
Settling Self-determination Conflicts: Recent Developments

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Abstract

Self-determination conflicts outside the colonial context have previously appeared virtually impossible to settle. Long-running and very destructive internal armed conflicts have been the result. Since the termination of the Cold War, however, there has been a veritable wave of self-determination settlements. While some of these trade the claim to secession for internal autonomy in order to safeguard the territorial unity of the state, a number of innovative solutions have been adopted, going beyond this traditional approach. This article reviews over 40 settlements and draft settlements in order to identify an emerging post-modern pattern of practice of settling self-determination disputes. The article also assesses the impact of this practice on the classical, restrictive understanding of the doctrine of self-determination.

1 Introduction

The claim to self-determination often encapsulates the hopes of ethnic peoples and other groups for freedom and independence. It provides a powerful focus for nationalist fervour, and it offers a convenient tool for ethnic entrepreneurs seeking to mobilize populations and fighters in pursuit of a secessionist cause. Indeed, self-determination conflicts are among the most persistent and destructive forms of warfare. Given the

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structural inequality between an armed self-determination movement and the opposing central government, self-styled ‘national liberation movements’ will at times resort to irregular methods of warfare, possibly including terrorist tactics. Such a campaign may trigger a disproportionate response by the government, at times putting in danger the populations of entire regions. This may lead to profound destabilization of societies placed at risk of disintegration, as can be seen in Sri Lanka or Sudan. And, due to the doctrine of non-intervention, international actors are traditionally hesitant to involve themselves in attempts to bring about a settlement of the conflict.

At present, there are about 26 ongoing armed self-determination conflicts.¹ Some are simmering at a lower level of irregular or terrorist violence; others amount to more regular internal armed conflicts, with secessionist groups maintaining control over significant swathes of territory to the exclusion of the central government. In addition to these active conflicts, it is estimated that there are another 55 or so campaigns for self-determination which may turn violent if left unaddressed, with another 15 conflicts considered provisionally settled but at risk of reignition.² Self-determination conflicts, therefore, remain highly relevant, as the most recent episode involving Georgia has demonstrated.

The powerful force of nationalism or ethnic entrepreneurship does not alone explain the explosive nature of self-determination claims. At the structural level, the very doctrine of self-determination contributes to the fact that, traditionally, few existing or new conflicts were addressed. Instead, such conflicts have often seemed beyond resolution. For the doctrine of self-determination has traditionally been seen as an all-or-nothing proposition. True, self-determination has numerous layers of meaning. This includes a right to democratic participation for individuals which can be derived from the doctrine of self-determination, group rights and certain additional human rights entitlements for minorities, and for indigenous peoples. But at the sharp end, where opposed unilateral secession is concerned, the doctrine in its simplicity and mono-dimensional application has contributed to conflict, rather than helping to resolve it.³

International legal rules are made by governments. Governments have an interest in perpetuating the legitimating myth of statehood based on an exercise of the free will of the constituents of the state – their own legitimacy depends on it. But while embracing the rhetoric of free will and self-constituting states, governments have simultaneously ensured that the legal right to self-determination, at least in the sense of secession, is strictly rationed and cannot ever be invoked against the state they represent.

Hence, self-determination as a positive entitlement to secession has been applied only to classical colonial entities and closely analogous cases.⁴ For instance, while

¹ Quinn, ‘Self-determination Movements and their Outcomes’, in J.J. Hewitt, J. Wilkenfeld, and T.R. Gurr (eds), *Peace and Conflict 2008* (2007), at 33.

² *Ibid.*, at 35, 38.

³ For an in-depth discussion of this problem cf. Weller, ‘The Self-determination Trap’, 4 *Ethnopolitics* (2005) 3.

⁴ This includes cases of armed occupation, racist regimes (formerly South Africa), and alien domination (Palestine), in addition to instances of secondary colonialism (Western Sahara, formerly East Timor).

Chechnya might want to argue that it was occupied forcibly by a metropolitan power during the age of imperialism for the purpose of economic exploitation (a layman's working definition of colonialism), it nevertheless did not qualify for colonial self-determination. Unsurprisingly, the Russian Federation, and many other states faced with an equivalent claim, made sure that the doctrine of self-determination was framed to apply only in the classical and narrowly defined circumstances of salt-water colonialism which practically no longer exist.⁵

Even in relation to such traditional colonies, the right to self-determination can be exercised only within the boundaries established by the colonial power – in that way the application of the right does not overcome the effects of colonialism by restoring the pre-existing situation, but the self-determination entity itself is defined by it.⁶ Furthermore, the right is of singular application. As soon as a colony has gained independence, it will itself start defending its own territorial integrity with utmost vigour. There is no secession from secession.⁷ And, when armed self-determination conflicts break out outside the colonial context, a legal inequality with significant practical consequences emerges. Colonial self-determination movements are entitled to establish national liberation movements, and the international system is twisted in their favour, to help them overcome the last vestiges of colonialism.⁸ Other rebel movements hiding in the deserts and jungles of the world will inevitably also lay claim to the label of 'national liberation'. However, in their case, the self-determination privilege does not apply. Instead, the international system is structured in such a way as to help the central state ensure their defeat. However committed their cause, groups fighting on behalf of peoples outside the colonial context are classified as secessionist rebels and, potentially, terrorists. Hence, they can be engaged with minimum international legal restraint, under the very legal order of the state from which they seek to escape.

This restrictive doctrine of self-determination leaves unaddressed three principal types of cases:

- *Cases arising outside the colonial context* (for example, Chechnya, Corsica, the Basque Country, Kosovo, etc.). These are cases where the concept of self-determination in the sense of secession does not apply at all, given the lack of a colonial nexus.
- *Challenges to the territorial definition of former colonial entities* (for example, Bougainville, Sri Lanka, Philippines, Burma, India in relation to tribal peoples). These are cases where a former colony exercised the right to self-determination, but ethnic movements emerging within the newly independent state seek separation.

⁵ See, e.g., J. Crawford, *The Creation of States in International Law* (2nd edn, 2007).

⁶ E.g., OAU Resolution AGH/Res. 16.1 (1964); Case Concerning Frontier Dispute (Burkina Faso–Mali) [1986] ICJ 554; Badinter Opinion No. 2, 31 ILM (1992) 1497.

⁷ Badinter Opinion No. 3, *ibid.*, at 1499.

⁸ Genuinely colonial self-determination entities enjoy legal personality even before administering the act of self-determination, they have a right to territorial unity, to be free from the use of force and repressive measures, they may 'struggle' through the means of a national liberation movement, and arguably receive international support in their struggle. They can also unilaterally bring into application the law of international armed conflict, instead of the much more limited law of internal armed conflict which covers domestic conflicts: cf. Weller, *supra* note 3, at 8ff.

- *Challenges to the implementation of colonial self-determination* (for example, Eritrea, Somaliland, Kashmir, perhaps Southern Sudan and the Comoros and Mayotte). These are cases where it is argued that the doctrine of *uti possidetis* was wrongly applied at the point of decolonization, or that an entity was wrongfully incorporated into the newly independent state at that moment.

Overall, the all-or-nothing game of self-determination has helped to sustain conflicts, rather than resolve them. Self-styled self-determination movements see no alternative to an armed struggle or the resort to terrorist strategies in order to achieve their aims. Central governments see little alternative to violent repression. Generally, self-determination conflicts will therefore terminate only once the government has won a decisive victory against the secessionist entity, as was the case, for instance, in relation to Katanga and Biafra in 1963 and 1969 respectively.⁹ Other conflicts may persist for decades – it is estimated that the 26 presently ongoing self-determination conflicts have already lasted for 27 years on average.¹⁰

Of course, there is a third way between victory and protracted fighting. This is the option of achieving a settlement. However, out of the some 78 self-determination conflicts since the end of World War II only a handful were settled during the Cold War; most either ended in a decisive victory for the government or led to a protracted and mutually damaging stalemate.

With the end of the Cold War, this situation changed. First, there was a profusion of new self-determination conflicts triggered by the unfreezing of the Cold War blocs. These risked causing regional destabilization, especially in Europe. Hence, settlements were imposed in relation to some of them, in particular the former Yugoslavia. Secondly, long-running conflicts in other regions were finally starved of fuel from their former Cold War supporters. A settlement suddenly became an attractive option to both sides, especially as a continuation of the conflict damaged the economic interests of both central government and secessionist regions.¹¹ This climate of ‘a new beginning’ also affected other protracted conflicts, such as Northern Ireland. The parties used this momentum to escape a mutually harmful stalemate through settlement. Hence, since the end of the Cold War in 1988 thereabouts, at least 32 self-determination settlements have been achieved.¹² These exhibit innovative attempts to address the self-determination dimension underlying the conflict. There are another 10 draft settlements which have either not yet been adopted or have been rejected by the one or other party for the moment, with a strong likelihood

⁹ An exceptional case is Bangladesh, where independence was obtained, albeit as a consequence of an armed intervention by India.

¹⁰ M.G. Marshall and T.R. Gurr, *Peace and Conflict 2005* (2005), at 27.

¹¹ For instance, the wish to exploit the resources of South Sudan significantly contributed to the conclusion of the Machakos Protocol of 20 July 2002, available at: www.intstudies.cam.ac.uk/centre/cps/documents_sudan_machakos.html and subsequent instruments.

¹² For all references to self-determination settlements and related documents, refer to the archived documents available at: www.intstudies.cam.ac.uk/centre/cps/documents.html.

of the resurrection of the agreement.¹³ The draft settlements, too, shed light on these new approaches to the settlement of self-determination conflicts which are being tried out at present.

Self-determination settlements can be divided into nine different categories. These are:

- A. Trading self-determination for autonomy or enhanced local self-government
- B. Regionalism, federalization, or union with confirmation of territorial unity
- C. Deferring a substantive settlement while agreeing to a settlement mechanism
- D. Balancing self-determination claims
- E. Agreeing on self-determination but deferring implementation
- F. Establishing a *de facto* state
- G. Supervised independence
- H. Conditional self-determination
- I. Constitutional self-determination

It will be convenient to address each of these in turn before asking whether this practice reveals a change in understanding of the substance of the doctrine of self-determination or the application of new and innovative settlement mechanisms.

A Trading Self-determination for Autonomy or Enhanced Local Self-government

Territorial autonomy has been the classical means of settling self-determination disputes outside the colonial context. It denotes self-governance of a demographically distinct territorial unit within the state. The extent of autonomy granted will normally be established in the constitution and/or an autonomy statute. This statute will often be legally entrenched as a special or organic law, to ensure the permanence of this arrangement. While operating within the overall constitutional order of the state, autonomy implies original decision-making power in relation to devolved competences. In this respect autonomy differs from decentralization. Decentralization allows local agencies some room to implement decisions taken at the centre. Autonomy provides competence to local actors to take such decisions themselves.

Virtually all settlements of the Cold War era were autonomy settlements. Building on the early precedent of the Åland Islands from the League of Nations period,¹⁴ the South Tyrol settlement offers the best-known example from that period.¹⁵ However,

¹³ These include further tribes in Burma and India, settlements for Corsica, Cyprus, Kosovo, Abkhazia, South Ossetia, Transnistria, Nagorno-Karabakh, Western Sudan (Darfur), Sri Lanka, and Thailand. One might also include the settlement plan for Western Sahara, although this is the last remaining major outstanding case of colonial self-determination next to the special case of Palestine.

¹⁴ The Resolution of the Council of the League of Nations on the Åland Islands of 24 June 1921, reproduced in L. Hannikainen and F. Thorn (eds), *Autonomy and Demilitarisation in International Law. The Åland Islands in a Changing Europe* (1996), at 297–298.

¹⁵ Italy has maintained that the arrangements for South Tyrol (the so-called 'Package' and the 'Operational Calendar') which led to the new Autonomy Statute of 1971–1972 are not formally the result of international agreement. However, it is fair to say that the arrangement has also been internationally entrenched, including through parallel decisions by the Italian and Austrian parliaments.

there are a number of others, including home rule for the Faroe Islands, established in 1948, and Greenland, established in 1979; special arrangements for the Brussels capital region and for certain other parts of Belgium; Madeira, and the Azores in relation to Portugal under the 1976 constitution; the Spanish autonomies of the Basque Country, Galicia, Catalonia, and Andalusia, adopted according to the 1978 post-Franco constitution; and the devolution of Scotland and Wales of 1998.¹⁶

Since the outbreak of violent secessionism triggered by the Cold War transition, autonomy has been advocated once again as a possible solution. In the 1990s, a major initiative towards this end was launched in the UN General Assembly by the government of Liechtenstein.¹⁷ The theory was that secessionist entities would be able to accommodate their aims through self-governance without the need to disrupt the territorial integrity of existing states.¹⁸ Recent practice distinguishes two types of self-governance solutions. These are local or regional autonomy and federalization. The latter, which will be considered in the next section, tends to be offered where the secessionist entity has established effective control over the relevant territory with no prospect of recapture by the centre, or where the entity can point to a federal status it enjoyed previously.

It is of course widely accepted that autonomy *can* be a means of addressing the minority rights entitlements of such communities.¹⁹ On the other hand, it remains contested whether territorially compact minorities have a positive right to self-governance through territorial autonomy.²⁰ An exception exists in relation to indigenous peoples. According to ILO Convention No. 169, indigenous peoples enjoy significant entitlements of self-governance in relation to matters connected with their lands, beliefs, and

¹⁶ See the handy survey by T. Benedikter, *The Working Autonomies in Europe: Territorial Autonomy as a Means of Minority Protection and Conflict Solution [sic] in the European Experience*, available at: www.gfbv.it.3dossier/eu-min/autonomy.html.

¹⁷ This initiative is detailed in W. Danspeckgruber and Sir A. Watts (eds), *Self-determination and Self-administration: A Sourcebook* (2000).

¹⁸ See generally Berhardt, 'Federalism and Autonomy', in Y. Dinstein (ed.), *Models of Autonomy* (1981), at 23–30 and the book generally; Y. Ghai (ed.), *Autonomy and Ethnicity* (2000); H. Hannum, *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* (1996); R. Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* (1997), at 27 and 57ff; J. Marko, *Autonomie und Integration* (1995), at 262ff; A. Reynolds (ed.), *The Architecture of Democracy* (2001); M. Suksi (ed.), *Autonomy: Applications and Implications* (1998); H. Hannum (ed.), *Documents on Autonomy and Minority Rights* (1993); K. Gal, *Minority Governance in Europe* (2002); M. Suksi (ed.), *Autonomy: Applications and Implications* (1998); M. Weller and S. Wolff (eds), *Autonomy, Self-governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (2005).

¹⁹ C. Palley, Possible ways and means to facilitate the peaceful and constructive resolution of situations involving racial, national, religious and linguistic minorities, E/CN.4/Sub.2/1989/49. Art. 27 ICCPR – the only legally binding provision on minorities in a general universal human rights instrument – does not address autonomy. However, GA Res. 47/135, the Declaration on the Rights of National, Ethnic, Religious and Linguistic Minorities, at least implies it in Art. 2.3: see the Commentary provided by the Chairman of the UN Working Group, Asbjorn Eide, E/CN.4.SUB.2/AC.5/2001/2, 2 Apr. 2001, paras 38ff.

²⁰ M. Weller, *Towards a General Comment on Self-determination and Autonomy*, Working Paper submitted to the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, 11th Session, E/CN.4/Sub.2/AC.5/2005/WP.5, 25 May 2005.

economic and cultural development.²¹ The recognition of further self-determination entitlements has been the subject of protracted discussion at the UN.²² Ultimately, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. The Declaration confirms that 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.²³ The declaration adds that:²⁴

Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Devolution of powers of self-government can occur state-wide, establishing an entity which is not quite a federation, but which is nevertheless entirely composed of units of regional or local government endowed with significant and equal devolved competences. An example of such a design is the 'cantons' which are contained within the Bosniak-Croat Federation within the state of Bosnia and Herzegovina. More often, however, devolution takes place in relation to only certain parts of the territory, resulting in asymmetrical autonomy. That is to say, the overall state continues to administer itself under an essentially centralist state structure, offering special status to one or more entities which enjoy autonomous or even federal-type competences. The devolution of Scotland and Wales may serve as an example. In some instances, a constitution provides the opportunity of devolution to all regions, offering the potential that an initially asymmetrical situation will gradually turn into a symmetrical one.²⁵

Governments often remain hesitant when it comes to granting territorial autonomy. The loss of state control over important public functions in areas where minorities dominate is sometimes seen as a dangerous development which may ultimately lead to secession. The post-Cold War environment, however, has seen a significant proliferation of autonomy arrangements that, previously, tended to be mainly concentrated in Western Europe. These include arrangements for the Tuareq in Northern Mali; the Kurds in Iraq; the Afar in Djibuti; the Omoros in Ethiopia; the Casamaçais in Senegal; the Cabindans in Angola; the Southerners in Chad; the Chittagong Hill Tribes and Bodos in India; the Moros in the Philippines; Aceh and West Papua in Indonesia; the Kachin, Karenni, Karens, Mons, and Wa in Burma/Myanmar; and the Miskito Indians in Western Nicaragua.²⁶

²¹ Art. 7 of Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its 76th session.

²² *Indigenous Issues, Human Rights and Indigenous Issues*, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 Mar. 1995 on its 11th session, E/CN.4/2006/7922 Mar. 2006.

²³ GA Res. 61/295, at para. 3.

²⁴ *Ibid.*, Art. 4.

²⁵ Art. 143 of Constitución Española de 1978, reproduced in *Constitutions of Europe: Texts collected by the Council of Europe Venice Commission* (2004), ii, 1696.

