SOMALI SELF-DETERMINATION IN THE HORN: LEGAL PERSPECTIVES AND IMPLICATIONS FOR SOCIAL AND POLITICAL ENGINEERING

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Somaliland, as a geographical term, refers to vast areas in the Horn of Africa, inhabited almost exclusively by the Somali people for centuries. Western Somaliland, the extensive inland area between the mountain ranges of Ethiopia and the plains of the Somali Republic, has been claimed by both countries. It is inhabited almost entirely by Somalis, who appear to identify, to all intents and purposes, with the Somali Republic; ecologically, the area appears to be more integral to Somalia than to Ethiopia. Ethiopia exercises jurisdiction in the area. However, throughout most of this century it has been the theatre of intermittent warfare, sometimes local, but increasingly international.

Any consideration of the legal issues in the conflict in western Somaliland – in particular, to whom it rightly belongs – requires some historical perspective. The dismemberment of Somaliland and the division of its people were effected in the last half of the 19th and the early part of the 20th centuries by four expanding Empires: Great Britain, France, Italy, and Ethiopia. Britain's original interest in Somaliland was as a food source for Aden. By the 1870's, the UK had agreed to Egyptian jurisdiction as far south as Ras Hafun, primarily to prevent other European powers from entering there. Meanwhile the French established themselves at Obock and the Gulf of Tadjoura, while the Italians entered the wings, as it were, at Assab in Eritrea. In 1889, Italy tried to establish a protectorate over Abyssinia. But Ethiopia repudiated the interpretation of Italy's claims and developed its own imperial ambitions, circulated in the letter by Menelik II, in 1891, in which he made allegedly historical claims over vast areas of East Africa.[1]

From 1884 to 1889, Britain concluded protectorate agreements with coastal Somalis in order to fill the vacuum created by Egypt's precipitous withdrawal from the region. In 1896, a treaty with the Ogaden was signed. Comparable agreements were struck with other Somalis by France and

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Italy. Among themselves, the three imperial powers had worked out basic spheres of influence and some boundary agreements.[2] In 1884, for example, Britain purported to establish boundaries with Italy for their respective protectorates. Neither had been authorized to do this under the express terms of the treaties with the Somalis by the local authorities party to the original protectorate agreements.

During this period, the power of Ethiopia increased greatly, partly because of the political acumen of Menelik II and partly because of the cupidity of European arms merchants who supplied his forces with modern arms. In 1896, Menelik decisively defeated the Italian army at Adowa, thus undoing the border agreements which Britain and France had just concluded with Rome. Menelik's strategic importance was magnified by the Mahdist revolt in full flame in the Sudan. Anxious to purchase Menelik's neutrality in that conflict and to discourage his incursions into the Somali protectorate, Britain concluded another border agreement with Menelik in 1897, surrendering large expanses of the British Somaliand Proctectorate to Ethiopia.[3] This treaty was concealed from the Somalis, who apparently could not divine it, in any case, from changes in the minimal local activity by Ethiopian regular and irregular forces. As for the boundary between Ethiopia and the Italian Somali protectorate, an agreement was concluded in 1896, but no copy of it nor record of its terms is extant. The local inhabitants were not again consulted. A joint attempt to demark the boundary in 1908 failed. In the south, Britain established a protectorate over Jubaland which was ultimately extended into that part of Somaliland now administered by Kenya in its Northern Frontier District. Part of this was ceded back to Italy by Britain after the First World War, again, without consultation of the inhabitatnts.

Modern Somali nationalism is said to have commenced with Sheikh Mohammed Abdullah Hassan, the so-called 'Mad Mullah', who sought to drive out the Europeans as well as the Ethiopians at the beginning of the century.[4] He failed and, for the next forty years, the struggles in Somalia were essentially between the four imperial powers. In 1935, Italy occupied Ethiopia and in 1940 British Somaliland as well. Shortly afterwards, the British conquered the Italians in East Africa and, for a short period, virtually all of Somaliland was united under a single colonial power. In 1942, Britain restored Ethiopian sovereignty in the metropolitan areas and confirmed the borders which had been set in 1897; but it retained administration of parts of Somaliland: Ogaden, the Haud and the Reserved Area.

