." Maivân Clech Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603, 616 (1992).

tions that developed it.<sup>201</sup> This perhaps accounts for why international law indicted colonialism as criminal<sup>202</sup> and yet protected colonial acquisitions, which by logical extension are riddled with criminality, under such principles as "prompt and adequate compensation" and "acquired rights."<sup>203</sup>

Contemporary international law has hardly shed its traditional garb. This is evident in the contemporary concept of self-determination, which has been lukewarm in recognizing group rights of ethnic nations.<sup>204</sup> One can trace this to the modern western notions of individualism that sacralizes the individual over his community.<sup>205</sup> On the contrary, in Africa, the ethnic nation remains the most cohesive and harmonious political entity.<sup>206</sup> Based on its biological and historical evolution as a transgenerational group,<sup>207</sup> the pre-colonial African ethnic nation has been the inde-

201. See Richard Falk, *Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order*, 8 HOW. L.J. 128, 133-35 (1962).

202. See GROS-ESPIELL, *supra* note 106.

203. For discussions of tension between sovereignty over resources, colonial acquisitions and international law principles, see Brownlie, *supra* note 106, at 521-52; see also *Seminar Discussions on the Charter of Economic Rights and Duties of States* reprinted in ASIL PROC. 223 (1975); *Permanent Sovereignty Over Natural Resources* in KANAL HASSAIN, LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 33 (1980); Bertain Brown, *Developing Countries in the International Trade Order*, 14 NO. ILL. U.L. REV. 347, 406 (1993).

204. See Sergesvry, *supra* note 103; see also Emerson, *The Fate of Human Rights in The Third World*, WORLD POLITICS 201, 207 (1975) (espousing the view that international self determination law does not provide for situations where major ethnic cleavages divide the people of a state).

205. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 156 (1989). According to Professor Donnelly, "most human rights refer principally to the individual considered separate from the community, and they are valued primarily as claims against the communities." *Id.* An apparently vexed statement of the same argument says:

[A]bstract concepts have in the past only too often presented grave dangers to the enjoyment by individuals of their human rights and fundamental freedoms. Some of the worst violations of those rights have been perpetrated in the service of some *inspiring abstractions*, such as . . . the nation . . . and indeed the masses. A "people" is no less an abstraction than any of these: it cannot in reality consist of anything more than the individuals who compose it.

PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 368 (1983) (emphasis added).

206. See Mutua, *supra* note 142, at 505. Observing states in Africa, Dr. Mutua noted that "citizenship means little, and carried few substantial rights or duties compared with membership in a family, clan, religious sect or ethnic community." *Id.*

207. See also, Segesvary, *supra* note 103. He made the following conclusions, which

structible and effective political community of the malfunctioning post-colonial state.<sup>208</sup> While the modern sovereign state is a mere juridical fiction,<sup>209</sup> what transforms this juridical fiction into an empirical reality is a national consciousness.<sup>210</sup> Experiences of malfunction of the state show that a harmonious multinational state in Africa must be based on the willful evolution of these "bio-political organisms" (the ethno-cultural political community). The post-colonial state did not precede the ethnic-nation and cannot assimilate it by compulsion. Therefore, the dismantling of sovereign and independent kingdoms and empires in Africa and their coercive amalgamation into the modern state, with-

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are valid for the African ethnic group:

- a. That the individual and his group are ontologically interdependent, i.e., the life and destiny of the individual and group are inextricably intertwined. There can be no individual without a group; there can be no group without individuals who are not only actors in social and cultural life, but the bearer of the group's belief and value systems of its traditionally transmitted symbolic order.
- b. Group identities include physical elements of the body (which is of biological origin) and the natural environment, and the psychological element, i.e., the distinction between "we" and "they."

*Id.* In summary, while the evolution of the individual and his ethnic group are inextricably linked, the psychological element demarcates the ethnic group as a political community.

208. Its indestructibility is well borne out by this song:

We carry in our hearts the true country,  
And that cannot be stolen,  
We carry in our hearts the true country,  
And that cannot be broken

Quoted in Adelman, *supra* note 170, at 15; see also CZESLAW MILOSZ, SWING SHIFT IN THE BALTICS, THE NEW TONE REVIEW OF BOOKS 15 (explaining the recent upsurge in national feelings argued that technological revolution has negatively created a modern void, and the innate human need to belong redirects to the group in a search for personality).