²⁶ Cf. the listing in Marshall and Gurr, *supra* note 10, Annex 11.2 and the agreements exhibited at the Cambridge-Carnegie website, *supra* note 12.

As already noted, in Europe, Belgium, Denmark, Italy, Portugal, Spain, the UK, and other states had already gained positive experience with self-governance arrangements during the Cold War period and even before. Like subsequent settlements, these tend to balance autonomy with a legally entrenched commitment to territorial unity. For instance, the 1972 Autonomy Statute for South Tyrol grants autonomy and a ‘legal identity’ to the region of Trentino-Alto Adige/South Tyrol, ‘within the political unity of the Italian Republic; one and indivisible . . .’.²⁷ This is also illustrated by the example of Spain:²⁸

The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to *autonomy* of the nationalities and regions of which it is composed, and solidarity amongst them all.

This provision referring to ‘indissoluble unity’ may have appeared conservative when it was adopted in 1978. The initial autonomy statutes of entities such as the Basque Country and Catalonia of 1979 were deferential to the constitution, confirming that the ‘the powers of the Government of Catalonia emanate from the [Spanish] Constitution’, along with the autonomy statute and ‘the people’.²⁹ At that stage, it was not made clear whether ‘the people’ were the people of Spain or those of Catalonia. However, by 2006, a newly reformed statute made it clear that self-government is indeed also based on ‘the historical rights of the Catalan people . . .’.³⁰ This strengthening of a possible self-determination claim of the ‘Catalan people’ was somewhat balanced by a reference to the development of the ‘political’ rather than legal personality of Catalonia, ‘within the framework of a State which recognizes and respects the diversity of identities of the peoples of Spain’.³¹

Over the past two decades, further attempts have been made in Western Europe to deploy territorial autonomy, although less successfully. Autonomy or self-government was proposed in relation to Corsica and, in a very wide-ranging way, for Cyprus. In both cases the draft agreement failed to be accepted by the relevant populations, or segments thereof.³²

In South-eastern Europe, autonomy was proposed as a means of settlement for minorities by the Carrington Conference on the former Yugoslavia – a proposal turned into a demand put forward by the states of the EC/EU as a precondition for recognition. However, while recognition occurred, the demand for autonomy was not complied with, for instance in relation to Croatia.³³ The subsequent Rambouillet Agreement for

²⁷ Reproduced in Hannum, *Documents*, *supra* note 18, at 462.

²⁸ Art. 2 of Constitución Española de 1978, *supra* note 23.

²⁹ Art. 1 of Catalonia Autonomy Statute of 18 Dec. 1979, reproduced in *Constitutions of Europe*, *supra* note 25.

³⁰ Preamble to Organic Law 6/2006 on the Reform of the Statute of Autonomy of Catalonia, 19 July 2006 reproduced in *ibid.*

³¹ *Ibid.*

³² Results for Corsica can be found at www.electionguide.org/results.php?ID=954, and results for Cyprus at www.electionguide.org/results.php?ID=213.

³³ Extraordinary EPC Ministerial Meeting, Declaration on Yugoslavia, Brussels, 16 Dec. 1991, reproduced in M. Weller, *The Crisis in Kosovo 1989–1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (1999), at 80–81.

Peace and Self-government in Kosovo also provided for wide-ranging self-government or autonomy, but it did not attract the support of Serbia.

Autonomy was, however, negotiated successfully in Eastern Europe, in particular in relation to the Ukraine (Crimea) and Moldova (Gagauzia). Enhanced local self-government was also deployed as a substitute for formal autonomy in the Ohrid Agreement addressing the Republic of Macedonia, adopted in the wake of the 2001 conflict with ethnic Albanian armed groups.

Crimean autonomy within the Ukraine had a difficult birth, achieved with the assistance of the OSCE High Commissioner on National Minorities. Russia had transferred this mainly ethnic Russian inhabited area to the Ukrainian Republic only in 1954. In the context of the dissolution of the USSR, the area declared itself a Republic, claiming a right of secession from the Ukraine.³⁴ Ukraine overruled this declaration in its 1995 Law on the Status of Crimea and in its own 1996 constitution.³⁵ According to Article 134 of that constitution, 'the Autonomous Republic of Crimea is an inseparable constituent part of Ukraine and decides on the issues ascribed to its competence within the limits of authority determined by the Constitution of Ukraine'. In the meantime, the autonomous region gave itself a constitution, approved in 1998 by the Ukrainian parliament, which also determines that the Autonomous Republic is an 'inalienable component part of the Ukraine'.³⁶

When Moldova gained independence as a result of the dissolution of the USSR, unrest developed in the mainly Turkic populated area of Gagauzia. After OSCE mediation, Moldova on 23 December 1994 adopted a Special Law on the Autonomous Territorial Unit of Gagauzia.³⁷ The law defines Gagauzia as:

an autonomous territorial unit with a special status as a form of self-determination of the Gagauzes, which constitutes an integral part of the Republic of Moldova. ...³⁸

This model of autonomy settlement is particularly interesting, as it confirms on the one hand that Gagauzia is in fact a self-determination entity. However, it does so in a very specific way – emphasizing that the parties have adopted autonomy as the most appropriate form of self-determination in this instance. In this way, Gagauzia did not have to surrender its claim to self-determination as a precondition for a settlement, but it has implemented that right through the settlement. Hence, its claim to self-determination was accepted, while it was at the same time contextually reduced to autonomy exercised without prejudice to the territorial integrity of the overall state, save under certain specific conditions.³⁹ The law also clarifies that the legal powers enjoyed by Gagauzia are devolved, rather than original, confirming that Gagauzia is to be governed on the basis of the national constitution and national laws. This is

³⁴ Bowring, 'The Crimean Autonomy', in Weller and Wolff (eds), *supra* note 18, at 75, 82.

³⁵ Law on the Status of Crimea, 17 Mar. 1995, Ukrainian version available at: <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=92%2F95%2D%E2%FO>.

³⁶ Cited in Bowring, *supra* note 34, at 89.

³⁷ Special Law on the Autonomous Territorial Unit of Gagauzia (Gagauz Yeri), 23 Dec. 1994, *supra* note 12.

³⁸ *Ibid.*, Art. 1 (1).

³⁹ See *infra*, sect. 4.

an important safeguard for the central government, in view of the Badinter Commission's logic concerning constitutional self-determination, to which reference will be made below.⁴⁰

Even in instances where the concept of self-determination is not raised expressly, the central government will often seek to build provisions strengthening territorial unity into the agreement. For instance, Hong Kong was granted the right to 'exercise a high degree of autonomy'. This commitment is balanced by a confirmation of the finding that 'the Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China'.⁴¹ The West Papua settlement was enshrined in the Papua of Indonesia Act of Autonomy of 2001, the preamble to which confirms 'that the integration of the nation must be maintained within the Unitary State of the Republic of Indonesia by respecting the equal and uniformed social and cultural life of the people of Papua through the formulation of a Special Autonomous region'.⁴² Article 1 of the agreement then confirms that the Irian Jaya (West Papua) Province is granted special autonomy 'in the framework of the Unitary State of the Republic of Indonesia'. The Article continues:

Special Autonomy is a special authority acknowledged and granted to the Papua Province to regulate and manage the interests of the local people at its own initiative based on the aspiration and fundamental rights of the people of Papua;

This provision does not expressly assign a right of self-determination to the people of Papua, although it does at least refer to their 'aspiration and fundamental rights'.

In the more recent Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement 2005, Aceh is granted very wide powers of self-administration, covering all sectors of public policy other than foreign affairs, external defence, national security, monetary and fiscal matters, justice, and freedom of religion, which fall into the jurisdiction of the government of the Republic of Indonesia in conformity with the constitution.⁴³ International agreements entered into by the government of Indonesia which relate to matters of special interest to Aceh are to be entered into in consultation with and with the consent of the legislature of Aceh. Moreover, decisions with regard to Aceh by the legislature of the Republic of Indonesia will be taken in consultation with and with the consent of the legislature of Aceh. Administrative measures undertaken by the government of Indonesia with regard to Aceh will be implemented only in consultation with and with the consent of the head of the Aceh administration. This very wide-ranging grant of authority is, however, balanced once again by an express commitment to the 'unitary state and constitution of the Republic of Indonesia'.⁴⁴

⁴⁰ Cf. *infra* sect. 1.

⁴¹ Arts 1 and 2 of the Basic Law on the Hong Kong Special Administrative Region of the People's Republic of China, Decree No. 26, 4 Apr. 1990, reprinted in Hannum, *Documents*, *supra* note 18, at 233, 234.

⁴² Preamble, para d, to the Papua of Indonesia Act of Autonomy, 22 Oct. 2001, available at the website cited *supra* note 12.

⁴³ Arts 1(1) and 2 of the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 15 Aug. 2005, available at the website cited *supra* note 12.

⁴⁴ *Ibid.*, Preamble.

The 1989 Act establishing an autonomous (mainly Muslim) region of Mindanao also locates autonomy 'within the framework of the Constitution and national sovereignty and the territorial integrity of the Republic of the Philippines...'.⁴⁵ The settlement for Northern Mali similarly confirms the aim of balancing the 'cultural, geographical and socio-economic diversity existing in the Republic of Mali' with a 'solution which, at the same time, helps to consolidate national unity and integrity'.⁴⁶ The settlement offers both local self-government and regional autonomy for the three northern regions. In a step approaching asymmetrical federation, the agreement goes on to provide:⁴⁷

In order to respect the unity of the State and the Nation of Mali, and with the goal of encouraging the policy of development within an area of the national territory which shares very similar geographical, climatic, socio-economic and cultural parameters, an inter-regional Assembly shall be created between the Regions of the North of Mali, for the benefit of the populations concerned and of the Republic of Mali as a whole.

The northern regions remain free to opt into the inter-regional assembly arrangement or not. The competences of the inter-regional assembly are, however, mainly limited to consultation and coordination among the autonomous regions of the north, and it is therefore appropriate to consider the settlement principally an autonomy settlement.

While other settlements emphasize greatly the guarantee of continued territorial unity and integrity, the Mali settlement also reflects the experience of certain autonomous entities in the past. After a constitutional settlement, these found themselves to be defenceless in the case of a unilateral dismantling of their autonomous powers by the central government (the best-known example relates to Kosovo's position under the 1974 constitution of Yugoslavia which was gradually diminished to the point of non-existence in the post 1988 period).⁴⁸ Hence, the Mali settlement adds:

2. The content of the present Pact is a solemn commitment and the terms therein are irrevocable, agreed by the two parties and binding all Malians and their institutions. In this regard, the permanence of the statutory dispositions and the execution of the other terms are guaranteed by the State.

The trading of autonomy for a confirmation of permanent unity is evident even where more limited power is transferred without any sense of status for the people gaining autonomy. For instance, in the Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua, autonomy for the indigenous population is balanced by a clear commitment to the permanent territorial unity of the state.⁴⁹

⁴⁵ Art. 1 of Act No. 6734, Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, 1 Aug. 1989, reproduced in Hannum, *Documents*, *supra* note 18, at 430–431.

⁴⁶ Preamble to the National Pact Concluded between the Government of Mali and the Unified Movements and Fronts of Azawad giving Expression to the Special Status of Northern Mali, 11 Apr. 1992, available at the website cited *supra* note 12.

⁴⁷ *Ibid.*, at para 18.

⁴⁸ M. Weller, *The Crisis in Kosovo 1989–1999* (1999), at 59ff.

⁴⁹ Art. 2 of the Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua, Law No. 28, 7 Sept. 1987, available at the website cited *supra* note 12.

The Communities of the Atlantic Coast are an indissoluble part of the indivisible State of Nicaragua, and their inhabitants enjoy all the Rights and Responsibilities which correspond to them as Nicaraguans, in accordance with the Political Constitution.

The concern of the central government is clearly evident when it doubly ensures that the communities are an ‘indissoluble part’ of an ‘indivisible state’. Another technique of avoiding granting a status which might make the central government nervous is to deny that the autonomy settlement actually provides autonomy, while still transferring autonomous powers. This was the case in the Ohrid Framework Agreement on Macedonia. There is certainly no talk of self-determination for the ethnic Albanian groups which launched an armed campaign in 2001. Instead, the agreement of 13 August 2001 confirms the territorial integrity of Macedonia, stating that ‘Macedonia’s sovereignty and territorial integrity, and the unitary character of the state are inviolable and must be preserved. There are no territorial solutions to ethnic issues.’⁵⁰ Consistent with this aim of preserving the unitary character of the state, the Framework Agreement of 13 August 2001 does not formally establish territorial autonomy for the land area bordering Kosovo and mainly inhabited by ethnic Albanians. Rather, the settlement disguises effective autonomy for these regions as enhanced local self-government.⁵¹

Where even autonomy in disguise appears too challenging, at least the concept of decentralization may be applied after a period of violent strife. For instance, the settlement concerning the Afar of Djibouti explains the objectives of decentralization as follows:

- 1) *Politique = participation des citoyens par le biais de leurs élus locaux à la gestion et la valorisation de leur collectivité.*
- 2) *Administratif = mise en place d’une Administration plus efficiente car plus proche de ses administrés.*
- 3) *Economique = promouvoir des pôles de développement économiques en dehors de la capitale et réduire les disparités régionales.*

The agreement provides for the establishment of five regions and for decentralization at the communal level. While decentralization may facilitate the participation of citizens in local governance and may bring the administration closer to the people, as the agreement suggests, it nonetheless differs fundamentally from autonomy. As has already been noted, decentralization facilitates the local implementation or execution of decisions which have been taken centrally. Autonomy and local self-government, on the other hand, generate space for the adoption of original decisions at the local or regional level, although within the overall framework of the constitutional order. While only decentralization is formally foreseen in the Djibouti agreement, the establishment of a regional structure does suggest slightly more. In any event the law

⁵⁰ Art. 1.2 of the Framework Agreement of 13 Aug. 2001, available at the website cited *supra* note 12.

⁵¹ *Ibid.*, Annex B (I).

implementing the agreement of course pays full respect to '*le respect de l'unité nationale et l'intégrité du Territoire*'.⁵²

Somewhat surprisingly, given its reputation for strongly regionally based governance in its provinces, the constitutional settlement for Afghanistan also appears to take the route of mild decentralization. According to Article 137 of the constitution of 4 January 2004, 'while preserving the principle of centralism' the government is to 'delegate certain authorities to local administration units for the purpose of expediting and promoting economic, social, and cultural affairs, and increasing the participation of people in the development of the nation'. The insistence on the maintenance of 'centralism' in this instance appears somewhat removed from reality.

A final way of addressing ethnic movements is focused less on questions of constitutional architecture than on resource issues. In the settlement of the conflict between Senegal and the Mouvement des Forces Démocratiques de la Casamance (MFDC), there is recognition of the frustrations experienced by part of the population in the Casamance region. However, this is to be addressed through '*un programme de développement spécifique à cette région naturelle*'. Here, there is little suggestion that the popular movement of Casamance struggled on behalf of a people's right of self-determination in the sense of secession. Instead, the people of a region seem to have joined forces to seek redress in relation to their exclusion from the economic opportunities of the state.⁵³

B Regionalization, Federalization, or Union with Confirmation of Territorial Unity

Recent practice has offered a number of solutions going beyond autonomy. These range from loose confederations or state unions to full or asymmetrical federal solutions. It should be noted that some of these, however, have been subjected to possible dissolution through self-determination clauses. This includes the very complex structure of the Sudan in the wake of its three settlements (South, West, and East) permitting the South to leave after six years; Bougainville, which enjoys an asymmetrical federal status for at least ten years; the abortive 1996–1967 settlement of Chechnya; and the now defunct State Union of Serbia and Montenegro. These will be addressed separately below.

While autonomy already raises concerns of governments, federal-type solutions are even more difficult to achieve nowadays. As was noted above, autonomy is often traded for an express renunciation of self-determination and a confirmation of the permanent territorial unity of the state. Where a more elevated status, such as that of a federal republic or constituent unit of a confederation or state union is concerned,

⁵² Art. 1 of Loi No. 174/AN/02/4ème L portent Décentralisation et Statut des Régions, available at : www.presidence.dj/text2005/decr0185pr05.htm.

⁵³ Preamble to the Accord Général de Paix Entre le Gouvernement de la République du Sénégal et le Mouvement des Forces Démocratiques de la Casamance, 30 Dec. 2004, available at: www.kassoumay.com/casamance/paix-casamance.html.

the stability of such an arrangement is even more difficult to assure.⁵⁴ In fact, the recent recognition of the doctrine of constitutional self-determination has made this more complicated. The Badinter Commission attached to the EU peace process for the former Yugoslavia had found that:⁵⁵

in the case of a federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the state implies that the federal organs represent the components of the Federation and wield effective power;

The Commission concluded that in the case of the Socialist Federal Republic of Yugoslavia (SFRY) the central institutions no longer functioned in the wake of the attempted secessions of Croatia and Slovenia. Hence, the state was found to be ‘in the process of dissolution’.⁵⁶ The Canadian Supreme Court Reference concerning Quebec also appeared to suggest that a federal unit might be entitled to secede after having completed or exhausted negotiations to this end with the central state. As the Court found:⁵⁷

The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.