This is not the place to explore the strikingly consistent territorial metaphysics of empires throughout history; however, a brief comment is called for. Empires which have based themselves on an attributed divine

authority or some mystical *volksgeist* do not seem to accept the notion of fixed borders. Instead they conceive of what we may call 'perimeters' provisionally demarking their sphere of effective control from that of the 'barbarians'. The perimeter is to be respected by the barbarian but will be pushed back at an appropriate time by the power of the empire. In the interim, imperial designs on the barbarian territory are to be respected by third states. This metaphysics, confounding to the outsider but self-evident to believers, permits the empire simultaneously to demand respect for the perimeter at will, and to retain the right to denounce,with a full righteous indignation, territorial moves by another state in its own intended area as 'aggressive' or 'expansionist'. An insight into this metaphysics can help to explain Haile Selassie's territorial programmes, even before he himself regained effective power. An imperial proclamation of 1941 declared:

> I have come to restore the independence of my country, including Eritrea and the Benadir [the Ethiopian name for Somalia], whose people will henceforth dwell under the shade of the Ethiopian flag.[5]

Belatedly, Europeans familiar with the history of the area began to consider the interest of the Somalis. In 1946 Ernest Bevin, then British Foreign Secretary, recommended a Greater Somalia:

> Now may I turn to Eritrea and Somaliland. I think that M. Molotov has been more than unjust in stating that we are trying to expand the British Empire at the expense of Italy and Ethiopia, and to consolidate what he calls the monopolistic position of Great Britain in the Mediterranean and Red Sea. In the latter part of the last century the Horn of Africa was divided between Great Britain, France and Italy. At about the time we occupied our part, the Ethiopians occupied an inland area which is the grazing ground for nearly half the nomads of British Somaliland for six months of the year. Similarly, the nomads of Italian Somaliland must cross the existing frontiers in search of grass. In all innocence, therefore, we proposed that British Somaliland, Italian Somaliland, and the adjacent part of Ethiopia, if Ethiopia agreed, should be lumped together as a trust territory, so that the nomads should lead their frugal existence with the least possible hindrance and there might be a real chance of a decent economic life, as understood in that territory.[6]

The proposal failed and, in 1948, the British withdrew from the Ogaden and the Ethiopian Empire seized it. A Somali protest in Jigjiga was suppressed. In 1950, the Italian protectorate was transformed into an

Italian Trust Territory with a pre-determined duration of 10 years. In 1954, the vestige of the Reserved Area was given to Ethiopia without warning, occasioning violent demonstations of protest in the British protectorate. In 1960, the British protectorate and the Italian Trust Territory achieved independence and united, as the Somali Republic.

For their part, Somali leaders consistently refused to endorse the unauthorized disposition of their territory by the Protecting powers. As Lewis writes:

> After independence, the union of Somalia with the British Protectorate added a new complication. In their negotiations with the British government the Protectorate leaders formally refused to endorse the provisions of the Anglo-Ethiopian treaty of 1897 which they were considered to fall heir to in succession to Britain. However questionable in international law, their attitude was that they could hardly be expected to assume responsiblity for a treaty which, without Somali consent and in defiance of prior Anglo-Somali agreements, eventually led to Ethiopia's acquisition of the Haud.[7]

The Somali Liberation Front began operations in the administered territories against Ethiopian forces and established a number of offices abroad.

The available record of Ethiopia's activities in the Somali territories it administers varies from indifference to bursts of violence. From some publications such as the United States *Area Handbook*[8] a picture of benign neglect emerges. But examinations closer to the field reveal frequent instances of official violence, often intended to suppress the political and economic rights of the Somalis. Practices of this sort were heralded by Ethiopian entry into the Ogaden in 1948, when police opened fire and killed 25 members of the Somali Youth League. Nor was this a single instance. A correspondent for the *London Times* who visited the Haud in 1956 reported:

> Individual tribesmen have been brutally treated (it is not possible to describe the intensely painful and humiliating torture) and Ethiopian police have attacked the tribal women. British liaison officers have been threatened by armed police, and attempts have been made to overwhelm and disarm the British tribal policemen. The most recent and serious development has been a blatant attempt to suborn the British tribes. In the case of the Habr Awal, the Ethiopian authorities tried to foist upon it some settled and partly detribalized members as Sultan and elders, a plan that strikes at the roots of the tribal organization and loyalty. At the same time, an intertribal meeting was called without notifying the British liaison officers, and Ethiopian officials, alternating between threats and promises, tried to persuade the tribesmen to accept Ethiopian nationality . . .[9]

Many other examples are provided by the late Professor Silberman in an unpublished manuscript.[9a] It is difficult to say whether acts such as these represented a policy of official terror or were simply undisciplined outbursts. From the standpoint of international responsibility the distinction may not be important.

