Wilsonian Self-Determination and the Versailles Settlement
Author(s): Anthony Whelan
Source: *The International and Comparative Law Quarterly*, Vol. 43, No. 1 (Jan., 1994), pp. 99-115
Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law
Stable URL: http://www.jstor.org/stable/760824
Accessed: 13-05-2015 09:57 UTC

WILSONIAN SELF-DETERMINATION AND THE VERSAILLES SETTLEMENT

ANTHONY WHELAN*

Nearly forty years ago, a Professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface, it seemed reasonable: let the people decide. It was in fact ridiculous, because the people cannot decide until someone decides who are the people.[1]

I. INTRODUCTION

IT is the purpose of this article to re-examine, and to recharacterise, the principle of self-determination which was enunciated by President Woodrow Wilson during the First World War, and which was the purported basis of the subsequent Versailles Peace Settlement of 1919. In the process, it is hoped to answer the vociferous allegations of incoherence, such as that quoted above, which were levelled against this principle. It is also anticipated that a proper understanding of the Wilsonian theory of self-determination can in due course provide the key with which to interpret the apparently radical transformation of the principle in the decades after the Second World War. That key is provided by the employment of a more sophisticated conception of the nature of legal relations in international law than has prevailed to date in the area.

The Wilsonian principle of self-determination had historical roots in a number of ideas which evolved over the centuries to shape the modern world. One is that the legitimacy of rule is dependent upon the consent of the governed. Through the English, French and American Revolutions, the idea has achieved almost universal currency that the people are not subjects of the State, but are sovereign, and "can do their own state-making".[2] Another is that of State sovereignty in international affairs, which arose as national kingdoms became consolidated in Europe and the feudal claims of Empire (and Papacy) were eroded. A third is the idea of ethnic nationalism, often exclusivist and irredentist, which threatened

* Lecturer in Law, Trinity College, Dublin. My thanks are due to Philip Allott of Trinity College, Cambridge, and to Liz Heffernan and Clive Symmons of Trinity College, Dublin, for their help and advice. Responsibility for all errors, infelicities of style, and views expressed, naturally remains my own.

1. Sir Ivor Jennings, *The Approach to Self-Government* (1956), pp.55–56.
2. A. Cobban, *National Self-Determination* (1945), p.5.

the great multinational empires of Europe in the nineteenth century, and aided their collapse in the twentieth.

Of these, the notion of consent seemed to gain considerable ground in State practice in the nineteenth century, in Europe at any rate, in the widespread resort to plebiscites to accompany cessions of or accessions to territory. While never uniformly, and often imperfectly applied, nonetheless "by 1866 the method of appeal to a vote of the inhabitants, either by plebiscite or by representative assemblies, especially elected, bade fair to establish itself as a custom amounting to law".[3] This progress was halted by a new spate of annexation by conquest after 1870, in Europe, Africa and Asia. But the earlier fragmented practice was revived as the basis for a potent war cry by the Western allies in the First World War. Consistent with the early slogan of "the defence of small nations", President Woodrow Wilson proposed a post-war order informed by the notion that ethnically identifiable peoples or nations would govern themselves.

President Wilson actually preferred the phrase "self-government", which implied their right to select their own *democratic* government. This coincided with his Anglo-American view of the nation as "a community of organisation, of life and of tradition", which he contrasted unfavourably with the German concept of *Volk*—a "community of blood and of origin".[4] Thus a week before his famous "Fourteen Principles" speech,[5] he still saw Austria-Hungary as an integral whole, for whose peoples democracy and internal self-government were to be achieved. However, with war policies of stirring up nationalism, the failure to secure a separate Austrian peace, and Wilson's own messianic vision of himself as spokesman for "the silent mass of mankind everywhere",[6] his thesis assumed its now-familiar radical proportions, and constituted the American policy at the Peace Conferences of 1919 and after.

His concern for oppressed ethnic nationalities led to three of the central interlocking elements of the post-war settlement: (1) a scheme whereby identifiable peoples were to be accorded Statehood; (2) the fate of disputed border areas was to be decided by plebiscite; and (3) those ethnic groups too small or too dispersed to be eligible for either course of

3. S. Wambaugh, *A Monograph on Plebiscites* (1920), pp.41–45, 269–301.

4. L. Notter, *Origins of the Foreign Policy of Woodrow Wilson* (1937), p.104. See M. Pomerance, "The US and Self-Determination: Perspectives on the Wilsonian Conception" (1976) 70 A.J.I.L. 1, 13. The former saw nationhood as growing up within political institutions and boundaries—the political or territorial view; the other saw such institutions and boundaries as being dictated by the nation, or people—the ethnic approach. See A. Cobban, *Nation State and National Self-Determination* (1969). For an example of the political view, see Pilsudski's remark, "It is the State which makes the nation and not the nation the State", quoted by H. Roos, *A History of Modern Poland* (1968), p.68.