Of course, this expansive reading of a right to constitutional self-determination may not yet be firmly established in international law – general practice still appears to require an express confirmation of a right to secession in the constitution in order to generate a definite international legal entitlement to secede.⁵⁸ Nevertheless, such pronouncements are prone to confirming the suspicion of governments contemplating a settlement that federalization is the first step towards a legally privileged secession. Moreover, settlements such as those of Southern Sudan or Bougainville, which actually provide for loose federation as an interim step towards a referendum on independence,

⁵⁴ This problem was already addressed through the doctrine of perpetuity in the Articles of Confederation, Art. XIII, 8 Aug. 1778, available at: www.loc.gov/rr/program/bib/ourdocs/articles.html: ‘[e]very State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.’

⁵⁵ Badinter, Opinion No. 1, 31 ILM (1992), 1494, para. 1 d.

⁵⁶ *Ibid.*, at para 3; on the Badinter Opinions cf. Pellet, ‘The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’, 3 *EJIL* (1992) www.ejil.org/journal/Vol3/No1/art12.html#pdf.

⁵⁷ Reference re Secession of Quebec, para. 151, available at: www.sfu.ca/~aheard/827/SCC-Que-Secession.html.

⁵⁸ Cf. *infra*, Section 9.

are bound to strengthen this impression.⁵⁹ This is all the more so as some settlements do not allocate sovereignty exclusively to the centre before devolving power to federal units. For, where sovereignty is expressly allocated to constituent units or shared by them and the centre, a stronger claim of constitutional self-determination may be made than in cases of federal authority devolved from the centre to constituent republics. The theory is that in such cases sovereign constituent units have transferred powers to the centre (rather than the other way around) and, accordingly, they may recapture their full sovereignty by seeking dissolution of the federal or confederal ties they have freely accepted. This would be in analogy to the notion of 'association' from the colonial context, where the associating entity retains the right of subsequent separation.⁶⁰

The abortive Cyprus settlement of 2004 attempted to address this problem through the concept of 'indissoluble partnership'. The Comprehensive Settlement of the Cyprus Problem of 24 March 2004 provided for 'The United Cyprus Republic', consisting of a federal government and two 'constituent states'.⁶¹ The constituent states were to be of equal status. Within the limits of the constitution, they would 'sovereignly' exercise all powers not vested by the constitution in the federal government, organizing themselves freely under their own constitutions. On the other hand, the federal government would also 'sovereignly' exercise the powers specified in the constitution. In this way, the question of whether original sovereignty lies with the centre or with each of the two constituent entities has been sidestepped. It lies with both the centre and the constituent states. Given this unusual construction, it was, however, found necessary expressly to confirm:⁶²

The United Cyprus Republic is an independent state in the form of an indissoluble partnership, with a federal government and two equal constituent states, the Greek Cypriot State and the Turkish Cypriot State. Cyprus is a member of the United Nations and has a single international legal personality and sovereignty.

While this provision clearly confirms singular legal personality for Cyprus at the international level, it retains the theory of two sovereign entities when analysed from within. It is also interesting to note that the more usual word of state 'union' for this kind of construction was, in the end, replaced by the non-technical term 'partnership', avoiding the need to take a view on the precise legal nature of this arrangement.

Cyprus is a somewhat special case, as the settlement proposal provided for only a very limited element of integration between the two constituent entities. Another proposed settlement providing for a loose association of two 'sovereign' entities has resulted from the Minsk Group negotiations process on Nagorno-Karabakh.⁶³ This mainly ethnic Armenian inhabited territory of Azerbaijan was forcibly brought under

⁵⁹ Cf. *infra*, Section 6 A.

⁶⁰ Principle VI of GA Res. 1541 (XV), available at : <http://daccessdds.un.org/doc/RESOLUTION/GEN/NRO/153/15/IMG/NRO15315.pdf?OpenElement>.

⁶¹ *The Comprehensive Settlement of the Cyprus Problem*, 31 Mar. 2004, at para. 1 a and b, available at the website cited *supra* note 12.

⁶² *Ibid.*, at para 1.a.

⁶³ See P. Carley, *Nagorno-Karabakh: Searching for a Solution* (1997).

Armenian control by 1992, the 20–25 per cent ethnic Azeries having been largely displaced by then. A land corridor connecting the territory with Armenia and certain outlying regions has also been occupied since that date. A cease-fire was achieved in 1994.⁶⁴ Since then, intensive efforts have been made within the framework of the OSCE and the so-called Minsk Group of states to achieve a settlement.⁶⁵ While Nagorno-Karabakh considers itself an independent state, the UN Security Council has confirmed ‘the sovereignty and territorial integrity of the Azerbaijani Republic’, reminding the parties of ‘the inadmissibility of the use of force for the acquisition of territory’.⁶⁶

In 1996, the OSCE called for a settlement respecting the territorial integrity of Azerbaijan, while offering:⁶⁷

Legal status of Nagorno-Karabakh defined in an agreement based on self-determination which confers on Nagorno-Karabakh the highest degree of self-rule within Azerbaijan.

By 1998, the Minsk Group had reportedly proposed a ‘common state’ featuring ‘non-hierarchical relations’ between Azerbaijan and the enclave – a solution which was nearly agreed upon at high-level talks between the presidents of both states held at Key West, Florida, in March and April 2001.⁶⁸ After that period, the governments appear to have somewhat distanced themselves from this confidential initiative, ultimately leaking the successive proposals to the outside instead.

According to the leaked information, the initial draft settlements reportedly provided that ‘Nagornyi Karabakh is a state and territorial formation within the confines [*v sostave*] of Azerbaijan’.⁶⁹ There would have been a loose confederation within a ‘common state’, but providing for ‘the internationally recognized status of a Republic with its own constitution, armed forces, and power to veto any legislation passed by the authorities in Baku’. The ‘common state’ would feature weak, perhaps only nominal, central institutions in the form of a ‘joint commission’ from the two entities. The Nagorno-Karabakh Republic (NKR) would form its executive, legislative, and judicial branches as well as a ‘national guard’ and police units. ‘The Azerbaijani army, security and police forces shall not be allowed to enter the territory of Nagorno-Karabakh without the consent of the Nagorno-Karabakh authorities’, the proposal reportedly foresaw. Azerbaijani laws, regulations, and executive directives would have legal

⁶⁴ *Bishkek Protocol*, 5 May 1994; *Ceasefire Agreement*, Bishkek, 11 May 1994, both available at: www.c-r.org/our-work/accord/nagorny-karabakh/keytexts15.php.

⁶⁵ The Group includes Armenia, Azerbaijan, Belarus, the Czech Republic, France, Germany, Italy, the Russian Federation, Sweden, Turkey, and the USA.

⁶⁶ Preamble to SC Res. 853 (1993).

⁶⁷ This declaration was supported by all states but Armenia at the Lisbon OSCE Summit. It was issued as part of the Lisbon Summit documents as the Statement of the OSCE Chairman-in-Office, OSCE 1996 Summit, Lisbon, 3 Dec. 1996, Annex I.

⁶⁸ The actual texts of the proposals from 1998 onwards have apparently not been published. But see the excellent account in T. Huseynov, *Mountainous Karabakh: Conflict Resolution through Power-sharing and Regional Integration*, available at: www.peacestudiesjournal.org.uk/docs/Mountainous%20Karabakh%20final%20version%20edited%203.pdf.

⁶⁹ The account in this para. is taken from ‘OSCE Karabakh Peace Proposals Leaked’, *Radio Free Europe/Radio Liberty Caucasus Report*, iv, No. 8, 23 Feb. 2001. I owe this reference to Dr Jonathan Wheatley.

force in Nagorno-Karabakh only as long as they did not contradict the latter's constitution and laws.

Karabakh residents would travel abroad with specially marked Azerbaijani passports. Only the government in Stepanakert would be empowered to grant such passports and residence permits and to establish 'direct relations' with foreign states in 'economic, trade, scientific, cultural, sports and humanitarian fields'. This would also involve the right to have diplomatic missions abroad, which would nonetheless have to be affiliated with Azerbaijani embassies.

This example, together with the proposed Cyprus settlement, shows how far international actors and agencies are willing to go in order to retain, nominally, the doctrine of territorial unity of states. In these two instances in particular, where effective control over Northern Cyprus and Nagorno-Karabakh respectively was obtained in conjunction with the use of foreign military forces, a settlement formally ratifying the disruption of the territorial unity of the state under attack would have been legally difficult. The doctrine of *jus cogens*, which uncontroversially includes the prohibition on the use of force, would inhibit such an approach. On the other hand, a peaceful and effective reincorporation would not appear feasible. Hence, both settlements largely retain the *de facto* result obtained through the use of force, while *de jure* restoring the territorial unity of the state.

A similar approach was taken in relation to Bosnia and Herzegovina, which had also suffered territorial division as a result of the use of external armed force and the gravest of violations of humanitarian obligations. Recognizing the reality as it then was, the Bosnia Herzegovina settlement achieved at Dayton in 1995 also provided a settlement consisting of entities endowed with quasi-sovereign powers. In this instance, the disintegrative force of confederal status was meant to be flanked by complex power-sharing. This would allow the entities fully to retain and develop their separate powers while sharing control over the limited competences of the central state. In fact, contrary to widespread expectation, the state has managed to grow together to some extent since then, although an attempt to formalize this achievement through integrative constitutional revisions failed early in 2006.⁷⁰

The Dayton Accords on Bosnia and Herzegovina of 14 December 1995 confirm the statehood and continued legal personality of the state of Bosnia and Herzegovina. The state consists of the Republika Srpska and the Bosniak/Croat Federation. The latter, in turn, is composed of cantons which are either Bosniak or ethnic Croat dominated, and have aligned with one another accordingly. The powers of self-government of Republika Srpska and of the associations of Bosniak or Croat cantons respectively within the Croat/Bosniak Federation are very wide. The entities are entitled 'to establish special parallel relationships with neighboring states'. However, the feared merger of Republika Srpska with Serbia and of the Croat cantons with Croatia is precluded by the agreement, which confirms the commitment of the parties to the sovereignty,

⁷⁰ European Parliament, Outlook for Bosnia and Herzegovina, P6-TA-PROU (2006).

territorial integrity, and political independence of Bosnia and Herzegovina.⁷¹ There is no further express guarantee of territorial unity, as a powerful NATO-led force was deployed to enforce the territorial solution which had been agreed.

The enforced continuation of territorial unity is meant to be eased by consociational power-sharing techniques. Weak central authority is balanced with extensive human rights provisions, which are, however, not always effectively enforceable at the central level. Very extensive consociational mechanisms of co-decision, disproportionate representation and veto provisions are not coupled with the necessary effective dispute resolution mechanism. Instead, in practice, decision-making at the international level has had to take on this role. There is also provision for excessive executive representation in the government and in executive agencies at the central level, and separate agencies of governance at the entity, federal, and cantonal levels. At the outset, there were even separate armed forces of both entities.⁷²

The combination of a confederal union composed of two entities, one of which is itself a federation and the other a highly centralist component republic, is certainly unusual, and can be explained only in the light of the results of the armed conflict when, in 1995, violence was finally arrested in Bosnia. However, asymmetrical federal or confederal settlements are by no means uncommon. As was noted already, asymmetrical settlements of this kind generally occur where the secessionist entity has effectively escaped state control. Another very complex and highly asymmetrical settlement has emerged in relation to Sudan. As will be noted later, the Machakos Protocol offers a quasi-confederal union between the North and South for an interim period of six years.⁷³ While the South continues to be represented in the central institutions of the state, it governs itself virtually independently of the North. Other parts of the package that was to become the Sudan settlement offer a somewhat special status to the capital region and to several component states on the frontline between North and South.⁷⁴

In addition to the Southern settlement, two further settlement documents have been generated. The first concerns Darfur. It is at present not fully accepted by all factions in western Sudan, and its status is therefore somewhat uncertain.⁷⁵ According to the 2006 Darfur settlement, sovereignty is vested in the people (presumably of Sudan)

⁷¹ The General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton on 21 Nov. 1995 and signed in Paris on 14 Dec. 1995, Annex 4, Art. 3(2)(a); see also the Preamble to SC Res. 1031 (1995).

⁷² For a detailed analysis see Bieber, 'Power Sharing and International Intervention: Overcoming the Post-conflict Legacy in Bosnia and Herzegovina', in M. Weller and B. Metzger (eds), *Settling Self-determination Conflicts* (2007).

⁷³ Cf. *infra*, section 6 A.

⁷⁴ Machakos Protocol, *supra* note 11; cf. also Weller, 'Self-governance in Interim Settlements: the Case of Sudan', in Weller and Wolff (eds), *supra* note 18, at 158.

⁷⁵ In fact, the Sudanese government and one main opposition movement have signed the document and claim that it is in force. However, the main opposition movements have refused to sign, and attempts are underway to launch a new set of negotiations, which may be based in part on the 2006 document.

and exercised by the state in accordance with the national constitution into which the settlement is to be incorporated.⁷⁶ The state structure remains as before:⁷⁷

44. The Republic of Sudan has a federal system of government in which power shall effectively be devolved. Pending a final decision on the status of Darfur in accordance with this Agreement, responsibility shall be distributed between the national and other levels of government in accordance with the provisions of the Constitution.

However, there is an option for the creation of a new layer of governance, at the regional level. An interim authority for the Darfur region is to be created. The authority will also ensure that:⁷⁸

55. The permanent status of Darfur shall be decided through a referendum held simultaneously in the three states of Darfur.

57. In the referendum, the following options for the political administration of Darfur shall be presented

- (a) The creation of a Darfur Region composed of the three states
- (b) Retention of the status quo of the three States

In either instance, the character of Darfur, as defined by historical and cultural tradition and ties shall be respected.

The settlement offers a somewhat enhanced federal status to the three western states, in particular in relation to wealth-sharing, development, and transfer of federal resources. However, it is also possible for the West to transform itself into an asymmetric region within the federation to enjoy these benefits together by forming a unit of self-government.

Eastern Sudan, on the other hand, has achieved less of a status. Confirming in the preamble the 'sovereignty, unity and territorial integrity of Sudan', Article 1 of its settlement reiterates that:⁷⁹

The Republic of the Sudan is a united, independent, and sovereign state. Sovereignty is vested in the people and shall be exercised by the State in accordance with the National Interim Constitution into which this Agreement shall be incorporated.

This is balanced by the confirmation that:⁸⁰

A federal system of government, with an effective devolution of powers and a clear distribution of responsibilities between the centre and other levels of government, including local administration, is essential to ensure fair and equitable participation of the citizens of the Sudan in general and the people of Eastern Sudan in particular.

However, instead of gaining at least the option of forming their own regional unit:⁸¹

⁷⁶ Art. 1(1) of the Darfur Peace Agreement, 5 May 2006, available at: www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, Art. 1(1).

⁸⁰ *Ibid.*, Art. 1(5).

⁸¹ *Ibid.*, Art. 5.

Exercising their rights as set out in the INC, the three states of the Eastern Sudan shall set up an Eastern Sudan States' Coordinating Council to enhance coordination and cooperation among them.

Instead of forming their own region going beyond coordination and cooperation, the Eastern States are in fact bound more closely into the overall state by the application of integrative power-sharing techniques. Hence, the East gains weight in central decision-making, a fairer representation of Easterners in the federal executive and, crucially as always in this region, an element of wealth-sharing.

Another example of a somewhat flexible federal geometry is furnished by the new Iraqi constitution. According to Article 1:⁸²

The Republic of Iraq is a single, federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.

The federal system is composed of a capital city area exercising decentralized powers, regions, and governorates. The interesting aspect, again, relates to the regions. Regions can establish their own constitution and structures of regional authorities and can exercise all powers not exclusively assigned to the centre. In essence, they can constitute themselves into federal units only loosely bounded by the constitutional system. The constitution expressly recognizes the region of Kurdistan, along with its authorities as they exist upon coming into force of the constitution, as a 'federal region'.⁸³ However, other governorates have the right to turn themselves into further regions, if they wish. This may be done by one single governorate or in conjunction with one or more others, following a referendum. Hence, the presently unipolar asymmetry in the Iraqi constitution may, over time, be changed into a more complex asymmetry, or, ultimately, the state may transform itself into a full federation of regions (for instance, North, Centre, and South) under the existing constitution.⁸⁴

Another example of a proposed complex asymmetry is Moldova. As we noted, after a period of armed unrest Gagauzia was granted asymmetrical autonomy in 1994. After violent conflict during the post-Soviet transition, Transnistria established itself under the leadership of its 'President' I.N. Smirnov as a quasi-state outside the control of the Moldovan government, with the informal support of a Russian-led 'peace-keeping' presence.⁸⁵ There would be no possibility for the Moldovan government to change this situation even through the use of force. Accordingly, a very loose association between Moldova and Transnistria might be expected. This would take account of the realities on the ground, without creating a precedent in favour of disrupting territorial unity.

On 8 May 1997, the sides concluded a memorandum on the 'normalization of relations' between the Republic of Moldova and Transnistria on the basis of mediation

⁸² Iraqi Constitution, adopted by referendum on 15 Oct. 2005, available at: www.uniraq.org/documents/iraqi_constitution.pdf.

⁸³ *Ibid.*, Art. 117.

⁸⁴ *Ibid.*, Arts 118ff.

