# TOWARDS A MECHANISM FOR THE REALIZATION OF THE RIGHT TO SELF-DETERMINATION

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**Introduction**

This paper proposes a mechanism for the realization of the right to self-determination.

It recommends:

- The establishment of a Self-determination Commission comprising representatives of the UN member States;
- The establishment of an office of a High Commissioner for Self-determination;
- The appointment of an Expert Group on Self-determination to serve as an advisory body to the Commission.

The words 'self-determination' immediately conjure up the notion of a territory seceding from another and sounds an echo of the struggles of the 1940s and 1950s by the former colonies to achieve independence. In discussions of how an ethnic or political group can achieve self-determination such terms as autonomy or self-regulation are used to broaden the definition and to avoid implications of secession and the breakdown of the nations state. The paper will attempt to

show that self-determination can cover a range of concepts from outright secession through means of popular participation to federalism and local domestic autonomy, and that the term is firmly grounded in the international human rights framework.

The paper will argue that there is a pressing need for a mechanism for the achievement of self-determination and that this needs to be anchored in the United Nations system not only because the human rights framework provides a universal one agreed to in principle by the international community but also because it is a feature of modern-day post-Cold War conflicts which create an unacceptable threat to peace and security. Since the UN Charter is based on the maintenance of peace and security and the realization of human rights, it is within the UN system that the quest for self-determination must be pursued.

**Historical background**

The words 'self-determination' were included in the founding documents at the time of the creation of the United Nations following the horrors of the Second World War. The words appear in the UN Charter as an enunciated principle rather than as a designated right and - in a not too subtle allusion to the American Declaration of Independence which served as an inspiration to the Charter - the concept is tied to the notion that "peoples" have equal rights.

The inclusion of the term self-determination arose from pressure from the territories under the colonial domination of European powers and from other First World States without colonies whose economic and strategic interests would benefit from independence for the old colonies. Self-determination was thought of from the outset by the UN member states as a descriptive term applying to the process of decolonization.

From some perspectives the decolonization process has been one of the outstanding successes of the United Nations machinery. If one looks purely in numerical terms the history of decolonization is an impressive one. In 1948 among the original fifty-one countries in the UN only three had recently emerged from colonial rule. Less than twenty years later, in 1965 out of a total of one hundred and nineteen members fifty had only recently been colonies while another twenty had been former colonies and another six had emerged from under foreign tutelage.[1]

The entire process of decolonization was not all smooth sailing. There were many instances when those states still intent on holding on to their colonies put up a strong resistance against having their dominions stripped from them but the calls for independence - in many cases accompanied with well-motivated insurgent movements - brought home to the international community the importance of achieving self-determination in order to ensure peace and security.

Indeed the motivation for decolonization did not stem merely from concerns about justice but from the realization that the instability created by peoples seeking their independence from colonial occupation could easily lead to conflict and undermine peace and security and the strategic balance between the countries of east and west.

Such instability is once again threatening world peace and security in the post-Cold War period in which long-repressed nationalist sentiments as well as discriminated-against minorities are calling for self-determination.

The forums initially available to the anti-colonialist forces were the UN General Assembly and its Fourth Committee - the so-called Decolonization Committee - the Security Council itself and the Trusteeship Council.

The Trusteeship Council was established by virtue of Article 88 of the UN Charter. Half of its members were the administering powers of the Trust Territories and it is not surprising therefore that unanimity over the process and pace of the granting of independence would be slow. Not only did the administering powers use stalling tactics to delay progress but they would also exert influence on the other members of the Council. Thus only three or four of the members at any one time would be actively pressuring for progress in the granting of independence to individual colonies.

The Trusteeship Council itself had only limited powers: its main activity was the issuing of questionnaires concerning the political, economic, social and administrative advancement attained within each territory. This information was supposed to provide the framework for an annual report submitted by each administering power. The Council also sought to augment its information by asking to send missions to the relevant territory but this was at the mercy of the administering power which were often reluctant to cooperate over requests for such missions.[2]

With the odds stacked against any progress through the Trusteeship Council, it was not unexpected that the Fourth Committee of the UN General Assembly with delegates from all the member States repeatedly expressed its impatience with the decolonization process and began to seek to carry out fact-finding missions itself.