The most recent history of western Somaliland has less to do with the issues of substantive law considered in this paper and more with procedures. Hence it may be reviewed briefly. The uneasy stalemate of Somali and Ethiopian claims in western Somaliland was stabilized from 1960 to what appeared to be a reciprocally tolerable level of violence. Whenever that level was exceeded Ethiopia responded with major coercions directed against the Somali Republic. Throughout this period, Somalia contended that its regular forces were not engaged in the belligerent zones, while Ethiopia insisted that they were.

The overthrow of the Emperor by the Dergue in 1974 set loose centrifugal forces throughout the Empire and, as in other parts, the level of fighting escalated in western Somaliland. The increasing success of Somali forces coicided with the expulsion of the Soviets from the Somali Republic and the shift of their support to the Dergue. In addition to material, this support included as many as 10,000 Cuban soldiers reportedly under Russian generals, a force sufficient to turn the tide against the Somalis, most of whose forces appeared to break and retreat to the Somali Republic. Thus, Ethiopian control of the area was re-established. If the pattern in the Horn of Africa persists, the events of 1977 and 1978 will not be the conclusion but only one more chapter in a continuing conflict. The international legal issues are not moot.

1. The Boundary Issue and Ethiopian Claims

The western Somali case is not, at heart, a boundary dispute, but an aspect of the case which is quite unique in the context of African politics is the absence of legal borders between Somalia and Ethiopia. Between Ethiopia and the former Trust Territory, there is only a provisional administrative line which the British established when they transferred the territory to Italy (the UN designated trustee) in 1950; the provisionality of the line was underlined in Article 1 of the Trusteeship Agreement and, in fact, from 1950 until the termination of the Trust in 1960 the General Assembly of the United Nations pressed Ethiopia and Somalia to establish a boundary.[10]

Nor are there binding treaties, for the Somalis are not party to any agreement ceding parts of Somaliland to Ethiopia since they never authorized any European government to cede their territory.

In 1897, an agreement between the Italians and Emperor Menelik II reportedly established a provisional border running parallel to the coast. The terms of the agreement are not known because no documents have survived.[11] But here again there is no indication of Somali privity.

In 1908, another Italian-Ethiopian Convention established the basis for the demarcation of the border,[12] but it was never implemented, partly because it incorporated the 1897 agreement which had vanished. From 1935 to 1948, the Ogaden was merged with Italian Somaliland and administered in sequence by the Italians and the British. Thereafter, the Ogaden was given back to Ethiopia, once again without consulting the wishes of the inhabitants. This latter transfer, it may be noted, was effected after the United Nations Charter and the formal installation of the doctrine of the right of self-determination as a key norm of international law.

Thus, the legal situation with regard to the southern borders is that there is no *de jure* border; all that exists is the 'provisional administration line' established by Britain, Italy and Ethiopia at the time of the establishment of the Trust in 1950. The repeated United Nations efforts to secure a demarcation of a boundary between Ethiopia and Somalia from 1950 to 1960, a well as the language of the Trusteeship Agreement itself, make clear that the official representatives considering the matter in the UN did not believe that the provisional administrative line of 1950 was a legal or *de jure* border.

The complex and confusing web of border claims between Ethiopia and the Somalia Republic in the area of the former British Protectorate can only be unraveled by tracing lines of asserted authority back to their source: the will of the indigenous Somali peoples inhabiting the regions in question. In the 1880s, Great Britain concluded a number of Protectorate Agreements with Somali coastal tribes, the final being with the Ogaden in 1896.[13] These Protectorate Agreements represent the foundation of British authority on the Horn of Africa.

The agreements, with minor variations in formula, reiterate a number of key points. First, the manifest objective of the agreement, as set out in the considerandum, is the maintenance of the independence of the tribe concluding the agreement. Second, the agreements by express language and implication concede the sovereignty of the tribes over their territory. To deny it would, indeed, have undercut the entire purpose of concluding such agreements. Third, the agreements establish a relationship of trust and good faith, hardly less demanding than that of a trustee in private law. Thus Article I of the Agreement with the Warsangeli provides:

> The British Government, in compliance with the wish of the undersigned Elders of the Warsangeli, undertakes to extend to them and to the territories under their authority and jurisdiction the gracious favour and protection of Her Majesty The Queen-Empress.[14]

Given the ecological indispensability of the inland areas to the nomadic life, it requires a great leap of the imagination to assume that the Somalis would even imply that Britain or anyone else might alienate that vital territory. Professor Silberman observes:

> . . . the Somalis in signing the 1884, and later, agreements knew full well what they were doing and . . . they had not ceded any right to the Crown to disrupt by treaty the arduously built up mastery of the seasonal ecology of the Horn.[15]

It is this complex of protectorate agreements which formed the exclusive basis of the authority of Great Britain with respect to the Somali territory. Principles of the interpretation of international agreements require strict construction of the terms of the instruments, especially when there may be a partial cession of sovereignty. Lawful performance requires strict fidelity to the explicit terms which have been agreed upon.