⁸⁵ See, generally, J. Mackinlay and P. Cross (eds), *Regional Peacekeepers: The Paradox of Russian Peacekeeping* (2003).

by the Russian Federation, the Ukraine, and the OSCE. The preamble to the document misses the traditional reference to territorial unity and integrity. Instead, there is merely a softer reference to the principles of the UN, OSCE, and generally recognized norms of international law, and an invocation of the 'unity of their spiritual and material resources'. In the agreement, the parties pledge to continue 'the establishment between them of state-legal relations'.⁸⁶ They do not, however, define these relations, including the status of Transnistria and the 'division and delegation of competences'.⁸⁷ Presumably, this is meant to refer to a loose state union or confederation. At the very end of the document, however, the parties do commit themselves to building 'their relations in the framework of a common state within the borders of the Moldavian SSR as of January of the 1990'.⁸⁸

The absence of the usual, more direct commitment to the territorial unity and integrity of Moldova is balanced by a Joint Statement by the presidents of the Russian Federation and the Ukraine adopted in connection with the Memorandum in which both governments:⁸⁹

Declare that the provisions of the Memorandum cannot contradict the generally accepted norms of international law, and also will not be interpreted or acted upon in contradiction with existing international agreements, decisions of the OSCE, the Joint Declaration of 19 January 1996 of the Presidents of the Russian Federation, Ukraine, and the Republic of Moldova, which recognize the sovereignty and territorial integrity of the Republic of Moldova.

In this way, the unwillingness of Transnistria to commit itself altogether too expressly to the territorial unity of Moldova at this early stage of agreement, before its status had been formally settled, could be compensated for by a commitment to the continued territorial integrity of Moldova on the part of its principal sponsor (the Russian Federation) and the neighbouring state controlling its eastward boundary.

In 2003, the Russian Federation presented a draft settlement, which provided for a 'united, independent, democratic state based on federal principles within the borders of the Moldovan SSR of 1 January 1990'.⁹⁰ Transnistria was given significant and wide powers as a 'subject of the federation' in a classical asymmetrical federal design.⁹¹ It was also proposed that:⁹²

Subjects of the federation have the right to leave the federation in case a decision is taken to unite the federation with another state and (or) in connection with the federation's full loss of sovereignty.

⁸⁶ *Memorandum on the Bases for Normalization of Relations Between the Republic of Moldova and Transnistria*, 8 May 1997, at para. 2, available on the website cited *supra* note 12.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, at para. 11.

⁸⁹ *Joint Statement of the Presidents of the Russian Federation and Ukraine in Connection with the Signing of the Memorandum on the Bases for Normalization of Relations between the Republic of Moldova and Transnistria*, 8 May 1997, available at: www.osce.org/documents/mm/1997/05/456_en.pdf.

⁹⁰ *Draft Memorandum on the Basic Principles of the State Structure of a United State in Moldova*, 17 Nov. 2003, at para. 1, available on the website cited *supra* note 12.

⁹¹ *Ibid.*, at para. 3(3).

⁹² *Ibid.*, at para. 3(13).

This proposal for conditionality of a right of secession finds its counterpart, and presumably inspiration, in a provision of the Gagauzia settlement. In the event of a change in the status of the Republic of Moldova as an independent state, the settlement assigns to the people of Gagauzia ‘the right of external self-determination’.⁹³ It was feared, however, that the corresponding formulation in the Russian draft relating to a loss of sovereignty might be treated as an invitation to Transdniestria to create the conditions identified by the Badinter Commission on the former Yugoslavia indicating that the federation would no longer fully function, and then claim a right of secession on the basis of this action.⁹⁴

The Russian proposal was much criticized due to its emphasis on wide powers for Transdniestria, the insistence of the Russian Federation to link a constitutional settlement to the permanent demilitarization of Moldova, and the lack of express protection of the continued territorial unity of the state.⁹⁵ Hence, a year later, in 2004, the OSCE, the Russian Federation, and the Ukraine offered a joint and formal recommendation for a settlement to the parties, which was somewhat different. In relation to the two sides, the proposal recognizes ‘their responsibility for the unification of the country’, and would establish a federal state. Within the federation, which enjoys exclusive subjectivity in international law, there would exist ‘special territorial federal units’ or ‘federal subjects’.⁹⁶ The proposal adds:

National sovereignty is vested in the people of Moldova, who are the only source of state authority in the Federal State.

The proposal represents a significant backtracking from the far more open document of 1997. Clearly, Transdniestria was now offered an asymmetrical federal status firmly embedded in the overall constitutional order of Moldova. However, the Moldovan central authorities and the Moldovan parliament remained concerned about the consequences of federalization even as foreseen in the joint proposal, and were also opposed to a general revision of the state constitution. Transdniestria, on the other hand, saw little advantage to be gained from settling, given the relatively comfortable *status quo*.

Another year later, in 2005, the Ukraine put forward its own settlement plan. Rather than a complete revision of the constitution of Moldova which had been foreseen in the Russian initiative, Ukraine proposed that an asymmetrical constitutional settlement might be achieved within the present constitutional make-up of Moldova while still granting Transdniestria ‘a special legal status as a constituent part of Moldova’.⁹⁷

⁹³ The Law on the Special Legal Status of Gagauzia (Gagauz Yeri), 23 Dec. 1994, Art. 1(4), available on the website cited *supra* note 12.

⁹⁴ Cf. *infra*, Section 9.

⁹⁵ Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction to the individual complaint to the Constitutional Court), adopted by the Venice Commission at its 61st Plenary Session, 3–4 Dec. 2004.

⁹⁶ Proposals and Recommendations of the Mediators from the OSCE, the Russian Federation, Ukraine with regards to the Transdniestrian Settlement, OSCE Document CIA.GAL/11/04, 13 Feb. 2004.

⁹⁷ *Ukrainian Plan for Settling the Transdniestrian Conflict*, 22 Apr. 2005, at para. I(2), available at: www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dmd20050621_07/dmd20050621_07en.pdf.

Upholding Moldova's territorial integrity and sovereignty, the plan however also referred to 'the people's right to self-determination'.⁹⁸ In particular, it sought to ensure that 'the residents of Transnistria shall have the right for self-determination solely if Moldova loses its sovereignty and independence'.⁹⁹ The Moldovan parliament adopted a decision endorsing this plan in principle.¹⁰⁰ However, in the meantime the position of the Russian Federation hardened once again, and Russia sought to return to the position of 1997. In a meeting between Mr Smirnov and the Russian government, both sides pledged 'support for Transnistrian people in upholding their inalienable rights'.¹⁰¹ The sides even signed a formal protocol on Russian–Transnistrian cooperation, in which the Russian Federation expressed its readiness, 'in case of developments inhibiting Transnistrian rights laid down in the 8 May 1997 *Memorandum on the Basis for Normalization of Relations Between the Republic of Moldova and Transnistria*, to take practical steps to ensure implementation of provisions of the document'.¹⁰² Further negotiations have remained deadlocked since then. However, the events in Georgia of August 2008 have led the parties to renew their search for a settlement and a revival of some of the previously discussed solutions is expected.

The events in Georgia, of course, were preceded by their own protracted history of settlement attempts. Before the armed action of 2008 both South Ossetia and Abkhazia maintained themselves as quasi-independent states under the cover of Russian 'peace-keeping' forces. As opposed to Transnistria, however, the territories border Russia directly. The UN Security Council had firmly committed itself to the maintenance of the territorial integrity and unity of Georgia.¹⁰³ Indeed, as late as April 2008, the Council had restated that commitment in a resolution.¹⁰⁴

In relation to South Ossetia an initial settlement memorandum was achieved in 1996. The settlement purports to be guided by the twin principles of 'territorial integrity of states, and the right of nations for self-determination' when working further to 'attain a full-scale political settlement'.¹⁰⁵ However, such a settlement remained elusive.

⁹⁸ *Ibid.*, at para II(2).

⁹⁹ *Ibid.*, at para I(3).

¹⁰⁰ Decision on the Ukrainian Initiative Concerning the Settlement of the Transnistrian Conflict and Measures for Democratization and Demilitarization of the Transnistrian Zone, No. 117-XVI, 10 June 2005.

¹⁰¹ Protocol on the results of the working meeting between Vice-Chairman of the RF Cabinet A.D. Zhukov and President of Transnistria I.N. Smirnov, 23 May 2006, available at intstudies.cam.ac.uk/centre/cps/documents_protocol23May2006.html.

¹⁰² *Ibid.*, at para 6.

¹⁰³ E.g., SC Res. 876 (1993), at para. 1; Res. 1752 (2007), at para. 1, '[r]eaffirms the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders'.

¹⁰⁴ SC Res. 1808 (2008), 15 Apr. 2008, at para 1: '[r]eaffirms the commitment of all Member States of the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders'.

¹⁰⁵ Memorandum on Measures to Provide Security and Strengthen Mutual Trust Between Sides in the Georgian-Ossetian Conflict, 17 Apr. 1996, preamble, at para. 10, available on the website cited *supra* note 12.

After much discussion about a federalization of Georgia, the Georgian government instead put forward a number of settlement plans based on asymmetrical autonomy designs.¹⁰⁶ Again, the establishment of an entirely new constitutional order to achieve full federalization has proved too controversial for the Georgian authorities, as has the prospect of Badinter-based secession after the grant of federal or even confederal status.¹⁰⁷

A settlement for Abkhazia, which had historically enjoyed a greater degree of self-government than South Ossetia, has also remained elusive. There was initial progress in UN-sponsored negotiations in Geneva,¹⁰⁸ which contemplated a looser association with Georgia, and competences for ‘joint action’ even in relation to foreign policy, foreign economic ties, borders, and customs.¹⁰⁹ By 2002, the so-called ‘Boden’ proposal, providing for two sovereign entities (Abkhazia and Georgia) under the roof of the Georgian constitution, coupled with safeguards for continued unity, was put forward. This document gained the formal support of the UN Security Council, which reminded the parties that lack of progress in this area was ‘unacceptable’ and that there had to be ‘the achievement of a comprehensive political settlement, which must include a settlement of the political status of Abkhazia within the state of Georgia’.¹¹⁰ Unhappily, ‘the Abkhaz de facto Prime Minister, Anri Jergenia, rejected any suggestion that Abkhazia was “within the State of Georgia”’ and refused even to receive the proposal.¹¹¹ Since then, there has been little progress. In fact, the situation became tenser, with the occasional invocation of the spectre of a possible incorporation of Abkhazia and South Ossetia into the Russian Federation if Kosovo gained independence – a prospect which led the Georgian President to declare at the UN General Assembly:¹¹²

any attempt – and many have been made – by Russian officials to create or suggest a nineteenth century-style solution involving deals and territorial swaps in exchange for agreement on Kosovo would not only be old fashioned but deeply immoral. I wish to remind all present that my country’s territories, just like yours, are not for sale or exchange. Any hint of a precedent for Abkhazia and South Ossetia would therefore be both inappropriate and reckless. The foundation of modern peace and security in Europe is based directly on the principle of respect for territorial integrity and sovereignty. Indeed, it is the cornerstone of contemporary international order.

¹⁰⁶ ‘South Ossetia represents an autonomous entity within the territory of Georgia. ... The authorities of Georgia provide the population of South Ossetia with broad rights of local self-government’: Section IV of the Initiative of the Georgian Government with Respect to the Peaceful Resolution of the Conflict in South Ossetia, Mar. 2005, available at: http://smr.gov.ge/en/tskhinvali_region/policy/peace_plan.

¹⁰⁷ See *infra*, Section 5.

¹⁰⁸ Communiqué, S/1994/32, 13 Jan. 1994; Memorandum of Understanding, S/26875, 1 Dec. 1993.

¹⁰⁹ E.g., Declaration on Measures for a Political Settlement of the Georgian/Abkhaz Conflict, 4 Apr. 1994, at para. 7. The full text is available at: www.intstudies.cam.ac.uk/centre/cps/documents_gum_decla.html.

¹¹⁰ Preamble to and operative paras 2 and 3 of SC Res. 1393 (2002); the Boden document has not been published but see Coppieters, ‘The Georgian-Abkhaz Conflict’, available at: www.ecmi.de/jemie/download/1-2004Chapter5.pdf, at 8ff; I owe this reference to Dr Jonathan Wheatley.

¹¹¹ Report of the Secretary-General concerning the situation in Abkhazia, Georgia, S/2002/88, 18 Jan. 2002, at para. 4.

¹¹² Declaration of the President of Georgia to the General Assembly, A/61/PV.16, 22 Sept. 2006, at 3ff.

In fact, in the wake of armed action which took place in relation to South Ossetia in August 2008, Russia significantly increased its troop presence in that territory and in Abkhazia, recognizing the purported independence of both soon afterwards.¹¹³

Whatever Russia's role in relation to Georgia, it achieved its own agreement with the former Autonomous Socialist Soviet Republic (SSR) of Tatarstan. The entity, which was not a Union Republic, had claimed sovereignty, 'ensuring the right of Tatars, of the whole population of the Republic to self-determination' during the process of dissolution of the USSR.¹¹⁴ In 1992, it adopted a constitution declaring the Republic of Tatarstan a 'sovereign democratic state' exercising 'inalienable' sovereignty.¹¹⁵ Like Chechnya, it did not initially sign on to the 1993 constitution of the Russian Federation. Unlike the USSR constitution, which allocated sovereignty to the Union Republics, Article 3(1) of the Russian constitution states that 'the bearer of sovereignty and the only source of power in the Russian Federation shall be its multinational people'. Article 4 underlines this statement, confirming that the sovereignty of the Federation extends throughout its entire territory. Article 5, which establishes the federal subjects, emphasizes the integrity of the state and the 'unity of the system of state authority'.

The following year, in 1994, the Russian Federation and the 'Republic of Tatarstan' concluded a 'Treaty' on their mutual relations. The treaty proceeds from 'the universally recognized right of peoples for self-determination, principles of equality, voluntariness and freedom of will'.¹¹⁶ The treaty takes 'into consideration the fact that the Republic of Tatarstan as a state is united with the Russian Federation by the Constitution of the Russian Federation, the Constitution of the Republic of Tatarstan' and the Treaty.¹¹⁷ In this way, the instrument has the appearance of establishing a co-equal relationship between the Federation and the Republic, mentioning both constitutions and the treaty as the source of authority. Of course, in reality the Russian Federal constitution in turn establishes its superiority over legal acts of a federal subject.

The treaty determines that the Republic of Tatarstan can adopt its own constitution and legislation, conferring significant competence on its 'state bodies'.¹¹⁸ Both sides were even supposed to assign 'plenipotentiary representatives' to one another, and Tatarstan can engage in international relations and become a member of international organizations. On the other hand, the treaty also 'guarantees' 'the maintenance

¹¹³ These developments are chronicled in the records of the UN Security Council, where the decree on recognition was dramatically read out by Russia's Permanent Representative, at S/PV.5969, 28 Aug. 2008, at 6f.

¹¹⁴ Declaration on the state sovereignty of the Republic of Tatarstan, 30 Aug. 1990, available at: www.tatar.ru/english/00002028.html.

¹¹⁵ Art. 1 of the Constitution of the Republic of Tatarstan, 6 Nov. 1992.

¹¹⁶ Preamble to the Treaty on Demarcation of the Objects of Management and Mutual Delegation of Powers Between the Bodies of State Power of the Russian Federation and the Bodies of State Power of the Republic of Tatarstan, 15 Feb. 1994, available at: www.tatar.ru/?DNSID=ecc25bbc24856e9f76fe17e347d497a5&node_id=1384.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, Art. II.

of the territorial integrity' and the 'unity of economic space'.¹¹⁹ In 1999, Tatarstan, proceeding from the 'conventional right of peoples of self-determination', gave itself a new constitution.¹²⁰ In that document, it declared itself to be a democratic constitutional state 'associated' with the Russian Federation. It still claimed sovereignty, although this now consisted merely of 'full possession of state authority (legislative, executive and judicial) beyond the competence of the Russian Federation'.¹²¹ However, like other federal subjects during the process of recentralization undertaken by President Vladimir Putin, Tatarstan came under increasing pressure to relinquish the quasi-sovereign powers it thought it had gained.¹²² By 2005, Tatarstan's State Council approved a new draft treaty which left out the terms 'sovereign' and offered a more modest arrangement.¹²³

Chechnya, too, had concluded a treaty relationship with the Russian Federation. Although the entity was offered constitutional self-determination in the agreements of 1996–1997, to be actualized by the end of 2001, it was forcibly reincorporated into the Russian Federation.¹²⁴ Article 1 of the new Chechen constitution adopted through a controversial referendum in Chechnya claims that:¹²⁵

(1) The Chechen Republic (Nokhchiin Republic) is a democratic, social law-governed state with a Republican form of government. The sovereignty of the Chechen Republic is expressed in the possession of the full authority (legislative, executive and judicial) outside of the jurisdiction of the Russian Federation and outside the authority over objects of shared jurisdiction between the Russian Federation and the Chechen Republic, and is to be an inalienable part of the Chechen Republic.

The perhaps surprising affirmation of the inalienable sovereignty being vested in the Republic may be a result of the overall structure of the Russian Federation and the previous Soviet constitutional history. However, the Chechen constitution confirms very clearly that 'the territory of the Chechen Republic is one and indivisible and forms an inalienable part of the territory of the Russian Federation',¹²⁶

Naturally, federations which have gone through violent conflict will tend to be particularly concerned about territorial unity at the victorious conclusion of the conflict, even if there is no settlement. This is evident in the case of the Federal Republic of Nigeria, which had been subjected to significant secessionist strife in the past, and where the potential for secessionist violence is never far away. The constitution confirms

¹¹⁹ *Ibid.*, Preamble.

¹²⁰ Preamble to the Constitution of the Republic of Tatarstan, 1999, amended 2002, *supra* note 115.

¹²¹ *Ibid.*, Art. 1(1).

¹²² This concerned in particular the abolition of directly elected regional governors in favour of central appointees: Coalson, 'The End of the Russian Federation?', Radio Free Europe, Analysis, 23 Sept. 2004, available at: www.rferl.org/featuresarticle/2004/09/f0a0ffd4-b61a-40de-ac19-e315fc95f9b5.html.