As well, anti-colonial sentiments were more prevalent in the General Assembly than in the Security Council given that it was in the Assembly where the former colonies had the numbers.

In 1960 the UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples and this reflects the growing impatience of a majority of the member States. The Declaration lays out the aspirations and expectations of the international community in the face of the slowing down of the progress towards decolonization. It proclaims the right to self-determination - which was subsequently incorporated into the preambles to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

In a move parallel to the interpretation by States of the Declaration on the Right to Development in more recent times, the drafters of the Declaration on the Granting of Independence to Colonial Countries and Peoples seriously limited their definition of self-determination. Just as many UN member States have behaved as if the Right to Development refers to national development alone and downplayed the people-focus of development, so the definition of self-determination is qualified by a major caveat in the 1960 Declaration:

> *any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles which are the United Nations*.

This formulation is aimed at preventing any definition of self-determination that is not based on the gaining of independence of the former colonies of the European powers and to exclude any other definition. It also shifts the focus away from the rights of peoples and communities to those of governments.

The irony is that as far back as 1955 when the UN was trying to draft a right to self-determination, one delegate suggested six categories in which the right would apply:

1. 1. Peoples which constitute independent and sovereign States.
2. 2. Peoples of States which had lost their independence and sovereignty and wish to regain it.
3. 3. Peoples which although constituted in independent sovereign States are prevented by their own dictatorial governments from exercising their right to self-determination.
4. 4. Peoples who form part of a independent and sovereign State, but consider themselves absolutely different from the other elements in the country and wish to set up a separate State.
5. 5. Peoples constituting States which were formerly or nominally independent and sovereign but whose independence and independence were forcibly controlled by another State.
6. 6. Non self-governing peoples whose territories were administered by the so-called colonial powers.[3]

Philip Alston points out that these well-meaning definitions would inevitably antagonize States that would see most of them as a threat to their national cohesion and accordingly lead to the rejection of any suggestion for their incorporation in the declaration. As he puts it,

> *"This was put forward, as I understand it, in good faith by someone who wanted the right to self-determination to be recognized. But it seems to me to be the best possible summary of all the reasons why governments would not have been prepared to accept such a right"*.[4]

In the event the UN recognized three types of situations in which the right to self-determination is applicable. The first is of course that of colonial peoples to self-determination. Next is when a State falls under the foreign domination of another power as this is seen as a violation of the right to self-determination. The third situation covers racist domination and has only been applied in Southern Africa.[5]

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples proposed a Committee to oversee the decolonization process. Originally constituted of seventeen members, the Committee was increased to twenty-four in 1962 and was henceforth known as the Committee of Twenty-Four. The significant difference from the Trusteeship Council was that the Committee of Twenty-Four was no longer dominated by the administering powers and that its secretariat was involved on a more independent basis in the preparation of the agenda and documentation of the Committee.

The secretariat would provide papers assessing not only the civil and political situation in the territory under question but also economic, social and cultural factors and the performance of the administering powers in relation to these.

The Committee was far more assertive in the face of resistance from the colonial powers and the proceedings were often characterized by denunciation and recrimination. The Soviet Union, intent on creating trouble for the European Powers, encouraged an antagonistic relationship between the Committee and the colonial powers. The Committee thus invited petitions from the independence movements in the administered territories and sought to conduct fact-finding missions which would often be refused. The Committee would also seek to have Security Council involvement arguing that some of the insurgencies were a threat to peace and security.

The main criticism of the Committee of Twenty-Four focussed on the adversarial nature of its processes and on its attempted political manipulation by the Soviet union. In a sense this was also the measure of its success since it managed to maintain a high international profile for the issue of decolonization particularly during those periods of the year that the mechanisms of the United Nations faded from the gaze of the media. As Luard has said in his history of the UN,

> *The most visible effort of the Committee was that UN pressures were maintained even in periods when the Assembly was not meeting and were exerted in a rather more publicized form than before.*[6]

The Fourth Committee by contrast, comprising as it did representatives of all the Member States of the UN, was in a sense more democratic and less open to political manipulation. Given the increasing representation in the UN by the former colonies, the activism of this Committee increased under the goading of the more campaigning Committee of Twenty-Four to the extent of itself calling for access for fact-finding missions. It also had the advantage of benefiting from the greater media attention given to a full committee of the General Assembly. To quote Luard again,

