Self-Determination, the Use of Force and International Law: An Analytical Framework

DR RODNEY PAILS*

The right to self-determination, and regulation of the use of force, are both important topics of international law. How these legal topics might intersect was cause for speculation during the Kosovo and East Timor crises. It was reasonably asked, which 'peoples' have a right to self-determination, how may such a right be exercised, and might force be lawfully used to support or suppress acts of self-determination? This article provides a framework for answering these kinds of questions. First, the three operational contexts of the international legal right to self-determination are sketched. Second, the legality of forcible intervention in self-determination processes is examined.

In terms of methodology, an orthodox positivist legal approach has been adopted. Thus, the following account of the law is constructed from relevant treaties, custom, judicial decisions and learned writings, these being traditional sources of public international law.[1] International legal discourse is enriched by a growing number of understandings of the very idea of international law. However, this article remains digestible only if one methodology is pursued.[2]

Development of an International Legal Right to Self-Determination

The right to self-determination - essentially to 'self-government' - has important historical and political contexts. Cassese traces its origins to the American Declaration of Independence and to the French Revolution.[3] For the next 150 years the idea of self-determination

* Faculty of Law, Griffith University, Australia.

1 *Statute of the International Court of Justice*, opened for signature 26 June 1945, [1945] ATS No 1, art 38(1) (entered into force 24 October 1945).

2 For other theoretical approaches see 'Symposium on Method in International Law' (1999) 93 *American Journal of International Law* 291.

3 A Cassese, *Self-Determination of Peoples - A Legal Reappraisal* (1st ed, 1995) 11-23.

largely endured as a political theory. By the end of the First World War, self-determination was still yet to be accepted by States as an international legal principle, and the *Covenant of the League of Nations* failed to embrace it in any significant sense.[4] In the *Aaland Islands (Advisory Opinion)* of 1920, an International Committee of Jurists found that:

> Although the principle of self-determination of peoples plays an important part in modern political thought ... the recognition of this principle in a certain number of international treaties cannot be considered ... to put it upon the same footing as a positive rule of the Law of Nations.[5]

The *United Nations Charter* was the first multilateral treaty to deal substantially with the topic of self-determination, principally in the context of the management of colonial empires.[6] Article 1(2) of the *Charter* declares that development of friendly relations, based upon respect for self-determination, is a purpose of the United Nations organisation. Chapter XI concerns 'non-self-governing territories'. Article 73 provides that:

> Members of the United Nations which have or assume responsibilities for the administration of territories *whose peoples have not yet attained a full measure of self-government* recognise the principle that *the interests of the inhabitants of these territories are paramount*, and accept as a *sacred trust* the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> (a) to ensure, with due respect for the culture of the peoples concerned, *their political, economic, social, and educational advancement* ... ;
>
> (b) to *develop self-government*, to take due account of the *political aspirations of the peoples*, and to assist them in the progressive development of their *free political institutions* ... [7]

There is debate about whether such language is suggestive of complete independence for non-self-governing territories, or merely lim-

4 UKTS 4 Cmd 3.

5 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question' [1920] *Official Journal of the League of Nations*, Special Supp 3, 5.

6 *Charter of the United Nations*, opened for signature 26 June 1945, [1945] ATS No 1 (entered into force 24 October 1945) (hereafter *Charter*).

7 (Emphasis added). On self-determination, see also article 55 and Chapter XII of the *Charter*, ibid.

ited autonomy.[8] Despite this uncertainty, there is undoubtedly crystallisation in the *Charter* of an international *legal* right to self-determination.[9] Evolution of this legal right is then largely found in international customary law, that is, the consistent practice and *opinio juris* of states on self-determination matters.[10] In other words, the right's legal content has been dictated by the attitude of states to self-determination, and by the extent to which governments generally have accorded legitimacy to various independence struggles. For example, over the past fifty years, coalitions of developing and socialist states entrenched the concept of self-determination, as the legal basis for the decolonisation of Western empires.[11] Socialist and developing states propelled the legal content of the right in an 'anti-colonial' ('anti-Western') direction. Several fundamental General Assembly Resolutions concerning self-determination were ultimately passed, including: *The Declaration on Colonial Countries*;[12] *The Declaration on Non-Intervention*;[13] *The Declaration on Friendly Relations*;[14] *The Defini-*

8 For example, consider B Simma (ed), *The Charter of the United Nations – A Commentary* (1st ed, 1995) on article 73.

9 Note also article 1 of both *The International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and *The International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976): 'All peoples have the right to self-determination ... [To] ... freely determine their political status and freely pursue their economic, social and cultural development'.

10 *Opinio juris* being the belief by governments in a *legal* duty to conform to a particular practice. The nature of customary international law is succinctly outlined at pages 38-48 of P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, 1997). Malanczuk explains how customary international law develops, and where one might look for evidence of customary international law (for example, records of State practice, official government statements, and possibly UN Resolutions).

11 As a matter of historical record and for ease of discussion, the terms 'developing states', 'Socialist Bloc' and 'the West' are used in this article. However, the appropriateness of these labels has often been questioned.

12 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th Sess Supp 16 (1960) 66 (89 in favour, 0 against, 9 abstaining).

13 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, GA Res 2131 (XX), UN GAOR, 20th Sess Supp 14 (1965) 11 (100 in favour, 0 against, 5 abstaining).

14 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th Sess Supp 23-8 (1970) 121 (adopted without vote).

tion of Aggression;[15] and *The Declaration on Non-Use of Force*.[16] These resolutions arguably evidence widespread *opinio juris* that a people's legal right to self-determination requires the facilitation of decolonisation processes by (largely Western) governments. The customary international legal right to self-determination has arguably also come to include a people's right to be free from foreign occupation in more general terms, and from suffocation by a culturally-oppressive government. As colonialism has become obsolete, these other customary legal contexts of self-determination have assumed greater importance.

By way of introduction, it is also pertinent to note that some commentators classify self-determination according to what is sought to be achieved by the process. They make a distinction between:

- external self-determination – a people's accomplishing of national independence or territorial secession (essentially, the 'breaking away' cases); and
- internal self-determination – the achievement of free political, economic and cultural expression, but within the borders of existing states.[17]

All states have traditionally resisted broad interpretations of what is lawful 'external self-determination', fearing fragmentation of existing states by the territorial secession of cultural groups.[18] Balancing the obviously incompatible concepts of external self-determination and maintenance of territorial integrity has been a regular theme of the discourse.[19] Chaos theories of secessionist global disorder abound; it is asked, for example, what precedent might be set for today's multi-ethnic states, if Kosovo is allowed to break away from the Federal Republic of Yugoslavia.

15 *United Nations Special Committee on the Question of Defining Aggression - Draft Definition of Aggression* adopted by GA Res 3314 (XXIX), UN GAOR, 29th Sess Supp 31 (1974) 142 (adopted without vote).

16 *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22, UN GAOR, 42nd Sess Supp 49 (1987) 287 (adopted without vote).

17 Consider for example Cassese, above n 3, and L Buchheit, *Secession: The Legitimacy of Self-Determination* (1st ed, 1978). See also *Reference re Secession of Quebec* [1998] 2 SCR 217, [126].