5. Delivered on 4 Dec. 1917; in which the phrase "self-determination" did not actually feature.

6. Pomerance, *op. cit. supra* n.4, at p.4.

action were to benefit from the protection of special minorities regimes, supervised by the Council of the new League of Nations. This was calculated to solve the problem of "peoples, of ethnic communities, nations or nationalities distinguished by language and culture crisscrossing the lines of the existing political entities".[7] Meanwhile, the colonies of the defeated powers were transformed into Mandates of the League and entrusted to the control of the allies.

Idealists nonetheless objected to the settlement as "patchwork Wilsonism".[8] This was due partly to its limited scope (only defeated States' territory was on the table),[9] partly to French and Italian opposition, and partly to Wilson's own unequal sympathies for different nationalities. Thus, Poland's economic and security needs, and France's pride and historic claim, took precedence over the inhabitants' wishes in Danzig and Alsace-Lorraine respectively.

II. POST-WAR PLEBISCITES

A number of plebiscites did take place.[10] The mechanism employed in those cases is of interest. The Schleswig plebiscite was operated on the basis of a number of smaller units within the province. After the scrupulously conducted vote, a close study of voting patterns caused the area to be divided—Humptrup went to Germany, Saed to Denmark, etc.—and "a new border was drawn reflecting the predominant wishes of the inhabitants, and was generally accepted".[11]

These cases, however, pointed up more serious difficulties in the identification of the peoples who were to be granted self-determination. The cynical might suggest that self-determination, a useful slogan during the war and subsequently against the Bolsheviks, was used simply to break up enemy territories, and to accommodate nationalities which had already seized power.[12] But more important, conceivably, in a peace settlement where geo-political considerations could hardly be excluded,

7. L. C. Chen, "Self-Determination as a Human Right", in W. M. Reisman and B. H. Weston (Eds), *Toward World Order and Human Dignity* (1976), p.198 at pp.225–226.

8. H. Nicolson, *Peace-making 1919* (1933), p.70.

9. The question of allied colonies, and of Ireland, and of any wrongs temporarily incorporated in the settlement was left to Wilson's great rectifier, the League, "the boxroom in which he stores all inconvenient articles of furniture": *idem*, p.204.

10. Plebiscites did take place in Schleswig; Allenstein and Marienwerder; the Klagenfurt Basin; Silesia; and in Sopron in 1920–1; and in the Saar in 1935. Plebiscites were also proposed in Teschen, Spisz and Orava in 1920, between the Czechs and the Poles, and in Vilna in 1921, between Poland and Lithuania. The territorial dispute in the former was resolved by negotiation, and the latter went unresolved.

11. L. J. Farley, *Plebiscites and Sovereignty—The Crisis of Political Illegitimacy* (1956), p.35.

12. But note the enthusiasm of the Germans for self-determination and for the conduct of plebiscites as a condition of territorial transfer, in order to protect their country from a more unprincipled carve-up.

than the absence of principle, was the alleged failure of principle. Wilson's Secretary of State, Lansing, remarked that self-determination, simply stated, begged the question of the "self", and that claims must necessarily conflict: "When the President talks about 'self-determination', what has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability."[13]

The answer to the question was, it seemed, that expert commissions of ethnologists, geographers and historians were to report on the "facts" of "racial aspects, historic antecedents, and economic and commercial elements".[14] But, as Pomerance suggests, this did not even begin to answer the questions whether to adopt a territorial or an ethnographic criterion of the "self"; on the boundaries of areas and the identity of "races" or "communities"; and on the importance to be attributed to the factor of time and to historic claims.[15]

An observer might wonder why Schleswig should have voted in a number of units in its plebiscite, whose destination was then separately and severally determined, while the Czech people as a whole acquired a Statehood embracing many border areas where Germans were in a majority (not to mention the often recalcitrant Slovakians): why should the settlement in one case ignore the integrity of a unit in order to further as well as possible the wishes of both the communities for different national identities, while insisting on the integrity of the unit in the other, until subsequently faced with the threat of war? In Schleswig the Danish and German inhabitants were both accorded the status of "peoples", and a compromise was sought between their claims; but in Czechoslovakia the Germans were from the start a "minority".

David Makinson would appear to advert to such apparent logical failures when he remarks that it would be "a confusion of thought to see the term 'people' as a simple opposite of 'minority', partitioning the domain of collectivities in two".[16] In fact, the problem of identifying

13. H. Lansing, "Self-Determination", *Saturday Evening Post*, 9 Apr. 1921, p.7.

14. R. S. Baker, *Woodrow Wilson and World Settlement* (1922), p.9. Cited by T. M. Franck, "Legitimacy in the International System" (1988) 82 A.J.I.L. 705, 743.

15. M. Pomerance, "Self-Determination Today: The Metamorphosis of an Ideal" (1984) 19 Israel L.Rev. 310, 312. See also Arnold Toynbee: "Self-determination is merely the statement of a problem, and not the solution of it": "Self-Determination" (1925) 484 Quarterly Review 319. Verzijl is also scathing: "Not only does the asserted right lack a specified and even a specifiable holder, but its substantive contents and the extent of its possible application are also floating in air: J. H. W. Verzijl, *International Law in Historical Perspective* (1968), Vol.1, p.323.