¹²³ Corwin, 'Moscow, Kawan Agree to Share Power – Again', Radio Free Europe, 3 Nov. 2005, available at: www.rferl.org/featuresarticle/2005/11/8d037c1e-6805-41d3-b0be-19e95d6cb9b2.html. This agreement was, after an initial failure in Russia's upper chamber, adopted on 11 July 2007.

¹²⁴ *Cf. infra*, Section 6 B.

¹²⁵ Chechnya – Constitution, adopted by referendum on 23 Mar. 2003, unofficial translation available at: www.intstudies.cam.ac.uk/centre/cps/documents_chechnya_const2003.html.

¹²⁶ *Ibid.*

the state structure consisting of 36 federal states and a federal capital territory, under the condition that ‘Nigeria is one indivisible and indissoluble sovereign state’.¹²⁷ Precautions of this kind may also be considered necessary after a merger of two formerly sovereign states. Hence, the constitution of the Yemen Republic confirms that the state is ‘an independent, sovereign, unitary, and indivisible state whose territorial integrity is inviolable’.¹²⁸

C Deferring a Substantive Settlement while Agreeing to a Settlement Mechanism

When autonomy or federalization is not acceptable to one side and secession is not on the cards for the other, the option of a deferral of the issue comes to the fore. This allows both sides to retain their legal positions. In the meantime, they may enter into negotiations on a substantive settlement or establish an agreed interim phase of autonomous administration until final settlement negotiations can take place. For instance, under international pressure, Lithuania suspended the application of its declaration concerning independence to facilitate negotiations on an agreed divorce.¹²⁹ Similarly, under the so-called Brioni agreement, Croatia and Slovenia were meant to suspend the application of their declarations of independence a few days after they had been made. This suspension for a period of three months was meant to ‘enable negotiations on the future of Yugoslavia’.¹³⁰ The brief outline settlements for South Ossetia of 1996 and for Abkhazia of 1993–1994 were also meant to provide space for a more detailed settlement while freezing the situation on the ground through a cease-fire. However, the inability to constrain the parties to negotiate seriously after agreeing to suspend their positions has led in this instance, and in the case of Transdniestria, to the establishment of the term ‘frozen conflicts’ in the diplomatic vocabulary. Accordingly, this option bears the risk of enhancing the position of the party which benefits from the *status quo*. Indeed, as the latest events in Abkhazia and South Ossetia have shown, this may extend to an attempted consolidation of *de facto* independence over time.

Nevertheless, deferment of the self-determination issue to another time and mechanism can be more than a formalized way of ignoring the problem. For, in agreeing to address the issue in the future lies a recognition that there is an issue to be addressed – this may include an acknowledgement that the case, at least potentially, may indeed be one of self-determination. In other words, this technique does not resolve the self-determination issue, but it recognizes that there is an issue that needs resolving. For

¹²⁷ Art. 2(1) of the Constitution of the Federal Republic of Nigeria, available at: www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm.

¹²⁸ Art. 1 of the Yemen Constitution of 16 May 1991, available at: www.servat.unibe.ch/law/icl/ym00000_.html.

¹²⁹ Cf. Brill Olcott, ‘The Soviet Dis(Union)’, 82 *Foreign Policy* (Spring 1991) 127.

¹³⁰ Brioni Accord, reproduced in S. Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution* (1994), at 311; in fact, the Brioni Accord is less specific, referring only to the absence of unilateral action, but has been taken by the participants to imply a three-month delay, e.g., Decision of the SFRY Presidency, 12 July 1991, in *ibid.*, at 316.

instance, the Brioni agreement was adopted at a time when it was far from certain that the unilateral declarations of independence of Croatia and Slovenia would attract international support. However, it contained a reference to the right of peoples to self-determination, albeit balanced by a reference to ‘the relevant norms of international law, including those relating to territorial integrity of states’.¹³¹

Deferment of the issue was introduced into the Rambouillet settlement of 1999.¹³² Kosovo was willing to agree to an autonomy settlement only if it was clear that it would merely apply during an interim period. Following upon that period of three years, Kosovo insisted, there would need to be a referendum on independence.¹³³

The agreement which resulted from talks conducted at Rambouillet and Paris confirmed ‘the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia’.¹³⁴ While the settlement was presented as an interim agreement, it was in fact virtually permanent, as its duration was not formally limited and changes could be obtained only with the consent of both parties – a most unlikely condition given their diametrically opposed interests. On the other hand, in a crucial provision, it was stated that:¹³⁵

Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party’s efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.¹³⁶

This provision was of course not free of deliberate ambiguity. The reference to the Helsinki Final Act, which is generally taken to emphasize territorial unity over self-determination in the sense of secession, was regarded as strengthening the position of the Yugoslav government. The prospect of the final settlement, ‘on the basis of the will of the people’, was understood to imply the possibility of a change in the status of Kosovo on the basis of a referendum. This latter point was confirmed in a confidential side-letter issued to Kosovo by the US delegation.¹³⁷ The conditionality element, based on performance by the parties of their obligations under the agreement, also seemed to support the view that a change in status could be contemplated, depending on the conduct of the parties.

¹³¹ Listing of Principles, Brioni Accord, *supra* note 123.

¹³² Another view would be to classify this case as one of secession denied, given the strong references to the continued territorial integrity of the Federal Republic of Yugoslavia in both the Rambouillet agreement and Res. 1244 (1999). However, in view of the provisions invoked here, it was felt more appropriate to list this case under this heading.

¹³³ Weller, ‘The Rambouillet Conference’, 75 *International Affairs* (1999) 211.

¹³⁴ Preamble to the Interim Agreement for Peace and Self-Government in Kosovo, 23 Mar. 1999, available at: www.state.gov/www/regions/eur/ksvo_rambouillet_text.html.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, Chap. 8, Art. 1(3).

¹³⁷ On the drafting history and all other relevant materials see M. Weller, *The Crisis in Kosovo 1989–1999. From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (1999), at Chap. 8.

While there may be dispute about the substance of the provision in terms of a possible change of status for Kosovo, it consists of course principally of a requirement of process. In mandatory terms, it provides that a meeting 'shall' be convened three years after entry into force of the agreement. That meeting would be 'international', presumably led once more by the international Contact Group of states which had guided the Rambouillet process. However, rather than necessarily achieving a final settlement for Kosovo, the meeting was only to determine the mechanism that would be applied in achieving such a settlement.

Of course, the Rambouillet agreement remained unimplemented. Instead, a military confrontation ensued. When hostilities concluded, the UN Security Council adopted Resolution 1244 (1999). That resolution also provides for a fairly complex approach to the underlying self-determination issue. Again, the resolution restates the commitments of UN member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. It also recalls its previous call for substantial autonomy and meaningful self-administration for Kosovo. This was to be achieved through an international interim transitional administration overseeing the development, 'pending a final settlement', of substantial autonomy and self-government and a transfer of authority to these agencies of self-government.¹³⁸

The UN mandate, adopted under Chapter VII, also extended to 'facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords'.¹³⁹ Annex 1 to the resolution consists of the G-8 statement concluded at Petersberg, Germany, on 6 May 1999, when attempts to bring the conflict to a close were on foot. That statement refers to:

A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA; ...

Annex 2, which contains a list of conditions for the termination of hostilities which was accepted by the Federal Republic of Yugoslavia, restates this provision, adding that '[n]egotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions'.

The meaning of these provisions is of course subject to dispute. The Federal Republic of Yugoslavia has pointed to the strong reference to territorial integrity and political independence. Instead of the more oblique invocation of the Helsinki Final Act in the provision of the Rambouillet agreement, this requirement now appears expressly to limit the remit of the 'political process' that was to occur. This limitation is no longer balanced by a reference to the 'will of the people'. Still, there is a cross-reference to the Rambouillet accords, which shall be fully taken into account. Hence, it might be argued that the pledges contained therein, including the assessment of 'the will of the people', have been incorporated into the regime of Resolution 1244 (1999).

¹³⁸ UN SCR, 1244, 10 June 1999, at para. 11(a), also (c), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>.

¹³⁹ *Ibid.*, at para. 11(e).

A more careful reading of the provisions in the resolution and its annexes, however, reveals a somewhat more surprising result. The conditions established in the provisions cited above relate merely to the political process aiming to achieve an ‘interim political framework agreement’. That is to say, they are not focused on final status negotiations, but instead establish a limitation for an interim settlement in advance of a determination of final status (much like Rambouillet). Hence, the separate mandate for the facilitation of a political process designed to determine Kosovo’s future status established in paragraph 11(e) of Resolution 1244 (1999) was unrestricted by any condition bar the requirement ‘to take into account’ the Rambouillet accords. As was noted above, these are ambiguous, referring both to the Helsinki accords and also to the exercise of the will of the people, presumably through a referendum.

In actual practice, the UN Mission in Kosovo proceeded quite swiftly to establish an interim arrangement for self-government. After having set up a Joint Interim Administrative Structure within six months of the termination of hostilities, a full constitutional framework document for provisional self-government was promulgated on 15 May 2001. There is no express reference to the continued territorial integrity of the Federal Republic of Yugoslavia in that document.

Negotiations on final status, however, commenced significantly later than after the three years envisaged at chateau Rambouillet. The Vienna discussions began in 2005. A comprehensive settlement proposal emerged in March 2007.¹⁴⁰ The proposal was accompanied by a recommendation of UN Special Envoy President Martti Ahtisaari in favour of ‘supervised independence’ for Kosovo.¹⁴¹ However, it could not be endorsed by the UN Security Council, leading to a situation which will be briefly addressed in Section G.

D *Balancing Self-determination Claims*

The balancing of self-determination claims is an innovative way of overcoming the mutually exclusive positions of both sides in a self-determination conflict. Essentially, balancing allows both sides to claim that their view has prevailed, and that their legal position has been preserved in the settlement. This is the secret of the success of the Good Friday Agreement on Northern Ireland. The agreement starts by recognizing the self-determination dimension and its application to the case of Ireland and Northern Ireland. Then the agreement addresses the thorny issue of identifying the self-determination entity – is it the island of Ireland as a whole, or is it the North? The parties:¹⁴²

- i. Recognize the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

¹⁴⁰ Comprehensive Proposal for the Kosovo Status Settlement, available at the website cited *supra* note 12.

¹⁴¹ Annex to the Letter dated 26 March from the Secretary-General addressed to the President of the Security Council (S/2007/168), at 5.

¹⁴² Art. 2(1) of the Agreement Reached in the Multi-Party Negotiations (Good Friday Agreement), 10 Apr. 1998, available at: www.nio.gov.uk/agreement.pdf.

ii. Recognize that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

The first paragraph appears to identify the North as the self-determination unit. Its decision alone appears to determine continued union or a merger with the Republic of Ireland. However, the second paragraph has been crafted to allow the opposing interpretation. The reference to the 'people of the island of Ireland' as the body entitled to exercise 'their right to self-determination' could be taken to imply that the island as a whole is the self-determination entity. Under this reading, it is one act of self-determination appertaining to one entity. The fact that it is administered through two referenda is merely a procedural issue, and not a substantive one affecting the definition of the entity. This sense is confirmed by paragraph (vi) of the same Article where the parties:

Affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish.

Once again, the focus seems to be on the people of the island of Ireland as the subject of the right. However, this is counterbalanced by another paragraph wherein the parties:¹⁴³

Acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

In accordance with this determination, the draft clauses included in the agreement for incorporation into British legislation provide:

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

¹⁴³ *Ibid.*, subpara. (iii).

This clause could be seen formally to establish a constitutional right to self-determination. While previously the United Kingdom had indicated less formally that it would comply with the wish of the population of Northern Ireland to join the Republic of Ireland should this be made manifest in a referendum in the North, this has now been made express (subject to the doctrine of parliamentary sovereignty). However, one must note that this is not a right of self-determination in the full sense. Instead, it is a right to opt for a specific territorial change, moving sovereignty in relation to Northern Ireland from the United Kingdom to the Republic of Ireland. Other options, such as independence for Northern Ireland, are not available.

In terms of process, Schedule 1, to which reference is made in the above provision, requires the United Kingdom Secretary of State to order the holding of a poll on joining the Republic of Ireland 'if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'.¹⁴⁴ Under this clause, the Secretary is required to ('shall') hold a poll, but this mandatory requirement comes into force only subject to the exercise of his or her appreciation of popular will – the very fact that can really be assessed only through the poll. No further poll is to be held for seven years after a referendum which has rejected a change in territorial status.

This provision makes a change virtually impossible until a significant demographic shift has occurred, or until popular sentiment in the North has changed dramatically due to the experience of the new complex power-sharing arrangements introduced by the accord. That arrangement provides for multi-layered governance from the local level to the level of Northern Ireland, the level of UK authority, and joint Anglo-Irish mechanisms.

A further technique of addressing self-determination disputes also seeks to achieve delay in implementing self-determination that is agreed upon in principle. This is the mechanism of generating interim periods in advance of administering the act of self-determination.

E Agreeing on Self-determination but Deferring Implementation

There are two types of cases in this category of deferred implementation. The first type includes cases where self-determination is granted or confirmed, but the central government and the secessionist leadership have different expectations as to the likely outcome of the act of self-determination. The entity may opt for continued integration with the state, or for independence. The interim period is therefore open – it is designed to offer space for campaigning for the one or other solution, or in some instances for continued unity, and for the preparation for the act of self-determination. A second type of deferment concerns situations where it is clear that, after an agreed period of standstill, self-determination and almost inevitably secession will occur. In this type of case, the standstill period can be devoted to planning for the post-referendum period.

¹⁴⁴ Sched. 1, paras 1 and 2.

1 Open Interim Periods

One proposal for interim governance has been put forward in relation to the long-running Western Sahara dispute. Like that of East Timor before it, the case of Western Sahara is somewhat special, given its context of unfulfilled colonial self-determination. In the peace plan for self-determination of the people of Western Sahara of 23 May 2003, it is clarified that the purpose of the plan is to achieve a political solution to the conflict in Western Sahara which provides for self-determination, as contemplated in paragraph 1 of Security Council Resolution 1429 (2002), of 30 July 2002. The plan then proposed:¹⁴⁵

A referendum to determine the final status of Western Sahara shall be held no earlier than four and no later than five years after the effective date of the plan.

According to the final version of the plan, the population would be entitled to opt for continued integration, for independence, or for a continuation of the interim autonomy settlement that was to apply over the period of four to five years.¹⁴⁶ During the interim period, it was proposed that Western Sahara would be granted special, asymmetrical autonomy, covering most aspects of governance typically associated with a federal component state.¹⁴⁷ However, despite its earlier commitment to a referendum offering the option of independence, Morocco objected to the plan, claiming that:¹⁴⁸

Whereas the Council required the Personal Envoy to propose a political solution providing for self-determination, international practice clearly shows that democratic consultation concerning the status of a territory, as negotiated between the parties, is a valid means of allowing a population to achieve self-determination. This practice is based on General Assembly Resolution 1541 (XV) of December 15th, 1960 and on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly Resolution 2625 (XXV) of 24th October 1970, which states that the options of independence, association or integration, as well as 'the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'.

Morocco continued its argument by reminding the UN envoy that many disputes throughout the world, since the Åland Island case in 1920, had been resolved by granting autonomous status within the existing state structure. Basing itself on this precedent outside the colonial context, Morocco claimed that negotiations remained the privileged means for the parties to adapt the settlement to their aims and to regional characteristics. These negotiations would favour the attainment of such self-determination as 'would fall squarely within the democratic, decentralized nature of the Moroccan state as a whole'.¹⁴⁹ Morocco's earlier acceptance of the holding of a

¹⁴⁵ Peace Plan for Self-determination of the People of Western Sahara, S/2003/565, Annex 2, at para. 1.

¹⁴⁶ For the initial version see Report of the Secretary-General on the Situation Concerning Western Sahara, S/2001/613, 20 June 2001, Annex I.

¹⁴⁷ Peace Plan for Western Sahara, *supra* note 145, Section 8.

¹⁴⁸ *Ibid.*, Annex III.

¹⁴⁹ *Ibid.*

referendum was now claimed to relate to the endorsement of such a settlement.¹⁵⁰ Accordingly, Morocco reverted to offering a decentralization or autonomy solution, instead of offering the genuine act of colonial self-determination which was meant to be on offer after the expiry of the interim period of self-governance. Hence, the proposal remained unimplemented.

A more successful example of an interim settlement leading to an act of self-determination is represented by the Machakos Protocol of 20 July 2002.¹⁵¹ That framework document, which is to be supplemented by a more detailed settlement, was concluded by the government of Sudan and the Sudanese People's Liberation Army/Movement. An envoy of the long-standing IGAD international mediation process (led then by Kenya's President Daniel Arap Moi) witnessed its signature. The negotiations were also strongly supported by the US government which, since October 2001, had applied certain pressure upon the parties.

The preamble to the agreement at first appears to point to an attempt to integrate the country after prolonged conflict between the mainly Muslim North and the mainly Christian South. Division is to be overcome by correcting historical injustices and inequalities in development between both regions and by establishing a framework for governance through which power and wealth are equitably shared and human rights guaranteed. Article 1.1 accordingly proclaims that the unity of the Sudan 'is and shall be the priority of the parties and that it is possible to redress the grievances of the people of South Sudan and to meet their aspirations within such a framework'. However, this strongly integrative provision is immediately countered by Article 1.3, which states clearly and unambiguously:

That the people of South Sudan have the right to self-determination, inter alia, through a referendum to determine their future status.