18 K Doehring, *'Self-Determination'* in Simma (ed), above n 8, from 57.

19 See, for example, paragraph 1 principle 5 of the *Declaration on Friendly Relations 1970*, above n 14; essentially states agree that nothing in the Declaration (which canvasses self-determination) should be construed as encouraging the dismembering of states.

Clearly today there is little argument about the *existence* of an international legal right to self-determination. However, there remains much debate about the *content* of this largely customary right, *who* might exercise it and *how*. To a large extent this is symptomatic of the decentralised nature of international legal and political systems, and the auto-interpretive quality of international law. Acknowledging this discord, three commonly accepted operational contexts of self-determination are identified and discussed below.

The Colonial Context of Self-Determination

The right of a colonised people to self-determination is well established in customary international law. So many colonies have achieved independence, that this context of lawful self-determination is becoming redundant. It remains relevant though in those cases where a colony's independence continues to be frustrated (for example, the situation in Western Sahara, discussed below).

In the *Case Concerning East Timor*, and in the context of a colonial dispute, the majority of the International Court described as irreproachable the proposition that, ' ... the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character ... '. This means that the right of colonised peoples to self-determination must be respected by all members of the international community. It also means that all states have a legal interest in ensuring proper exercise of the right.[20] What the *erga omnes* character of the legal right to self-determination might actually mean in specific terms, however, is open to speculation. Also open to speculation is whether the right to self-determination is one of *jus cogens* status; that is, a peremptory norm of international law from which no derogation is allowed. This is an important question. If the right to self-determination in the colonial context is of supernormative *jus cogens* status, then this 'super-right' would render void:

- a colonial government's *consent* to foreign intervention which frustrates decolonisation (such foreign intervention might then be branded an unlawful use of force);

[20] *Case Concerning East Timor (Portugal v Australia) (Jurisdiction and Admissibility)* [1995] ICJ Rep 90, 102. In this case, Portugal relied upon the *erga omnes* character of the right to self-determination, to help argue it had *locus standi* to sue Australia. See also the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase) (Judgment)* [1970] ICJ Rep 3, [33] and [34] of the majority judgment.

- *treaties* which run counter to decolonisation processes (the treaty becomes of no effect); and
- *title* to territory obtained in violation of a people's right to self-determination (title can then be legally refuted).

The *jus cogens* question is yet to be settled by the international community. This uncertainty obviously complicates legal analysis of decolonisation crises and their consequences.[21]

A colonised people may achieve self-determination in one of three ways: they may choose to *associate* with an existing state, fully *integrate* with it, or instead decide on complete *independence*.[22] The international community has generally accepted that colonised peoples must be allowed to make a free and informed choice as to the end result of the decolonisation process, expressed perhaps by way of a United Nations sponsored plebiscite.[23] It is, however, broadly accepted that achievement of self-determination in the colonial context is a 'one-off' proposition. Once decolonisation is effected by one of the three accepted methods, cultural groups do not have consequential rights of territorial secession.[24]

[21] In support of these observations about *jus cogens* and self-determination, consider L Hannikainen, 'The Case of East Timor from the Perspective of *Jus Cogens*' in C Chinkin (ed), *International Law and the Question of East Timor* (1st ed, 1995). See also article 53 of *The Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980):

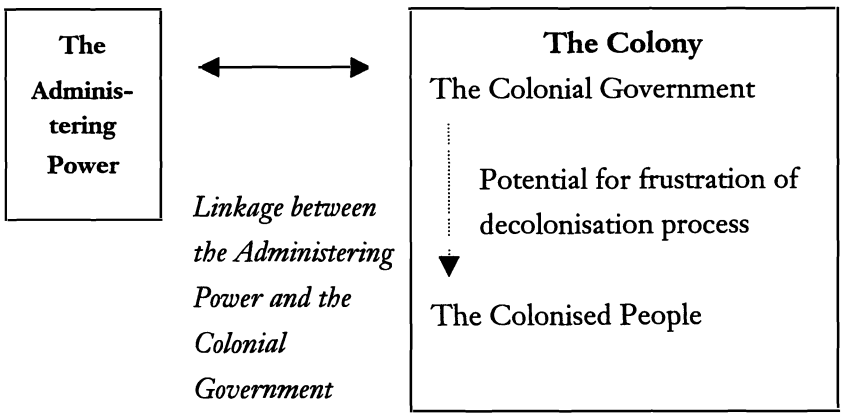
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law ... accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[22] See principle VI of the General Assembly resolution *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter*, GA Resolution 1541 (XV), GA GAOR, 15th Sess Supp 16 (1960) 29 and also the *Declaration on Friendly Relations 1970*, above n 14, para 1 principle 5. An example of consensual integration is found in the case of the people of the Cocos (Keeling) Islands, who chose integration with Australia by means of a UN supervised referendum in December 1984.

[23] Paragraph 5 *Declaration on Colonial Countries 1960*, above n 12; also para 55 of the *Western Sahara Advisory Opinion* [1975] ICJ Rep 12. Also note para 3 of the *Declaration*, which provides that, 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.

[24] This is an expression of the *uti possidetis juris* rule, discussed later.

The primary players in the decolonisation process are depicted below:



Colonialism – Primary Players [25]

How might the *jus ad bellum* – ie, international law on the right to resort to force – apply to the decolonisation process, specifically in terms of the colonised people's primary struggle for self-determination against a colonial occupier? It all depends on the perspective one has of the diagram above. There are two possibilities:

- 'the colony' is manifested in the colonised people – thus the colonial government is viewed as being a foreign trespasser in what should be an independent state; or alternatively
- 'the colony' is a dependency – it is essentially part of an administering power which has sovereignty over it, and the colony is properly governed by that administrative power, in tandem with the colonial government.

The implications flowing from these two different viewpoints are explored below.

The first explanation of the colonial experience has been typical of the rhetoric of socialist and developing states.[26] Here it is thought to be the colonised people that embody the colonial state, not the colonial government. The people may be represented by a national liberation movement, which is said to have international legal personality. The colonial government is branded a foreign occupier.

25 The aim here is to provide a generic model for discussion. The model could be easily adapted to particular situations.

26 Typical Socialist/Developing Bloc views on self-determination are described by N Ronzitti, 'Resort to Force in Wars of National Liberation' in A Cassese (ed), *Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict* (1st ed, 1975) 219.

In terms of the *jus ad bellum*, the act, or continuing fact, of colonisation is said to violate the grundnorm of the *Charter*, article 2(4):

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[27]

Colonisation is also argued to breach two further international legal norms:

- the *customary* prohibition upon use of force (which mirrors article 2(4) above); and
- the *customary* prohibition upon intervention, directly or indirectly, in the internal or external affairs of other states.[28]

Argued to comprise an 'armed attack' against the colonial state, colonisation is claimed to trigger a colonised people's right to wage a self-defensive war of national liberation, pursuant to international custom and/or article 51 of the *Charter*, the latter of which provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security ...