In 1884, the British attempted to delimit the inland boundaries of the Somali protectorate with Italy, which purported to have a protectorate over Ethiopia. The agreement of 5 May, 1894 extended the protectorate considerably inland. But Menelik II, the Ethiopian Emperor, refused to acknowledge Italy's asserted protectorate. The subsequent Italian defeat at the hands of Menelik and Britain's difficulties with the Mahdist uprising in the Sudan made London anxious to settle with Ethiopia on terms that would win Menelik's good will.[16] James Rennel Rodd, later Lord Rennel of Rodd, was sent to Addis Ababa in 1897 and concluded a treaty andan exchange of notes delimiting the border.[17] The note of 4 June, 1897, purported to establish the border. In contrast to the agreement with Italy in 1894, Great Britain in the 1897 agreement ceded about 25,000 square miles. Other provisions of the Treaty of 4 June, 1897 made plain that the United Kingdom had struck a 'package' deal, purporting to trade the patrimony of the Somali tribes in exchange for commercial privileges for British traders in Ethiopia and commitments by Menelik to remain neutral with regard to the Mahdist war. As against Britain's breach of the Somali protectorate, there was no countervailing Ethiopian claim of any international legal merit, for as of 1897 Ethiopian claims could not be supported 'by any firm Ethiopian occupation on Somali soil beyond Jigjiga.'[18] The Somalis themselves were unaware of the 1897 Agreement. Lewis reports:

> . . . it was not until 1934, when an Anglo-Ethiopian boundary commission attempted to demarcate the boundary, that British-protected Somali became aware of what had happened, and expressed their sense of outrage in disturbances which cost one of the commissioners his life. This long period of ignorance, far from indicating acquiescence, was facilitated by the many years which elapsed before Ethiopia established any semblance of effective administrative control in the Haud and Ogaden.[19]

Ethiopia's claims for Somali territory adjacent to the former British Protectorate are ultimately based, in international law, upon the 1897 Treaty and the Exchange of Letters which followed it. Insofar as that treaty is null and void, Ethiopia's claims have no legal basis.

As a matter of law and fact, the 1897 Treaty was void because it presumed an authority which the Somalis had never accorded Great Britain. The Somalis gave no authority to the British to transfer Somali territory to another state. Ironically, the British had committed themselves to protect the Somali territory and this was the manifest reason for the Protectorate. In attempting to transfer the land to Ethiopia, the British were acting without competence, exceeding their jurisdiction and concluding an agreement without the participation of the central party. Moreover, the Treaty violated the fundamental trust which was expressed in the Protectorate Agreements on which the British rested their authority with regard to the Somali Territory. Even if the Treaty of 1897 had originally been valid, it would have been invalidated by Ethiopia's failure to perform key obligations. In the *Namibia* opinion, the International Court of Justice held that

> . . . a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.[20]

The 1954 Anglo-Ethiopian Agreement, the purported successor of the 1897 agreement, imposed fundamental obligations on Ethiopia, some deriving from the core of the original 1897 agreement. In particular, the 1954 Anglo-Ethiopian Agreement reaffirmed the boundary and grazing rights of the 1897 treaty and so provided for the continued functioning of tribal authorities and police in the areas to be given to Ethiopia 'as set up and recognized by the Government of the Somaliland Protectorate', but 'without prejudice to the jurisdiction of the Imperial Ethiopian Government'. Ethiopia did not comply with these provisions to the satisfation of its treaty partner, and the British Government formally stated:

> many of the actions of the Ethiopian authorities . . . proved to be neither in accord with the letter nor the spirit of the Agreement. . . .[21]

These Ethiopian violations cut at the fundamental provisions of the Treaty and may thus be deemed to be contrary to the basic purposes of the Agreement, thus authorizing the termination of the agreement by Somalia.