Article 1.10 concludes that the design and implementation of the peace agreement are to be performed so as 'to make the unity of the Sudan an attractive option especially to the people of South Sudan'. The agreement then provides for a transition process to apply during an interim period lasting for six years. At the end of that period:

There shall be an internationally monitored referendum, organized jointly by the GOS and the SPLM/A, for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession.¹⁵²

There then follows an agreed text on the right of self-determination for the people of South Sudan. This provides for a mid-term review of the implementation of the peace agreement by the parties and international representatives with a view to improving the institutions and arrangements created under the agreement, and again to making the unity of Sudan attractive to the people of South Sudan.

In terms of state structure, the protocol provides that the national constitution of the Sudan shall be the supreme law throughout the Sudan. The constitution is taken

¹⁵⁰ *Ibid.*, at Annex II.

¹⁵¹ See *supra* note 11.

¹⁵² *Supra* note 11, Art. 2(5).

to be the source of all public authority, suggesting a devolved interim power-sharing arrangement. However, the constitution is to be amended even before the transition period to take account of the elements to be agreed in the definitive settlement. This includes a provision which limits the authority of the national government to the exercise of such functions 'as must necessarily be exercised by a sovereign state at national level'. There is also provision for the exemption of the South from legislation inspired by the Sharia. Instead, legislation of national application is to take account of the diversity in Sudan.

A whole bundle of additional settlements based on the Machakos Protocol were completed during 2004 and formally presented as a Comprehensive Peace Agreement on 9 January 2005. The two principal parties then rapidly drafted a new constitution for Sudan in 2005.¹⁵³ The basic design of deferred secession balanced by a joint campaign in favour of continued unity was left untouched.¹⁵⁴

The Bougainville agreement of 30 August 2001 represents another innovative case of deferred possible secession.¹⁵⁵ The agreement establishes a detailed autonomy/asymmetrical federal regime for Bougainville. Self-governance is to be exercised under a 'home-grown Bougainville constitution with a right to assume increasing control over a wide range of powers, functions and personnel and resources'.¹⁵⁶ The agreement states one of its aims as being the promotion of the unity of Papua New Guinea and the maintenance of a mutually acceptable balance of interests between those of Bougainville and those of Papua New Guinea as a whole.¹⁵⁷

Section C of the agreement contains detailed principles on a referendum. No earlier than 10 and no later than 15 years after the election of the first autonomous Bougainville government, a referendum shall be held, unless the Bougainville government waives this entitlement. The referendum pledge is a conditional one, depending on the achievement of good governance and weapons disposal. A dispute settlement mechanism is to be established to address divergences relating to the referendum. A UN mission is to help stabilize the transition process.

In terms of state structure, the Bougainville constitution is the supreme law within the territory in relation to all matters which fall within its jurisdiction. Bougainville may change the constitution, according to special procedures. The national government exercises competence over defence, foreign relations, transport and communication, and some other areas. The Bougainville authorities enjoy authority over all other matters provided they have been set out in a list of powers to be developed. Unlisted items remain initially with the national government, although there is a procedure to address claims to the exercise of authority in these areas by either entity. Listed powers

¹⁵³ Weller, 'Self-governance in Interim Settlements: the Case of Sudan', in Weller and Wolff (eds), *supra* note 18, at 158ff.

¹⁵⁴ Comprehensive Peace Agreement, 9 Jan. 2005, available at: www.unmis.org/English/documents/cpa-en.pdf.

¹⁵⁵ Bougainville Peace Agreement, 30 Aug. 2001, available at: www.usip.org/library/pa/bougainville/bougain_20010830.html.

¹⁵⁶ *Ibid.*, Art. 1.

¹⁵⁷ *Ibid.*, at Section B.1(4).

will be transferred gradually to Bougainville. While a Bougainville court system is to be developed, the national Supreme Court remains the final court of appeal for Bougainville, including for constitutional matters.

These cases are noteworthy inasmuch as the parties agree to self-determination, but also undertake an obligation to test the possibility of continued union during a period of federal or autonomous governance. In another type of case, it is difficult to deny that secession is foreseen at the outset.

2 *Acceptance of the Claim of Self-determination with Deferment of Implementation*

Deferment of the implementation of a claim to self-determination which has, in principle, been accepted is not to be confused with deferment of implementation of status after an act of self-determination. An example of deferment of status after the completion of the act of self-determination is furnished by East Timor. There, the central state concerned, Indonesia, denied that colonial self-determination was still applicable, the purported integration of the territory having taken place in accordance with the wishes of the population. Indonesia offered East Timor special autonomy. In an agreement with East Timor's colonial power, Portugal, of 5 May 1999, it was decided that a referendum on the proposed special autonomy would decide the status issue. If the referendum were in favour of the autonomy, East Timor would indeed be recognized as being integrated with Indonesia. If it were against:¹⁵⁸

the government of Indonesia shall take the constitutional steps necessary to terminate its links with East Timor thus restoring under Indonesian law the status East Timor held prior to 17 July 1976, and the Governments of Indonesia and Portugal and the Secretary-General shall agree on arrangements for a peaceful and orderly transfer of authority in East Timor to the United Nations. The Secretary-General shall, subject to the appropriate legislative mandate, initiate the procedure enabling East Timor to begin a process towards independence.

Hence, the decision on a referendum which was nominally about special autonomy, but effectively about independence, had already been taken in this arrangement. The referendum was in fact held only a few months after the agreement, on 30 August 1999. The deferment, or interim period, was created to implement the decision if the referendum went against special autonomy. Portugal in fact recognized independence only three years after the agreement had been concluded, when East Timor's new constitution entered into force on 20 May 2002.¹⁵⁹

A genuine deferment after a decision to grant secession took place in relations between Ethiopia and Eritrea. Eritrea had mounted a prolonged secessionist struggle. When a change in government occurred which brought into power the previous opposition forces, a Transitional Period Charter was adopted in 1991. The Charter confirmed, in Article 2, the right of nations, nationalities, and peoples to self-determination. This included 'the right to self-determination of independence, when the concerned nation/

¹⁵⁸ Art. 6 of the Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, 5 May 1999, available on the website cited *supra* note 12.

¹⁵⁹ Cf. Report of the UN Secretary-General, S/2002/432, 17 April 2002.

nationality and people is convinced that the above rights are denied, abridged or abrogated'. Eritrea exercised this option after completing a two-year standstill period. A referendum was held on 13–25 April 1993, endorsing independence with a claimed majority of 99.83 per cent.¹⁶⁰

Another deferment occurred in the case of the Union of Serbia and Montenegro. In 2001–2002, the Montenegrin government was arguing in favour of leaving the Federal Republic of Yugoslavia. As one of the former Republics of the Socialist Federal Republics of Yugoslavia, it was clear that Montenegro had the right to secession. However, significant international pressure was applied to delay any such action, fearing a destabilizing effect in relation to the situations in Kosovo, and Bosnia and Herzegovina. This resulted in the rather cryptic Accord on Principles in Relations between Serbia and Montenegro of 14 March 2002 on the future of 'a common state'. It provided for a 'sovereign identity' of both constituent republics. Accordingly, both states formed a very loose state union, with only limited functions exercised by the centre. The Constitutional Charter of the State Union of Serbia and Montenegro of 4 February 2003 provided in Article 60:

Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro.

The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum.

Montenegro actualized its entitlement upon the expiry of the three-year period. Although the EU imposed upon it an unusually high threshold of 55 per cent of votes cast in favour of independence, that mark was narrowly passed in the referendum of 21 May 2006.¹⁶¹

A final, if somewhat disheartening, example of the endorsement of self-determination with an agreement to defer implementation is furnished by the 1996–1997 agreement on Chechnya. In 1991, that entity had unilaterally declared independence from what was to become the Russian Federation. It had withstood a military assault from the Federation, impelling the central government to agree to a settlement. On 31 August 1996, General Lebed of the Russian Federation and Aslan Maskhadov representing Chechnya adopted a joint declaration in the presence of an OSCE representative. The declaration proceeded from 'the universally recognized right of peoples to self-determination, the principles of equality, voluntary and free expression of will' and determined that the future relations of both entities should be determined in accordance with universally recognized principles and norms of international law by 31 December 2001. While currency, financial, and budgetary 'interrelations' would be restored in the meantime, Chechnya would enjoy powers of legislation limited only by the observance of human and civil rights, the right of peoples of self-determination, the principles of equality among nationalities, and inter-ethnic accord.

¹⁶⁰ African Elections Database, available at: <http://africanelections.tripod.com/er.html>.

¹⁶¹ See <http://serbia-montenegro.usaid.gov/code/navigate.php?Id=372>.

On 12 May 1997, a formal Treaty on Principles of Interrelation between the Russian Federation and the Chechen Republic Ichkeria was concluded between Russian Federal President Boris Yeltsin and Mr Maskharov. In the treaty, both sides agreed again to develop their relations on the basis of generally recognized principles and norms of international law, thus confirming the international legal personality of Chechnya. Essentially, therefore, the Russian Federation had settled for statehood, although deferred until the end of 2001, i.e., for a period of four to five years. However, citing the alleged involvement of Chechen groups in acts of terrorism, Moscow unilaterally abrogated this commitment and set about re-conquering the territory. International bodies or states did not significantly resist this action. Instead of defending the identity of Chechnya as a pre-state entity with international legal personality, governments and international organizations limited themselves to the demand for a cessation of human rights abuses and of an armed campaign which paid little regard to humanitarian law.¹⁶²

F *Establishing a de facto State*

The settlements just noted may assign sovereignty to constituent units or offer joint sovereignty shared by the centre and constituent republics. They will then seek to dilute the effect of this action by denuding the purportedly sovereign entity of the power to remove itself from the federation, confederation, or state union. Another option for a settlement avoids issues of the *de jure* status of the entity altogether. There are two ways of achieving this. One is to seek agreement on the *de facto* configuration of the projected new states, which will confirm at least its potential independence. This was attempted in the proposal put forward by Martti Ahtisaari, the UN Special Envoy for a final status settlement for Kosovo, in March 2007. A second way will merely seek to offer territorial stability for the *de facto* entity. A possible example may be the emerging arrangements in relation to Abkhazia and South Ossetia. In that instance, the EU obtained guarantees from Georgia not to use force, or deploy its forces, in what nominally would remain its own territory in order to regain control over the two areas. Instead, the EU agreed to deploy an observation force of around 200, in order to implement its ‘guarantee’ of this undertaking.¹⁶³ Although the EU and others have voiced strong objections to the purported independence of the territory, they have nevertheless taken steps which will stabilize the effective control of the local authorities, supported by Russian forces, over them for a prolonged period. While this undertaking was to be balanced by international talks, the substance of these remained controversial at the time of writing. An initial proposal of the EU to address the status of the territory had been rebuffed by Russia, which instead insisted

¹⁶² Declaration of the EU Presidency on Behalf of the European Union Concerning Chechnya, 17 Jan. 1995, Press Briefing, 4215/95.

¹⁶³ EU, Implementation of the Plan of 12 Aug. 2008 and Reaffirmation of the Commitment of all the Parties to Implement in Full all of the provisions of the Medvedev-Sarkozy six point plan of 12 Aug. 2008, 8 Sept. 2008. On file with the author.

that only topics agreed by all parties, including the governments of the two 'states' would be addressed.¹⁶⁴ This would of course not include their status.

A more complex example of creating an effective entity without pronouncing oneself on its status is furnished by the Ahtisaari negotiations on the future status of Kosovo. In contrast to the 1999 Rambouillet document on Kosovo and Security Council Resolution 1244 (1999) establishing the UN mandate for Kosovo, the proposal assiduously avoided references to the territorial integrity and unity of Serbia.¹⁶⁵ However, it also stopped short of assigning independence to Kosovo. There was no reference to sovereignty. On the other hand, the document made it clear that Kosovo would have all the powers of governance which attach to statehood, covering the legislative, the executive, and the judicial branches. According to UNMIK Regulation No. 1, adopted pursuant to Security Council Resolution 1244 (1999), '[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK'. The proposed package provided that UNMIK's mandate shall expire and all legislative and executive authority vested in UNMIK shall be transferred to the governing authorities of Kosovo. Hence, Kosovo would have gained full public powers consistent with state sovereignty. Belgrade, on the other hand, was not mentioned at all in this context. It retained no original or sovereign powers relating to Kosovo. All it would have been able to do was to offer voluntary cross-border cooperation.

The package confirmed the aim of statehood in several other ways. It unambiguously assigned to Kosovo the capacity to enter into international relations, including to conclude treaties and be a member of international organizations. It specifically requested Kosovo to sign and ratify the European Convention on Human Rights – an act which can be performed only by a state. The package even insisted that Kosovo should assume control of its air space – another function typically exercised only by a fully sovereign state.

Overall, therefore, the Ahtisaari proposal provided Kosovo with all the competences necessary for statehood, but left it to individual states or institutions to form a view as to the statehood of the entity. This was a result of the fact that it was known that the two parties, Serbia and Kosovo, would never be able to agree on status. Ahtisaari did, however, attach to his proposal a separate recommendation to the UN Security Council. That recommendation was in favour of 'supervised' independence, offering continued international involvement in the governance of Kosovo even after statehood.¹⁶⁶ Despite the failure of the Ahtisaari process, this solution was nevertheless implemented by way of unilateral, but still supervised, independence.

¹⁶⁴ Ministry of Foreign Affairs of the Russian Federation, Implementation of the Plan of Russian President Dmitry Medvedev and French President Nicolas Sarkozy, 12 Aug. 2008, Press Release 1321-8-092008, 8 Sept. 2008.

¹⁶⁵ Letter dated 26 Mar. 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168/Add.1.

¹⁶⁶ *Ibid.*, enclosing the Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, at 4.

G *Supervised Independence*

Supervised independence would trade international recognition of statehood for a commitment by the newly independent entity to certain permanent or temporary limitations of its sovereignty or the exercise of its sovereignty. According to the Ahtisaari Comprehensive Proposal, it was foreseen that Kosovo would enshrine in its constitution a number of important provisions established in the proposal. These concerned human and minority rights, the protection of cultural heritage, provisions safeguarding the political participation of minorities, and many other requirements. These guarantees were to be permanently assured. This in itself is not unusual. A number of states, including, for instance, Germany, remove human rights from the danger of ill-advised constitutional change.

Another requirement concerned the abandonment of any territorial claims in relation to neighbouring states, including the acceptance of the boundary with Macedonia which was agreed by Belgrade. While it was controversial whether at the time Belgrade still had the power to address that issue, this agreement was ratified by the UN Security Council and could not be easily reopened in any event. Finally, Kosovo was not to seek a union with another state. It was not clear whether this requirement was really to be a permanent one according to the new constitution, or whether it was supposed to be reflected in a binding Security Council decision, had a resolution been forthcoming.

Provision was also made for continued international supervisory mechanisms. The proposed new institution of the International Civil Representative and the International Steering Group of governments and organizations overseeing the transition would have continued to enjoy certain prerogatives for a period yet to be established. Kosovo authorities would have needed to give effect to decisions of the relevant international bodies. However, the package repeatedly emphasized the principle that Kosovo's authority to govern 'its own affairs' was to be full and complete, subject only to temporary review and supervision in relation to certain specific areas. Such an arrangement would not have been inconsistent with the assumption or preservation of full sovereignty, as international practice, for instance in relation to Bosnia and Herzegovina, has demonstrated.

The failure of the Ahtisaari package to gain acceptance by Serbia, and by the UN Security Council, somewhat complicated the application of the scheme of supervised independence. In the end, Kosovo unilaterally declared independence on 17 February 2008. In its declaration, the Kosovo Assembly noted that Kosovo 'is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation'. In substance:

We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of the UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal of the Kosovo Status Settlement.

We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote

the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making process.

...

We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

The Declaration had been adopted unanimously, by 109 votes, including those of virtually all non-Serb minorities. The 10 representatives of the ethnic Serb community, and one Gorani associated with them, had boycotted the meeting of the 120-member Assembly.

The declaration had been drafted in conjunction with, and checked by, key governments. It was phrased in such a way as to have important legal implications for Kosovo. Employing the international legal notion of a 'unilateral declaration', it created legal obligations *erga omnes*. These are obligations that all other states are entitled to rely on and of which they can demand performance. In this sense, an attempt was made to replace the binding nature of a Chapter VII resolution of the Security Council imposing the limitations on Kosovo's sovereignty foreseen in the Ahtisaari plan with a self-imposed limitation of sovereignty. In view of the fact that Kosovo had not yet adopted its new, Ahtisaari-compliant constitution at the time of the declaration of independence, this fact was of particular importance.

Serbia's parliament promptly adopted a decision purporting to annul this declaration.¹⁶⁷ Serbia and the Russian Federation also immediately protested at the international level, demanding an urgent meeting of the Security Council which, for the first time in several months, would address the Kosovo issue in public.¹⁶⁸ The meeting revealed a significant international split on the issue of independence in this instance, with Russia taking the lead in opposing this development, along with Serbia.¹⁶⁹ The Secretary-General noted that the declaration of independence confirmed Kosovo's full acceptance of the obligations contained in the Comprehensive Settlement Proposal as well as continued adherence to Resolution 1244 (1999). There had also been a strong commitment by the Kosovo Prime Minister to the equal opportunities of all

¹⁶⁷ Decision on the Annulment of the Illegitimate Acts of the Provisional Institutions of Self-government in Kosovo and Metohija on their Declaration of Unilateral Independence, undated, available at: http://en.wikisource.org/wiki/Decision_on_the_annulment_of_the_illegitimate_acts_of_the_provisional_institutions_of_self-government_in_Kosovo_and_Metohija_on_their_declaration_of_unilateral_independence (last accessed 4 July 2008).