> *The Fourth Committee of the Assembly, though it became in time almost as radical [as the Committee of Twenty-Four], was probably more influential, because it was recognized as more representative, and because its debates were more highly publicized.*[7]

If it is accepted that the decolonization process was a relatively successful one then a number of factors can be identified that contributed to this success:

- The inclusion of all UN member States through their participation in the General Assembly and its Committees conferred the legitimacy needed for sufficient pressure to be placed on the colonial powers to want to achieve a resolution of the problems that confronted the administered territories.
- This was aided by assessments that at least some of the independence struggles could prove a threat to world peace and security particularly in the context of the Cold War.
- The involvement or possible involvement of all the member States tended to mitigate the possibility of overly aggressive conflict in the debates around decolonization.
- The fact that the decolonization process was taking place at UN Headquarters and thus in the shadow of the Security Council, meant that the political dimension of the decolonization process could not be overlooked and added to the urgency of the calls for independence.

- The debates taking place in the Committees and in the General Assembly itself meant that there was constant and continuing public scrutiny of the process with the consequent increased media attention.

**Definitions of self-determination**

The great independence struggles following the Second World generally resulted in successful outcomes as evidenced by the rapid increase in the number of UN member states - with the exception of some notorious cases such as the territories of East Timor and West Papua. In almost all cases of successful decolonization the newly independent States have been strong defenders of the pre-colonial boundaries established by the colonizers. The rationale for this position for both the emerging nations and the former colonial powers was based on pragmatism.

> *The reasoning behind this principle (the sanctity of borders) was quite clear; without it, the newly decolonised states would be condemned to fight each other over the unrealistic borders established by the haphazard nature of the conquests of the colonisers. In the Burkina Faso and Mali (Frontier Dispute) case of 1986, the International Court of Justice held that the principles of* uti possidetis *"is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".*[8]

The principle re-affirmed by the International Court has however been applied quite selectively and inconsistently. For example, the principle was used to recognize the former federated states of Yugoslavia such as Croatia and Slovenia but was not applied to the former province of Kosovo. The old colonial borders took little account of the ethnic divisions that have now become an intrinsic aspect of so many bloody conflicts in Europe and Africa.

What could be categorized as the old Soviet colonial system is a case in point. The imposed borders of the fifteen former Soviet republics have been maintained with the fall of the Union but the consequent lifting of the heavy hand of the state apparatus has resulted in calls for self-determination from ethnic minorities in Georgia, Uzbekistan, Tajikistan and Armenia, to name but a few. The existing *minorities* in these newly independent states are entitled to some form of self-determination and have a legitimate claim for the retention of their culture. The denial of these has lead to the civil conflicts we see on our TV screens virtually every night.

The principle of the sanctity of borders was reinforced through such instruments as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. This declaration served to preserve the former boundaries and underpinned the claims of States that internal conflicts are exclusively an issue of domestic jurisdiction and not subject to international scrutiny. In this doctrine any expression of concern by the international community can be construed as interference in the affairs of States and an infringement of national sovereignty.

Yet the Declaration itself makes clear that self-determination may stop short of territorial separation. It makes provision for acts of self-determination arising from an act of free choice that does not necessarily involve secession:

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

Ian Brownlie points out that there already exists a range of options in the realization of the right to self-determination. He describes how trusteeships - of which there are only a very few remaining examples - represent one form of autonomy providing that it is established with the consent of the people under trusteeship. While trusteeship is related to a presumed transition to independence it is possible to envisage an act of free choice which will lead to a different relationship to the State administering the trust territory. He describes a number of examples:

> *... there are a variety of other models, including that of 'Associated State' (as in the case of the Cook Islands and New Zealand), the regional autonomy of Austrians in the South Tyrol, the Cyprus Constitution of 1960, and the various arrangements within the Swiss and other federal constitutions.* [9]

Frederick Kirgis Jr goes further in listing what he calls the 'numerous faces' of self-determination. While pointing out that the legal nature of some of these can be questioned, he notes that there are degrees of claims just as there are degrees of self-determination and argues that the legitimacy of each claim is proportional to the level of democratic participation allowed by the government concerned. This argument is based on both pragmatism and empirical observation. For example, a claim for secession will not be supported by the international community if it is made within a representative democracy whereas there is likely to be more support if the claim is lodged where the government is extremely unrepresentative and where there is a high degree of destabilization brought about by the conflict with the claimants.