Use of force in self-defence is one of three key exceptions to the prohibition on international use of force; the others are use of force with the authority of the United Nations, and use of force with the consent of the state against which force is used (both of which are discussed later). In the colonial context, self-defensive wars of liberation are said to be legitimately directed at any or all of the following: the colonial government, a supportive administering power, and also any other state or body which forcibly frustrates the decolonisation process.[29] It is sometimes claimed that the customary right to self-

[27] Recalling that self-determination is expressly mentioned in the *Charter's* enumeration of the purposes of the United Nations.

[28] On those norms generally see the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, [188], [190], [202] and [205] of the majority judgment.

[29] But noting customary international legal limits upon self-defensive responses - that they must be immediate, necessary and proportionate to the original attack (see the so-called *Caroline Case*, 29 British and Foreign State Papers 1137-8, 30 British and Foreign State Papers 195-6). A self-defensive war of national liberation might be argued to always be 'immediate', if colonial occupation is accepted to be a form of ongoing armed attack.

determination itself implies a right to struggle forcibly for independence.[30]

Predictably, there is an alternative legal cognition of how the *jus ad bellum* might or might not apply to the players described in the earlier diagram. It is a particularly Western story of the colonisation experience. Essentially, the proposition is that colonisation has, for the most part, been benign and beneficial. It is persuasively argued that at the time of particular acts of colonisation, there was nothing unlawful about foreign occupation. In this regard it is worth recalling that before 1945 there was no comprehensive international legal prohibition on the use of *force* by states in their international relations.[31] Following colonisation, it is said that administering powers/colonial governments enjoy sovereignty over now dependent colonies. Whilst the broad aspiration of decolonisation is accepted, it is typically argued that there are certain peaceful processes and procedures to be followed for a dependent people to achieve independence. Adopting this mindset, their war of national liberation presents as an unlawful *internal* uprising, which may legitimately be put down by the administering power/colonial government. As between these players the *jus ad bellum*, under articles 2(4) and 51 (UN authorisation for intervention) of the *Charter*, is said to be irrelevant, because the decolonisation process is argued to be a *purely internal* state matter.[32] The national liberation movement is effectively denied international legal personality. Administering powers/colonial governments point to both the customary prohibition upon illegal intervention in internal affairs, and article 2(7) of the *Charter*, to denounce external interference in their management of the decolonisation process.[33]

Wearing a positive international lawyer's hat, and so believing it is possible to divine objectively the content of customary international law and the meaning of the *Charter*, it is submitted that this second

30 That view is supported by the language of article 7 of the *Definition of Aggression*, above n 15.

31 See generally I Brownlie, *International Law and the Use of Force by States* (1st ed, 1963).

32 On the 'Western view', see generally R Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in Cassese (ed), *The Current Legal Regulation of the Use of Force*, above n 26, 449.

33 Article 2(7) of the *Charter*, above n 6, provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

story is a more persuasive *legal* account of colonialism and the *jus ad bellum*. There has of course been an exponential increase in the number of non-government organisations that are accorded a degree of international legal personality. National liberation movements are sometimes given international recognition, such as observer status in the United Nations.[34] However, liberation movements are arguably yet to attract *sufficient* legal personality, to justify application of the *jus ad bellum* to their primary struggle for self-determination against a colonial government. In other words, despite general acceptance of a right to self-determination in the colonial context, the positivist legal discourse still suggests that international law on the use of force does not apply to the primary conflict between administering powers/colonial governments and their 'subjects'. This conclusion is clearly of some importance. The unavailability of an international legal right to self-defence particularly disempowers colonised peoples. As will be discussed, without a right of individual self-defence, there can be no lawful collective self-defence of colonised peoples by sympathetic third states.

The Foreign Occupation Context of Self-Determination

This context of external self-determination concerns a people's right to freedom from subjugation by unlawful occupiers. It is a species of self-determination that has arisen independently of the colonial context (given the West's charitable view of colonialism), and concerns clearer cases of unlawful invasion and occupation. Peoples argued to have fallen within this context of external self-determination include those of East Timor (freedom from Indonesia), Kuwait (freedom from Iraq) and Tibet (freedom from China), though obviously the characterisation of territory as being under 'foreign occupation' is often overwhelmingly political. Again largely the product of customary international law, this context of self-determination is also evidenced by numerous General Assembly resolutions.[35] It is generally accepted that self-determination is achieved by withdrawal of the invader, though there is some suggestion that there needs to be a plebiscite in cases of long-term contentious occupation.

The foreign occupation context of self-determination is obviously closely allied to the legal regime regulating the use of force, the *jus ad*

[34] For example, the Palestine Liberation Organisation.

[35] For example, see generally the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force 1987*, above n 16.

bellum. This time there is no problem marrying the two bodies of international law. By definition there will initially have been an illegal use of force by the aggressor contrary to both article 2(4) of the *Charter* and the customary prohibition on use of force. If the prohibition on use of force, and the consequent right to self-determination following occupation are *jus cogens* norms, then the illegality of the invasion will nullify the aggressor's claims to territory, as well as treaties inconsistent with the occupied state's liberty.[36] The occupying state may attempt to justify legally its intervention by pleading the 'consent-by-the-victim-to-intervention' excuse. The occupier would need to demonstrate that voluntary consent to the occupation was given by the lawful government in effective control of the invaded state, and this may not be so easy to do.[37] In most cases the occupied state will have a right of immediate, necessary and proportionate self-defence. Thus a self-defensive campaign against the occupier and others is feasible, so long as it is uninterrupted by long periods of acquiescence. Anticipatory self-defensive manoeuvres (before an aggressor's invasion gets underway) might be legally questionable, but may perhaps be a necessity.[38]

Having now explored the two contexts of external self-determination, it is possible to canvass 'historical consolidation', 'reintegration' or 'reversionary rights' arguments, which become relevant when these two contexts of self-determination are viewed together. Essentially, the issue here is whether territories undergoing decolonisation are free from predatory territorial claims by neighbours. The neighbour might be an independent state, or another colony achieving independence at the same time. As justification for 'territorial reintegration' upon decolonisation, the neighbour might allege the existence of some pre-colonial cultural link with the colonised people. A good

36 In this regard consider Indonesia's unlawful occupation of East Timor and later questions about the legality of the *Timor Gap Treaty*, discussed later (*Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* [1991] ATS No 9 (entered into force 9 February 1991).

