

“PEOPLES”: THE PERSPECTIVE OF INTERNATIONAL PUBLIC LAW

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Abstract. *The article deals with the application rationae personae of the right to self-determination. Relying on the existing international legal framework, decisions of the judicial bodies and doctrine, the author analyses conceivable beneficiaries of the above-mentioned right: the inhabitants of Trust and Non-Self-Governing territories, peoples under foreign occupation, the entire population of a state and subgroups within a state.*

Keywords: *self-determination, peoples, minorities, trust territories, non-self governing territories, peoples under foreign occupation, subgroups within a state, a “minority-people”.*

Introduction

The origin of the principle of self-determination can be traced back to the American Declaration of Independence (1776) and the French Revolution (1789), which challenged the statement of the King Louis XIV of France and other absolute monarchs – “*L’etat*

c'est moi" (*I am the State*)¹. Since then the principle took a long way of evolution², and now it plays a special role among the fundamental principles of public international law enshrined in Article 2 of the United Nations Charter and particularised in the Friendly Relations Declaration³. It is argued that even the principle prohibiting threat or use of threat may be overridden by the "sacred right to self-determination"⁴. The right to self-determination is also reflected in other international documents, such as the Declaration on Granting Independence to Colonial Countries and Peoples⁵, Resolution (XV)⁶ of the General Assembly of the United Nations, the United Nations Covenant on Civil and Political Rights (1966), as well as the United Nations Covenant on Economic, Social and Cultural Rights (hereinafter both documents are referred to as the 'Human Rights Covenants') (1966), the Final Act of the Conference on Security and Co-Operation in Europe (1975), the Vienna Declaration and the Programme of Action (1993). All the documents refer to "peoples" as the holders of the right to self-determination.

While there is no dispute on the importance and existence of the right to self-determination⁷, there are some aspects that remain unclear and even controversial. This article focuses on the controversial aspect of self-determination regarding its scope of application *rationae personae*⁸. The application *rationae personae* can be determined only insofar as the term "peoples" has been defined. The crux of the problem is the absence of the definition of the term "peoples" within the framework of international law. Despite such absence of the definition, the states' practise and jurisprudence have revealed some entities that might be considered as "peoples". Firstly, the term "peoples" refers to the inhabitants of Trust and Non-Self-Governing territories⁹. Some assert that

- 1 Žilinskas, J. *Kosovo mazgas* [The knot of Kosovo]. [interactive]. 2008-05-02 [accessed on 2012-05-18]. < http://vz.lt/straipsnis/2008/05/02/Kosovo_mazgas?readcomment=1>.
- 2 See more about the evolution of self-determination, for instance, Sureta, R. *The Evolution of the Right of Self-Determination: A Study of United Nations Practise*. Leiden: Sijthoff, 1973.
- 3 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc. A/Res/2625 (XXV) of 24 Oct. 1970.
- 4 Pomerance, M. Self-Determination Today: the Metamorphosis of an Ideal. *Israel Law Review*. 1984, 19 (3-4): 310-339.
- 5 Declaration on Granting Independence to Colonial Countries and Peoples, UN Doc. A/Res/1514 (XV) of 14 Dec. 1960.
- 6 Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, UN Doc. A/Res/1541 (XV) of 15 Dec. 1960.
- 7 After the adoption of the United Nations Charter in 1945, the principle of self-determination is referred as a right. See, for instance, Raič, D. *Statehood and the Law of Self-Determination*. Leiden, Boston: Martinus Nijhoff Publishers, 2002, p. 200; Musgrave, T. D. *Self-Determination and National Minorities*. Oxford: Clarendon press, 1997, p. 62.
- 8 The other controversial aspect relates to the principle's application *rationae materiae*, i. e. whether the right to self-determination includes the right to independent statehood, particularly in the situations where no consent of a parent state is given. In this respect, the issue of self-determination involves a wide range of claims by people who seek to establish sovereign states or to achieve the recognition for a certain part of the territory, as in the case of Kosovo, Chechnya, Kashmir, South Ossetia, Abkhazia, etc. However, the detailed discussion of the international legal position of secession is beyond the scope of this article, thus only some of the relevant observations will be made.
- 9 See more in Quane, H. The United Nations and the Evolving Right to Self-Determination. *The International and Comparative Law Quarterly*. 1998, 47 (3): 537-572.

the right to self-determination pertains merely to colonial people, although the analysis of the relevant international documents denies this perception¹⁰. Secondly, people that are organised as states can be regarded as beneficiaries of self-determination¹¹.

The application of self-determination to the above-mentioned entities may invoke discussions among academics¹², although it does not entail significant difficulties in practise. On the contrary, there is no consensus whether distinct subgroups (groups) within independent states may be qualified as “peoples” for the purpose of self-determination. Even if so, there are ambiguities with regard to the characteristics of such subgroups. Except for the African Commission on Human and Peoples’ Rights¹³, international courts or bodies tried to avoid clarification on the features attributable to a subgroup¹⁴. In this regard, the ironical approach of I. Jennings seems to be quite relevant as he stated that “[o]n the surface it seem[s] reasonable: let the people decide. It [is] in fact ridiculous because the people cannot decide until somebody decides who are the people”¹⁵.

The inability to determine all aspects of the term “peoples” “<...> means that the appropriate circumstances in which to apply the right of self-determination often remain in doubt”¹⁶. It implies that the right of self-determination may become an inoperative legal norm or dependent upon political considerations. The subjects of the right may not be able to invoke it, as well as states to assure it, what entails international responsibility of the state. Thus it is of great importance to analyse the scope of application *rationae personae* in order to know the groups that may legitimately exercise the right to self-determination.

One may argue that there can be no absolutely clear criteria and that the existence of “peoples” depends on the circumstances of each individual case¹⁷. To some extent,

10 See Chapter 1 of this article.

11 See Chapter 2 of this article.

12 See Chapters 1 and 2 of this article.

13 *Kevin Mgwanga Gunme et al v. Cameroon*, 266/03, of 27 May 2009.

14 For instance, the Supreme Court of Canada stated “as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of ‘peoples’, the result has been that the precise meaning of the term ‘people’ remains somewhat uncertain.” *Reference re Secession of Quebec*, [1998] S.C.R., § 281.

15 I. Jennings also reminds the professor of Political Science “<...> who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.” see in Jennings, I. *The Approach to Self-Government*. Cambridge University Press, 1956, p. 55-56.

16 Musgrave, T. D., *supra* note 7, p. 148.

17 For instance, Aureliu Cristescu, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities stated: “<...> whenever in the course of history a people has become aware of being people, all definitions have proved superfluous”. As quoted in Duursma, J. *Self-Determination, Statehood and International Relations of Micro States. The Cases of Liechtenstein, San Marino, Monaco, Andorra and the Vatican City*. Groningen (Netherlands): Drukkerij van Denderen, 1994, p. 41. Elizabeth Chadwick upholds the similar position and maintains that “<...> the right of self-determination allows states to agree mutually that “all peoples” are so entitled, whilst the concrete

the author agrees with this view. The above-mentioned right is inextricably related with politics, and its application may depend on particular circumstances, though it does not mean that the application of self-determination *rationae personae* cannot be analysed from the perspective of international public law. *A contrario*, if "<...> international law wants to maintain its credibility and its role as a stabilizer of international relations, it needs to adapt itself to these recent developments, without, however, abandoning its normative aspirations"¹⁸. In other words, the analyses of individual cases help evaluating whether a certain case can be regarded as a political solution or may contribute to the development of international norms. Any analysis based merely on individual circumstances would not be legally relevant unless it is conducted within the legal international framework.

The research on self-determination, including its application *rationae personae*, does not lack the attention of foreign scholars. However, most of the researchers, with few exceptions¹⁹, while trying to define the beneficiaries of self-determination, do not clearly emphasise or distinguish different modes of implementing self-determination: internal and external²⁰. In the author's view, this makes the definition of "peoples" confusing and unclear. Yet, some of the scientists analysing the notion "peoples" base their research on the presumption that self-determination involves or might involve secession²¹. As a result, the category on occasion has been limited and the term "peoples" has on occasion been "stripped of its ordinary meaning and reconstructed as something quite different"²². It might be the reason why "peoples" are still the subject

application of self-determination can be left to domestic state arrangements, and, of course, "events", such as the outbreak of non-international armed conflicts" see Chadwick E. Post-World War 2 Exercises of Self-Determination: "Peaceful", "Friendly", and "Other" in Summers, J. (ed.) *Kosovo: A Precedent?* The Netherlands: 329. Martinus Nijhoff, 2011, p. 329.