Kirgis lists the following 'faces' of self-determination:

- Decolonization is the most obvious and well-accepted manifestation of the right to self-determination.

  The process is incomplete most obviously in East Timor and is now very much in question in West Papua where the Act of Free Choice was certainly not free with little choosing allowed by the peoples of this former Dutch Colony.

- The people within a defined territory may elect to remain dependent through an act or plebiscite as was the case with Puerto Rico deciding to remain a dependency of the United States.

- A referendum in the former Czechoslovakia decided peacefully on its dissolution into two independent states. A similar act of self-determination won Eritrea its independence from Ethiopia following the fall of the Mengistu regime.

- The international community eventually recognized the right of East Pakistan to secede and become Bangladesh. That act recognized the arbitrary nature of the former colonial power's partition of its former colonies.

Tibet was invaded in 1949 by Chinese forces and annexed by the Chinese authorities as a part of China. It is clear that the Tibetan people do not want to remain a part of China and that their cultural and ethnic identity is under attack from the Chinese authorities. There is no indication as yet that any of the member states of the UN are prepared to take up the cause of the self-determination of Tibet.

- Germany is an example of two territories agreeing to become one and has some lessons for the two Koreas both of whose state policies call for reunification.

- The limited autonomy, short of secession, for groups defined territorially or by common ethnic, religious and linguistic bonds is exemplified by the relationship of some Pacific Island States to Australia and New Zealand.

- The Inuit of Canada have been granted self-determination within a larger political entity and minority groups elsewhere including those in Australia are pointing to this example as a model.

The draft Declaration on the Rights of Indigenous People while using the language of the accepted international human rights instruments elaborates on aspects of self-determination that clarify the specifics of the obligations to and entitlements of indigenous people. It is no surprise that the wording therein has proved so controversial and is having such a difficult passage through the UN. It is worth quoting from this draft Declaration for the echoes of the terms of the debate on self-determination that started at the beginning of the twentieth century:

> Indigenous peoples have the right to self-determination. By virtue of that rights they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3) Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristic, as well as their legal systems, while retaining their rights to participate fully, if they so chose, in the political, economic, social and cultural life of the State. (Article 4)
>
> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions. (Article 31)[10]

Even if the Declaration is adopted, it may not have very much impact on the practices of many UN states. It is after all in the developed world that indigenous people have won

acceptance of their rights while in the developing world their voices have been muted. In the words of Michael Ong,

> *Indigenous minorities [he is speaking about Asia] share several commonalities. They are, in the overwhelming majority of cases, demographically insignificant and thus politically ineffectual. They also exist on the periphery of their country's economy and have often become the primary targets of domination and subjugation by the more powerful, including the government, resulting with their assimilation.* [11]

Yet the accommodation reached by the indigenous populations with their governments in countries like Sweden, Canada, Australian and New Zealand demonstrate that the nexus between self-determination and independence or secession can be broken and provide an example for other claimants.

- The internal self-determination freedom to choose one's form of government, or even more sharply, the right to a democratic form of government.[12]

The last case is about the democratic process. People ought to be free to choose whatever form of government is most appropriate to them but a more important point highlighted by this last case is that self-determination is and must remain an ongoing process. A single act of self-determination is meaningless if it does not alter the situation of the people concerned in any meaningful manner. There are too many instances of such a single act leading to a deterioration in the protection of human rights supposedly endorsed by that single act.

Dr Peter Wilenski, the former Permanent Head to the UN and an ardent proponent of UN reforms in a speech to the General Assembly highlighted this dimension to the nature of self-determination. Self-determination is not simply a single definitive act. In a view shared by many of his colleagues, Wilenski explains that the notion of popular participation is intrinsic to the notion of self-determination:

> *Realisation of the right to self-determination is not limited in time to the process of decolonisation nor it is accomplished solely by a single act or exercise. Rather, it entails the continuing right of all peoples and individuals within each nation State to participate fully in the political process by which they are governed. Clearly, enhancing popular participation in this decision-making is an important factor in realising the right to self-determination. It is evident that, even in some countries which are formally fully democratic, structural and procedural barriers exist which inhibit the full democratic participation of particular popular groups.* [13]

This notion of continuing process and of popular participation is especially relevant to the self-determination of indigenous populations whether defined within a given territory or within a 'larger political entity'.