209. See Robert Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 J. INT'L AFF. 1 (1992). Professor Jackson draws a distinction between juridical statehood and empirical statehood. While the United Nations principle of sanctity of states corresponded with the former, it did not guarantee the latter. Professor Jackson argues that juridical statehood conferred an international legitimacy on the the post colonial African state which covered up its internal illegitimacy especially during the Cold War. In other words decolonization vested international legitimacy on colonial entities without regard to their internal legitimacy. Thus while juridical statehood refers to political independence, it did not guarantee the internal harmony of the system. See *id.*

210. See Adelman, *supra* note 170, at 16. It is the common national destiny that creates the will in a people to assume the future of a state, whereas the westphalian state prioritizes its physical boundaries. See *id.*

out deference to cultural, linguistics, demographic, and social factors arrested the evolutionary process, while the principle of state sanctity imprisoned the continent.

There are grounds for arguing that the Westphalian state and its state nationalism were a historical metamorphosis of traditional European type of indigenous nationalism. It has been observed that in traditional Europe, indigenous nationalism prevailed as the norm by consolidating cultural predominance over a specific territory governed by a single state. The "nation preceded the state and was its foundation rather than the state becoming the instrument to forge a new nation."<sup>211</sup>

This is perhaps why the very first articulation of self-determination as a concept by President Wilson was a synthesis of two factors: (1) consent of the group and (2) their cultural identity.<sup>212</sup> This original version is known as national self-determination and is what Obiora Okwu-Okafor has aptly called "The Pure Theory of Self-Determination."<sup>213</sup> The practical consequence of absence of consent in the amalgamation of the post-colonial African state has been the legitimization of coercive assimilation of nations, tyranny, and violent repression of liberation movements.<sup>214</sup> The specter of failed states has been attributed to the tyranny and authoritarianism of the contrived states in Africa and their concocted citizenry.<sup>215</sup> This is the heritage of colonialism and Africa's post-colonial burden which will remain a recurring decimal to the international law of self-determination.

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211. *Id.*

212. See ALFRED COBBAN, *THE NATION-STATE AND NATIONAL SELF-DETERMINATION* 109-10.

213. Okwu-Okafor, *supra* note 6, at 95.

214. See YILMA MAKONNEN, *INTERNATIONAL LAW AND THE NEW STATES OF AFRICA: A STUDY OF THE INTERNATIONAL LEGAL PROBLEMS OF STATE SUCCESSION IN THE NEWLY INDEPENDENT STATES OF EASTERN AFRICA* 462 (1983) (observing that "the whole task of national integration and nation building may require the denial of the right to ethnic self determination in most territories as they emerge from dependency.").

215. See Mutua, *supra* note 142, at 505. The 1885 Berlin conference which laid the foundation for the modern day Africa was based on interests totally alien to the African. Crawford Young, *The Heritage of Colonialism, in AFRICA WORLD POLITICS* 10 (John Harbeson & Donald Rothchild eds., 1991).

## IV. CONCLUSION: WHAT CAN BE DONE?

The current crisis in Ogoni cannot be said to have taken the world by surprise. In 1994, Okwu-Okafor Obiora astutely anticipated the situation.<sup>216</sup> After the genocide in Rwanda, Angola, Kwa-Zulu, Somalia, Southern Sudan, Liberia, and Uganda, is it not crystal clear that the African contrived state is very sick? Will it take a genocidal Burundi to confirm the prognosis? Eminent predictions indicative of the causes are not necessarily in short supply.<sup>217</sup> Professor Mazrui Ali suggested an African Security Council composed of South Africa, Ethiopia, Zaire (now Democratic Republic of Congo), Nigeria, and Egypt.<sup>218</sup> None of the above, however, is stable by itself. Nigeria, Zaire and Ethiopia are neck-deep in crisis, while Egypt battles Islamic fundamentalism. South Africa after Nelson Mandela, is still anybody's guess. The Zulus have not been silent. In addressing a solution, it is necessary to first debunk the stigmatization of any intellectual discourse of the ethnic factor as "ethnocentrism" or "post-modern tribalism."<sup>219</sup> It betrays a superficial appreciation of the reality of a complex situation that can be properly described as a conundrum of "nations without a state versus states without a nation."<sup>220</sup> At the center of it all is the ethnic-nation. It would be hypocritical to

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216. Okwu-Okafor in reference to the Ogoni struggle had forewarned that the Ogoni profound feeling of alienation was a festering sore in need of immediate attention. See Okwu-Okafor, *supra* note 6, at 115.