- 18 Ryngaert, C.; Sobrie S. Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia. *Leiden Journal of International Law*. 24 (2): 467-490, 2011, p. 468.
- 19 See Raič, D., *supra* note 7 p. 243-272; Crawford, J. The Right of Self-Determination in International Law: Its Development and Future in Alston, P. (ed). *People's Rights*. Oxford: Oxford University Press, 2001.
- 20 See, for instance, Pomerance, M., *supra* note 4, p. 320-327; Gunter, L.; Smis, S. New dimensions of the right to self-determination: A study of the international response to the Kosovo crisis. *Nationalism and Ethnic Politics*. 2000, 6 (2): 43-70; Ghebwebet, H. *Identifying units of statehood and determining international boundaries*. Frankfurt am Main: Lang, 2006, p. 117-125; Koeck, H. F.; Horn, D.; Leidenmuehler F. *From Protectorate to Statehood Self-Determination v. Territorial Integrity in the Case of Kosovo And the Position of the European Union*. Vienna: Graz, 2009, p. 97-99; Wilson, G. Self-Determination, Recognition and the Problem of Kosovo. *Netherlands International Law Review*. 2009, LVI: 455-481, p. 470-471; Brown, S. B. Human Rights, Sovereignty, and the Final Status of Kosovo. *Chicago-Kent Law Review*. 2005, 80 (235): 235-272; Musgrave, T., *supra* note 7..
- 21 Quane, H. A Right to Self-Determination for the Kosovo Albanians? *Leiden Journal of International Law*. 2000, 13: 219-227, although see a rather different view in Quane, H. Self-Determination and Minority Protection after Kosovo in Summers, J. *Kosovo: A Precedent?* The Netherlands: 329. Martinus Nijhoff, 2011, p. 181-212; Castellino, J. *International Law and Self-Determination: the Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity*. Cambridge: Kluwer law international, 2000, p. 46-73; Tomuschat, C. Self-Determination in a Post-Colonial World in Tomuschat, C. (ed.). *Modern Law of Self-Determination*. Netherlands: Kluwer Academic Publishers, 1993, p. 1-20.
- 22 As quoted in Raič, D., *supra* note 7, p. 243.

of uncertainty. Moreover, the research on the application *rationae personae* cannot be considered as comprehensive, because usually it constitutes merely a small part of the broad analysis on self-determination issues. Thus, in the author's view, there is quite a lot of room for research in this field.

Therefore, the article focuses on “peoples” as the beneficiaries of the right to self-determination, specifically on the inhabitants of Trust and Non-Self-Governing territories, people organised as states and subgroups within independent states. A special emphasis will be drawn on the latter category, whereas the first two are applicable in practise without any significant difficulties. Pursuant to the scope of the research, the right to self-determination is understood as having two modes of implementation, i.e. internal and external²³.

1. The Inhabitants of Trust and Non-Self-Governing Territories as “Peoples”

After the adoption of the United Nations Charter, the concept of self-determination developed mainly in the context of decolonization due to the General Assembly resolutions and “the increase in Afro-Asian membership in the 1960's”²⁴. Self-determination has played a pivotal role as “a catalyst of decolonization”²⁵, and it is undoubtedly considered that the inhabitants of Trust and Non-Self-Governing territories are beneficiaries of self-determination²⁶. In other words, self-determination “<...> belongs to the people as the whole: if the population of a colonial territory is divided up into various ethnic groups or nations, they are not at liberty to choose by themselves their external status”²⁷. The entire population of a colony is regarded as a “people” “in a strict legal sense and for legal purposes only”²⁸.

In terms of colonialism, peoples were confined to a free choice of the territory's external political status²⁹. This mode of self-determination “<...> is often referred to

23 The right of secession can be exercised under the existing constitutional right to secede or where the subsequent approval has been obtained by the former sovereign. Unilateral secession is the secession without the consent of the former sovereign. For instance, Kosovo secession from Serbia is regarded as the unilateral one.

24 Higgins, R. Self-determination and Secession in Dahlitz, J. (ed). *Secession and International Law. Conflict Avoidance – Regional Appraisals*. The Hague: T.M.C. Asser Press, 2003, p. 23.

25 Jaber, T. A case of Kosovo? Self-determination and secession in the XXI century. *The International Journal of Human Rights*. 2011, 15 (6): 926-947, p. 928.

26 Although this conclusion is uncontroversial, see more in Quane, H., *supra* note 9.

27 Cassese, A., *Self-determination of peoples: a legal reappraisal*. New York: Cambridge University Press, 1995, p. 72. It should be pointed out that the exceptions were made. For instance, in the case of the non-self-governing territory of the Gilbert and Ellice Island, the General Assembly approved the partition of the territory as the result of the wishes of the inhabitants of the Ellice Islands, which became the state of Tuvalu. See UN Doc. A/Res/32/407, 28 Nov. 1977.

28 Raič, D., *supra* note 7, p. 143.

29 The General Assembly Resolution 1541 maintains the obligation of the states to report continuously until „a territory and its peoples attain a full measure of self-government”. Self-government encompasses:

as *external* self-determination, because it generally denotes the determination of the *international* status of a territory and a people, as opposed to *internal* self-determination, which generally refers to the relationship between the government of a State and the people of that State³⁰. The complete disregard of internal dimension might be the reason why self-determination is still quite often equated with the right to statehood.

After the adoption of the General Assembly resolutions concerning decolonization, the principle of self-determination was elaborated in other international instruments. In 1966, Article 1 (1) of the Human Rights Covenants confirmed that "all peoples have the right of self-determination". In both documents the key idea of self-determination was expressed that peoples "[b]y virtue of that right <...> freely determine their political status and freely pursue their economic, social and cultural development" (Article 1 (1)). Furthermore, it is emphasised that the State Parties to the Covenants "<...> including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations" (Article 1 (3)). International treaties lay down the obligation regarding self-determination to *all* states, not merely those administering Non-Self-Governing and Trust Territories. Therefore, self-determination is considered as a human right and extends beyond the context of decolonization.

Despite the fact that self-determination was envisaged as a human right applicable to "all peoples", one asserts that self-determination was "<...> relevant only to colonialism and was specifically applied in the promotion of the independence of peoples under colonial domination"³¹. The author of this article favours the approach in which the beneficiaries of self-determination are not confined to colonial people.

Firstly, the principle was enshrined in the universal multilateral treaty – the United Nations Charter – without limiting its applicability to specific situations. Secondly, the provisions of both Human Rights Covenants also clearly refer to "all peoples" and not merely to colonial peoples. This conclusion is supported by the wording of the Article 1 (3) of both international treaties as it refers to "[t]he States Parties to the present Covenant *including* those having responsibility for the administration of Non-

(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State (Principle VI). The Friendly Relations Declaration reiterates these forms and states: "The establishment of a sovereign and independent State, the free association or integration with an independent State or emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

30 Raič, D., *supra* note 7, p. 205. On the modes or forms of self-determination see also, for instance, Cassese, A., *op. cit.*, p. 71-140; Rosas, A. Internal Self-Determination in Tomuschat, C., *supra* note 21, p. 225-253; Alfredsson, G. The Right of Self-Determination and Indigenous Peoples in Tomuschat, C., *supra* note 21, p. 41-55. In this Article see Chapter 3.

31 For instance, during the debates on the adoption of the General Assembly resolution 2625 (XXV) in 1970, the representative of Burma stated: "[t]he sum total of the experience gained by the United Nations in the implementation of the principle [of self-determination] had clearly and incontrovertibly established its meaning and its purpose, namely that it was relevant only to colonialism and was specifically applied in the promotion of the independence of peoples under colonial domination." As quoted in Raič, D., *supra* note 7, p. 226.

Self-Governing and Trust Territories”³². If it had been applicable merely to colonies, it would not have contained two separate references to all states parties and to those states that were responsible for the administration of colonial territories.

Furthermore, the perception that the beneficiaries of self-determination are not limited to the inhabitants of Trust and Non-Self-Governing territories is also rebutted by the Friendly Relations Declaration³³. It states that:

“[n]othing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination as described above *and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*”³⁴

The inclusion of the paragraph cited above would be unnecessary “[i]f self-determination would have been intended to apply to colonial situations only”³⁵. The wording of the paragraph implies that, as in Article 1 (3) of the Human Rights Covenants, *all states have to conduct themselves in compliance with the right to self-determination*. Moreover, states “<...> must also respect this right in regard to their *own* peoples”³⁶. In addition, the General Assembly of the United Nations does not limit the use of the term “peoples” to colonial situations. It has recognised the right to self-determination for many situations outside the context of decolonization, including “Palestinian people”³⁷, “Tibetan people”³⁸, or “the people of South Africa”³⁹.