**Is a self-determination mechanism feasible?**

Many of the current threats to international peace and security stem from the struggles of various minorities to claim their right to self-determination. Wherever one looks, such claims are creating the sorts of tensions which have a major impact on the good relations between states.

The status of East Timor remains - in the words of President Suharto - the stone in the shoe of the relations between Indonesia and Portugal, Australia, the Netherlands and the US. The suppression of Tibetan culture has most recently lead to a breakdown in cordial relations between China and its trading partners, Germany and the United Kingdom. The failure to recognize the popular will in Burma has resulted in threats of economic sanctions from the European Community. The attempted wiping out of the Christian minority in the southern Sudan is giving rise to grave concerns about relations between Sudan and its African neighbours. The aspirations of the indigenous people of Mindanao threaten the prospects for a trade triangle between the Philippines, Brunei and Indonesia. The survival of the Palestinian people is the basis for a possible conflagration in the Middle East. The subjugation of the citizens of Chechnya may provide the kindling for a resurrection of a totalitarian military regime in Russia.

In most of these cases attempts are under way to try to resolve the conflict either through the good auspices of the UN Secretary-General as in the case of East Timor, by governments themselves as in Mindanao, through international mediation as in Palestine or by using the suasion of regional bodies such as ASEAN in Burma or the OAF in Sudan. The fact remains that each time a new situation develops, a considerable time is expanded internationally or within the state on trying to develop a process appropriate to the specific disagreement - and the lack of success in finding either a rapprochement between the parties or a solution to the problems remains notoriously elusive.

The legacy of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States is invoked in the refusal of many of the respective states to countenance any external involvement in the resolution of disputes. It is argued that the insistence on the supremacy of national sovereignty in such disputes arise from fear of the disintegration of the state. This gives rise to an increased focus on the inviolability of national boundaries and the categorising of attempts by the international community to assist as an unwarranted interference in their internal affairs.

In a certain sense this approach to conflicts arising from the claims of ethnic or other minorities parallels that by those governments accused of abuses of human rights.

Prior to the early 1990s at least, the standard reaction of these governments to criticism by the UN or its member States of the violations of rights was that this constituted an interference in their internal affairs - this response was particularly and understandably strongest in those cases in which the threat of some kind of sanction would be made against the offending state.

In the lead up to and at the second UN Conference on Human Rights held in Vienna in 1993 this position lost its legitimacy following the re-affirmation by governments and non-governmental organizations alike that human rights were the legitimate concern of the international community. Through the work of human rights organization such as Amnesty International and Human Right Watch and their emphasis on inalienable rights and a focus on the victims of the denial of these rights, it is less common for governments to use domestic jurisdiction as a defence for their abuses.

While there are still governments that reject criticism of their human rights records as an unjustified intrusion in their domestic affairs, this is becoming rare and the new defence of abuses now centres on claims that the realization of human rights varies according to the cultural context in which it is situated and on the economic and social status achieved by each country. In general most governments now acknowledge the essential role played by the UN human rights mechanisms in the protection of the inalienable rights of their citizens.[14]

In the light of this acknowledgment and the increasing awareness by the international community of the costs associated with the struggles for self-determination and their possible impact on a globalizing world, the time is ripe for addressing the issue of self-determination more directly than in the past and from a different perspective than that of the UN Commission on Human Rights.

Such private bodies as the Canberra Commission on Nuclear Disarmament can have considerable moral force and add to any existing momentum for change. However, like the Peace Tribunals of the 1970s, they lack the legitimacy provided by apolitical governmental support in the UN. There is thus a need for the establishment of a body similar to the Decolonization Committee but with a wider mandate to explore the realization of all aspects of the right to self-determination.

In a paper delivered to the International Peace Research Association Conference in 1992, Herb Feith and Alan Smith proposed a new UN process for the evaluation of self-determination claims. They also allowed for the range of possible definitions of self-determination outlined above. However they focused more on how these would be assessed and described a three-step procedure which they point out has similarities to the processes adopted by the former League of Nations to protect minorities.

The first step is the registering of claims to self-determination with an organ of the UN. This is followed by an evaluation of the legitimacy of the claim and whether there is a prima facie case made out for self-determination. If the case is deemed legitimate, the UN organ charged with the evaluation refers the case to the Security Council which in turn endows its authority to negotiations between claimant and the State concerned.