217. The Hutu-Tutsi conflict is the same old story of ethnic domination with colonial roots in Africa. See Mutua, *supra* note 142, at 521. In 1993, a distinguished historian, Al-Mazrui had predicted that:

[O]ver the next century the outlines of most of present day African States will change in one of two main ways. One will be ethnic self determination, which will create smaller States, comparable to the separation of Eritrea from Ethiopia. The other will be regional integration towards large political communities and economic unions.

*The Bondage of the Boundaries, Why Africa's Maps will be Redrawn*, ECONOMIST, Sept. 11, 1993, at 28. Boutros Boutros-Ghali is reported to have conceded that "ethnic conflict poses as great a danger to common world security as did the Cold War." Julia Preston, *Ethnic Conflict Imperils Security*, WASH. POST, Nov. 9, 1993, at A13.

218. See Mazrui Ali, *The Message of Rwanda: Recolonize Africa?*, NEW PERSPECTIVE QUARTERLY, Sept. 22, 1994, at 18.

219. See Franck, *supra* note 175, at 3.

220. See NANA KUSI APPEA BUSSIA, JR., THE STATUS OF HUMAN RIGHTS IN PRE-COLONIAL AFRICA: IMPLICATIONS FOR CONTEMPORARY PRACTICES 245 (1994).

ignore this truth. On the other hand, we must come to grips with historical complexities that have translated into unavoidable realities, including: (1) the post-colonial economy's natural resource fixation; and (2) colonial boundaries.

First, because of the colonial economies' emphasis on raw materials and cash crops, post-colonial African states are still largely dependent on agriculture and mineral resources for survival. Thus, until individual self enterprises support the economies, communities with natural endowments would probably be required to provide for the entire colonial states. On the other hand, as long as these communities cannot share in what rightfully belongs to them, internal peace may remain elusive.

Second, redefining colonial boundaries also may not be practicable. Historical claims do not always provide precise and deterministic evidentiary tools and are likely to leave lingering feelings of injustice and deprivations. Also, memories of Morocco's Green March into Western Sahara and Ethiopia's peasant march into Eritrea dictate that bringing up the question of boundary redemarcation may endorse a post-colonial scramble for Africa by Africans. This should serve as warning that India's redemarcation of its colonial boundaries may not be an apt precedent for Africa, as the India Pakistani enmity is traceable to that redemarcation. Furthermore, the Nigerian-Cameroon conflict over the Bakassi-Peninsula,<sup>221</sup> which resulted in intense fighting at the border, gives insight into what intrastate territorial claims in post-colonial Africa would look like.

Beyond both states' initial resort to military force, there were several complexities that undermine the desirability of redemarcating Africa's borders. For example, while Cameroon claims the peninsula, a majority of the inhabitants are Nigerians. Additionally, France's premature intervention on behalf of Cameroon underscores the fact that factors besides historical claims, for example—external interests—will play a substantial role in any redemarcation of Africa. The *Uti-Possidetis* Principle may well have become a necessary evil. In seeking a solution that is not only just, but realistic, this writer contends that a non-

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221. The Bakassi-Peninsula is a collection of Islands in the Gulf of Guinea of approximately twenty square miles bordering Nigeria and Cameroon, which is very rich in oil resources.

revolutionary solution, such as in the international law of self-determination, is the most viable tool for relieving Africa of its colonial burden. Looking at our variables and factual lenses, such as "egregious human rights violations," it is clear that the contemporary law of self-determination is inadequate to accommodate the African problem. Its principles can only be reactive in the African context where ethnic conflicts are imminent. This is because colonial Africa was built on ethnic division and post-colonial Africa preserved the inequities of colonial Africa. Therefore, the law of self-determination tends to focus on the symptoms and consequences of internal crisis instead of its causes. Furthermore, given that the enforcement of the self-determination of minorities often requires multilateral cooperation it acquires a political content in which the dominant and oppressive group may hold sway and small nations such as the Ogoni may end up not having any protection.

This paper proposes a pro-active foundational solution: expansion of the law of self-determination to mandate in Africa a loose federation based on ethno-cultural autonomy, with defense and foreign relations being a preserve of the state. This middle of the road solution has several benefits. It retains the original consent theory of nationalism with its cultural basis without tampering with the *uti-possidetis* boundaries. In addition, it recognizes pre-colonial property rights and allows for a negotiated relationship between the real owners and the state. It will therefore, not engender separatist or secessionist movements. On the contrary, it will foster emergence of a virile harmonious state where a conscious desire to build a home will galvanize participation. Does the Draft Declaration on indigenous peoples foreshadow the emergence of such a right?