The level, not to speak of its quality, of the administration exercised by Ethiopia in western Somaliland was itself inadequate to cure the defects in its treaty claims or to constitute an independent basis for claiming title to the area. In the *Western Sahara* case, the Kingdom of Morocco sought to build its argument on the *Eastern Greenland* precedent, where the absence of inhabitants had led the Permanent Court of International Justice to require only a very low level of administration of satisfying the requirement of effective and manifest control. In rejecting that claim, the International Court remarked:

> But in the present instance, Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organized tribes were in constant movement and where armed incidents between these tribes were frequent.[22]

In those regions of Somaliland claimed by Ethiopia, the level of control has been sparse and often nonexistent. Nor does it appear that any historical claims can avail:

> 'Tax collecting' forays in the Somali Ogaden country were called off as early as 1915 after the massacre of one hundred and fifty Ethiopian soldiers in January of that year. Since that was the only profitable element in the provincial administration of the Ogaden, this zone, which also included territory to the south of the Somaliland border, was barely occupied by the authorities before the Wal Wal incident.[23]

From the time of its establishment, the Somali Republic has consistently denounced the borders asserted by Ethiopia. Neither words nor deeds after independence can be construed as recognition of the Ethiopian claims. The fact that time elapsed *before* the establishment of Somalia as an independent state during which European states, purporting to act on behalf of the Somali people did not protest the Ethiopian claims, does not contribute to Ethiopian claims to western Somaliland. Nor does this fact in any way preclude or estop the Somali Republic or in any way extinguish its rights; laches or estoppel do not run against a party which has been denied procedural access.[24] If the absence of protest is relevant to the consolida-

tion of a title, it is necessary to provide sufficient notice and sufficient time for, as Judge Huber put it in *Island of Palmas*, 'a reasonable possibility' to react.[24] In short, Ethiopia's claims cannot benefit from a claim of estoppel or preclusion.

Under international law, prior to the installation of the doctrine of self-determination as a fundamental norm, the requisite components for the establishment of a title by occupation were 'an intention to secure sovereignty and the exercise of continuously effective control, the former being derivable from the latter.'[25] Ethiopia certainly fulfills the requirements of the psychological component.[26] But Ethiopia's aspirations have far exceeded her political capacities and she has not fulfilled the all-important requirement of continuously effective control in the occupied Somali territories.

It has been claimed that it is only the most recent international agreement which must be consulted. To the purported disposition of portions of Somaliland, this claim concedes that the 1897 agreement violated the Protectorate agreements of 1884 to 1889, but avers that the violation is irrelevant, since the latest agreement in time prevails.[27] But the internal, domestic doctrine of *lex posterior derogat priori*, ie, a later law prevails over earlier ones, makes no sense and indeed has no application where the competence to make law is derived from, and limited by, some other authority nor is it pertinent in a system which includes peremptory norms or *jus cogens*.

Consider the following example. Mr X's title to property which he has purchased from Mr Y is only as good as Mr Y's title to that property. Mr Y's title, in turn, is only as good as the title of Mr Z from whom Y acquired it. This sequence continues until we encounter some basic or first authority. That first authority in cases of inhabited territory is the will of the indigenous inhabitants. In international law, basic authority in the disposition of territory, as we will see shortly, is the principle of self-determination.

The authority with which Britain disposed parts of Somaliland is found in the complex of protectorate agreements concluded by Britain and the Somali tribes from 1884 to 1889; for it is only in these agreements that the Somali tribes accorded whatever authority the British might have had with respect to the territories. *No authority to transfer was given.* The contention that, this limited authority notwithstanding, Britain could make subsequent agreements violating the authority and trust on a principle of *lex posterir derogat* would defeat the basic policies of international law.

2. Decolonization and the Right of Self-Determination

The traditional search for title in international law is in fact of only secondary interest, because no contemporary consideration of these problems can proceed without reference to the doctrine of self-determination. It is a basic right of contemporary international law which has been given prominence in the United Nations Charter, by subsequent multilateral agreements exhibiting customary expectations, and by numerous resolutions by the General Assembly.[28] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[29] affirm in identical terms the right of self-determination. Article 1 of each instrument provides:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> The States Parties to the present Covenant, 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.

The most authoritative expression of the right of self-determination is Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, which the General Assembly adopted unanimously in 1960.[30] The Declaration adopts a functional definition of colonialization, speaking of colonialism in 'all its forms and manifestations'. Thus it does not limit itself, by its express terms, to the subjugation of non-European peoples by Europeans. Rather it undertakes a more functional approach in which the emphasis is upon the *fact of subjugation* by a racially or ethnically distinct group, which need not be European. This crucial point was clarified in Resolution 1541 (XV),[31] which was passed on the same day as Resolution 1514 (XV), cited above, and may be viewed as an authentic interpretation thereof. That Resolution, entitled, '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', was concerned *inter alia* with identifying the features of a non-self-governing territory's status, which would, under Charter obligations, require the annual submission of information by the administering state. Principle IV and V of the Annex provided:

> *Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.
> Once it has been established that such a *prima facie* case of

> geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position of status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.