The above-mentioned position is supported by professor J. Crawford who points out that the right to self-determination as applicable only to colonial situations cannot be interpreted “just as a matter of ordinary treaty interpretation”⁴⁰. Yet, it should be noted that the application of the principle mostly to colonial situations does not mean that its application is restricted from the legal point of view. *A fortiori* the right of self-determination was applicable in the restoration of Lithuania’s independence⁴¹, as

32 Emphasis added.

33 According to professor V. Vadapalas, although the General Assembly declarations do not have a legally binding power, the latter declaration is considered to be obligatory as it meets certain conditions. The Resolution confirms the existing norms and principles of international law. Moreover, it formulates the rights and obligations. Finally, the Resolution was adopted unanimously without vote. It implies that the international community “as the whole” expressed its *opinion juris* with regard to the norms included in the document. See in Vadapalas, V. *Tarptautinė teisė* [International Law]. Vilnius: Eugrimas, 2006, p. 126.

34 Emphasis added.

35 Raič, D., *supra* note 7, p. 231.

36 *Ibid.*

37 See, for instance, UN Doc. A/Res/64/438 of Dec. 19, 2009; UN Doc. A/Res/65/202 of Dec 21, 2010.

38 See, for instance, UN Doc A/Res/1723 of Dec. 20, 1961.

39 See, for instance, UN Doc. A/Res/41/35 of Nov. 1986.

40 Crawford, J., *supra* note 19, p. 27.

41 See more on the applicability of the principle of self-determination in Lithuania’s case in Žalimas, D. *Lietuvos Respublikos nepriklausomybės atkūrimas. Pagrindiniai klausimai pagal tarptautinę teisę*. [Restoration of the independence of the Republic of Lithuania. The main questions under international law] Vilnius: Rosma, 1997.

well as of the other Baltic states, although it does not imply that the right is applicable only to territories which are illegally annexed and are under foreign occupation. Thus, there are two different aspects which cannot be equated. They were well illustrated by M. Kreca, the judge *ad hoc* of the International Court of Justice. He observed that “[t]he fact that in the Court’s practice <...> the right to <...> self-determination has been linked to non-self government territories cannot be interpreted as a limitation of the scope of the right to self-determination *ratione personae*, but as an application of universal law *ad casum*”⁴².

As noted above, self-determination is understood as one of the legal grounds to restore independence. In other words, the population which is under foreign occupation or illegally annexed may also be considered as the beneficiaries of the right to self-determination. The idea that entitlement to self-determination stems not merely from colonial rule, but also from the alien subjugation of any other type found its place in the Friendly Relations Declarations⁴³. It envisages that every state has a duty to promote the realisation of the principle of equal rights and self-determination, and refers to colonialism and peoples subjected “<...> to alien subjugation, domination and exploitation constitutes a violation of the principle <...>” (Paragraph 2). Due to such a formulation it is obvious that the Declaration distinguishes two categories: colonial peoples and peoples that are under “alien subjugation, domination and exploitation”. This understanding of *ratione personae* “<...> has now been widely accepted not only by individual groupings of States, but by the world community at large <...>”⁴⁴. It was also supported by the United Nations International Law Commission⁴⁵.

When analysing the term “alien subjugation, domination and exploitation”, some academics, for instance, professor R. Higgins refer to the “<...> occupied territories upon the termination or suspension of military hostilities”⁴⁶. Professor A. Cassese supports the approach in which peoples subjected to foreign occupation or domination have the right to external self-determination⁴⁷. Others, for instance, dr. H. Quane⁴⁸ or

42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Dissenting Opinion of Judge *ad hoc* Kreca) [2007] ICJ Rep 43, p. 740.

43 Higgins, R., *supra* note 24, p. 26.

44 Cassese, A., *supra* note 27, p. 91–92. Professor A Cassese quotes statements made by the United States and Brazil.

45 In 1988, the International Law Commission discussed the provision on colonialism of the “Draft Code of Crimes against the Peace and Security of Mankind”, all members of the Commission agreed that self-determination did not only apply to colonial peoples but also to “peoples under alien subjugation”. According to the Report of the International Law Commission to the General Assembly, “The principle of self-determination, proclaimed in the Charter of the United Nations as a universal principle, had been applied mainly in eradicating colonialism, but there were other cases in which it had been and could and should be used. By not tying it exclusively to colonial contexts, it would be applied much more widely. In that connection, all members of the Commission believed that the principle of self-determination was of universal application.” As quoted in Cassese, A., *op. cit.*, p. 92-93.

46 Higgins, R., *op. cit.*, p. 26.

47 See more in Cassese, A., *op. cit.*, p. 90-99.

48 Quane, H., *A Right to Self-Determination for the Kosovo Albanians?*, *supra* note 21.

professor L. Brilmayer⁴⁹ indicate that illegal annexation entitles to implement self-determination and both refer to the illegal annexation of the Baltic States as an example.

In the author's opinion, notwithstanding the exact meaning of the term, attention should be drawn that in all of the above-mentioned cases the right to self-determination plays merely a subsidiary role⁵⁰ and might be considered as "an appropriate remedy for prior illegal"⁵¹ actions. On the contrary, in colonial cases the right to self-determination plays a pivotal role and is considered to be the main legal ground for achieving "self-government". Peoples that are under other not colonial type of "alien subjugation, domination and exploitation" are entitled to invoke the right they were deprived of. In other words, the right to self-determination belonged to these peoples prior to the moment of occupation or other type of subjugation. This leads to the conclusion that peoples living under occupation or other type of subjugation are vested with the right of external self-determination, although they cannot be considered as a separate group of the holders of this right.

In conclusion, the inhabitants of Trust and Non-Self-Governing territories are considered as "peoples". In this regard, the entire population, not excepting various subgroups within the territory, has the right to self-determination, whereas the right is confined merely to the free choice of the territory's external status. Peoples under other non-colonial type of subjugation cannot be regarded as a separate category of "peoples", as they were entitled to the right of self-determination before the situation had appeared.

2. The Entire Population of The State as "Peoples"

Article 1 (2) of the United Nations Charter envisages that one of the purposes of the United Nations is "[t]o develop friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*"⁵². In the particular Articles the Charter also refers to "states"⁵³, which poses the question whether the terms "nations" and "states" differ from the term "peoples". In 1951 H. Kelsen made an attempt to define "people" by equating the term "peoples" with "states"⁵⁴. He noted

49 Brilmayer, L. Secession and Self-Determination: One Decade Later. *Yale Journal of International Law*, 2000, 25, p. 283.

50 For instance, the restoration of independence of the Republic of Lithuania.

51 Brilmayer, L., *supra* note 49, p. 284. See also the United Nations General Assembly Resolution on Universal Realization of the Right of Peoples to Self-Determination (UN Doc. A/Res/41/100, of 4 Dec. 1986. The paragraph 2 of the Resolution maintains that the General Assembly "[d]eclares its firm opposition to acts of foreign military intervention, aggression and occupation, since these have resulted in the suppression of the right of peoples to self-determination <...>" (emphasis added). Paragraph 4 states that the General Assembly "[r]equests the Commission on Human Rights to continue to give special attention to the violation of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation;" (emphasis added).

52 Emphasis added.

53 For instance, Article 1 (6), Article 3, Article 4, etc.

54 Kelsen, H. *The Law of the United Nations: a Critical Analysis of its Fundamental Problems: with supplement*. London: London Institute of World Affairs, 1950, p. 52.

that Article 1 (2) of the United Nations Charter referred to the relations among states⁵⁵. As only states could possess equal rights in general international law, H. Kelsen concluded that the reference to "peoples" in the same provision denoted "states"⁵⁶. However, *travaux préparatoires* to the Charter reveal that this view is not sustainable⁵⁷. During the debates at the United Nations Conference a Belgian delegate expressed a concern over the use of the word "peoples" and submitted that the word "states" would be more appropriate⁵⁸. The proposal was rejected by the drafting committee, which explained that the term "peoples" was a concept distinct from that of "state", and the word "peoples" did not signify "states". The committee explicitly declared that Article 1(2) was intended "to proclaim the equal rights of peoples as such", and "[e]quality of rights", it stated, "extends in the Charter to states, nations and peoples"⁵⁹.