¹⁶⁸ Letter dated 17 Feb. 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/103, 17 Feb. 2008; Letter dated 17 Feb. 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, S/2008/104, 17 Feb. 2008.

¹⁶⁹ UN Doc. S/PV/5829, 18 Feb. 2008.

inhabitants and a pledge that there would be no ethnic discrimination. The Secretary-General also noted a Letter from the EU High Representative for Common Foreign and Security Policy, stating that the EU would deploy a rule of law mission within the framework provided by Resolution 1244 (1999) and an EU Special Representative for Kosovo. The Secretary-General confirmed that, pending guidance from the Council, UNMIK would continue to exercise its mandate under Resolution 1244 (1999).

The administration of supervised independence in this instance became politically fraught, given the reluctance of Russia to permit the transfer of authority from UNMIK to the new EU-led mission. In view of the risks of instability, and ‘pending guidance from the Security Council’, the Secretary General announced his intention to ‘adjust operation aspects of the international civil presence in Kosovo’.¹⁷⁰ This would include an enhanced operational role for the EU in the area of rule of law, including, gradually, policing, justice and customs throughout Kosovo. The OSCE would remain in place, addressing the promotion of democratic values and the protection of the interests of communities. UNMIK would take on a role of monitoring and reporting, facilitating arrangements for Kosovo’s engagements in international agreements, facilitating Prishtina–Belgrade dialogue, and certain functions discussed with Belgrade. These functions were outlined in a letter of the Secretary-General to the Serbian President Boris Tadic. In particular, Kosovo Police Service operations in ethnic Serb-majority areas would remain under the overall authority of the UN. There would be additional local and district courts generated within self-majority areas operating within the Kosovo court system under the applicable law and within the framework of Resolution 1244 (1999). A solution for the maintenance of a single customs area in Kosovo would be sought. There would be a joint committee on transportation and infrastructure including Serbia. NATO would continue to fulfil its existing security mandate, including with respect to boundaries, throughout Kosovo. Finally, the Serb Orthodox Church would remain under the direct authority of its religious seat in Belgrade, retaining the sole right to preserve and reconstruct its religious, historical, and cultural sites in Kosovo. It would be afforded international protection.¹⁷¹

Kosovo was also informed of these steps, which would be of limited duration and without prejudice to the status of Kosovo.¹⁷² The Secretary-General noted that his proposal might ‘not fully satisfy all sides’ but would at least be ‘the least objectionable course to all’.¹⁷³ The Council did not adopt a resolution on this issue. Overall, it appeared to have been accepted by all that Resolution 1244 (1999) remained in place. Kosovo had somehow hedged its bets, indicating that it would act ‘in accordance with’ the resolution, rather than accepting its continued validity *de jure*. It was also accepted by all sides that the UN civil presence would remain in place, provid-

¹⁷⁰ *Ibid.* at paras 13–16.

¹⁷¹ Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr Boris Tadic: *ibid.*, Annex 1.

¹⁷² Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr Fatmir Sejdiu: *ibid.*, Annex II.

¹⁷³ Plan to reconfigure UN presence in Kosovo ‘least objectionable option’ – Ban, UN Press Release, 13 June 2008, available at: www.unmikonline.org/news.htm (last accessed 8 July 2008).

ing a roof under which the new EULEX mission might operate. In practice, it seemed clear that most of UNMIK's functions would devolve to the EU mission, with the UN retaining a role focused mainly on reporting and monitoring, and facilitating dialogue between Kosovo and Belgrade. While Russia appeared to maintain that this plan had not been approved, it seemed as if the UN Secretary-General had done enough to give himself the space to implement this design for administering supervised independence without a further Security Council resolution.

H Conditional Self-determination

Another technique of addressing the self-determination dimension is conditionality. There can be external and internal conditionality. An example of external conditionality is provided by the Gagauzia autonomy statute, to which reference has already been made above. The Statute confirms:¹⁷⁴

In case of a change of the status of the Republic of Moldova as an independent state, the people of Gagauzia shall have the right of external self-determination.

That is to say, Gagauzia turns into a self-determination entity with the opportunity of lawful secession if an event out of its own control occurs – in this case a change in the status of Moldova. The circumstance contemplated was a merger of Moldova with neighbouring Romania. Some of the draft settlements for Transnistria noted above would offer a similar provision for Moldova's Eastern part in that eventuality.¹⁷⁵

In relation to Gagauzia, the identity of this conditional constitutional self-determination unit is defined in an unusual way too. Localities in which (ethnic) Gagauzes constitute less than 50 per cent of the population may be included in the autonomous territorial unit 'on the basis of the freely expressed will of a majority of the electorate revealed during a local referendum' (Article 5(2)). Accordingly, this would be one of the more recent examples where the will of the people does, after all, triumph over previous administrative/territorial arrangements. This is an interesting departure from the classical colonial self-determination practice, including the doctrine of *uti possidetis*.

Internal conditionality, on the other hand, relates to the acceptance and effective implementation of certain requirements of governance. The EU has pioneered this approach with its Conditions for Recognition of Eastern European States, and in particular the criteria for recognition of the former Yugoslav states.¹⁷⁶ Similarly, the Rambouillet interim settlement for Kosovo would have provided for an assessment of its implementation before discussions about a mechanism for a final settlement commenced.¹⁷⁷ Similarly, the UN policy of 'standards before status' sought to condition

¹⁷⁴ Art. 1 of the Law on the Special Legal Status of Gagauzia (Gagauz Yeri), 23 Dec. 1994, available on the website cited *supra* note 12.

¹⁷⁵ See *supra*, text accompanying notes 86, 89, 90, 96.

¹⁷⁶ EPC Guidelines on the Recognition of New States, *supra* note 30; Declaration on Yugoslavia, Extraordinary EPC Meeting, 16 Dec. 1991, *supra* note 30.

¹⁷⁷ Cf. *infra*, Section 9.

possible independence for Kosovo on the development of good governance within the territory, including in particular provision for minorities.¹⁷⁸

Internal conditionality is particularly pronounced in the case of the Bougainville settlement. While the settlement promises that the national government will move constitutional amendments that will ‘guarantee a referendum on Bougainville’s future political status’,¹⁷⁹ there are significant conditions attached:¹⁸⁰

The constitutional amendments will guarantee that the referendum will be held:

no earlier than 10 years, and, in any case, no later than 15 years after the election of the first autonomous Bougainville Government, when the conditions listed below have been met, unless the autonomous Bougainville Government decides, after consultation with the National Government and in accordance with the Bougainville Constitution, that the referendum should not be held.

The conditions to be taken into account include weapons disposal and good governance.

The actual date of the referendum will be agreed after consultations by the autonomous Bougainville Government and the National Government.

The requirement of ‘good governance’ in particular appears to be a rather open criterion.

I *Constitutional Self-determination*

A final way of settling claims to self-determination is to enshrine the right directly in the state constitution. Hence, the right to self-determination is not directly based in international law, although international actors are likely to take account of such internal provisions when an entity so entitled seeks to exercise its rights. Constitutionally established self-determination is not unknown, although it has remained comparatively rare. For instance, the 1947 Constitution of the Union of Burma, provided:¹⁸¹

201. Save as otherwise expressly provided in this Constitution or in any Act of Parliament made under section 199, every State shall have the right to secede from the Union in accordance with the conditions hereinafter prescribed.

202. The right of secession shall not be exercised within ten years from the date on which this Constitution comes into operation.

203. (1) Any State wishing to exercise the right of secession shall have a resolution to that effect passed by its State Council. No such resolution shall be deemed to have been passed unless not less than two-thirds of the total number of members of the State Council concerned have voted in its favour.

¹⁷⁸ G. Kallenbach, *Westlicher Balkan – failed states oder zukünftige EU Mitgliedstaaten ? Die Zukunft des Kososvo* (2005), available at: www.gisela-kallenbach.de/fileadmin/dateien_redakteure/ap/051116_vort_zuk_kos.pdf.

¹⁷⁹ Art. 1 of the Kokopo Agreement on Agreed Principles on Referendum, 26 Jan. 2001, available at: www.c-r.org/our-work/accord/png-bougainville/key-texts33.php.

¹⁸⁰ *Ibid.*, Art. 4.

¹⁸¹ The Constitution of the Federal Republic of the Union of Burma, 24 Sept. 1947, available at: <http://burmalibrary.org/docs3/CONSTTTN.47>.

(2) The Head of the State concerned shall notify the President of any such resolution passed by the Council and shall send him a copy of such resolution certified by the Chairman of the Council by which it was passed.

204. The President shall thereupon order a plebiscite to be taken for the purpose of ascertaining the will of the people of the State concerned.

Indeed, it appeared that only two of the constituent states would in fact be entitled to this right, and even in relation to them the provision remained unimplemented when separation was actually sought.

The same phenomenon was evident in relation to the Soviet Union. In accordance with Leninist doctrine, Article 70 of the Constitution of 7 October 1977 provided that the Union 'is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics'. Article 72 simply added 'each Union Republic shall retain the right freely to secede from the USSR'.

Of course, it was probably not anticipated that any Union Republic would ever assert this constitutional right of self-determination. When, in 1989–1990, the Baltic Republics declared their intention to revive their full sovereignty and moved towards full independence, this was strongly resisted by Moscow. Given the clear and unambiguous nature of Article 72 of the Constitution, it was not easy to justify such a stance. However, in rather a strained argument, attention was drawn to Article 78, which required ratification by the USSR of changes in Union Republic boundaries to which these had agreed between themselves and of provisions assigning competence in relation to the external boundaries of the federation to the centre.¹⁸² This interpretation would render meaningless the unilateral right of secession established in Article 72, and a legal race developed on this issue between the Baltic Republics and Moscow. The central Congress of People's Deputies worked at high speed to prepare a Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR.¹⁸³ That instrument, finally brought into effect on 3 April 1990, provided for a lengthy interim period of at least five years, and left to the Congress of People's Deputies the final decision on giving effect to the will of the population of the republic concerned. However, on 11 March, Lithuania had already declared the renewal of its independence.

This event triggered a somewhat ambiguous response, especially on the part of Western states. Many of these had never *de jure* recognized the incorporation of the Baltic Republics into the Soviet Union, arguing that this had occurred as the result of an unlawful use of force. Accordingly, it was difficult for them to insist on the doctrine of territorial unity in this instance. On the other hand, very few – other than heroic

¹⁸² Art. 73(2) assigned to the USSR jurisdiction in relation to the determination of the state boundaries of the USSR and also approval of changes in the boundaries between Union Republics.

¹⁸³ Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR, 3 Apr. 1990, reproduced in Hannum, Documents, *supra* note 18, at 753.

Iceland, which did recognize – were willing to act on principle when confronting this fact. The issue was resolved when the USSR dissolved entirely in the wake of an unsuccessful coup against President Gorbachev.¹⁸⁴

The case of the USSR therefore ultimately became one of outright dissolution of a federal state rather than secession, and the argument of express constitutional self-determination was not fully tested in this instance. While ultimately the SFRY also dissolved, there was nevertheless a strand of argument in relation to the secession of Croatia and Slovenia which can be seen as the point of discovery of the claim to constitutional self-determination in international relations. The 1974 SFRY constitution provided that:¹⁸⁵

The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people – the Socialist Federal Republic of Yugoslavia ...

This provision quite clearly assigned to all ‘nations’ contained in the federation the right to self-determination, including expressly the right of secession. Each of the federal republics was seen as the political expression of the constituent nations. Hence, the republics had had assigned to them an express right to self-determination and secession. This proposition was put to the test in 1991.¹⁸⁶

Under the Milosevic regime, Serbia had gained ascendancy within the Yugoslav Federation during the second half of the 1990s. With the support of some other compliant republics, it was undoing the careful balancing act between the different republics that was reflected in the design of Tito’s 1974 constitution. Kosovo, in particular, suffered the virtual unilateral abolition of its autonomy.

Faced with this change in the balance of powers within the federation, Croatia and Slovenia attempted to protect their position by proposing a new federal constitution which would enhance their status. Negotiations to this end conducted during 1990 and early 1991 were frustrated by Serbia. Croatia and Slovenia then unilaterally declared independence on 25–26 June 1991. The central government in Belgrade had been unwilling to settle, as compromise on this issue would have meant surrender of some of the very powers it had just captured. The republics – and Kosovo – would have no option but to comply. After all, the international system uniquely privileged the central government, permitting it to deploy the armed forces of the state if necessary in order to defend the central value of territorial unity by way of ‘internal police action’. Based on state practice over the past decades, it was clear that independence was no option.

¹⁸⁴ Annex 2 to the Alma Aty Declaration, 21 Feb. 1991, UN Doc. A/47/60 and S/23329.

¹⁸⁵ Basic Principles, Section I of the Constitution of the Socialist Federal Republic of Yugoslavia.

¹⁸⁶ See Weller, ‘The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia’, 86 AJIL (1992) 568.

While international actors tried very hard to dissuade Croatia and Slovenia from declaring independence, they rapidly acknowledged this fact once it occurred. When Belgrade proceeded to answer the declarations of independence of Slovenia and Croatia with the use of force, the international community, led by the EU, took an unusual step. While it failed to recognize the two entities until January 1992, it nevertheless adopted the following unprecedented view only a few weeks after the declarations of independence:¹⁸⁷

The European Community and its member States are dismayed at the increasing violence in Croatia. They remind those responsible for the violence of their determination never to recognize changes of frontiers which have not been brought about by peaceful means and by agreement. ... The Community and its member States call on the Federal Presidency to put an immediate end to this illegal use of the forces on its command.

In short, while Belgrade continued to invoke the doctrine of territorial unity, the EU took the view that both entities were either already states or entitled to become states and in possession of pre-state rights. These were the right to territorial integrity and unity, and to protection against the use of force by the central government – the core entitlements that appertain to a classical self-determination entity.

The EU then unsuccessfully attempted to negotiate an orderly secession. When this failed, it declared, through the medium of its Badinter arbitration/advisory commission, that the entire Yugoslav Federation was in a process of dissolution. Obviously, this was not an agreed dissolution, which would have been legally unproblematic. Instead, it would be an effective dissolution that was still being opposed from the centre. Nevertheless, the Badinter Commission held, and the EU governments accepted, that the individual republics that wished independence would obtain it unilaterally, provided they complied with a number of requirements, including the holding of a free and fair referendum and the acceptance of minority rights guarantees.¹⁸⁸

Of course, the thesis of the dissolution of the SFRY was somewhat daring. After all, the federation was dissolving only because Croatia and Slovenia had seceded in the first place. Hence, the argument of express constitutional self-determination of these two entities was also deployed.

The Yugoslav episode also pointed to the attempts of the international actors to ensure that no wide-ranging precedent would ensue which might encourage secession elsewhere. For instance, the line was drawn in relation to federal units which had not quite managed to achieve the status of full republic, such as Kosovo. That territory enjoyed dual status according to the constitution of the Socialist Federal Republic of Yugoslavia. On the one hand, it had full federal representation, along with the six constituent republics of the SFRY and Vojvodina. Hence, it was represented equally in the rotating collective federal presidency, it sent directly elected representatives to the federal parliament, etc. Moreover, its substantive competences were similar to those

¹⁸⁷ EC Declaration on Yugoslavia, 27 Aug. 1991, EPC Press Release, P.82/91.

¹⁸⁸ Badinter Opinion No. 1, *supra* note 55.

of constituent republics proper, including even the right to maintain its own central bank. On the other hand, Kosovo was also a unit which was legally subordinated to Serbia – the latter being a constituent republic in its own right. Hence, in relation to the federation, Kosovo was a federal unit; however, in relation to Serbia, it was an autonomous province.

In view of this situation, the UN Security Council and other international actors insisted on maintaining the territorial unity of the rump Yugoslav Federation in relation to Kosovo. This dictum has only recently been challenged in the context of the final status settlement, to which reference was made above.

In spite of the attainment of supervised independence by Kosovo, it appears likely that this will be declared to be a singular solution of no precedential value. An attempt will be made to maintain the view that not all federal units within a federation providing for express self-determination status are entitled to self-determination. Express constitutional self-determination will generally be applied only to the entities that are very specifically nominated in the constitution, such as full federal republics. However, there are also recent examples which take a more flexible view. One is the new constitution of Ethiopia which was adopted after the final victory of internal opposition forces which had displaced the central government. Article 39(5) of the constitution of 8 December 1994 declares with the greatest clarity. '[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'. Paragraph 5 adds an unusual definition:

A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

Another example is furnished by the constitution of the Principality of Liechtenstein. Article 4(2) permits each municipality to 'remove itself from the state-community'.¹⁸⁹ In both instances, the constitutions provide for a certain process which must be gone through before secession.

In addition to an express recognition of a right to self-determination in the constitution or an anchoring of a new right to self-determination in a settlement made at the internal constitutional level, there can also be a less formal approach. Implied constitutional self-determination exists where traditional constitutional practice has confirmed that a referendum on self-determination would be acted upon by the centre. For instance, in the United Kingdom it is clear that if a referendum on the independence of Scotland were to be successful, this outcome would be very hard to ignore. Similarly, the Canadian Supreme Court reference has confirmed that Canada would not remain indifferent to a clear result in favour of the independence of Quebec.¹⁹⁰ Canada has subsequently regulated the process relating to secession in its Clarity Act.¹⁹¹

¹⁸⁹ Constitution of the Principality of Liechtenstein, 5 Oct. 1921, available at: www.liechtenstein.li/en/pdf-fl-staat-verfassung-sept2003.pdf.