The same functional approach was confirmed in the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970:

> By 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.
>
> Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and cooperation among states; and
>
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.[32]

The significance of this development was aptly summarized by the International Court of Justice in the *Namibia* case. There the Court said:

> Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government' (Art 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status has been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'. Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.[33]

It is obvious that the principle of self-determination will sometimes challenge existing state structures, the maintenance of whose stability is another goal of the international legal system. This coordinate goal is expressed in the UN Charter and in virtually all UN Resolutions which have expressed international policy on the matter of self-determination. There is, in short, a potential conflict between two policies. Which one prevails?

The answer to that question has recently been provided by the International Court of Justice in its important opinion regarding the Western Sahara.[34] That case squarely contraposed the policies of self-determination of a people against the territorial integrity of an existing state. Morocco and Mauritania claimed land to which they had had legal ties which Spain ignored when it occupied the territory in the latter days of its imperial expansion into North Africa. Though the people of the Western Sahara were not present in the Hague, the Court, directed by the reference of the General Assembly, considered their opposing claim that the contemporary will of the people was paramount over past legal claims in dispute of this sort. The Court concluded that both Morocco and Mauritania could demonstrate 'legal ties', but that it was the will of the people which prevailed.[35] These dramatic legal developments may be summarized as follows:

> (i) Self-determination is a fundamental right in contemporary international law;
>
> (ii) The right is available to all peoples who are subjugated, ie, functionally subjected to colonialism;
>
> (iii) A situation of subjugation will be inferred from such objective factors as geographical, ethnical or cultural distinctiveness.

Prima facie, the western Somali territory and people administered by Ethiopia are factually in a colonial situation. Their territory is distinct geographically and ecologically from metropolitan Ethiopia, and their racial, ethnic, linguistic and cultural distinctiveness from Amhara-ruled Ethiopia is total. Hence, they would appear to be entitled to the right of self-determination under international law.

3. Self-Determination and Non-Self-Governing Territories

Self-determination – the notion that people should decide upon their community and its power structure – is the basic principle of political legitimacy in this century. Its predominance, as we have seen, is no where more evident than in the United Nations Charter where it occurs, in grand language, in Article 1, where it is listed among the purposes and principles of the Organization, in Chapters XII and XIII where it is given practical application in the conception of international trusteeship and, in most extraordinary form, in Article 73. It is that provision which introduces the idea of the 'non-Self-Governing Territory', a notion which may well be the most radical political conception in the entire Charter.

> Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of internationl peace and security established by the present Charter the well-being of the inhabitants of these territories, and, to this end:
>
> (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
>
> (c) to further international peace and security;
>
> (d) to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, their specialized international bodies with view to the practical achievement of the social economic, and scientific purposes set forth in this Article; and
>
> (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Legal reforms often include what lawyers call a 'grand-father clause', a proviso that reforms apply henceforth to everyone – *except* the reformers. But Article 73 has no grandfather clause. Hence the explosive potential of Article 73 cannot be overstated. It challenges, in express terms, historical claims by states to control peoples who are distinct from the ruling group; it insists that even existing states must contemporaneously justify their rule by the will of the people.

Although there have been ample opportunities to limit the thrust of this provision, it is significant that the tendency among international decision-makers has been to expand rather than to contract it. The International Court of Justice, in the *Namibia* case, indicated, as we saw earlier, that this provision is to be given an extensive interpretation in keeping with the basic principles of the contemporary international system.

The western Somali territory under Ethiopian administration would appear to fall into the category designated in Article 73 of the United Nations Charter as 'territories whose people have not yet attained a full measure of self-government'; and so member states of the United Nations administering them have special obligations to the inhabitants and to the international community.

The mere fact of a persistent popular uprising would lead one to believe that there is a feeling of deprivation of human rights in western Somaliland.[36] Indeed the record would suggest that the administrator has failed to ensure 'political, economic, social and educational advancement'; it has, for example, extensively used Amharic rather than Somali in schools and government offices in Western Somaliland; it has failed 'to develop self-government, to take due account of the political aspirations of the people and to assist them in the progressive development of their free political institutions' and it has failed to encourage self-determination. These failures to discharge the 'sacred trust' mentioned in Article 73 and affirmed by the International Court of Justice in the *Namibia* case would appear to be material violations of the agreements under which Ethiopia undertook administration and by which it must justify its contemporary authority.