16. D. Makinson, "Rights of Peoples—A Logician's View", in A. Cassese (Ed.), *The Rights of Peoples* (1988), p.69 at p.73. The notion of a minority is relational. But whether or not a collectivity constitutes a "people" should be a qualitative question independent of the choice of any larger reference group. However, for a critical view of "objective peoples", see e.g. E. J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (1990).

peoples under the Wilsonian principle is not, at bottom, a complex one of differentiating between groups on the basis of language, culture, race, religion, aspirations and so on, though this is necessary and will often be difficult and controversial; rather, it is a simple question of line-drawing. Depending on where the dividing line is drawn, an ethnic, religious or other community aspiring to nationhood can become either a "people", entitled to full self-government, or a minority, with only the minimal rights accorded to members of what was, in the Versailles scheme, a residual category.[17]

III. DEFINING "SELF"

THE Wilsonian principle does not disclose any test which might be applied in the drawing of such crucially important lines. Pomerance concludes: "In the final analysis, there is nothing within the confines of the self-determination formula itself to give guidance on the definition and concretisation of the self."[18]

This apparent weakness did not go unremarked at the time of the settlement, as we have seen, and Lansing, and Wilson's legal adviser David Hunter Miller, as well as a number of the allies, contrived the principle's exclusion from the proposed Article 3 of the League Covenant. Green, Verzijl and a number of others therefore reject explicitly the derivation of a general principle from the Versailles and other post-First World War settlements, Wilson's Points and Principles, the new Mandates and the League Covenant.[19] It is certainly the case that no *general right* can be said to have arisen in this period. This much is clear from the theory's extension only to the vanquished powers, and was confirmed in the case of the Aaland Islands.

The precise details of the Aaland Islands dispute, much of it concerning questions of recognition and State succession, need not concern us here.[20] Two bodies were established by the League Council to investigate the claim of islands populated by Swedes to secede from Finland, almost simultaneously with that country's secession from Russia. The Commission of Jurists, and the later Commission of Rapporteurs disagreed on the facts, on whether there was at any time a lapse in continuity between the Tsarist Grand Duchy and the independent State of Finland, which would

17. This line-drawing is of course essentially a political act, but this does not rule out its being governed by legal considerations, as it is hoped this article will demonstrate.

18. Pomerance, *op. cit. supra* n.4, at p.22.

19. L. C. Green, "Self-Determination and the Settlement of the Arab–Israeli Conflict" (1971) 65 A.J.I.L. 40. See also Verzijl, *op. cit. supra* n.15, at pp.321–336; but Franck, *op. cit. supra* n.14, at p.744, asserts the principle has achieved considerable coherence at this stage.

20. See A. Rigo Sureda, *The Evolution of the Right of Self-Determination* (1973), pp.110–117.

constitute "a vacuum of sovereignty".[21] But they both rejected any general right of national groups as such to separate themselves from the State of which they formed part:[22]

> To concede to minorities either of language or of religion, or to any fractions of a population, the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to uphold a theory incompatible with the very idea of the State as a territorial entity.

Two further features of these reports are worthy of note for future reference. First, the League Council favoured the Finnish view of the territorial definition of a people over the delimitation of territory in accordance with the wishes of the people, as the Swedes advocated, in the matter of *external* self-determination. But it chose a subjective criterion (as did the two Commissions) for the question of *internal* self-determination, recognising the islanders as "separate" and advocating considerable autonomy for them.[23] Second, as a possible corollary of this, both Commissions agreed that an abuse or failure of sovereign power might as a last resort justify secession "when the State lacks either the will or the power to enact and apply just and effective guarantees of religious, linguistic and social freedom".[24]

It is clear that some changes were afoot in the international order, if the post-war territorial settlement is seen as part of the same process which in 1919 characterised and penalised the Central Powers as aggressors, which produced the Pact of Paris of 1928 and the Stimson Doctrine in 1932,[25] and which culminated in the Atlantic and United Nations Charters. In fact, many of the commentators on that settlement have misconstrued the

21. *Idem*, p.113.

22. Commission of Rapporteurs' Report, Council Doc. B.7 21/68/106 (1921). See also Commission of Jurists' Report, L.N.O.J. Suppl. No. 3, Oct. 1920, p.5.

23. See Rigo Sureda, *op. cit. supra* n.20, at p.117. External self-determination concerns the acquisition of independent Statehood and full membership of the international community (or secession from one State to another); internal self-determination seeks the granting of regional autonomy, minority education and linguistic rights, more general civil and political rights and at the very minimum freedom from discrimination. Where self-determination is mentioned without qualification in this article, and the context does not indicate otherwise, external self-determination is meant.