The above-mentioned interpretation was supported by the Secretariat of the United Nations. When asked for a justification of the use of "states", "nations", and "peoples", it maintained that the word "state" indicated "<...> a definite political entity"⁶⁰. The term "nation" was referred to in "<...> a broad and non political sense <...>", so as "<...> to include colonies, mandates, protectorates and quasi-States as well as States"⁶¹. The interpretation of "peoples" is even wider, for it reflects "<...> the idea of "all mankind" or "all human beings <...>"⁶². Used in the formulation "self-determination of peoples", the term is justified as a "<...> phrase [of] such common usage that no other word seems to be appropriate". "Nations" are "<...> political entities, States and non-States, whereas "peoples" refers to groups of human beings who may or may not, comprise States or nations"⁶³.

The distinction between "peoples" and "states" was clearly reflected by the Human Rights Covenants and the Friendly Relations Declaration. The international documents declare that "all peoples" have the right to self-determination and "every state" has "the duty to respect this right"⁶⁴ and to promote its realisation⁶⁵. Therefore, "peoples" and "states" are separate notions.

55 Article 1(2) of the United Nations sets forth one of the purposes of the Organization: "To develop friendly relations among nations based on respect of the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;"

56 Kelsen, H., *supra* note 54, p. 52.

57 Musgrave, T. D., *supra* note 7, p. 149.

58 Duursma, J., *supra* note 17, p. 12.

59 Musgrave, T. D., *op. cit.*

60 As quoted in Duursma, J., *op. cit.*

61 *Ibid.*

62 *Ibid.*, p. 13.

63 *Ibid.*

64 Principle V of the Friendly Relations Declaration states that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

65 Article 1(1) of the Human Rights Covenants states that "[a]ll peoples have the right to self-determination." Article 1(3) maintains that "[t]he State Parties to the Present Covenant, including those having responsibility

As to the meaning of the term “nation”, several aspects must be emphasised. Firstly, it is clear that the term “nation” may have different meanings in international law. In the context of nationalism⁶⁶, the “nation” is understood as a community bound together by blood-ties and characterised by a particular language, culture, religion and a set of customs⁶⁷. Nationalism formed the scope of the holders of self-determination as peoples, which were defined by several attributes like history and language⁶⁸. Thus, in this sense the term “nation” encompasses ethnic considerations and grouping of the population based on race, ethnicity, language and other similar criteria.

Pursuant to the above-mentioned perception, the term “nation” has to be regarded as distinct from the term “peoples”. Otherwise it would lead to the negation of the self-determination of long-existing national identities on academic grounds, for instance, the United States of America⁶⁹. Of course, in case of ethnically homogeneous states the terms “peoples” and “nation” coincide, although it happens quite rarely, because nowadays many states are ethnically heterogeneous⁷⁰.

On the other hand, the term “nation” may be understood as the population of a particular territory. In this context “peoples” “<...> actually refers to <...> the nation <...>” whereas “nationality” refers to the country in which a person is a citizen”.⁷¹ Professor R. Higgins supports this approach as she indicates that pursuant to the relevant documents and state practise “peoples” “<...> is understood in the sense of *all* the peoples of a given territory. Of course, all members of distinct minority groups are part of the peoples of the territory. In that sense, they too, as individuals are the holders of the right of self-determination.”⁷²

for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”.

66 The concept of nationalism and its main idea “Every nationality one State” led to the Spring of Nations and became the principle expression of rebellion against “artificial” multinational empires. Raič, D., *supra* note 7, p. 176.

67 Musgrave, T. D., *supra* note 7, p. 5.

68 Koeck, H. F.; Horn, D., *supra* note 20, p. 71.

69 Professor I. Brownlie as quoted in Ghebrewebet, H. *supra* note 20, p. 124. Professor I. Brownlie refers to the fact that the United States of America does not recognise the existence of ethnic groups and the national identity of Americans is not based on ethnic criteria.

70 In the 1980’s some found only 15 of the world’s states are homogeneous nation states. See in Lee, S.; Moore, W., etc. *Ethnicity and Repression: The Ethnic Composition of Countries and Human Right Violations* [interactive]. 2002-10-02 [accessed on 2012-09-12]. <<http://mailer.fsu.edu/~whmoore/garnet-whmoore/research/Leetal.pdf>>.

71 A. Eide notes: “<...> from the perspective of international society, “nations” are understood in a territorial sense. International law presumes the existence of States which are already constituted and generally recognized. The criteria for statehood contained in the 1933 Convention on the Rights and Duties of States Article 1 are still generally held to be valid <...>. From the standpoint of international law, the “permanent population” is identical to the nation. “Nationality” refers to the country in which a person is a citizen. From an international law perspective, the nationality of a citizen of Belgium is simply Belgian, not Flemish [or] Wallonian <...>”. As quoted in Raič, D., *supra* note, p. 244-245.

72 Higgins, R. *Problems & Process: International Law and How We Use It*. Oxford : Clarendon press, 1994, p. 124.

The approach in which "peoples" means the entire population of the state is undoubtedly the least controversial as it excludes the possibility of external self-determination for a subgroup within a state⁷³. Therefore, only the "nation", not subgroups, has a right to external⁷⁴ as well as internal self-determination⁷⁵. In this sense "peoples" can exercise both forms of self-determination without a threat against the territorial integrity of the state.

The position towards territorially defined "peoples" is supported by the Friendly Relations Declaration which sets forth that states are conducting themselves in compliance with the right to self-determination if they possess "a government representing *the whole people belonging to the territory*"⁷⁶ (Principle V). The territorial application of self-determination is also evident from states' reports submitted under Article 40 of the International Covenant on Civil and Political Rights. It reveals that states consider the right to self-determination as a right for the entire population of the state⁷⁷. The reports also confirm that the right to self-determination *inter alia* includes the internal dimension, as 79% of the states commented directly or indirectly on this particular aspect⁷⁸.

Furthermore, the approach in which "peoples" are considered as the inhabitants of the state was also followed by regional international documents and the judicial bodies. For instance, the Final Act of the Conference on Security and Co-Operation in Europe⁷⁹ sets forth the right of peoples to self-determination (Principle VIII). Not only does Principle VIII refer to self-determination, but it also emphasises the territorial integrity of states⁸⁰ which may suggest that self-determination must be exercised within

73 For this reason the view that groups within states exercise the right to self-determination in conjunction with the entire population of the state was supported by Serbia during the proceedings related with the Unilateral Declaration of Independence of Kosovo at the International Court of Justice. *Accordance with International Law of the Unilateral Declaration of Independence in Respect* (Advisory Opinion) (Written Statement of Serbia) [interactive]. 2010-07-22 [accessed on 2012-09-01]. <<http://www.icj-cij.org/docket/files/141/15642.pdf>>.

74 For instance, the dissolution of Czechoslovakia, the reunification of Germany, etc.

75 There are no constraints on the application of self-determination either externally or internally in case "peoples" are territorially defined, thus the internal dimension of self-determination will be briefly presented in the subsequent chapter of the article.

76 Emphasis added. According to the cited provision, the theory in which "peoples" are territorially defined is named the representative theory of self-determination. See more about the theory in Musgrave, T. D., *supra* note 7, p. 151-154.

77 Quane, H., A Right to Self-Determination for the Kosovo Albanians?, *supra* note 21, p. 221. The conclusion is based on a survey of the reports submitted by 97 states. Of the 97 states, 87 commented on self-determination.

78 *Ibid.*

79 According to professor J. Crawford, notwithstanding the fact that the document is not legally binding, it is significant as a statement of various views. Moreover, it had a considerable currency and influence in East-West diplomacy, and led the Organization of Security and Cooperation in Europe. See in Crawford, J. *supra* note 19, p. 31.

80 Principle VIII sets forth that "[p]articipating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States".

the territorial limits of the state. Yet, the *travaux préparatoires* of the Final Act reveal that the term “peoples” in Principle VIII was intended to “<...> refer only to groups characterized by the fact of living in sovereign countries and identifying with the population of these countries”⁸¹. Furthermore, the Supreme Court of Canada, when analysing the meaning of the term “peoples” in the Quebec’s case, had no doubts that “peoples” might signify the “entirety of a state’s population”⁸².

In conclusion, it is difficult to rebut that the entire population of the state is considered as “peoples” who may invoke the right to self-determination, including its internal and external dimensions. In this regard, the term “peoples” ignores ethnic, cultural and/or other differences between distinct groups within a state. All subgroups within a state may exercise self-determination in conjunction with the entire population. However, ethnic considerations may be relevant in case of homogeneous states wherein the inhabitants of the state can be defined by an ethnic criterion as “nation”, though for the time-being most of the states are heterogeneous and encompass one or more distinct subgroups.