In the post-Charter period, the mere fact that an alien state seizes control over a territory and purports, by its internal law, to integrate it is no longer sufficient to consolidate or perfect an international title. The

principle of the right of self-determination of peoples and, in particular, General Assembly Resolutions 1514 (XV) and 1541 (XV)[37] now require that an erstwhile integrator fulfill prescribed conditions. Principle VI of the Annex to Resolution 1541 (XV)[38] states:

> A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
> (a) Emergence as a sovereign independent State;
> (b) Free association with an independent State; or
> (c) Integration with an independent State.

The implementation of any one of these three options requires free, voluntary and informed choice. The proportionately higher demand for meeting international standards in integration of culturally, racially, or linguistically distinct peoples which Principle IX sets is quite understandable. Unless the Metropolitian itself is extremely democratic and liberal, these distinctions will rapidly become impediments to the full participation of the integrated peoples and will, hence, involve a type of post-hoc denial of the right of self-determination. The Declaration on Friendly Relations between States provides in relevant part:

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.[39]

Because the procedures of Principle VI have not been complied with, attempts by Ethiopia to incorporate parts of western Somaliland are null and void. Hence the title to the territory of western Somaliland must be deemed pendent until an appropriate exercise of self-determination takes place.

4. Conflicts Between International and Regional Law

A regional organization cannot supersede a fundamental policy of the UN and insist that, though that policy may apply everywhere else in the world, it will not apply to member-states of that region. The issue is pertinent here because of AHG/Res 171, the Organization of African Unity's resolution of 1964 on boundaries. But it may be useful to consider the background of that resolution before we conclude that there is a conflict between regional and international law.

From the time of the All-African Peoples' Conference in Accra in 1958, the problem of 'artificial frontiers drawn by imperialist powers to divide the people of Africa' has been a continuing concern of African political leaders.[40] While the Charter of the OAU properly expresses concern for the principle of territorial integrity, it affirms 'the inalienable right of all people to control their own destiny', and incorporates by express reference the United Nations Charter. Thus, it superordinates the right of self-determination as does the Charter. An effort to do otherwise would be in vain, for Article 103 of the Charter states that in conflicts between the Charter and the obligations of other international agreements, the Charter prevails.

In 1964, the Assembly of Heads of States and Governments of the OAU, passed a resolution, under an agenda item entitled 'Study of Ways and Means which may help to avoid *new* border disputes between African countries'. It said:[41]

> The Assembly of Heads of State and Government meeting in its First Ordinary Session in Cairo, UAR, from 17 to 21 July 1964:
> Considering that border problems constitute a grave and permanent factor of dissention,
> Conscious of the existence of extra-African manoeuvres aimed at dividing African States,
> Considering further that the borders of African States, on the day of their independence, constitute a tangible reality,
> Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity,
> Recognizing the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States,
> Recalling further that all Member States have pledged, under Article VI of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity,
> 1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
> 2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.[42]

AHG/Res 171 was obviously animated by a valid concern: boundary disputes can stimulate conflict and provide opportunities for extra-continental intervention. The principle of self-determination, as I men-

tioned earlier, has an explosive potential which was deplored even at the time Wilson undertook to transform it into a principle of international law. But the principle itself is premised on the idea that the only stable state of affairs will be one with wide popular support, ie one in which self-determination has been achieved. Most important, the principle has become a fundamental norm of international law. Hence even if a regional grouping wanted to suspend its application, it could not. Moreover, it is difficult to see how someone can abjure the right of self-determination for someone else. Do I have the right to announce that I am hereby suspending *your* right of self-determination?

AHG/Res 171 can properly be understood as affirming on the regional level the strong policy in favour of the presumptive validity of boundaries where they exist and the requirement that disputes about them be solved peacefully, without the introduction of extra-continental force. But the western Somali case is not a boundry problem. There are no legal boundaries and extra-continental forces have already been introduced by one party to the conflict. AHG/Res 171 cannot be understood as abridging the right of self-determination.

If there is a legal right to self-determination in Western Somaliland, it is pertinent to consider briefly the alternative ways in which this right could be exercised. Before turning to the range of institutions and political devices by which self-determination might be achieved, I will suggest certain 'design principles' which should inform the choice of particular means.