37 O Schachter, 'The Right of States to Use Armed Force' (1984) 82(5 & 6) *Michigan Law Review* 1645.

38 The discourse upon the legality of so-called 'anticipatory self-defence' is extensive. The basic question is whether a state that merely *anticipates* a future attack may *pre-emptively* use force in its 'self-defence'. Such pre-emptive strikes seem to violate the language of article 51 of the *Charter*, above n 6, which arguably only permits forcible self-defence in response to a *prior* armed attack. This is the interpretation of custom favoured by the majority of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, [195].

illustration is the situation of the Saharawi people of Western Sahara.[39] A combination of international pressure and armed rebellion by POLISARIO[40] led Spain to initiate the decolonisation of Western Sahara in the 1970s. Neighbouring Morocco and Mauritania immediately claimed a legal right to territorial reintegration of parts of Western Sahara, based upon alleged historic ties. In an Advisory Opinion requested by the United Nations General Assembly, the International Court of Justice stated that the cardinal principle of self-determination – *the obligation to give effect to the free and genuine expression of the Saharawi people's will* – must be respected in this case. It found that whilst there were some ties between Morocco/Mauritania and Western Sahara, they were not of a nature that would affect the way the United Nations might administer Western Sahara's decolonisation. In this particular situation, the wishes of the Saharawi people as to the outcome of decolonisation had to be considered. The Court essentially rejected the reversionary rights arguments that had been advanced.[41] It was an acknowledgment that such arguments must be carefully scrutinised, and are not readily entertained.[42] Unfortunately, despite this Advisory Opinion, Morocco and Mauritania unlawfully invaded Western Sahara (Mauritania later withdrew). In legal terms, the Saharawi people have (and continue to have) a right to external self-determination in two contexts: decolonisation from Spain, and freedom from Morocco's unlawful occupation (the latter in theory triggering the *jus ad bellum*, though a right of collective self-defence has hardly been exercised). Clearly, the Saharawi people have not been able to make a free and genuine choice about the former colony's future. Distressingly, the work of MINURSO[43] (the United Nations Mission charged with arranging a Saharawi plebiscite) has

39 Other reversionary rights claims have included India in relation to Goa, China in relation to Hong Kong and Macau, and Indonesia in relation to East Timor (for a discussion of the latter, see, for example, Chinkin, above n 21).

40 The Constitutive Congress for the Front for the Liberation of Saguia el Hamra and Rio de Oro.

41 Interestingly, Morocco has more evidence of pre-colonial ties with Western Sahara than Indonesia could ever have mustered in relation to East Timor, casting doubt on old Indonesian reversionary rights claims.

42 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12. It should be noted that United Nations practice on decolonisation has not always reflected the tenets of this Advisory Opinion. It is possible to find examples contrary to the customary rules under discussion (for example, the reintegration of Ifni into Morocco – see Shaw, 'The *Western Sahara Case*' (1978) 49 *British Yearbook of International Law* 118, 122). This is typical of international practice on such politically-charged topics.

43 Misión de las Naciones Unidas para el Referendum del Sahara Occidental.

been plagued with endless difficulty.[44] Collective intervention with the authority of the United Nations Security Council does not appear to be considered feasible, and the outlook for the Saharawis remains bleak.[45]

Denial of historical consolidation claims is consistent with the *uti possidetis juris* rule of customary international law. This rule is closely allied to the principle of maintaining territorial integrity. The *uti* rule essentially requires the continuation of the borders between a colony, and a neighbouring colony or independent state, upon the first colony's independence. This is usually so even if newly created states are comprised of many distinct ethnic groups, and there are cross-border ethnic ties. Borders must be maintained, except of course if the peoples of each entity consent to territorial amalgamation. Decolonisation of a neighbour does not therefore provide an opportunity to unilaterally appropriate its territory. *Uti possidetis juris* developed in the context of decolonisation of Latin America and Africa, and has now been recognised to be of general application.[46] However, given its basis in customary law and its controversial content, definition and application of the *uti possidetis juris* rule remains contentious.[47]

[44] Consider, for example,disputes over voter eligibility – is it those recorded during the 1974 census, or those in the territory now (including an enhanced Moroccan presence)? Even more difficult is the fact that the Saharawis are a nomadic people and many are now located in POLISARIO refugee camps in Algeria.

[45] The case of East Timor shared many similarities with the Western Saharan situation – two contexts of self-determination at play (decolonisation from Portugal, freedom from Indonesian occupation), against a backdrop of enduring Indonesian frustration of exercise of self-determination by the East Timorese. Here, though, it appears the United Nations has intervened more successfully. The East Timor situation also attracted the International Court of Justice's attention: see the *Case Concerning East Timor (Portugal v Australia) (Jurisdiction and Admissibility)* [1995] ICJ Rep 90. The majority found that the Court lacked jurisdiction to hear this case on its merits (given the absence of Indonesia as a critical party). They were thus unable to rule upon the legality of the Indonesian-Australian *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, above n 36 (the Timor Gap Treaty), which Portugal alleged frustrated East Timor's right to (economic) self-determination.

[46] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali) (Merits)* [1986] ICJ Rep 3. The judgment emphasises that the purpose of the rule is to prevent newly independent states from being endangered by fratricidal struggles.

[47] For a restatement of the rule in a different context, see the *Conference on Yugoslavia, Arbitration Commission Opinion No 3* (an Opinion of the 'Badinter Commission') (1992) 31 ILM 1499 - *uti possidetis juris* in relation to the break-up of Yugoslavia. There is a more detailed discussion of the rule in M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8(3) *European Journal of International Law* 478.

The Culturally-Oppressive Government Context of Self-Determination

'Internal self-determination' is commonly understood to mean a people's attainment of a degree of autonomy *within* the borders of an existing state. Identifying the nature, scope and holders of the contemporary international legal right to internal self-determination is currently quite difficult. This is because the content of the right remains uncertain. The best that might be said is that 'internal self-determination' is about the right of 'cultural groups' within states to 'freedom of cultural expression', and perhaps also some limited 'political autonomy' in culturally distinct provinces. Exercise of this right to internal self-determination may be impeded by what might be described as a 'culturally-oppressive government'.[48]

Some of this language (which generally permeates the discourse) is clearly too vague. This is to be expected in a controversial and emerging area of customary international law. How do we define what is a 'cultural group'? What kinds of 'cultural expression' are protected, and what specifically is 'limited regional autonomy'? These challenging questions are simply not susceptible to absolute answers at this time, and it is erroneous to claim a degree of detail that is simply not there. In the wake of the Kosovo crisis, and in the context of other ongoing international campaigns for autonomy by cultural groups, it is only possible to outline what broad consensus there is.[49] Presently, it is accurate to say that throughout the discourse, the phrase 'cultural group' is still being used bluntly, as a general descriptor of a people bound by race, ethnicity, language and/or religion.[50] Such 'cultural groups' have the right to seek internal self-

48 Whilst the discourse on minority rights is wide and contentious, the discussion in this section is broadly inspired by Cassese, *Self Determination of Peoples*, above n 3, (particularly chapter 5), R Higgins 'Postmodern Tribalism and the Right to Secession' in C Brolman, *Peoples and Minorities in International Law* (1st ed, 1993) 28, and also a well-written recent Opinion of the Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217.

49 The state of applicable international law immediately before the Kosovo crisis was outlined by the Supreme Court of Canada in *Reference re Secession of Quebec*, ibid, particularly from [123]. The Court recognises the present uncertainty in the definition of 'peoples' entitled to self-determination, and the controversy surrounding exercise of self-determination by cultural minorities.