3. Subgroups Within a State as “Peoples”

3.1. The Applicability of Self-Determination to Subgroups Within a State

As mentioned above, the applicability of the right to self-determination to the entire population of a state is considered to be the least controversial as in the case of external self-determination it would not impair the territorial integrity of a state. However, in this regard the right to self-determination fails to take into consideration the enormous impact of linguistic, cultural, religious or other related factors by which various subgroups identify themselves. In general these subgroups do not “<...>

81 Cassese, A., *supra* note 27, p. 151.

82 *Reference re Secession of Quebec*, *supra* note 14, § 124. The Court stated: “The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to “nation“ and „state“. The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state’s population.”

The Supreme Court of Canada was asked to deliver an opinion whether Quebec could legally leave Canada by simply declaring independence. Secession would require the amendments of the Constitution. However, if a clear majority of Quebecers opted for secession, the federal government and other provinces would have had a duty to negotiate. If negotiations failed, and Quebec declared independence unilaterally, the international community would have had to decide whether to recognise the independence of Quebec. Thus, the Court had to evaluate not only the existing amendment procedures under the Constitution of Canada, but also it had to answer whether Quebec enjoyed the right under international law to declare independence unilaterally. The Court concluded that neither Canadian Constitution nor public international law afforded the province of Quebec the right to exercise external right to self-determination and to secede from Canada unilaterally. Notwithstanding the fact that the opinion is not binding and it was rendered by the national court, it is important as the Court analysed fundamental questions of international public law. Moreover, if the Court had favoured unilateral secession of Quebec, this would have entailed legal consequences.

consider themselves as one "people" by virtue of the fact that they happen to reside within certain established territorial limits"⁸³.

Thus, limiting the right to self-determination to the colonial entities and the entire population of a state is conceivable, for it eliminates the possibility to subgroups to invoke external self-determination. In this sense, it is worth reminding that self-determination does not include an absolute right to unilateral secession, i.e. external self-determination. According to a certain approach, the right to external self-determination stems from a relevant provision of the Friendly Relations Declaration⁸⁴. Even if it is true, the right is confined to the fulfilment of certain conditions. Therefore, launching the analysis whether subgroups may constitute "peoples", it is necessary to perceive the right to self-determination as encompassing the external, although not in the form of absolute unilateral secession, as well as the internal dimension. The exclusion of internal dimension from the concept of self-determination would lead to fallacious conclusions.

The internal dimension of the right to self-determination was confirmed by including it in the Human Rights Covenants that refer to "all peoples" as the beneficiaries of the right (Article 1 (1). The wording of their respective Article 1 (1) "[a] people's pursuit of its political, economic, social and cultural developments" means the right of peoples to participate in the decision-making processes. The decisions "<...> have not to be taken *for* a people but *by* the people"⁸⁵. It also implies that self-determination "<...> is supposed to be materialized primarily by achieving internal self-determination – i.e. by establishing constitutional mechanisms that allow the entity <...> to pursue its political, economic, social and cultural development within the framework of the existing state <...>"⁸⁶. Pursuant to the key element of internal dimension of self-determination – participation – the right has a continuous character and cannot be "consumed" once as in the case of external self-determination. The ongoing character of internal self-determination was reflected in the General Assembly's resolution on the

83 Musgrave, T. D., *supra* note 7, p. 153.

84 Principle V of the Friendly Relations Declaration states that "[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*" (emphasis added). It is argued that according to the so-called "safeguard clause", a people may exercise a right to external self-determination if a state lacks a representative government that acts in conformity with the right to self-determination as described in the Declaration. See more, for instance, Seidel, G. A, *supra* note 3, p. 207; Ryngaert, C.; Griffioen, C., *supra* note 18, p. 579-585; Raič, D., *supra* note 7, p. 308-397.

85 Koeck, H. F.; Horn, D., *supra* note 20, p. 101.

86 Muharremi, R. *Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited. Review of Central and East European Law*. 2008, 33: 401-435, p. 414. The Supreme Court of Canada supported the position towards the internal self-determination as it stated that "[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state". *Reference re Secession of Quebec*, *supra* note 14, § 126.

Universal realization of the right of peoples to self-determination,⁸⁷ which establishes that “<...> self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights”. The standpoint that self-determination serves as a safeguard for the effective realization of other human rights was reiterated by the Human Rights Committee in its General Comment on Article 1 of the Covenant on Civil and Political Rights⁸⁸.

One may argue that the ongoing character of self-determination “<...> is nothing else (and nothing more) than a right of all peoples organized as independent States to choose and to develop their political, social and economic structure according to their wishes and desires without outside, that is, third States interference”⁸⁹. To some extent, professor J. Crawford supports the approach in which the ongoing character is bound with the rule preventing interference in the internal affairs of a state, though he does not confine the right to self-determination to this perception.⁹⁰ Indeed, it is hard to accept that self-determination is, in essence, the right of states which coincides with the rule against intervention in the internal affairs of a state. In this sense, several aspects must be emphasised.

First of all, the United Nations Charter lays down the obligation to its members to act *inter alia* in accordance with the principles of sovereign equality and non-intervention into the matters which are within the domestic jurisdiction of states (Article 2 (1), (7)). These principles ensure the possibility for states to act freely in their internal affairs, whereas self-determination has a different purpose and meaning. In addition, if self-determination had meant only the rule against interference in the internal matters, a separate reference to it in the text of the Charter would have been redundant. Moreover, it would be tenable to agree that “[o]ne should not easily assume that a principle, which has already received so much attention, also in legal texts, does not have independent meaning”⁹¹.

Secondly, the principles of sovereign equality and non-intervention refer to states, whereas the right to self-determination pertains to “peoples”. As noted above, only “peoples”, not states, are the beneficiaries of the right.

Accordingly, it cannot be assumed that self-determination as a continuing right refers merely to the rule against intervention in the internal affairs of a state. Yet, it is true that internal self-determination means “<...> a right of a people to participate (a right

87 UN Doc. A/Res/41/10, of 4 Dec. 1986.

88 General Comment 12, Article 1, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1 Rev.1 p. 12, 1994.

89 As quoted in Raič, D., *supra* note 7, p. 233.

90 Professor J. Crawford maintains that “<...> to existing States, excluding for the purposes of self-determination those parts of the State that are themselves self-determination units as defined. In this case the principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a State, a central element of which is the right of the people of the State to choose for themselves their own form of government. In this sense, at least, self-determination is continuing, and not a once-for-all right.” See in Crawford, J. *The Creation of States in International Law*. Oxford: Clarendon press, 2006, p. 126.

91 Rosas, A. Internal Self-Determination in Tomuschat, C. (ed.), *supra* note 21, p. 229.

to have a say) in the decision-making process of the State"⁹². The acknowledgement of this perception can be found in the respective provision of the Friendly Relations Declarations. It sets forth that states are conducting themselves in compliance with the principle of equal rights and self-determination of peoples if they possess "a government representing the whole people belonging to the territory without distinction as to race, creed or colour." (Paragraph 7, Principle V).

The wording of the above provision also leads to the conclusion concerning the beneficiaries of the right to self-determination. It is asserted that the term "the whole people" means either that one state can have but one people, or that within a state more than one people may coexist⁹³. The latter meaning therefore seems tenable if we read the term "the whole people" in conjunction with the words "as to race, creed or colour". It is difficult to rebut that the prohibition on discrimination regarding race, creed or colour refers to the subgroups that exist within a state. The subgroups, in addition to the entire population of the State, also have a right to participate in the decision-making process of the State⁹⁴. In other words, in cases where all the people, including distinct groups within the state, exercise the right to self-determination through the participation in the government of the state on a basis of equality, the territorial integrity of such a state is protected⁹⁵.

The applicability of self-determination to subgroups within independent states was upheld by the Declaration on the Rights of Indigenous Peoples, adopted in 2007⁹⁶. Article 3 of this Declaration recognises the right to self-determination of indigenous peoples which means that they are enabled to free determination of political status and pursuit of their economic, social and cultural development⁹⁷. However, Article 4 confines the right to self-determination to its internal implementation as it sets forth that "[i]ndigenous 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."

The indigenous peoples traditionally form sub-communities within a state, thus their entitlement to internal self-determination suggests that the concept "peoples" extends to subgroups. In this regard, the author shares the opinion that the term "peoples" "<...> is not the subject to a restrictive interpretation"⁹⁸. Moreover, the Declaration on the Rights of Indigenous Peoples was adopted by the overwhelming majority that ascertains the *opinio juris* of states on the interpretation of "peoples"⁹⁹.