¹⁹⁰ See *supra* note 57.

¹⁹¹ Canada Clarity Act, CanLII – Fédéral – SC 2000, c. 26, 29 June 2000.

2 Conclusion

The proliferation of attempted or actual self-determination settlements in recent years has been impressive. This applies both to the more traditional autonomy arrangements and to more novel ways of grappling directly with the self-determination issue.

Autonomy arrangements were pioneered in Western Europe, starting with the Åland Islands. This trend continued into the Cold War years, ranging from the South Tyrol agreement, through devolution in Spain and the United Kingdom, to special provisions in Belgium, Denmark, and Portugal. Arguably, these settlements were successful in preventing the outbreak or intensification of ethnic conflict. Since then, however, attempts to establish autonomy in Western Europe have stalled. The settlement for Corsica failed to attract popular support from the relevant community. The Cyprus peace process also stalled, although there is now hope of its reignition. Among the newer members of the European Union, territorial autonomy remains a highly sensitive issue and few autonomy arrangements have been adopted. Moving beyond the European Union, Croatia, while still under pressure due to its EU accession campaign, has not implemented the autonomy provisions which were once foreseen for mainly Serb inhabited areas over which it regained control. Instead, state-wide local self-government and decentralization have been deployed. The Ohrid settlement imposed on Macedonia disguises autonomy as enhanced local self-government, and implementation has been somewhat hesitant throughout. Russia appears to be clawing back autonomy relating to Tatarstan. Moldova, too, is at present attempting to reshape its autonomy agreement with Gagauzia, seeking to make it more consistent with the state-wide system of local self-government. On the other hand, OSCE involvement did result in the establishment of Crimean autonomy within Ukraine – an arrangement which may now be severely tested by Russian assertiveness in the region.

Concern about the potentially disintegrative force of autonomy is also evidenced by the fairly numerous autonomy settlements which have been achieved in regions outside Europe. Virtually all of them contain very strong references to the guarantee of continued territorial unity and integrity. Very clearly, opting for autonomy is tied to an abandonment of claims to self-determination. Or, rather, one might say that these settlements can be taken as an exercise of the self-determination claim at the internal level. Once it has exercised this option, self-determination may no longer be a viable argument for the entity concerned, unless the arrangement is changed unilaterally by the central government. The exception remains Gagauzia, which is taken to have exercised self-determination when opting into the 1994 Autonomy Statute, but would gain external self-determination if the state of Moldova were to dissolve. The Transdniestria settlement which is now being considered for Moldova might contain a similar clause.

While territorial autonomy agreements have been proliferating outside Western Europe, there is a distinct lack of appetite for federal solutions, confederations, or state unions. Federal-type settlements have had to contend with the Badinter logic of constitutional self-determination. A wide reading of the Badinter Opinions, and

of the Quebec Supreme Court reference, would suggest that any federation implies a right to self-determination of territorial entities that are no longer fully represented in and by the centre. Given the restrictive attitude exhibited from among the organized international community, for instance, in relation to Somaliland, Northern Iraq, and, by some states, Kosovo, it is not clear, however, that this view has found universal support as yet. This hesitancy concerning a move towards what is sometimes called 'remedial self-determination' may have been reinforced by Russia's armed action relating to Georgia. On the other hand, over time, the situation in Kosovo, Abkhazia, and South Ossetia may well stabilize, leading to a retroactive reinterpretation of these episodes as instances of state practice in favour of remedial secession. The earlier cases of Bangladesh and the present instance of Somaliland may also be counted among this category.

If federal-type devolution is difficult, additional complications arise where a federal or confederal system is based on the sovereignty of its constituent republics, rather than devolution from the centre. The same applies where a settlement refers expressly to a right to self-determination of the entity. In such cases one might argue, by analogy to association in the colonial context, that the entity concerned might retain an entitlement of constitutionally-based self-determination.

To counter this possibility, these settlements will attempt to tie the formerly secessionist entity perpetually into an 'inviolable', 'indissoluble', 'inseparable', 'inalienable,' or 'indivisible' union. Indeed, solutions of this kind are at times considered sufficiently unstable to warrant the deployment of external guarantee powers (Transnistria, Cyprus, a NATO-led force in relation to Bosnia and Herzegovina). Such settlements will tend to come about where the secessionist entity has firmly established effective control over territory and population and there is no real prospect of a reversal of that situation.

It is noteworthy, however, that few central states have thus far accepted these designs. Several settlements establishing sovereign or semi-sovereign entities loosely tied into a federal or confederal system have failed to attract consent in the end. These include Cyprus, Transnistria, and especially Nagorno-Karabakh and formerly Abkhazia and South Ossetia. The rather loose Dayton settlement had to be imposed upon the parties (especially the Bosniak central government) under some pressure. The 1996–1997 Chechnya settlement was brutally disowned by the Russian Federation. However, confederal or federal designs are being repeatedly adopted as a transitory measure towards eventual or possible independence, as in the State Union of Serbia and Montenegro or Southern Sudan.

It is true that the lack of progress in achieving federal or confederal settlements in several cases may be explained with reference to the attitude of the Russian Federation, which has exercised a controlling influence in relation to the so-called 'frozen' conflicts and now decisively imposed a solution for Georgia. But there has also been a distinct hesitance on the part of the central governments, especially Georgia and Moldova, about full federalization. In retrospect, this hesitation has proven to be very costly, at least for Georgia. There are indications that this lesson is being learnt by the government in Chisenu, leading to a realization that it may be necessary after all to embrace asymmetrical federalism.

The practice of asymmetrical territorial autonomy and of federalization has given rise to a number of problems which go beyond the determination of the precise status of the entity in question. This applies particularly to situations where secessionist movements have exercised effective control over the territory and population in question. While these groups may be willing to trade their claim to self-determination for self-government, they will tend to have a very particular understanding of what self-government may mean. Generally, this will consist of continued rule by the 'war-time' leadership, resisting genuine democratization after the settlement. There may also be a failure to ensure that human rights can be effectively protected throughout the entire state territory, including in the asymmetric entity. 'New minorities' may be generated within that entity and require protection. These vulnerable groups may consist either of members of the state-wide majority, suddenly constituting a local minority within the self-governance unit, or of smaller minority groups suddenly confronted with life under the rule of the former secessionist fighters, rather than the former central state. This, for example, is the case in relation to the Muslim communities in the Tamil North-east of Sri-Lanka. These groups have threatened to launch their own secessionist struggle should they find themselves under Tamil control after a settlement.

In addition to issues of quality of governance in autonomous or federal units, there arises the question of integrative measures with the centre. The more balanced autonomy settlements will build in incentives for genuine participation of the unit of self-governance in the overall state. These go beyond wealth-sharing, covering in particular effective representation in elected state bodies and in the government. Clarity in the assignment of competences and legal dispute settlement mechanisms is also an important element of settlements.

As has already been noted, some self-governance settlements expressly refer to the process of opting into the state as an exercise of self-determination. This practice may contribute to the development of a legally protected expectation that certain territorial entities are gaining elements of legal personality in the sense of self-determination even outside the colonial context. Such recognition is, of course, even more pronounced in instances where the self-determination dimension of the conflict has been addressed in ways going beyond autonomy or federalization.

First, there is the recognition in cease-fire agreements or other provisional, transitional agreements that the self-determination dimension needs to be considered as such. While these agreements do not yet resolve the self-determination deadlock, they at least offer a transitory phase designed to lead to engagement with the self-determination dimension in formal negotiations.

Another model concerns the balancing of self-determination claims. Such settlements will unambiguously confirm the applicability of the rule of self-determination. However, they may then dilute the identification of the self-determination entity. Either side may claim confirmation of its legal position in this respect. As there is a mechanism for the administration of the act of self-determination attached, however, the issue is resolved in practice. In the case of Northern Ireland, this mechanism consists of recognizing that a referendum must be held in both parts of the island, but that no change in status is possible without the concurrence of the North.

A further technique consists of the recognition of the applicability of self-determination to the secessionist entity. The recognition is coupled with an interim period of autonomous governance, followed by a referendum. In some cases, there is an expectation that this experience of self-governance will extinguish the wish for external self-determination, with the referendum confirming continued union. There may even be an obligation on the parties to work towards making continued union attractive, in exchange for a referendum on either continued autonomy or full independence. In other instances, however, it would be clear to all from the outset that the interim period merely provides space for preparations for a referendum with the inevitable result of independence.

The Ahtisaari proposal for Kosovo adds yet another model for a possible solution. According to the settlement plan, Kosovo was to be equipped with all the objective elements of statehood. However, it was left to the organized international community to determine the consequences of these facts and form a view on statehood. It was hoped that this would be done collectively, through a decision of the UN Security Council which would at the same time establish original limitations on Kosovo's sovereignty and 'supervised independence'. As there was no Security Council resolution embracing this solution, another route had to be found to legally anchor this case of supervised independence. Kosovo unilaterally accepted original limitations on its sovereignty in its declaration of independence, along with the exercise of certain international supervisory powers for a period. Due to the deadlock in the Council, the UNMIK operation continued as something of a shell, within which the new EULEX mission will unfold.

Kosovo, along with the former Yugoslav Republics, Bougainville and Gagauzia, also points to a further innovation: conditional self-determination. External conditionality permits the activation of self-determination in the face of developments which lie outside the entity that may be seeking independence. Internal conditionality relates to the entity's acceptance of certain international obligations (combating terrorism or weapons of mass destruction, observing human and minority rights) and performance according to standards of good governance. While these standards were not spelt out in any detail in the Bougainville settlement, the UN Mission in Kosovo developed a large matrix of such commitments, at one stage encompassing some 127 criteria. Given the assumption that self-determination is an inherent right, at least in the colonial context, this development may at first seem surprising. Conditional self-determination appears to suggest that the organized international community is starting to establish a mechanism for the implementation of self-determination claims outside the colonial context.

Finally, there are cases where a right to self-determination is granted in the constitution of the state. While there are a few well-known examples of this approach, it has not worked terribly well in the past. The invocation of the right of secession by Burmese constituent states, by the Baltic Republics in relation to the USSR, and by Croatia and Slovenia were answered with resistance by the centre, and conflict ensued. However, the international response at least to the latter episode has confirmed that internal constitutional commitments of this kind are gaining in relevance at the international level. While constitutional self-determination is principally based on internal law, the

organized international community is entitled to take note of such an entitlement. In particular, where the entity so privileged is unilaterally deprived of its constitutional self-determination status or activation of the right is unreasonably refused or delayed after good faith attempts by the secessionist entity at negotiation, state or pre-state rights may be granted.

It remains to be seen whether the international failure to respond in this way to the unilateral abrogation of the Chechnya agreements can be explained with reference to the specific facts of that case, or whether it is to be taken as a somewhat cautionary tale of more general application. After all, most of the self-governance settlements reviewed here have been concluded at the level of internal, constitutional law. While they often came about in consequence of international mediation, they are frequently witnessed only by international actors, lacking a firm basis in international law. Even some of the settlements assigning sovereignty or quasi-sovereignty to a constituent entity, or confirming an entitlement to self-determination, have been concluded in a state of some legal ambiguity. Negotiators of settlements of this kind are certainly well advised to anchor commitments at the international level and provide for internationalized implementation mechanisms.

If this article has revealed a number of new techniques of addressing the self-determination dimension outside the colonial context, several questions of a more conceptual nature remain. First, how does this practice affect the right to self-determination outside the colonial context? Secondly, what are the consequences for our broader understanding of the international legal order? Thirdly, what specifically are the entitlements that appertain to certain types of groups, populations, or peoples? And, finally, there is an issue of process: Does the organized international community engage self-determination conflicts through clear and consistently applied mechanisms?

With respect to the first question, this article has clearly shown that there is now considerable practice in this area. This practice, while in some aspects diverse, is uniform in relation to at least one issue: it does indeed also address self-determination claims outside the colonial context. Given previous hesitations of international actors, this in itself is noteworthy. The practice is widespread, covering difficult cases on most continents. The expectation is that it marks out a trajectory that will extend into the future. While some further settlements are delayed due to geopolitical circumstances (the attitude of the Russian Federation in relation to Eastern/Central Europe) and others have faltered due to the attitude of the one or other local actor (say, Cyprus or Sri Lanka), it is likely that the trend of settlements chronicled here will continue in due course. But what is the legal significance of this trend for the international legal order, beyond the recognition that self-determination conflicts outside the colonial context can be addressed in various ways if the relevant actors so decide?

It is tempting to view the increasing willingness to engage with self-determination issues as further evidence of the emergence of one international system of multi-level governance, where national and international constitutional law come into direct contact and become at times difficult to distinguish. In such a universal system of public law, the state is only one of many possible layers of public authority. Sovereign powers can be assigned at various levels, ranging from local municipalities to regions,

federal entities, the state, sub-regional and regional integration organizations, and global institutions. In relation to each of these there exists an express or implied grant of authority from individual constituencies. Re-negotiating the constitutional assignment of powers to the state is one manifestation of this process. Complex settlements, such as that over Northern Ireland, which address local, regional, and state authority along with cross-border cooperation or the involvement of international agencies in governance, can perhaps be explained only with reference to this conceptual background.

The move away from unipolar sovereignty concentrated exclusively in the central state clearly generates greater complexity when one analyses state powers. Moreover, there is an increasing move away from effectiveness of control as the principal criterion for the authority to govern. Instead, along with recent developments concerning democratic governance as such, the practice on the assignment of public authority reviewed here reflects an increasing recognition that, ultimately, the authority to govern is based on the will of the people.¹⁹² In this respect, we are witnessing a gradual recognition of self-determination as a genuine, generalized principle for the construction of states and governance, with a number of layers of meaning attaching.

Of course, classically, self-determination has been defined as the right of peoples freely to determine their political status and pursue their economic, social, and cultural development.¹⁹³ In practice, the application of this provision had been severely contextually reduced, in both its external and internal dimensions. As was noted at the outset, external self-determination in the sense of secession would appertain only to colonial peoples defined by prolonged colonial administration within *uti possidetis* boundaries.¹⁹⁴ Internal self-determination would address both the constitutional system of public authority and the right of democratic participation in governance.¹⁹⁵ However, it was simply presumed that any constitutional system and structures of governance were, merely by virtue of their existence, the product of free determination by the people concerned.

The contextual restriction of external self-determination and the sharp division between external and internal self-determination appear to be dissolving, however gradually and hesitantly. Several innovative settlements provide for the opportunity of secession, expressly invoking self-determination outside the colonial context. Others re-allocate sovereignty to constituent entities or offer shared sovereignty between the centre and regions. Throughout, the will of sub-state populations is being accommodated in the variety of ways reviewed here, ranging from enhanced local self-governance to possible statehood. Moreover, the populations concerned are increasingly self-constituting. While settlements will generally concern territorially defined entities, this definition is no longer static. Instead of a rigid adherence to the *uti possidetis* principle, several settlements allow populations in certain areas to opt into, or

¹⁹² Art. 21(3) of the Universal Declaration of Human Rights.

¹⁹³ E.g., GA Res. 2625 (XXV).

¹⁹⁴ E.g., GA Res. 1514 (XV) and 1541 (XV).

¹⁹⁵ Art. 1 of the ICCPR and General Comment, in CCPR/C/21/Rev.1 and Add.1 and 2. See also Art. 25.

out of, proposed units of self-government (Gagauzia, Philippines, South Sudan). Units of self-governance are given open options to form larger regions or establish regional cooperation (Iraq, Darfur, Eastern Sudan, Bosnia).

The approach of international constitutional law can best help us conceptualize these developments. However, it is necessary to distinguish between conceptual explanation of observed phenomena and legal rights. The former help us to understand how and why new developments are taking place, and what effect these developments may have on the international system in the longer term. This understanding will also affect emerging patterns of practice of the future. But it is a different matter to ask whether these developments have already resulted in quite specific legal entitlements which apply equally in all similar circumstances.

The cases which have been considered are real, and new settlement practice is impressively widespread. With the exception of a few internationally imposed solutions, the settlements have resulted from negotiations. They are based on specific consent in relation to specific circumstances. Often, these circumstances were brought about by armed contest. The particular content of settlements is still as likely to be shaped by the relative power of the sides, and perhaps of the external actors which may be supporting them, as it is required by legal prescription. Moreover, the settlements have generally not been obtained by one central agency, such as the United Nations. Instead, a variety of internal and external actors have been involved, bringing with them a number of approaches.

It is therefore not possible, as yet, to claim that certain types of situation must trigger, by right, a certain specific solution. Hence, it would be premature to assert that ethnic movements of a certain kind will now always have a right to autonomy, or that the solution in certain circumstances has to be asymmetric federation or full independence. The key conclusion is, instead, rather more general. Self-determination claims are now being settled in a variety of ways. Self-governance within existing states remains an important solution, but interim settlements with a view to a referendum on self-determination are becoming increasingly accepted. The range of possible solutions has been significantly enhanced. While the absence of settlements and protracted conflict used to be the rule, a failure to engage in *bona fide* settlement attempts is now likely to be regarded as unusual. However, there is not, as yet, a clear international constitutional process in place to support such ventures. Instead, widespread practice confirms a right of initiative on the part of a diversity of international actors.

The independence of Kosovo outside an agreement with Belgrade and a new Security Council resolution, and unilateral action by Georgia relating to South Ossetia and Abkhazia, are unlikely to undermine the trends reviewed here. In these cases there existed settlement opportunities for 15 or more years. The lesson of these episodes is rather that these opportunities should be grasped while they are there. As this article has demonstrated, there is certainly no shortage of possible solutions that are now part of the international legal toolkit in relation to such cases.