50 One possible basis for the definition, and protection, of minority rights, is found in article 27 of *The International Covenant on Civil and Political Rights*, above n 9, which provides:

> In those States in which *ethnic, religious or linguistic minorities* exist, persons belonging to such minorities shall not be denied the right, in community with

determination within the borders of states, as outlined above.[51] As an example, consider the Kosovar Albanians' distinctive language, religion, ethnicity and way of life. This 'cultural group' inhabits a fairly distinct region of southern Yugoslavia, and seems to be globally-accepted as a 'people' entitled to internal self-determination. It had been generally agreed by the international community that the Kosovar Albanians should be accorded limited political autonomy from the Serb-dominated government, and be allowed to pursue their distinctive culture.[52] Importantly, though, before ethnic-cleansing began, the Kosovar Albanian right to self-determination was thought to be exercisable only *within* the broader Yugoslav federation (concerns for territorial integrity coming to the fore). Like the peoples of the Basque Region (Spain), Quebec (Canada), Chiapas State (Mexico), Aceh (Indonesia) and Bougainville (Papua New Guinea), the Kosovar Albanians were not generally considered to have an international legal right to territorial secession (that is, to *external* self-determination).[53] Thus, initially President Milosevic could argue that in the face of illegal secessionist activity, his Yugoslav army was simply using force to maintain internal law and order, and ultimately the territorial integrity of the Republic. It seems that only in cases of wholesale and extraordinary repression of a group's cultural development by a central government, that such a group might attain a customary legal right to secede.[54] That situation did of course arise in Kosovo. After months of appalling repression, Kosovar Albanians were culturally stifled and there was little regional autonomy. Milosevic's horrific ethnic cleansing campaign lent legal weight to the Kosovar Albanian attempt to territorially secede. A small part of the international community appeared to be embracing an 'internal to external' transformation of the Kosovar Albanian's right to self-determination. Equally, however, following NATO intervention, there has clearly been a solid international effort to keep Kosovo

the other members of their group, to enjoy their culture, to profess and practise their own religion, or to use their own language. (Emphasis added).

51 Malanczuk, above n 10, 338.

52 Widely-reported comments to this effect were made by Russian Foreign Minister Primakov (eg, Reuters Newsreport of 17 March 1998 at <http://www.dailynews.yahoo/stories/kosovo-10.html>) and by the Contact Group of Foreign Ministers (consider their 24 September 1997 Statement on Kosovo at <http://www.state.gov/www/regions/eur/stm-970924-kosovo.html>).

53 The same could be said of many of the world's Indigenous groups.

54 *Reference re Secession of Quebec* [1998] 2 SCR 217, [134]. Essentially the Court considered that in extreme cases of severe cultural repression, international custom possibly legitimises secession.

within Yugoslavia.[55] Whether the Kosovo crisis has significantly impacted upon the legal scope and meaning of the right of cultural groups to self-determination is still unclear.

For reasons similar to those previously discussed in the colonial context, application of international law on the use of force to armed conflict between cultural groups and their government is implausible. However, if the right to internal self-determination is of *erga omnes* and *jus cogens* normative strength, then any state may in theory judicially complain of culturally-oppressive policies. As well, a repressive government's consent to supportive external intervention (ostensibly to maintain law and order) would be void. One legal excuse for foreign intervention is thus removed. External intervention is more fully discussed later.

To conclude the preliminary discussion of the three contemporary legal contexts of self-determination, it might be observed that existing accounts of the law are under threat. The crises mentioned so far (and international responses to them) are both informing and challenging contemporary narratives. The positivist legal discourse is presently erratic, as new practice and *opinio juris* emerges as to the legal meaning of 'self-determination'. Still, it remains both possible and illuminating to explore how international law might regulate *external* forcible intervention in self-determination processes.

External Intervention Sanctioned by the United Nations

External forcible intervention in self-determination processes is lawful if properly authorised by the United Nations. Article 1 of the *Charter* provides that a purpose of the United Nations is the development of friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples. A related purpose is the settlement of international disputes that might lead to a breach of the peace. There is also reference to the UN's role in the maintenance of international peace and security, and to that end, to the authorising of collective measures to remove threats to the peace. When exploring the United Nations' legal capacity for authorising intervention in self-determination crises, it is important to recognise

[55] For example, at the end of the NATO campaign, the UN Security Council passed the critical SC Res 1244 (1999) on 10 June 1999 (adopted 14 in favour, none against, one abstention – China). In this document, there is no suggestion that Kosovo has a right to secede from Yugoslavia. Instead, the Resolution *expressly reaffirms* Yugoslavia's territorial integrity, Kosovo being entitled to substantial autonomy and meaningful self-administration *within* the federal structure.

that generally such crises are considered to be 'international issues' beyond domestic jurisdiction of states. Thus, the consensus is that the United Nations might properly intervene in genuine self-determination crises.[56]

Article 24(1) of the *Charter* establishes that the Security Council has primary responsibility for maintenance of international peace and security.[57] Chapter VI outlines the Security Council's role in the pacific settlement of disputes. But in terms of forcible intervention in self-determination crises, it is Chapter VII ('Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression') that comes into play. The contemporary positive legal regime regarding Council-authorised intervention is based upon three key articles:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security[58]
>
> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions ... [59]
>
> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security ... [60]

Though these articles provide a legal basis for Council-authorised intervention in self-determination struggles, there has been a half century of Council inaction because of constant use (abuse) of the veto power.[61] Since the 1990s, however, a newly invigorated and more cooperative Security Council has provided significant direction about what the above articles on Council-authorised intervention might mean. Regrettably, though, there remains some doubt about the finer legal points, because the Council commonly fails to identify

56 Consider the useful discussion at page 368 of Malanczuk, above n 10.

57 This suggests a secondary role for the General Assembly, discussed shortly.

58 Article 39 *Charter*, above n 6.

59 Ibid art 41.

60 Ibid art 42. Note also article 53(1): 'The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action ... But no enforcement action shall be taken ... without the authorisation of the Security Council ... '.

61 Ibid art 27(3).

the precise legal basis for resolutions authorising intervention. It remains difficult to be absolute about the evolving law and practice. However, some points of commonality in the legal discourse on Council-authorised intervention are outlined below, phrased in terms of intervention in self-determination crises.[62]

It is generally accepted that the Security Council must firstly find that there is a ' ... threat to the peace, breach of the peace, or act of aggression ...' before it might legitimately demand economic or other sanctions under article 41, or forcible intervention under article 42. This is a political assessment for the Security Council. The practice of the Council is that it will quite easily find international dimensions to what at first glance might appear to be wholly internal self-determination disputes; for example, the Security Council might allude to the possibility of trans-boundary refugee flows, or to the threat of 'regional instability'. It would be rare that a contemporary struggle for self-determination would not have an 'international element' that the Security Council might seize upon. Because of this, and in an era of globalisation, purely internal civil wars are now becoming something of a legal fiction.