24. Council Doc. B.7 21/68/106. See further L. Buchheit, *Secession—The Legitimacy of Self-Determination* (1978), p.72.

25. The Pact of Paris (or Hoare-Briand Pact) renounced recourse to war as a solution of international controversies or as an instrument of national policy: the Stimson Doctrine was one of non-recognition of situations brought about by means contrary to the Pact of Paris. It arose from a note by the US Secretary of State of that name on 7 Jan. 1932, in relation to the Japanese invasion of Chinese Manchuria, where it set up the puppet State of Manchukuo. The League of Nations Assembly resolved in a similar vein on 11 Mar. 1932, though the doctrine lost influence in the unfortunate circumstances of the years immediately following. See D. J. Harris, *Cases and Materials on International Law* (3rd edn, 1983), pp.172, 639–640.

notion of a *principle* of self-determination. Guided overmuch, perhaps, by subsequent debate about rights of self-determination, of decolonisation, of secession, and so on, and by the often extravagant claims of right of nationalist movements, they have tended to confine their enquiries, in respect of this period, to ascertaining the existence of a principle which might have constituted a latent or even nascent right—a right, that is, with verifiable bearers ("peoples") and corresponding duties owed by other parties (States), which might then be said to have matured in the aftermath of the Second World War. Finding, on most of their parts, that the post-1945 notion of self-determination differed markedly from that devised by Wilson; and finding also that the Wilsonian theory was possessed of no rule which could yield up objectively identifiable parties bearing, and bound by, the potential right and its concomitant obligations; they dismissed it as incoherent and unhelpful. Hence the considerable frustration experienced by many jurists with the failure of the principle to embody, *in itself*, any test by which the "self" was to be identified, and with how the principle was apparently "exercised and negated with arbitrariness and hypocrisy".[26]

However, the Hohfeldian theory admits of more categories of rights than the type just outlined. In his landmark *Fundamental Legal Conceptions*, W. N. Hohfeld criticised "the tacit or express assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analysing even the most complex legal interests".[27] It might be remarked that Hohfeldian abstractions are unsuitable for the complex, changing data of international relations, especially in so politically charged a field as that of self-determination of peoples. However, only by such rigorous analysis can the legal precepts prevailing at any particular time be understood in relation to those which precede and follow them. Otherwise, the shifting patterns of international law must defeat the comprehension of jurists. A more potent criticism is that levelled by Halpin, that Hohfeld's supposedly fundamental conceptions can all be broken down into complex clusters of rights and duties, and thus are not truly fundamental. However, he does concede that Hohfeld's four classes of rights are of invaluable practical convenience, as basic concepts of legal discourse.[28] It is for this purpose, as an explanatory tool, that it is proposed to employ his scheme in the discussion which follows.

26. Verzijl, *op. cit. supra* n.15, at p.322.
27. W. N. Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (1964, W. W. Cook (Ed.)), p.35.
28. A. K. W. Halpin, "Hohfeld's Conceptions: From Eight to Two" (1985) 44 C.L.J. 435.

IV. HOHFELD'S CLASSES OF RIGHTS

HOHFELD identified four classes of rights: claim-rights, privileges, powers and immunities. He sought in the scheme he set out to clarify the different types of legal relations, on the basis that all rights, however classified, are held *by* a specific person (meaning of course any legal person) *against* a specific person. Thus, the four classes of rights were attended by their respective "correlatives"; "Correlatives in Hohfeld's scheme merely describe the situation as viewed first from the point of view of one person, and then from that of the other."[29] For example, a right, properly so-called, is a legal claim of one person that another person act or omit to act in a certain way: hence the term "claim-right". The position of the other person (and the whole world may be in this relationship with the right-holder) is described by saying that he is under a duty. A duty is thus the correlative of a right.[30]

Of Hohfeld's *types*, we have witnessed the failure of this category of rights (meaning claim-rights) and related duties adequately to embody the Wilsonian principle of self-determination, as implemented at Versailles, Trianon, Sevres and Lausanne. But this conclusion does not preclude the explanation of the Versailles settlement in terms of some other of Hohfeld's legal conceptions. The frustration and disparagement of the publicists notwithstanding, it is evident that the principle found some place in the evolving *opinio juris* of the inter-war period, and it was introduced to international law primarily by means of the descriptive and analytical vehicle of a Hohfeldian *power*.[31]

A power is constituted by "the ability to alter legal rights and duties, or legal relations generally", so that the other party to the relationship is liable to have his legal position changed.[32] Instances include the power to conclude a contract, or to dispose of property by will. A similar power is that of the trustee with a discretion as to the allocation of trust property or income.[33] It is remarkable, then, that one element of the Versailles

29. W. W. Cook, in his introduction to *op. cit. supra* n.27, at p.10.

30. Hohfeld, *idem*, p.38.

31. Hohfeld defined the other two categories thus: a *privilege* (which some authors prefer to term a *liberty*) describes the position of a person who is free to do, or refrain from, some act, without transgressing a legal obligation to another person (*idem*, pp.38 *et seq.*); an *immunity* describes the position of a person who is free to enjoy a legal relation without it being changed by another person (*idem*, pp.60 *et seq.*).