92 Raič, D., *supra* note 7, p. 237.

93 Duursma, J. *Fragmentation and the international relations of micro-states: self-determination and statehood*. Cambridge: Cambridge University Press, 1996, p. 36.

94 Raič, D., *supra* note 7, p. 247.

95 Crawford, J., *supra* note 19, p. 57.

96 UN Doc. A/Res/61/295 of 13 Sep. 2007.

97 Article 3 states: "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."

98 Jaber, T., *supra* note 25, p. 930.

99 *Ibid.*

Of course, one may argue that the *opinio juris* refers merely to the indigenous peoples though not to the other subgroups¹⁰⁰. According to H. Quane, the emergence of the internal right to self-determination is confined to indigenous peoples, although still contentious for other groups¹⁰¹. In the author's view, this approach cannot be sustained.

First of all, the international documents refer to self-determination as pertaining to “all peoples” and not to one subgroup. Furthermore, the recognition merely of one subgroup – indigenous peoples – as the beneficiaries of the right to self-determination would be difficult to reconcile with the concept of representative government. No one could qualify a government which excludes all distinct subgroups, except one, from the use of the right to self-determination as being “representative”. It would be discriminatory towards various subgroups that exist within a state to assure the right only to indigenous peoples.

Moreover, if we admit that self-determination concerns, among other aspects, the need to protect the identity of a subgroup and/or their fundamental rights and freedoms¹⁰², there is no objective justification for the entitlement of protection merely to one subgroup.

Finally, the applicability of self-determination to various subgroups within a state has been confirmed by judicial bodies. In *Katangese People's Congress v. Zaire*¹⁰³ the African Commission on Human and People's Rights (hereinafter referred to as the ‘Commission’) admitted that Katangese who formed one part of the inhabitants of Zaire might be qualified as a “people” for the purpose of the right to self-determination. The Commission observed that “[t]he issue in the case is *not self-determination for all Zaireans as a people, but specifically for the Katangese*”¹⁰⁴. However, it maintained that the right to self-determination is exercised primarily internally, whereas the absolute right to secede does not exist. The Commission stated that “<...> self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity”. As concerns Katangese, the Commission added: “Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire”, i.e. internally.

Another example of application of self-determination to subgroups is Kevin Mgwanga *Gunme et al v. Cameroon* case. The Commission established that “the people of Southern Cameroon” – part of the inhabitants of Cameroon – can be referred to as a “people”. Relying on its former decision regarding Katangese, the Commission emphasised that secession as a form to exercise self-determination may be exercisable

100 Quane, H. Protection after Kosovo in Summers, J. (ed.), *supra* note 21, p. 191.

101 *Ibid.*

102 See, for instance, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Docs. E/CN.4/2001/85 p. 10, 12, 2001.

103 *Katangese Peoples' Congress v. Zaire*, 75/92, of 16 Dec. 1994.

104 Emphasis added.

only under certain conditions, thus, "<...> the secession is not the sole avenue open to Southern Cameroonians to exercise the right to self-determination"¹⁰⁵.

In its decision concerning Quebec, the Supreme Court of Canada exemplifies the same approach that was taken by the Commission. The Court acknowledged that subgroups within a state might be considered as the beneficiaries of the right to self-determination. It stated that "peoples" "<...> may include only a population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population."¹⁰⁶ According to the Court, "[t]o restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states <...>"¹⁰⁷. Lastly, it supported the approach in which self-determination was normally fulfilled through internal self-determination whereas a right to external self-determination, i.e. unilateral secession, arose only under certain circumstances¹⁰⁸.

To sum up, it follows that the right to self-determination is applicable to subgroups within a state, thus they can be qualified as "peoples". As compared to the inhabitants of Trust and Non-Self-Governing Territories, and/or the entire population of a state, the internal dimension of the right to self-determination must be emphasised, as subgroups are primarily entitled to exercise self-determination internally. It means the pursuit of subgroups' political, economic, social and cultural development within the framework of an existing state. Not only relevant international documents, but also the practise of the judicial bodies reveals that subgroups are not entitled to an absolute right to external self-determination.

3.2. Defining subgroups as "peoples"

As it has been shown that international law supports the applicability of self-determination towards subgroups within a state, the question of the characteristics of a subgroup needs to be addressed. It is a difficult task to decide on the features to be attributable to a particular subgroup that may invoke internal right to self-determination, as there has been no common agreement on it.

Of course, one may argue that any effort to define "peoples" is fruitless since "<...> self-determination is so dependent on the individual and contingent facts of the cases that it can only be governed by a standard of reasonableness or appropriateness"¹⁰⁹. On

105 *Kevin Mgwanga Gunme et al. v. Cameroon*, *supra* note 13, § 191.

106 *Reference re Secession of Quebec*, *supra* note 14, § 124.

107 *Ibid.*

108 *Ibid.*, § 126.

109 As quoted in Knop, K. *Diversity and Self-Determination in International Law*. Cambridge: Cambridge University Press, 2002, p. 37.

the other hand, “[e]ven if it would be true, it does not mean that the concept can have no place in international law”¹¹⁰. The author favours the latter approach, as the absence of clear definition has not prevented international bodies from applying the concept. Yet, it does not exempt states from the duty to respect and promote the right to self-determination either.

The term “subgroup” refers to a certain group of individuals. Obviously, not every group of individuals or aggregate of individuals qualifies as a group for the purpose of self-determination: an association of dentists is certainly a group, but not in the sense in which the term is used in this context¹¹¹. As it has been correctly pointed out, “<...> one must presuppose the existence of a collectivity as a distinct entity with certain group characteristics, which are non-reducible to the characteristics of the composing individuals. Reformulated with regard to the issue of group identity, this amounts to saying that the identity of the community has to go beyond the merely aggregated identities of the individual members”¹¹².

Emphasis on a clear identity of a group is placed by A. Cristescu, the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination¹¹³, whose position is based on various opinions of states expressed during the debates in the United Nations organs. He revealed three main elements that are attributable to a subgroup in order for it to qualify as “peoples”: a social entity possessing a clear identity and its own characteristics, a relationship with a territory and lastly, an entity should not be equated with ethnic, religious and linguistic minorities¹¹⁴.

Therefore, the distinctiveness of a subgroup refers to the composition of both objective and subjective criteria that provide guidance for the determination of its identity¹¹⁵. As to the objective criteria, UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples (hereinafter referred to as ‘UNESCO International Meeting of Experts’) suggested that an entity should possess some or all of the following common features: common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and common economic life. Moreover, the group must be of a certain number which need not be large (e.g. the people of micro-states) but which must be more than a mere association of individuals within a state¹¹⁶.

110 Raič, D., *supra* note 7, p. 261.

111 *Ibid.*, p. 260.

112 As quoted in Raič, D., *ibid.*

113 The Subcommission on the Promotion and Protection of Human Rights was established by the Commission on Human Rights under the authority of Economic and Social Council Resolution 9 (II) of 21 June 1946. The name was changed from Subcommission on Prevention of Discrimination and Protection of Minorities by ECOSOC decision 1999/256 of 27 July 1999. The work of the Subcommission is continued by the Human Rights Council Advisory Committee.

114 UN Doc. E/CN.4/Sub.2/404/Rev. 1, 1981, p. 41.

115 Raič, D., *op. cit.*, p. 263.

116 UNESCO International Meeting of Experts on Further Study of the Rights of Peoples, Final Report and Recommendations, UN Doc. SHS-89/CONF.602/7, of 22 February 1990, p. 7-8.

One may argue that the identification of objective criteria is usually "context-dependant", as "<...> the term "objective" does not mean characteristics totally unchangeable and independent from decisions, opinions and changes voluntary undertaken by a "people" since "peoples" is not a static concept"¹¹⁷. To some extent, the author should agree with this approach, for it is hardly possible to determine various groups within states by uniform objective attributes, particularly in the heterogeneous societies prevalent for the time being. In this sense, professor H. Hannum reasonably points out that it is difficult "<...> to identify the common characteristics – apart from citizenship – of Swiss, Indians, Nigerians, Guatemalans, and Americans, yet each of these groups is identified by the international community as a "people"¹¹⁸.