In terms of the legal effect of Security Council resolutions, mere 'recommendations' pursuant to article 39 do not bind states. However, 'decisions'/'enforcement measures' (for example, trade boycotts and forcible intervention ordered against Iraq, following its invasion of Kuwait) technically oblige the support of Member States.[63] Ultimately, though, the failure of Member States to strike military agreements pursuant to article 43 means that Council calls for *forcible* intervention in self-determination crises are more about political will and capability of Members to use force, than about a solid international legal obligation to do so.[64]

Traditionally, a distinction between United Nations authorised 'enforcement action' and United Nations 'peacekeeping operations' has been drawn, though complex missions involving self-determination might be difficult to pigeonhole, and may involve elements of both. The common understanding is that enforcement action is conducted

62 Though the discourse on UN authorised intervention is obviously wide, a useful starting point is to consider the various annotations to Chapter VII of the *Charter* in Simma (ed), above n 8. Those annotations have provided the basis for the present discussion.

63 See articles 2(5), 25, 48 and 49 of the *Charter*, above n 6.

64 See the straightforward and well-referenced discussion from page 389 of Malanczuk, above n 10.

against the will of the state in which the intervention is to occur, whilst peacekeeping occurs with the consent of the hostile actors involved.[65] Enforcement action on the basis of article 41 has included, for example, collective trade sanctions and arms embargoes against States such as Iraq, Libya, Haiti, Yugoslavia and Rwanda. Article 42 was arguably the basis for United Nations sanctioned operations in Iraq, Somalia and perhaps most recently in East Timor.[66] Peacekeeping missions, such as those in the Congo, Cyprus and Ethiopia/Eritrea, are often variously justified under other articles of the *Charter*. The mandate of such operations is usually more limited, and the use of force confined to self-defence. Ultimately, both UN authorised peacekeeping *and* enforcement action might contribute to resolution of self-determination crises; this was recently apparent in relation to East Timor's transition to independence.

As a legal validator of forcible intervention in self-determination processes, the mechanism of United Nations (essentially, Security Council) authorisation is uniquely and overtly political. Essentially, the legal position is that forcible intervention in self-determination processes in support of *any* party is lawful if the Security Council authorises such intervention by way of a procedurally sound resolution. Whether intervention is authorised turns largely on the tradeable political impulses of Security Council Members, particularly its Permanent Members.[67] There have of course been many inequities

[65] On UN peacekeeping, see, for example, R Lee, 'United Nations Peacekeeping: Development and Prospects' (1995) 28 *Cornell International Law Journal* 619.

[66] See Security Council Resolution 1264 (1999) on East Timor. The Preamble sets the scene:

> The Security Council ... Reiterating its welcome for the successful conduct of the popular consultation of the East Timorese people ... and taking note of its outcome, which it regards as an accurate reflection of the views of the East Timorese people, Deeply concerned by the deterioration in the security situation ... Appalled by the worsening humanitarian situation ... Determining that the present situation in East Timor constitutes a threat to peace and security, Acting under Chapter VII of the Charter of the United Nations ... .

In paragraph 3 the Council,

> [a]uthorises the establishment of a multinational force under a unified command structure ... to restore peace and security in East Timor, to protect and support UNAMET ... and authorises the States participating in the multinational force to take *all necessary measures* to fulfil this mandate ... .

The magical words which implicitly link intervention to article 42 are italicised. Paragraph 10 makes it clear that the multinational force is to be replaced by a UN peacekeeping operation.

[67] Russia, China, the United Kingdom, the United States and France – *Charter*, above n 6, article 23(1).

regarding the Security Council's response/non-response to various self-determination crises. The Security Council clearly shuns a number of self-determination struggles around the world, though embraces others. It failed to authorise armed intervention in Kosovo, but did so for East Timor and in other cases. Commonly, there are allegations of United States hegemony being manifested in Security Council resolutions. It must be asked whether Council-authorised intervention is really an effective means of protecting minority rights. Unsurprisingly, the discourse resonates with calls for reform of Security Council composition and processes.[68]

For the sake of completion, it should be noted that there is legal recognition of a subsidiary role for the General Assembly in the maintenance of international peace and security, deriving from both the *Charter* and from the *Uniting for Peace Resolution* of 1950.[69] Given the sheer size of the General Assembly and the contemporary dynamism of the Security Council, it is difficult to see how the General Assembly could or would presently recommend military intervention in a self-determination crisis. For a host of legal and political reasons, the General Assembly's potential to authorise use of force in such situations is severely circumscribed.

External Intervention Frustrating Self-Determination without United Nations Authorisation

What international legal norms are violated if the government of one state assists the government of another to frustrate a people's self-determination? Such assistance might include:

[68] See *The Kosovo Report – Conflict, International Response, Lessons Learned*, produced by the Independent International Commission on Kosovo, October 2000, and reproduced at <http://www.kosovocommission.org/reports/index.html>. The Commission concluded that the *Charter* as originally written does not meet the challenge of the humanitarian catastrophes the world faces today.

[69] Article 11(2) of the *Charter*, above n 6, provides, 'The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it ... and ... may make recommendations with regard to any such questions ...', though note article 12(1), which confirms the General Assembly's secondary role if the Security Council is examining the same matter. The *Uniting for Peace Resolution*, GA Res 377(v), UN GAOR, 5th Sess Supp 20 (1950) 10 (52 in favour, 5 against, 2 abstaining) – provides that,

> ... if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security ... the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including ... the use of armed force when necessary ... .

- legal and political support (including the signing of treaties which impact adversely upon a people's seeking of self-determination);
- financial assistance;
- supply of arms and logistical assistance; or even
- armed intervention.

It is useful to firstly discuss breach by the intervening state of the customary obligation to respect lawful self-determination. As outlined earlier, the international legal right to self-determination is manifested in three contemporary contexts (colonial, foreign occupation and culturally-oppressive government contexts). If it can be established that:

- as a question of law, a people have an international legal right to self-determination; and
- as a question of fact, exercise of that right is being frustrated by one or more governments,

then customary international law censures the conduct of *all* obstructive governments.[70] This is so even if external intervention occurs with the consent of the government primarily responsible for thwarting self-determination. How might other concerned states respond? One option arises from the *erga omnes* nature of the customary right to self-determination; in theory, any state may judicially query another government's frustration of the self-determination process. Also, if the right to self-determination is accepted to be of *jus cogens* super-normative status, it might be possible to obtain a declaration as to the invalidity of consent to the intervention, or of any treaty entered into that frustrates exercise of the right. The availability and utility of these outcomes is, however, limited.[71]

70 See, for example, paragraph 6 of the *Declaration on Intervention 1965*, above n 13, evidencing *opinio juris*.

71 Consider Australian foreign policy in relation to Indonesia's annexation of East Timor in 1975. Australia accorded *de jure* recognition of Indonesia's claim over East Timor, and then negotiated the infamous *Timor Gap Treaty*, above n 45. By these acts, Australia arguably violated the right of East Timor's people to self-determination, which was grounded in both the colonial and foreign occupation contexts. Portugal partially relied on the *erga omnes* nature of self-determination to launch a case against Australia which essentially questioned the validity of the *Timor Gap Treaty;* see *The Case Concerning East Timor (Portugal v Australia) (Jurisdiction and Admissibility)* [1995] ICJ Rep 90. Unfortunately, a full judgment on the merits was not delivered because of the absence of Indonesia as a critical defendant (Indonesia had not accepted the Court's non-compulsory jurisdiction). For that reason the Court declined to hear the case, despite acknowledging the *erga omnes* nature of self-determination. This highlights practical limitations upon legal pursuit of violations of the right to self-determination. At the least, the

In terms of proving violation of the customary right to self-determination, there are also obviously significant evidentiary problems. Establishing the fact of intervention by a foreign government, and then a nexus between the intervention and frustration of self-determination, is not always straightforward. For example, even if supply of arms by one government to another can be established, supply of arms does not *prima facie* violate international law. It might be difficult to link weapons sales to forcible suppression of self-determination. Consider also that armed intervention in a self-determination crisis might be argued to be intervention to assist the return of internal law and order, rather than factually suppression of self-determination. Essentially, the intervening state might be able to hide or explain away its intervention, so as to avoid international censure.