32. N. E. Simmonds, *Central Issues in Jurisprudence* (1986), p.131. See Hohfeld, *idem*, pp.50 *et seq.*

33. There is a duty with regard to the proper exercise of the discretion. Therefore, beneficiaries do have a right to be properly considered, which right can be vindicated in court. The power exists within the parameters of the requirements about its exercise. Powers can exist independently of other sorts of rights: a trustee with a duty not to transfer trust property to another (and so no liberty or right to transfer it) has the power to effect such a transfer to a *bona fide* purchaser without notice. See Lloyd of Hampstead, *An Introduction to Jurisprudence* (1985), p.444.

settlement was characterised by the language of trusteeship—namely, the Mandate—and was eventually succeeded by the principle of Trusteeship as set out in Chapters XII and XIII of the UN Charter.[34]

The territorial settlement in Europe in 1919 can be similarly categorised as the exercise of a power. The old rights to title by conquest were essentially Hohfeldian powers, allowing the victors in war to effect a change in the legal status of a territory. It is not entirely clear *who* was the subject of the correlative liability, as membership of the class of subjects of international law, due to its rather stunted development as a legal system, was then limited to States. Peoples were not eligible in any respect. The defeated State, could, however, have been said to have been liable to have its legal relations with a body of its citizens altered—with various international law consequences, e.g. the subsequent reattribution of nationality. Also, that State would alter its legal relations with the conqueror, and with the world at large, with respect to the relevant territory—in terms of title to it, responsibility for it, and so on.[35] The victorious allies were seised in 1919 of such a power of conquest, but at the urging of President Wilson, chose to exercise it subject to certain radical new considerations. These criteria were adopted under the rubric of self-determination, and foremost among them was the consideration of the ethnic, religious, linguistic, historic or other identity of a territory's inhabitants. It may be objected that this principle was not uniformly applied—and that the allies did not feel bound by it. This is true. But it is not suggested that the transformation in the legal order was achieved in one great leap forward at Versailles. Rather, the allies' observance of the new criteria in the exercise of their power was a crucial initial step in the process of its loss and supersession—the settlement was in the nature of a catalyst of change. If the allies did not feel bound by the principle, the enthusiasm and insistence of its beneficiaries might ensure that they did in future.

The introduction of these criteria went in tandem with a shift towards the outlawing of the power whose exercise they were to inform—the power of conquest. As that power lost its legal force, victorious parties in war who chose to abide by international law had to find new means with

34. See Art.22, League of Nations Covenant. Despite the volte-face in the *South-West Africa (Merits)* case, I.C.J. Rep. 1966, 1 from the earlier judgment in the *Preliminary Objections* case, I.C.J. Rep. 1962, 319, denying League members rights under the "conduct" provisions of the Mandate, these provisions still gave rise to obligations *vis-à-vis* the League itself, which the League could enforce: I.C.J. Rep. 1966, 1, 6 *et seq.* While it is always dangerous to adhere too strictly to legal analogies, the Mandate/Trusteeship scheme seems to have many of the attributes of a discretionary trust—both are constituted by powers of decision and disposition, which are subject nonetheless to duties of proper exercise with correlative rights of enforcement inhering in other interested parties.

35. In this respect, the British position on the independence of the former Spanish colonies in Latin America is of interest. See Harris, *op. cit. supra* n.25, at pp.89–91.

which to deal with territories over which they had actual, military control. They, or perhaps the international community at large, were in fact invested with a new power—a power, also, of disposition, but in fact a discretion, to be exercised in the interests of the population and in good faith.[36] This power of line-drawing was also attended by a liability: a liability not of some portion of the population of a territory who by some contrivance were specified to be a "people", but of all its inhabitants. It may seem curious to speak of a *liability* to self-determination. That this represents considerable progress becomes more obvious when it is considered that this liability was to be accompanied by a new *immunity*—an immunity, that is, from territorial disintegration or reallocation without proper consideration of the population. Terminology notwithstanding, this liability constituted a considerable advance from the previous position of conquered populations, for it was a liability to have their fate decided by a controlling power or alliance of powers, or by the international community, not in accordance with those parties' interests and ambitions but in accordance with their own. It is not suggested that the doctrine reached full maturity, and the new power legal validity at the expense of the old, before the Second World War. But it is suggested that the peace settlement after the first great global war was largely responsible for this development, which formed part of a general (if limited) revolution in international relations in this century.