On the other hand, the author maintains that the description "context-dependant" should not be applied to the criterion of territorial connection which is most often considered as a necessary condition for "peoplehood"¹¹⁹. It is argued that the criterion implies that a group of people constitutes the majority on that particular territory¹²⁰. The existence of the majority is necessary in order to be capable to form a new state¹²¹. As noted above, self-determination does not involve an absolute right to an independent statehood, thus, the author does not link territorial connection with the attributes of a future state. It seems reasonable to consider that the relationship with a territory is essential for the expression of the identity of a subgroup¹²². The link to a defined territory not only creates conditions to cultivate, preserve and develop the specific characteristics of a subgroup¹²³, but entitles it to determine its political destiny in a democratic fashion¹²⁴. Moreover, the territorial connection differentiates "peoples" from a minority as for minorities no territorial relationship is demanded¹²⁵.

As to the subjective criteria, UNESCO International Meeting of Experts has stated that an entity "<...> as a whole must have the will to be identified as a people or to be conscious of being a people <...>; and possibly <...> must have institutions or other

117 As quoted in Raič, D., *supra* note 7, p. 263.

118 Hannum, H. Rethinking Self-Determination. *Virginia Journal of International Law*. 34 (1): 1-69, 1993, p. 34 (1): 1-69, 1993, p. 36.

119 *Ibid.*, p. 263-264.

120 Murswiek, D. The Issue of a Right of Secession – Reconsidered in Tomuschat, C. (ed.), *supra* note 21, p. 27; Raič, D., *op. cit.*, p. 262. However, it is difficult to give an indication of what constitutes a clear majority. Some assert that as the risk of creating a large minority in the newly established State must be brought to a minimum, a majority of at least 80 per cent would be required. The Kosovo Albanians, e.g., constitute 90 per cent of the population of Kosovo. See Ryngaert, C.; Sobrie S., *supra* note 19, p. 577.

121 Murswiek, D., *supra* note 120, p. 37. C. Ryngaert and S. Sobrie maintain that "[i]t is difficult to give an indication of what constitutes a clear majority. As the risk of creating a large minority in the newly established State must be brought to a minimum, a majority of at least 80 per cent would be required. The Kosovo Albanians, e.g., constitute 90 per cent of the population of Kosovo." in Ryngaert, C.; Sobrie S., *supra* note 18, p. 577.

122 Those subgroups which consider themselves to be entitled to self-determination usually inhabit a distinct territorial unit. For instance, Kosovo Albanians, Flemish in Belgium, the Inuit in Kanada, etc.

123 Murswiek, D., *op. cit.*, p. 27.

124 Scharf, M. P. Earned Sovereignty: Juridical Underpinnings. *Denver Journal of International Law*. 2004 31(3): 373-387, p. 379.

125 See Chapter 3.3. of this article.

means of expressing its will of identity”¹²⁶. In other words, the subjective criteria refer to the so-called collective individuality which “<...> reflects the “selfness” of a collectivity as a result of which this “self” would be distinguishable from any other “self” on the globe”¹²⁷.

The subjective criteria seem to prevail over the objective ones. This approach was taken by the African Commission on Human and Peoples’ Rights. Analysing whether “the people of Southern Cameroon” qualify as “peoples”, the Commission maintained that Southern Cameroonians manifest numerous characteristics and affinities, though “[m]ore importantly they identify themselves as a people with a separate and distinct identity”¹²⁸. The International Commission of Jurists even asserts that “<...> a people begin to exist only when it becomes conscious of its own identity and asserts its will to exist <...>”¹²⁹. Therefore, it seems tenable to argue that the subjective criteria are crucial in distinguishing “peoples” from other groups and communities, including minorities, as they do not possess a group identity¹³⁰. The differences between “peoples” and minorities will be discussed in the subsequent Chapter of this article.

The African Commission on Human and Peoples’ Rights relied on the criteria elaborated by UNESCO International Meeting of Experts. In *Kevin Mgwanga Gunme et al. v. Cameroon* case the respondent state – Cameroon – claimed that “<...> no ethno-anthropological argument can be put forward to determine the existence of a people of Southern Cameroons, the Southern part being of the large Sawa cultural area, the northern part being part of the Grass fields’ cultural area. Since 1961, although some specificities had been preserved on more than one aspect, there had been remarkable rapprochement at the administrative and legal levels. The “separate and distinct people” thesis is no longer valid today”¹³¹. In other words, Cameroon maintained that the qualification of “peoples” must be based merely on the objective criteria related with ethnic or anthropological characteristics of a group. It denied that specificities stemming from different legal, educational, cultural systems or historical tradition may be applied in order to determine “peoples”. Although the Commission agreed with the position that peoples “may manifest ethno-anthropological attributes”, it did not concur with the opinion that ethnic or anthropological attributes were obligatory in order to invoke self-determination. The Commission referred to UNESCO International Meeting of Experts which has stated that a “people” needs to manifest some or all of the objective criteria. Ethno-anthropological attributes may be added to the characteristics of a “people”, though they cannot be used as the only dominant factor to accord or deny the enjoyment or protection of people’s rights¹³². As noted above, the Commission

126 Emphasis added. UNESCO International Meeting of Experts on Further Study of the Rights of Peoples, Final Report and Recommendations, *supra* note 116, p. 8.

127 Raič, D., *supra* note 7, p. 266.

128 *Kevin Mgwanga Gunme et al. v. Cameroon*, *supra* note 10, § 179.

129 International Commission of Jurists. *The Events in East Pakistan, 1971: A Legal Study*. Geneva, 1972, p. 49.

130 Raič, D., *op. cit.*

131 *Kevin Mgwanga Gunme et al. v. Cameroon*, *supra* note 10, § 168.

132 *Ibid.*, § 178.

paid special attention to the subjective criteria for it maintained that "[i]dentity is an innate characteristic within a people. It is up to the external people to recognise such existence, but not to deny it"¹³³.

To sum up, a two-way test is applied in order to determine whether a group qualifies as "peoples". First, the test looks whether a group of individuals can be distinguished from other groups by one or all objective criteria, particularly ethnic or racial identity, common historical traditions, culture, language, religious or ideological affinities, common economic life. Moreover, a group must have a territorial connection with a particular territory. Second, the test examines "the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct "people"¹³⁴. If a subgroup satisfies the necessary criteria, it can legitimately invoke the internal right to self-determination.

3.3. The relationship between minority and "peoples"

The relevant international documents indicate that "peoples", not minorities, have the right to self-determination. Minorities benefit from the minority rights envisaged in Article 27 of the Covenant on Civil and Political Rights. It enunciates that persons belonging to ethnic, religious or linguistic minorities within a state shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. With regard to the Covenant and other international documents it seems reasonable to assert that "<...> self-determination and minority rights are two distinct rights, with different beneficiaries"¹³⁵.

On the other hand, it is hard to deny that a minority can be described by the same objective characteristics as "peoples". In the study regarding minorities, Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, points out that there are several objective characteristics attributable to minorities. First, a group must possess ethnic, religious or linguistic features which enable to distinguish a group from those of the rest of the population¹³⁶. Further, a group should be numerically inferior to the rest of the population¹³⁷. The analysis of the relevant international documents, practise of judicial bodies and states support the enumerated objective criteria, though adds that a group may also possess cultural diversities¹³⁸. Therefore, drawing a strict distinction between "peoples" and minorities seems to be extremely difficult. It is even noted that "[i]f

133 *Kevin Mgwanga Gunme et al v. Cameroon*, *supra* note 10, § 179.

134 Scharf, M. P., *supra* note 124, p. 380.

135 Higgins, R., *supra* note 24, p. 30.

136 UN Doc. E/CN.4/Sub.2/384/Add.5, 1977, p. 5.

137 *Ibid.*

138 See, for instance, Račkauskaitė-Burkeikienė, A., *Tautinėms mažumoms priklausančios kalbinės garantijos: tarptautinių standartų įgyvendinimas Lietuvos Respublikoje*. [Linguistic Guarantees of the National Minorities: the Implementation of International Standards in the Republic of Lithuania]. Daktaro disertacija. Socialiniai mokslai (teisė). Vilnius: Mykolo Romerio Universitetas, 2012, p. 18-74.

a minority is simply considered to be an ethnic, linguistic, or religious group that is numerically inferior to the remainder of the population of a state, then such a distinction would debar virtually all subgroups within independent states from claiming a right to self-determination”¹³⁹.

However, as in the definition of a minority no connection with a territory is required, it would distinguish “peoples” from other subgroups, including minorities. As to the links of minorities with a particular territory, the Human Rights Committee in its General Comment on Article 27 of the Covenant on Civil and Political Rights explained that the only link with the territory that is required is the fact of “existence”. The Committee maintained that “<...> it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply mean that individuals belonging to those minorities should not be denied the right, in community with members of their group <...>. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. <...>”¹⁴⁰. The position allows drawing the conclusion that there can be minorities which are well-established in a territory of a state, although no particular links are required.

