4 Different Forms of and Claims to the Right of Self-Determination
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INTRODUCTION

The right of self-determination is an attractive and popular concept. Who does not want to self-determine? An ever increasing number of peoples, groups, and even states and advocates on their behalf are wanting, demanding or fighting for their enjoyment of self-determination, with claims to a wide range of external and internal applications in the political, economic and cultural fields. With the multiplication of desires, the identification of all the different forms of self-determination, real and proposed, is becoming an increasingly difficult but necessary task.

If all or some of the proposals concerning different applications were to prevail, self-determination would be transformed into an umbrella for supposedly shielding everybody from misery and providing justice to all. It must be a good development – or is it? Further elaboration is required so that self-determination will not generate rather than resolve national and ethnic conflicts. Constant expansion may also divert attention from the more pressing and better-justified cases.

In this chapter, by way of an overview, distinctions will be drawn between the various forms and expressions of self-determination as practised or proposed. One should hasten to add that these distinctions are not easily made and they are likely to be controversial. The texts of many international instruments are unclear, state practice is inconsistent, and scholarly writing is often conflicting and unhelpful.

The lack of precision extends all the way to the Human Rights Committee which monitors compliance with the International Covenant on Civil and Political Rights.¹ In a general comment, after observing that many states parties in their reports completely ignore the article on the right of self-determination, provide inadequate information or confine themselves to election laws, the Committee recommended: “With regard to paragraph

* Any opinions expressed in this article are the author’s and do not necessarily reflect the position of his employers.

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1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.2 The Committee did not elaborate on the kind of internal processes it was referring to; they could range from federal systems to democracy to autonomy for groups. A look at state reports over the years, also after the adoption of the comment in 1984, confirms the confusion about the contents and beneficiaries of the right of self-determination.

In an attempt at clarification for the purposes of a legal and legislative examination, the various forms and expressions of self-determination could be classified thus:

- forms which have seemingly emerged as rules of public international law, that is binding law based on treaties and custom;
- forms which are contained in a soft, inactive fashion in existing international instruments or at the stage of ongoing political debate and legislative work; and
- forms which are the subject of claims, but are either better taken care of by other legal means or misplaced under the banner of self-determination.

These forms cover both “external” (regulation of a people’s status vis-à-vis the outside world) and “internal” (regulation of a people’s affairs within a country) applications of self-determination. These adjectives are generally not used by international organizations or in their instruments, but they may be helpful for the purposes of this survey and are therefore attached below to each form and sub-heading.

THE RIGHT OF SELF-DETERMINATION AS A RULE OF LAW

The forms of self-determination considered in this section, that is political decolonization, liberation of territories occupied in modern times and separation or unification by agreement, constitute rules of international law. They are set forth in several treaties and other international instruments, and they are anchored and supplemented in a relatively consistent practice of states and intergovernmental organizations, including case law of the International Court of Justice. All these forms relate to the right of peoples to determine their international juridical status, encompassing the possibilities of secession and creation of new states.

The term “peoples” is not expressly defined in any of the instruments. There are clear signs that the term is meant to stand for the population of a separate political unit, with delimited territory and with a background in