V. THE POWER OF SELF-DETERMINATION

WE can now appreciate the misunderstandings of the critics of the Wilsonian principle and of the Versailles settlement, who sought in vain a principle which could confer rights on identifiable people, to whom States would then owe a duty. If we instead think of a *power* of self-determination, things become clearer. The primary party is then the disposing State—clearly identifiable—and the liable party is the subject State or, as international law develops, the whole population (the "territorial people") of the territory—which, thus defined, is also clearly identifiable. It also becomes clear that the principle of self-determination need not contain *within itself* strict criteria or formulae for its own application through the medium of a disposing power. As we are now concerned not with a right but with a discretion, what is required is not a rule but a maxim, or criterion, which guides the exercise of this discretion but does not dictate its outcome. The idea of a power also answers the criticism

36. This requirement of good faith is a duty of the controlling State, with a correlative right in the international community, or perhaps even in some inchoate fashion in the inhabitants themselves, to require its fulfilment. Thus, the Japanese attempt to characterise their conquest of Manchuria as the liberation of its people was rejected by the League and Manchukuo did not achieve international recognition (see Harris, *idem*, pp.87–88). This incident helped realise some of the new ideas in the form of the Stimson Doctrine.

that self-determination (of component "ethnic peoples") was extended only to vanquished territories. As these were the only areas within the allies' power of disposition, *qua* conquerors, which power was the basis of the settlement, this was the furthest extent of its possible application.

At Versailles, the Powers had to exercise their discretion in carving from the territories of the Central Alliance a new European and world order, and opted to do so in accordance with the notions of self-determination then current. Each case was judged on its merits, as must be the case with a discretion—in fact, the prior adoption of a rule of practice is ordinarily a direct negation and breach of discretion. Germany remained substantially intact, while Austria's Danubian empire was apportioned among its constituent nationalities. Turkey was detached from its Arab possessions, which were in theory at least set upon the road to independence. These decisions of principle were hardly open to question. But what of that perceived discrepancy between the respective fates of the Schleswig and the Sudeten Germans?

Certainly, those cases do not reveal the application of a common rule, but that is precisely the point. In the instance of Schleswig, as fair as possible a border between Denmark and Germany was sought to be established, rather than any deduction of the wishes of the "people" of Schleswig as a single unit. There clearly existed two communities in the population between whose aspirations some compromise had to be found, and no other considerations really intervened. Here, therefore, Wilson's "expert commissions" could get to work in earnest. There existed in the Sudeten mountains two similarly differentiated communities, but other issues had also to be addressed—for the failure to consider all relevant factors is also a breach of discretion. Self-determination of peoples is not simply a matter of drawing borders on the basis of ethnic, religious or linguistic differences. For an independent State, its economy and its security are vital to any real exercise of self-determination, and the Sudetan region was vital to both in the Czech case. Security and economic considerations might be characterised as countervailing principles which restrain or compete with that of self-determination. However, if States are to have any real independence and viability in the international sphere, these factors are better classified as elements of the principle of self-determination, or as key *criteria* in decisions in accordance with the principle. The introduction of these factors must have been at least partly responsible for the different outcome from the decision-making process.[37] Other relevant questions included the history of a region and its people, in the instance of Alsace-Lorraine, where the allies sought to right a grievance of fairly recent origin. Most of the adjustments to the

37. The fact that the Sudetenlanders had at all previous times been Austrian Germans must also have been pertinent to the Powers' deliberations.

maps of Europe after the First World War can be similarly explained—as can the foundation of the Mandates. It can be alleged that mistakes were made,[38] and that the allies' powers were abused, or improper factors considered.[39] It would be surprising if it were otherwise, in a period when the principle was still unfamiliar to international practice, and was by no means felt to be binding by many of the Powers represented at the Conference. But, abuses and mistakes apart, a new, coherent, and eventually binding principle of State practice was—however unintentionally—introduced to international law in the years after 1919. In the event, the principle of self-determination, as applied, turned out to be rather less democratic and homocentric than it had at first appeared. It should be remembered, however, that Wilson's principle was always intended for application, in the post-war settlement, by the Powers. This was probably implicit in the view, couched in the language of the exercise of a power, that self-determination would be *granted* to peoples. So we have an answer to Sir Ivor Jennings's question: "Who decides who are the people?" In 1919 the Powers decided, as best they could.

VI. POSTSCRIPT: SELF-DETERMINATION SINCE THE SECOND WORLD WAR

WHAT follows is a necessarily brief outline of the radical transformation to which, as I pointed out at the outset, the principle of self-determination was subjected in the decades after the Second World War. It is an analysis which must bear further elaboration at a later stage. I have argued elsewhere that the most remarkable feature of this transformation was the development of a right to decolonisation: a right, in the Hohfeldian sense of the term, to independence, held by the populations of defined colonial territories ("territorial peoples") against the administering State.[40] The references in the UN Charter to self-determination are rather cursory, but provided the basis for a radical approach, which led to UN General Assembly Resolutions 1514 and 1541 (XV). In the latter, the UN's role in respect of non-self-governing territories was defined as applying in particular to colonies;[41] and in the former, that role was

38. It is notorious that Wilson did not realise until too late the presence of certain other minorities in Czechoslovakia.

39. While the discretion was arguably negated in respect of Trieste/Trentino, it is reassuring to note that Italian ambitions in Dalmatia and Illyria were thwarted, despite the earlier British position that pledges to allies were to prevail over the principle of self-determination. See the British Memorandum on Territorial Settlement in G. Dickinson, *Documents and Statements relating to Peace Proposals and War Aims* (1919), p.xiv. See also S. Prakash Sinha, "Is Self-Determination Passé?" (1973) 12 Col.J.Trans.L. 260, 265. The consideration of historical factors in Alsace-Lorraine would not now command universal support.