Feith and Smith suggest that the organ that would be charged with registering and evaluating claims could be either the Human Rights Commission or its Sub-Commission for the Prevention of Discrimination and Protection of Minorities, or the Decolonization Committee but they also issue a warning about the "ideological baggage from past debates" of these UN bodies.

The process they propose for the evaluation of a prima facie case is based on identifying at the outset the goals of a claim rather than focussing on the nature of the outcome (secession etc). The conditions for assessing these would encompass,

- an analysis of the nature of the dispute between the state and the claimant;
- the level of support from civil society in the affected territory;
- the historical basis for the claim;
- the actual or potential presence of an institutional entity able to administer the claim;

- the existence of any abuse of human rights leading to the claim.

These factors may serve to establish a bona fide claim. There is also a need however to establish whether any proposed process towards self-determination will actually benefit the population making the claim and protect the legitimate interests of the state in question. In other words, "the international community can demand observance by the claimant of peaceful settlement of outstanding disputes with the states involved and acknowledgment of the rights of new minorities" created in the self-determination process.[15]

Thus additional considerations must feature in the assessment of the legitimacy of claims. These might include the provision of protection or compensation to those adversely affected by fulfilment of the claim, whether individuals, groups or the state. For example, if a claim is based on greater political autonomy some kind of guarantee must be provided for the protection of the rights of minorities within the newly autonomous entity. Only if this is present should the claim be accepted.

Important also then is the need for the possibility of follow-up after a claim has been "settled". As Wilenski points out the right to self-determination is an ongoing process and there should also be a guarantee from the parties to the claim that there is a commitment to the ongoing process.

As for the process of involvement of the Security Council in the negotiations over self-determination, Feith and Smith take the UN Commission on Indonesia as their model. In this each disputant independently chose a member state for a small commission and the two parties together agreed on a third state to form a tri-partite commission.

**A Permanent Self-Determination Commission**

The proposal to divide the processing of claims for self-determination into three steps has an initial appeal. First is the registering of claims with a designated body. Then comes an assessment of the legitimacy of a claim by using a set of predetermined criteria. Finally, the claim is processed by a body designated by the Security Council.

There are drawbacks to the creation of separate commissions for each claim to self-determination. The Security Council does not have an outstanding record of impartiality in its votes over issues of international peace and security. While the veto has been exercised less frequently recently, the permanent members of the Council have applied it in a clearly political manner. As well, with the prospect of a process of democratization of the Security Council it is increasingly likely that the new members as well as the permanent members will be involved in claims themselves and will be in a position to prove obstructive to the establishment of commissions that they will perceive as potentially declaring against them.

On the other hand it is important to ground a Self-determination Commission in the UN system in New York. The experience of the Decolonization Committee is a valuable one. The new Commission would be made up of representatives of the member states of the UN and report

directly to the General Assembly. It would thus be advisory to the Security Council and be in an ideal position to forewarn of claims which are a danger to international peace and security.

There might be a temptation to convert the Decolonization Committee to fill the functions of a proposed Self-determination Commission. This should be resisted. That Committee is too closely associated with the decolonization process and will inevitably be forced to view self-determination through the prism of a search for independence and secession. It is also bound up with the history of decolonization and, as Feith and Smith point out about the Commission on Human Rights and its Sub-commission, carry the political baggage of past differences.

**Expert Group on Self-Determination**

The complexities of the issues around the right to self-determination creates a major challenge for those involved in the realization of that right. The usual practice for a UN commission is the allocation of a secretariat (unfortunately mostly underfunded) charged with servicing the UN-appointed organ. As has been argued above, there is a level of urgency in addressing the numerous claims for self-determination around the world. Yet the relevant literature is scattered and contradictory.

There is clearly a need for the development of a body of expertise focussing on the realization of the right to self-determination, for the compilation of lessons from past experience and the establishment of an organ able to explore the varieties of claims to self-determination. It is proposed therefore to recruit an Expert Group on Self-determination.