The giving of overt or covert assistance by one state to another, to frustrate lawful self-determination, may violate not only the self-determination norm, but also the *jus ad bellum.* Providing *political or financial support* to a colonial or culturally-oppressive government is, in terms of the *jus ad bellum*, mostly legally unassailable. It is difficult to characterise such support as illegal intervention in the affairs of another state (prohibited by customary international law), simply because the colonial or culturally-oppressive government will not protest the intervention. Contrast the situation where political or financial support is provided to an illegal occupier. Obviously, the allegation of illegal intervention will be more cogent, given the likelihood of protest by the government (perhaps in exile) of the occupied state. The impact of such an allegation in the international arena is, however, obviously limited.[72]

More serious is the *supply of weapons or logistical assistance* to a government that is suppressing lawful self-determination. In the colonial and culturally-oppressive government contexts, these forms of assistance are generally considered lawful in terms of the *jus ad bellum.* However, the situation is different in the foreign occupation context. The occupied state will generally have a right of forcible self-defence un-

validity of the *Timor Gap Treaty* must surely have been open to question. Fittingly, amendments to that treaty are directed at recognition of the emergence of East Timor as an independent state.

72 The non-intervention rule is essentially that states are prohibited from intervening directly or indirectly in the internal or external affairs of other states. This formulation was affirmed by the majority in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, [202] and [205].

der article 51 of the *Charter*. That state may direct its immediate, necessary and proportionate self-defensive response at interdicting the arms supply.

Difficult issues arise when there is *direct external military intervention* upon the territory of a state whose people are being denied self-determination. It is again useful to consider the colonial and culturally-oppressive government contexts of self-determination separately from the foreign occupation context. If a state sends troops to assist a colonial or culturally-oppressive government's frustration of self-determination, there is prima facie a technical violation of article 2(4) and customary prohibitions upon use of force by states.[73] How might the intervening state argue that such a violation be legally excused? The *jus ad bellum* condones military intervention, if it occurs with the consent of the lawful government in effective control of the state in which the intervention occurs. Such consent will of course apparently have been given. It is true that such consent will be void:

- if in fact there is no government *in effective control* of the state (for example, if the forcible struggle for self-determination has produced a state of civil war); or
- if one accepts that the obligation to respect self-determination is of *jus cogens* super-normative status – here, consent to intervention that violates the right to self-determination is again inoperative.

However, it can be difficult to establish conclusively either proposition. Therefore, often the consent of a colonial or culturally-oppressive government appears to legally excuse foreign intervention. In any event, what might another concerned state do? Alongside the usual raft of legal or political responses, there may be an attempt to invoke the intervention of the Security Council. However, concerned states have no legal right to engage in the collective self-defence of colonised or culturally-oppressed peoples, given that such peoples have limited international legal personality (discussed in the next section).

Application of the *jus ad bellum* is straightforward in situations where a state sends troops to entrench an illegal occupier's position. Violation of article 2(4) of the *Charter* by *all* states that forcibly intervene is

[73] Arguably there is a use of force against the territorial integrity and political independence of the state intervened in; but more intriguingly, perhaps a use of force contrary to facilitation of self-determination, which is a purpose of the United Nations, as earlier discussed.

clear, and there would be no *genuine* exculpatory consent to intervention given by the government of the occupied state. Rights of individual and collective self-defence vest in the occupied state and its allies, as well as potential for appeals to the Security Council.

To summarise, it is relatively easy to characterise external intervention on behalf of an *illegal occupier* as being unlawful, and the right to self-defence is relatively clear. Generally, it is harder to censure legally the giving of assistance to *colonial or culturally-oppressive governments.* The oppressive government will obviously consent to the intervention. Further, even if violation of the *jus ad bellum* can be established, a sympathetic state cannot lawfully intervene without the authorisation of the UN Security Council. This leaves colonised and culturally-oppressed peoples extraordinarily vulnerable. These difficulties are further explored below.

External Intervention Supporting Self-Determination without United Nations Authorisation

Intervention supporting self-determination might also be considered at levels of increasing intensity: the provision of humanitarian aid; the offering of political and financial support; provision of arms and logistical support; and then varying degrees of forcible intervention. The recent military campaign by NATO states in the Federal Republic of Yugoslavia provides an excellent platform for exploring the legality of intervention in support of self-determination struggles.[74] This is particularly because NATO's intervention was not expressly authorised by the Security Council, though as will be discussed, it is also significant that the Council did not noticeably condemn the campaign. NATO states asserted various politico-legal justifications for their massive military operation: the use of force in self-defence; to ensure regional security; to secure meaningful autonomy for the Kosovar Albanians; to halt ethnic cleansing; and to avert a humanitarian catastrophe. The cogency of such arguments must be scrutinised, in light of contemporary international legal discourse.[75]

[74] Australia for a time appeared to be considering unilateral intervention in East Timor, though ultimately such intervention occurred as part of a collective operation authorised by the United Nations Security Council.

[75] Despite Yugoslavia's launching of cases against NATO states in the International Court of Justice, protesting NATO's intervention, we may never see a judgment by the Court on the merits, given the recent ousting of Milosevic from power, and the installation of a new government more sympathetic to Western interests. On one view this would be unfortunate, because such a judgment would greatly illuminate the law of external intervention in self-determination crises. Presently

As a general proposition, assistance to peoples struggling for self-determination is unlawful in terms of the *jus ad bellum*, unless it occurs with the express authority of the Security Council, or can be characterised as being in the legal collective self-defence of the people seeking self-determination.[76] The right of collective self-defence is expressed in article 51 of the *Charter*, though it also exists in customary international law. The rationale for a right to act in the collective self-defence of another is that a state under attack may need to call for assistance from allies in delivering a self-defensive response.[77] A necessary implication is that the collective response must not exceed what is legally available in an individual capacity; the collective response must *in its entirety* be immediate, necessary and proportionate to the original armed attack. A lawful collective self-defensive response is feasible in the *foreign occupation* context of self-determination, on behalf of the occupied state requesting such intervention.[78] However, it is difficult to legally justify forcible intervention on behalf of a *colonised or culturally-repressed people*:

the Court has only ruled on jurisdictional issues; the current docket of the Court can be found at <http://www.icj-cij.org>.