40. A. Whelan, "Self-Determination and Decolonisation: Foundations for the Future" (1992) 3(4) Irish Studies in International Affairs 25.

41. Res.1541(XV), Principle IV.

expanded into a call for the speedy grant of independence to such territories, and for State abstention from the use of force against groups campaigning for such independence.[42] The condemnation in paragraph 6 of Resolution 1514 of the disruption of the "national unity and territorial integrity of a country" was thought by many States to countenance the reconstruction of historical polities whose integrity had been disrupted by colonialism[43] but since the Katangan débâcle and the Addis Ababa conference of the Organisation for African Unity in 1963, it has been identified with the principle *uti possidetis juris* and the preservation of existing colonial boundaries upon independence.[44] The international response to the attempted secession of Biafra from Nigeria in the late 1960s is evidence of a consensus on this point. The colonial focus was maintained in the Declaration on Friendly Relations in 1970, although the assurance of territorial integrity seemed to be made contingent on the representative nature of the government of States.[45]

The acquisition of a right to self-determination by subject peoples, comprising the population of a defined territory separate from that of the administering State, seems inconsistent with the power of disposition, subject to a general principle of self-determination of ethnically defined peoples, which I have attributed to the Powers at Versailles and during the inter-war period. However, *uti possidetis* and the territorial principle of self-determination are based on acceptance, if only for pragmatic reasons, of earlier dispositions by the Powers. Depending on their vintage, such dispositions might have been based either on the simple power of conquest or on the later, refined power to grant self-determination. In fact, the inception of the Mandate system in 1919 rendered unnecessary a general carve-up (principled or otherwise) of the non-European territories of defeated Powers. Nonetheless, the winding-down of the Trust system which succeeded the Mandates under the UN Charter witnessed the exercise of a similar power of disposition either by the UN alone (when the administering State had effectively despaired of a solution, as in Palestine);[46] or by the UN and the administering State acting together (in Togoland, Cameroun and Ruanda-Urundi,[47] and which course was recommended by the International Court of Justice in the *South West Africa* case of 1950);[48] or by the UN acting as delegate of the principal

42. Res.1514(XV), paras.5, 4.
43. These included Indonesia, Nepal, Morocco, Guatemala and Ireland; see Whelan, *op. cit. supra* n.40, at p.33.
44. See e.g. the judgment in the *Burkino Faso/Mali Frontier Dispute* I.C.J. Rep. 1986, 554, 556.
45. See Res.2625(XXV), Art.7, para.7; discussed in Whelan, *op. cit. supra* n.40, at pp.37–39.
46. See e.g. Rigo Sureda, *op. cit. supra* n.20, at p.133.
47. *Idem*, pp.162–166.
48. I.C.J. Rep. 1950, 128, 143–144.

Second World War allies (in Eritrea).[49] It could be contended that the principle of self-determination was extended to apply to the power of States to dispose of their own territories. Of this, the partition of India would be one of a very few examples; the partition of Ireland after the First World War may be an earlier example of such attempts to redefine territories on ethnic grounds before independence.

The guarantee of territorial integrity in Resolution 1514 (XV) and in later documents may have been intended to preserve territories from such partition in advance of independence.[50] Pre-independence colonial partitions have been uncommon, before and since then. Nonetheless, it is arguable that the administering State's power to effect such a disposition remained intact, subject to its being a genuine attempt to delimit the areas occupied by different ethnically defined peoples—although a presumption may have arisen against such a course of action.[51] Of course, a partition designed to facilitate the continuation of colonial domination could not be countenanced, any more than an attempted secession with that objective (as was conceivably the case in Katanga). The non-recognition of the South African Bantustans probably evidences this prohibition.

What of individuals and ethnic groups within larger territorial polities in which another ethnic group is dominant? The principle of internal self-determination, i.e. of equality, and burgeoning international human rights law, accord them certain protections, but secession from the State of the territory which they inhabit (even if it were readily severable) is not ordinarily within their range of entitlements. Nonetheless, the 1970 Declaration holds out the possibility of remedial secession where they are denied representative government. It can be argued that the right to decolonisation for which I have argued is a special instance, in that colonial rule is prima facie unrepresentative. There is otherwise a strong presumption against such secession, to say the least, and it is unlikely to be supported by the international community; but, where successful (as in the case of Bangladesh), the resulting State is unlikely to be isolated in the same way as a "State" the secession of which is perceived to be illegitimate (like the Turkish Republic of Northern Cyprus). Latterly, the international response to the Yugoslav crisis has indicated a somewhat more tolerant attitude to secession.[52] The serious questions of right and entitlement which arise in respect of self-determination generally precede the even more serious question of when States or other parties to