The group would consist of individuals with a high reputation and experience in a number of fields. Such a group would include:

- a human rights expert able to evaluate claims based on persistent discrimination and who would have a thorough knowledge of the UN human rights system,
- a diplomat experienced in negotiation and conflict resolution,
- a UN staff member familiar with the processes at the UN Secretariat and at the General Assembly,
- someone from the indigenous sector familiar with the procedures at the Sub-Commission and with indigenous claims to self-determination,
- a demographer able to assess the context in which claims arise,
- a sociologist who could advise on the outcomes of various forms of autonomy ranging to territorial independence,
- an international jurist who could draft terms of agreement acceptable to the parties to a claim.

This list is not exhaustive. The function of this group of experts would be initially to develop a proposal for the registration of claims, for assessing the legitimacy of claims and mechanisms needed to resolve the claims.

Initially, funded by sponsoring governments, it would produce a comprehensive report and recommendations for further action. Its most important task would be to then apply the

recommendations to a small number of carefully selected cases with a view to develop a body of experience leading to a more concrete proposal to set up the Commission on Self-determination itself.

Once the latter has been agreed and established the Expert Group would act as an advisory body to the Commission.

**A High Commissioner for Self-Determination**

The international human rights movement in 1993 during the lead up to the UN World Conference on Human Rights, resurrected the proposal to establish an office of a High Commissioner for Human Rights. The rationale for such a post was based on a perceived need to invest credibility in the UN human rights system, to provide for effective human rights diplomacy and to bring a semblance of order into the complicated human rights machinery of the UN.

It was thought that a person who had expertise and an impeccable reputation in the human rights field would be able to emulate the role of the High Commissioner for Refugees and enable high level discussions with state representatives on human rights matters. Such a person would be in a position to integrate the work of the treaty bodies and generated greater cohesiveness and coordination in their respective areas of concerns. The office would also serve as a liaison between the UN human rights activities based in Geneva and the General Assembly in New York and serve to regularize the work the Centre for Human Rights.

The proposal was accepted at the Vienna Conference and included in the Program of Action. After lengthy debate the General Assembly approved the establishment of the office of the High Commissioner and Jose Ayala-Lasso was appointed soon after as the first High Commissioner. This appointment has resulted in recommendations for human rights monitors in Rwanda, an increase in the provision of advisory services on human rights and numerous meetings between the High Commissioner and government officials in countries with human rights problems.

There has been some criticism about the performance of the office to date. For example it has been suggested that the High Commissioner has not succeeded in integrating the treaty bodies in his diplomatic activities and that in some cases he has undermined their work by not coordinating visits adequately. Concerns have also been expressed that reliance on advisory services and their promotion waters down any criticism and condemnation of human rights abuses by various relevant parties.

These criticisms may be justified but the fact remains that the high profile of the High Commissioner and his diplomatic background has opened doors which used to be firmly shut. Governments that used to be firmly opposed to any dialogue on human rights have welcomed the High Commissioner and, while the provision of advisory services may be seen as the softest option, the very process of identifying areas of international cooperation will lead to some improvements in the promotion of a rights culture in the affected countries.

The search for a mechanism to improve the observance of human rights parallels the situation in regards to efforts to engage governments in discussions on the right to self-determination. Similarities include the following issues:

- The stability of states is being challenged by ethnic, racial and other minority groups whose rights are under threat
- States are fearful that they will surrender their sovereignty if they accept to consider the concept of self-determination;
- States perceive that their integrity is under challenge in any talk of self-determination;
- There is concern in the international community about the outcomes of a failure to resolve these conflicts;
- The current mechanisms of the UN are not adequately equipped to address the question of self-determination;
- Certain of the conflicts impact on international peace and security.

As described throughout this paper there is likely to be continuing opposition by states to the rapid development of a mechanism to address self-determination. Yet the establishment of the office High Commissioner for Human Rights provides an example of the potential for moving the debate forward when the international community is faced with some intractable problems whose resolution will prove beneficial to many parties.

The first step needed is to find credible state sponsors for the proposal to establish an office of the High Commissioner for Self-determination. As outlined above, the mandate of the Expert Group on self-determination will include investigation of the process needed, the qualifications and the responsibilities of the proposed High Commissioner for Self-determination. Without pre-empting this work by the Expert Group, certain criterion spring immediately to mind. The High Commissioner will need to have acquired a high profile in the international community and have had experience in conflict-resolution and international diplomacy. She/he will not be associated with a current or past conflict over autonomy or self-determination and will be - and will be seen to be - independent of any geo-political grouping or political alignment. Another prerequisite is a thorough knowledge of the United Nations system including the human rights system and a commitment to the promotion and protection of all rights.