76 Whilst the mere supply of humanitarian aid to a people is lawful (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, [243]), *greater forms of assistance are generally considered unlawful, in the absence of an exculpatory legal defence.* Political and financial support constitutes illegal intervention, as does the provision of arms and logistical support. Forcible intervention of course violates article 2(4) of the *Charter*, above n 6. Ironically, forcible intervention on behalf of a people might itself constitute an 'armed attack', inviting an individual or collective self-defensive response by the oppressive government and its allies, despite that government's ongoing frustration of lawful self-determination processes. In that regard, consider possible Russian intervention in the Kosovo crisis in the collective self-defence of Yugoslavia. The above is generally agreed to be the legal position, despite the passage of a few General Assembly resolutions that suggest that *some* assistance may be given to struggling peoples – for example, article 7 of the *Definition of Aggression 1974*, above n 13 - 'Nothing in this definition ... could in any way prejudice the right to self-determination ... nor the right of these peoples to struggle to that end *and to seek and receive support* ...' (emphasis added). Contrast that language with paragraph 1 principle 5 of the *Declaration on Friendly Relations 1970*, above n 14, 'Every State has the duty to promote ... the realisation of the principle of ... self-determination of peoples, *in accordance with the provisions of the Charter* ... '. The legal position appears to be that states have no right to forcibly guarantee the self-determination of others, contrary to article 2(4) and other provisions of the *Charter*, above n 6.

77 *Nicaragua v USA*, ibid [193]. Use of force in collective self-defence is the legal basis of the NATO alliance.

78 Although problems might arise in cases of long-term illegal foreign occupation (such as Indonesia's occupation of East Timor), because the right to individual (and thus collective) self-defence might be argued to have lapsed, rendering supportive forcible intervention not sufficiently 'immediate', and thus unlawful.

- as being in the *collective* self-defence of an entity possessing sufficient international legal personality; or
- as being in the *individual* self-defence of the intervening state(s) - unless it could be said that the war of national liberation is so intense, that as an offshoot there occurs an 'armed attack' against a neighbouring intervening state – this kind of argument is difficult to establish in a factual sense.

States intervening in colonial or cultural independence struggles will rarely convince that their intervention is justified under article 51 of the *Charter*. Such states are forced to consider other possible exculpatory defences. Several NATO states will find themselves in this position if the International Court of Justice cases against them proceed. What are the possibilities? It is difficult to characterise NATO's intervention as being in the *self*-defence of NATO states following an 'armed attack' against one or more of them, or to claim convincingly that an international legal right of self-defence vests in the Kosovar Albanians, which NATO might assist them to exercise collectively. The *jus ad bellum* does not legitimise intervention simply to ensure vaguely-defined 'regional security' or 'self-determination', where such intervention occurs without the authority of the Security Council and is outside article 51 (despite the United States' standard insistence to the contrary). Such intervention directly defies key *Charter* provisions. Thus, the real question here is whether NATO's intervention in Kosovo (and international reaction to it) finally signals the emergence of a new customary international legal right of humanitarian intervention – a new 'just war' at the *fin du siècle*. The emergence of such a customary international legal right could legally justify external intervention in support of oppressed minorities in self-determination crises. In the wake of the Kosovo crisis, it might be asked whether the failure of the Security Council (and many states) to censure NATO's intervention in this urgent and overwhelming humanitarian catastrophe, crystallises a new legal right of humanitarian intervention. In answering this question, one must wonder how such a customary right of intervention might sit with article 2(4) and the rest of the *Charter*. There is the old chestnut of how clear *Charter* language might be interpreted to accommodate such a contentious and divisive *customary* right of intervention, which could clearly be open to serious abuse. Presently, there is no global acceptance of a new customary right of humanitarian intervention, which

The *Charter* suggests that such conflicts must be resolved peacefully by all relevant parties.

might help those struggling for self-determination.[79] Further, examples of intervention along the lines of that in Kosovo, coupled with sympathetic or even supportive international reaction, might in the future make it clear that a unilateral right of humanitarian intervention (without Security Council authorisation) has finally emerged.[80]

To conclude, in terms of the contemporary *jus ad bellum*, it is probably still the case that intervention on behalf of a colonised or culturally-oppressed people is unlawful, in the absence of either express Security Council authorisation, or a right of individual or collective self-defence pursuant to article 51 (the latter being rare). Such intervention is unlawful even if the people have a legal right to self-determination, their self-determination is being ruthlessly suppressed, and they are calling for desperate assistance. It is worth re-emphasising the perhaps ironic result that unauthorised or excessive intervention by a sympathetic state might itself attract a lawful self-defensive response by the oppressive government and its allies. Whilst the contemporary legal paradigm might be in a state of flux following the Kosovo crisis, there does not appear to be real acceptance of a unilateral right of humanitarian intervention. Thus, effectively the contemporary *jus ad bellum* forces sympathetic states to appeal to a politicised Security Council, or otherwise to act on the margins of, but outside, international law.

Conclusion

This article has explored the intersection between two important topics of international law – the law of self-determination, and the

[79] See for example B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10(1) *European Journal of International Law* 1; D Kritsiotis, '*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10(1) *European Journal of International Law* 23; and P Hipold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12(3) *European Journal of International Law* 437. The general conclusion is that NATO intervention in Kosovo has *not* crystallised an alleged 'humanitarian intervention' exception to article 2(4) of the *Charter*, above n 6.

[80] Recent US-led coalition intervention in Afghanistan does not necessarily indicate the emergence of a unilateral right of humanitarian intervention. American intervention in Afghanistan presents more as the use of force in self-defence following the terrorist attacks of September 11 (though noting the immediacy, proportionality and necessity requirements of self-defence), or the use of force in anticipation of future terrorist attacks (the legality of anticipatory self-defence being questionable). More controversially, the intervention is said to be part of a wider 'war against terrorism' (the legality of which is doubtful without proper Security Council authorisation).

law of forcible intervention. Self-evidently, these two topics go together. For good legal analysis of recent international crises (such as those in Kosovo and East Timor), it is clearly critical to understand how they might interact.

The legal right to self-determination was described as being largely the product of customary international law, and was argued to have three operational contexts. Peoples labouring under foreign occupation were generally found to be in a good legal position, primarily because of their pre-existing statehood. However, the position of colonised and culturally-oppressed peoples was discovered to be more bleak, given their comparatively limited international legal personality. The discussion demonstrated how easily colonial or culturally-oppressive governments might impede the self-determination of the peoples they govern, and how the law helps this situation to endure.

The vulnerability of colonised and culturally-oppressed peoples was reinforced by examining the legality of external intervention in self-determination crises. It became apparent that it is relatively easy to explain away intervention in support of colonial and culturally-oppressive governments. However, comparable intervention on behalf of an oppressed people is more quickly legally censured. By highlighting the politicised and arbitrary nature of Security Council intervention in self-determination crises, the vulnerability of such peoples was further emphasised. As the Kosovo crisis demonstrates, this environment will engender unlawful intervention by states, or transformation of the law to permit arbitrary 'humanitarian intervention'. Each alternative is equally troubling, as is the poor prospect for radical reform of international systems of organisation.