49. Discussed by Rigo Sureda, *op. cit. supra* n.20, at p.136.
50. See Whelan, *op. cit. supra* n.40, at pp.33–34.
51. *Ibid.*
52. See A. Whelan, "The Liberty of Peoples: Ireland, the EC and Eastern Europe", in A. Whelan (Ed.), *Law and Liberty in Ireland* (1993), p.145 at pp.,160–161; see also M. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 A.J.I.L. 569, 575, 606.

such disputes can legitimately use force. Even at a stage when the federal government was seeking to hold together the Yugoslavian federation, the EC States insisted that force not be used against the rebellious republics of Slovenia and Croatia.[53]

This complicated position can be more readily understood if cast in Hohfeldian terms. Legal entitlements, of whichever type, are held by a specific person against a specific person. Confusion in the area of self-determination can be caused by the shifting definition of right-holders, and by the shifting classes of legal persons who are subject to some correlative obligation, and by the shifting types of entitlement involved in these relationships. What follows is a very brief sketch of the various legal relationships which I identify in this area. In particular, it is sought to distinguish between principles and entitlements relating to the territorial people and the ethnic people. In employing Hohfeld's conceptions, I have accepted some refinements suggested by later writers, which are indicated in the footnotes.

(1) The UN, or the UN with the administering State, has a *power* of disposition (i.e. of partition or other territorial delimitation) over Trust Territories, to be exercised in accordance with the ethnic principle of self-determination.
(2) States may still have a power of disposition, exercisable on similar criteria, in respect of their few remaining colonies; and they must certainly still have such power over their metropolitan territories. In both the above cases, it is the population of the affected territory as a whole which is *liable* to the exercise of such powers.
(3) Populations are *immune* from the disposition of their territory by its sovereign except in pursuance of the principle of the self-determination of ethnically distinct "peoples".
(4) In the case of colonies and Trust Territories, the "people" (in this case, the population of the territory) has a *right* to independence, should it wish it; and the administering State (and, in the latter case, the UN) is under a *duty* to accede to this. This duty has both negative and positive content—it is a duty not just of non-interference with those claiming the right, but also positively to assist them, e.g. by not withholding a juridical grant of independence.[54]

53. Weller, *idem*, p.575.
54. Hohfeld did not distinguish between positive and negative duties, but the distinction has been suggested by later commentators. See A. Whelan, "Introduction", and G. Whyte, "Constitutional Adjudication, Ideology and Access to the Courts", in Whelan, *op. cit. supra* n.52, at pp.1, 197; and H. Davis and D. Holcroft, *Jurisprudence* (1991), p.237.

(5) The people (population) of a territory, incarnated after independence as the State, has a *right* to territorial integrity. It holds this right, post-independence, against the international community, and also against its own citizens and component ethnic groups, who are generally under a *duty* to respect it. If points (1) and (2) above are correct, this right is held by the people against the administering State and/or the UN, as the case may be, before independence, only to the extent that territorial integrity cannot be disrupted except with the object of advancing the self-determination of the population's component ethnic communities. As the negation of a power of disposition, it is probably more accurately represented as an immunity, as in (3) above.

(6) Where the government of a State or part of a State (other than a colony) is unrepresentative, and its oppression of some ethnic group very severe; and where that ethnic group occupies a readily severable territory which, ideally, is already delimited, e.g. by federal or administrative boundaries; that ethnic group (or "people") may have a *liberty* to secede.[55] A liberty, in Hohfeld's scheme, is a "no-duty not", i.e. the ethnic people is freed of its normal duty not to disrupt the territorial integrity of the State in which the territorial people should normally achieve full self-determination. Such a liberty does not impose any correlative obligation on the State; it is not subject to any duty not to interfere. Thus, the secessionists are probably free to use force, and the government is under no duty not to oppose them with force—hardly a very satisfactory situation, but one which corresponds with what might be termed the juridical abstention on the point of secession. The State, however, probably retains its right to territorial integrity held against other States, so that they are under a duty not to interfere on the side of the secessionists. Their duty to the embattled State is, however, probably only a negative one; it seems unlikely that they are required to assist it in any way. This states the position under general international law and it is not necessary for the analysis to refer to self-determination.

The international response to the Yugoslav secessions suggests the development of this mere liberty (which is in itself controversial) into a nascent *right* imposing a *negative duty* on the State from which it is sought to secede. While we are far

55. Glanville Williams is responsible for the term "liberty" (in respect of what Hohfeld described as a privilege), and for its definition as a "no-duty-not": see (1956) 56 Col.L.Rev. 1129.

from seeing a situation where States would be required positively to accede to such inroads on their territorial integrity, the international community took pains to prevent the use of force, every State's means of last resort, to interfere with the secessionist governments of Slovenia and Croatia.[56] This development has been explained by reference to the development of self-determination itself.[57]

56. See Weller, *loc. cit. supra* n.52.

57. Opinions of the Badinter Arbitration Committee, Nos.1, 2 and 3 (1992) 31 I.L.M. 1488, 1494–1500.