The office of the High Commissioner would be located in New York to stress the relationship it will need to develop with the UN Security Council and the General Assembly. The office would be responsible to the Self-determination Commission and take its direction from it. It would not be responsible for research or the evaluation of the legitimacy of claims to self-determination but instead act as the senior diplomatic representative for the Commission and be accountable to it.

It would facilitate dialogue sponsored by the Self-determination Commission between the various parties. It would ensure that ongoing discussions take place. The High Commissioner

would act as the Chair for these discussions as and if it is necessary. She/he would also prepare reports to the Commission on progress and present these reports at appropriate forums.

**Strategy for setting up a Self-Determination Commission**

The development of a strategy to bring about the establishment of a proposed UN mechanism for the settling of claims to self-determination is dependent on the willingness of a number of governments to sponsor an approach which will lead to the establishment of such a mechanism. Ideally this sponsorship will come from the developing as well as the developed world and not be restricted to the European democracies. However, the initiative will in all likely come foremost from neutral states in Europe and organizations such as the OAU, the OAS and the Commonwealth Secretariat that will act as initiators and honest brokers in the process.

Such a strategy might have the following components:

- A coordinated lobbying effort in the UN to gain acceptance of the notion of a Self-determination Commission.
- A lobbying effort to gain acceptance of the notion of the establishment of an office of the High Commissioner for Self-Determination.
- The provision of funding for the setting up of an expert group on self-determination. This group would have the mandate to:

    - establish a process for assessing the legitimacy of claims;
    - choose three current instances where there exists claims to self-determination. These would be judicially selected to be representative but with a reasonable chance of being resolved;
    - research past efforts to resolve each claim and consult with all the parties involved so far;
    - seek cooperation with the relevant parties as test cases;
    - apply the test of legitimacy to the three cases;
    - produce a comprehensive report on the findings.

- Under the auspices of the sponsoring states the group of experts would convene a series of conferences with the involved parties and begin negotiations over the settling of the claims.

- The sponsoring states will support the holding of a major international conference to debate the outcomes of the efforts of the expert group in the three cases.

Once these initiatives have been completed it should be possible to recruit additional support from the UN member states.

The first practical step in the creation of a mechanism for the realization of the right to self-determination is for its sponsors to agree to undertake to implement the strategy and to find the funds to achieve its component aspects.

## Endnotes

1. Evan D Luard, A history of the UN Vol 2, St Martins Press, 1989

2. Ibid

3. Philip Alston, *The Right to Self Determination in International Law*, in a paper delivered at the "New Dimensions of the Right to Self-Determination: Its implications for the World and Australia in the 1990s" Seminar organized by the Human Rights Council of Australia, 1 September 1992.

4. Ibid

5. Ibid

6. Evan D Luard, op cit

7. Ibid

8. Roland Rich, *Problems of Self-determination in Central and Eastern Europe*, in a paper delivered at the "New Dimensions of the Right to Self-Determination: Its implications for the World and Australia in the 1990s" Seminar organized by the Human Rights Council of Australia, 1 September 1992.

9. Ian Brownlie, *Rights of Peoples in International Law* in The Rights of Peoples, James Crawford, ed, Oxford 1988

10 Draft Declaration on the Right of Indigenous people; Sub-Commission on Prevention and Protection of Minorities, Forty-sixth session

11. Michael Ong, *The Asian Context*, presentation to the "New Dimensions of the Right to Self-Determination" Seminar, op cit

12. Adapted from Frederick Kirgis Jr, *The Degrees of Self-determination in the United Nations Era*, American Journal of International Law 1994

13. Speech to the 44th Session of the UN General Assembly, 1992.

14 Most of the debates on the legitimacy of international attention on human rights focus on the civil and political rights. Indeed in many such situations human rights are equated with civil and political rights. The question of the realization of economic, social and cultural rights is only now being addressed by some UN member states, human rights lawyers and by sectors of civil society.

15. Herb Feith and Alan Smith in *Self-determination in the 1990s: the need for UN guidelines and machinery to resolve ethno-nationalist conflicts*, presented to the International Peace Research Association, Kyoto 1992

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