Of course, minority groups may live in a territory of a state for a long time. Thus, “[t]he longer a minority is established in a given territory, the more chance there is that it will develop a particular attachment to the territory”¹⁴¹. For instance, Kosovo Albanians, who are generally considered as an ethnic minority in Serbia, lived in the territory which we know today as Kosovo for ages and their relationship with the territory cannot be denied¹⁴². If the relationship with a particular territory exists, a minority could constitute “peoples”.

The approach in which the territorial relationship plays a pivotal role in distinguishing the “peoples” and minorities is also supported in the doctrine. For instance, professor J. Crawford states that “<...> although distinctions are sometimes drawn on the basis of classes or categories of groups (e.g. national, ethnic, religious or linguistic minorities, indigenous populations, etc.), these distinctions are imprecise at best. A more useful distinction is that between the people of the state as a whole, more or less dispersed minorities which are in some way distinctive in terms of ethnicity, language or belief, and “concentrated” minorities forming a distinctive unit in a particular area of a state and constituting a substantial majority of the population in that area”¹⁴³.

It should be highlighted that the attachment to a specific territory cannot be sufficient in order to qualify a certain group as “peoples”. According to a certain

139 Jaber, T., *supra* note 25, p. 933.

140 General Comment 23, Article 27, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/I Rev.1, 1994, p. 40.

141 Duursma, J., *supra* note 17, p. 50.

142 Ethnic Albanians claim that their ancestors, the Illirian tribe of Dardanians, settled in Kosovo as long as 4 000 years ago. See, for instance, Weller, M. *Contested Statehood Kosovo's Struggle For Independence*. Oxford; New York: Oxford University Press, 2009, p. 26.

143 Crawford, J., *supra* note 19, p. 64.

approach, despite the fact that the Chinese minority population in New York have been living in a particular district for decades, it would not be reasonable to consider their claims for self-determination¹⁴⁴. Therefore, it seems tenable to agree with the opinion that not only a mere fact of territorial connection must be taken into consideration, but the length of the connection plays a significant role¹⁴⁵.

In addition to the territorial relationship as a distinctive objective criterion, emphasis should be placed on the subjective criteria. Thus, the other crucial criterion is "<...> formed by the characteristic of a collective individuality of a people"¹⁴⁶. It does not mean that minorities do not possess a group identity. They certainly do, although this identity is defined "<...> as a will of the group in question to preserve its own characteristics"¹⁴⁷. In other words, minorities identify themselves as minorities in order to gain certain rights flowing from a minority status.

As compared to "peoples", minorities do not have a collective individuality because they "<...> cannot (apart from geographic factor) and, indeed, do not wish to be distinguished from their kith and kin residing in the kin State"¹⁴⁸. Nevertheless, if a minority has a "collective individuality" – an identity by which it can be distinguished from those living in the "kin State" – it can be regarded as a "minority-people"¹⁴⁹. The members of a "minority-people" not only enjoy minority rights, but may legitimately invoke the right to self-determination. In this respect, the definitions "minorities" and "peoples" overlap.

To sum up, minorities maintaining a well-established relationship with a particular territory and possessing collective individuality can be considered as "peoples".

Conclusions

1. The inhabitants of Trust and Non-Self-Governing Territories are considered as "peoples" in a strict legal sense and for legal purposes. In this regard "peoples" are able to exercise external self-determination which can be effectuated through creation of an independent state, association with an independent state or integration with an independent state. Although the internal dimension of self-determination was completely disregarded in the context of decolonization, its existence has not been denied. In particular that the right to self-determination, including its beneficiaries, is not confined to colonial situations.

2. The entitlement to the right of self-determination does not stem solely from colonial rule, but also from the alien subjugation of any other type. However, peoples that are under any other type of alien subjugation, including occupation or annexation,

144 Jaber, T., *supra* note 25, p. 933.

145 *Ibid.*

146 Raič, D., *supra* note 7, p. 266.

147 UN Doc. E/CN.4/Sub.2/384/Add.5, 1977, p. 6.

148 Raič, D., *op. cit.*

149 Ryngaert, C.; Griffioen, C., *supra* note 18, p. 578.

cannot be regarded as a separate group of “peoples” as they had been vested with the right before the situation had emerged. Therefore, in this respect the application of external self-determination serves merely as a remedy for regaining the deprived right.

3. The entire population of a state is considered as “peoples” who may exercise the right to self-determination either internally or externally. In this sense the term “peoples” ignores ethnic, cultural, religious, linguistic and/or other differences among distinct groups within a state. All subgroups are entitled to exercise the right to self-determination in conjuncture with the entire population. Although for the time being most of the states are comprised of various diverse subgroups, there on occasion might be states comprising one group. The inhabitants of the group can be defined by an ethnic criterion as “nation”. In this sense “nation” can be regarded as “peoples”.

4. The subgroups that possess the relevant objective and subjective criteria can be qualified as “peoples” for the purpose of the right to self-determination. A well-established relationship with a particular territory and the collective individuality of a subgroup are considered as necessary prerequisites for “peoplehood”. The entitlement to the right of self-determination does not *per se* signify the right to unilateral secession, thus self-determination primarily can be exercised internally. The subgroups pursue political, economic, social and cultural development within the framework of the existing state.

5. The terms “minorities” and “peoples” can overlap. If a minority maintains a well-established relationship with a particular territory and possesses collective individuality as a group, it qualifies as “peoples” or a “minority-people”. In addition to minority rights, it can enjoy the right to internal self-determination.

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„PEOPLES“ SAŲOKA TARPTAUTINĖJE VIEŠOJOJE TEISĖJE

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Santrauka. Straipsnio tikslas yra atskleisti ir išanalizuoti apsisprendimo teisės taikymo *rationae personae* (subjektų) aspektą tarptautinėje viešojoje teisėje. Apsisprendimo teisę įtvirtinanti 1945 m. Jungtinių Tautų Chartija, kitos tarptautinės teisės sutartys bei dokumentai nustato, kad ši teisė priklauso „peoples“, tačiau nė vienas iš dokumentų nepateikia termino apibrėžties. Vis dėlto tarptautinių dokumentų, valstybių bei teismų praktikos analizė rodo, kad apsisprendimo teisės subjektais vienareikšmiškai galima laikyti globojamų ir nesavavaldžių teritorijų gyventojus bei visus atitinkamos valstybės teritorijoje gyvenančius asmenis. Analizė paneigia kai kurių autorių nuomonę, jog apsisprendimo teisė priklauso tik globojamų ir nesavavaldžių teritorijų gyventojams.

Tarptautinės viešosios teisės doktrinoje nėra vienareikšmiškai sutariama dėl to, ar apsisprendimo teisės subjektu galima laikyti valstybės teritorijoje gyvenančių žmonių grupę. Tarptautinės teisės dokumentų, teismų ir kitų institucijų praktikos analizė atskleidžia, kad žmonių grupė, iš kitų išsiskirianti objektyviaisiais bei subjektyviais bruožais, gali būti laikoma „peoples“, t. y. apsisprendimo teisės subjektu. Ši žmonių grupė gali sutapti su mažuma, jeigu mažumai būdingi atitinkami objektyvūs ir subjektyvūs bruožai.

Pažymėtina, kad apsisprendimo teisės priklausymas tam tikrai žmonių grupei per se nereiškia, jog ši grupė turi teisę į vienašalę secesiją. Šiuo atveju pirmiausiai įgyvendinamas „vidinis“ apsisprendimas, t. y. valstybės viduje, sprendžiant dėl politinio, socialinio, ekonominio, kultūrinio grupės vystymosi. Tuo tarpu globojamų ir nesavavaldžių teritorijų gyventojai apsisprendimo teisę įgyvendino tik „išoriškai“, t. y. įkurdami nepriklausomą valstybę, prisijungdami ar susijungdami su jau esančia valstybe. „Vidinis“ apsisprendimo teisės aspektas dekolonizacijos proceso metu buvo „ignoruojamas“. Tuo atveju, kai apsisprendimo teisę įgyvendina visi valstybės teritorijoje gyvenantys asmenys, jie gali įgyvendinti abu šios teisės aspektus – tiek „vidinį“, tiek „išorinį“.

Reikšminiai žodžiai: apsisprendimas, apsisprendimo teisės subjektas, mažumos, globojamos teritorijos, nesavavaldžios teritorijos, okupuotų teritorijų gyventojai, subgrupės valstybėje.

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