1. The principle of socio-political stability:
   To be a durable and continuously effective instrument, self-determination should establish communities with sufficient internal stability and vigour to stand against outside force and to prevent the introduction of extra regional forces.
2. The principle of ecological integrity:
   Territorial structures created to protect the integrity of groups will serve no purpose if they lead to the deterioration or destruction of the ecology of that territory. In the Horn, the annual movement of pastoral Somalis from coastal savanna to inland steppe is absolutely indispensable both for the survival of the nomadic Somalis as well as the maintenance of the ecology. This principle would therefore require the creation of porous boundaries, if boundaries at all, between the areas of Western and coastal Somalia. The ecological principle does not preclude intergration or association with Ethiopia but it does weigh against it.
3. The principle of the rationalisation of boundaries:
   Boundaries should be designed to be instrumental to the achievement of major social goals. In particular, they should facilitate rather than impede social contact between group members, a point of particular significance to the Somalis. Because their population is quite homogenous, a simple boundary would include most of them. Pockets of other nationalities in such a territorial settlement could be handled with guarantees, nationality options or reciprocal resettlements. One would note the general undesirability of creating a land-locked state when other alternatives are available.
4. Identification of the relevant group:
   Most of the members of historic Somaliland are members of a common ethnic and language-dialect group and are members of the same religious persuasion. Hence an argument for a plebiscite which would include all Somalis (Republic and Ogadeni) has a certain cogency. But to overlook the strong historical distinctions between Ogadeni and coastal Somalis and create an inclusive plebiscite necessarily dominated by the numerically larger Republic population all but assures a result calling for integration of the western areas into the Republic. I would suggest that the relevant group for consultation include only those Somalis who inhabit, involuntarily left, or regularly migrate to Western Somaliland. Procedurally, creation of this limited consultation group would avoid charges of annexation by plebiscite. It must also be considered whether other groups within the theatre of conflict, such as Oromo and Hararis, should be part of a single inclusive plebiscite or be permitted to have separate plebiscites accommodations might be reached by negotiation, prior to a plebiscite, on constitutional structures that gave territorial or sectoral jurisdictions to different areas, groups etc. There are substantive policy reasons for avoiding fragmentation. In addition to creating non-viable socio-economic constellations, they invite meddling by outside powers. International law expresses guarded preferences for the avoidance of territorial division but accepts them when order and justice are more likely to be served.

With these general principles in mind, it may be useful to look at a number of models of self-determination. We will group them in terms of independence, association or integration.

Western Somalia could opt for independence both from Ethiopia and from Somalia. As an independent state it could, of course, establish a variety of types of union with surrounding areas: customs unions, currency unions, common markets, military alliances and so on. Here, however, we encounter what might be called the problems of differential association: insofar as the new state associates with one of two other contending states, it may act as a destabiliziing factor. A complex network of links with both

parties, which tended to balance out the power the component associations give, might be developed. An inclusive structure obviating differences between old antagonists seems desirable; in the right circumstances, as Jean Monnett showed, it can work. A common market could be formed including all of the states, though the recent history of East African would make the probability of such a development seem to be quite remote.

As an independent state, Western Somalia would be eligible for membership in both regional and international organizations. Independence need not necessarily lead to a system of regional confrontation or militarization, with both Ethiopia and Somalia seeking to incorporate the new state in its own latent war community. Models such as post-war Austria indicate that if there is political consensus, it is possible to create a militarily neutral state, deemed sufficiently innocuous under the genetic limitations of its creation to be acceptable to a variety of contending powers.

A major problem with the independence alternative would be that it would tend to cement boundaries in precisely those areas in which maximum porosity would be desirable. This too could be obviated by treaty, but the history of the region suggests that such compacts promise the most limited success.

A second option consistent with the general principles of self-determination would be association. An associated state is a state which is generally recognized as 'independent' and as a separate international legal personality capable of discharging most of the functions of statehood. However, it is factually subordinated for some and, in some cases, for virtually all international and domestic competences to another state. An associated state may be a member of the United Nations and of regional and functional organizations if their general membership and operative elite so desire. Its 'independence' is not necessarily less than that of ostensibly independent and non-associated states, but it is deemed sufficiently independent to warrant the title 'state'. The function of international recognizing an associate as a sovereign state is to legitimize a functional subordination whose validity might otherwise be challenged by norms of decolonization and self-determination.

In considering the associated statehood option for Western Somalia, a critical question will be to which of the major states in the area will the new state choose to associate itself. It is rather difficult to conceive of a voluntary association on the part of the residents of Western Somalia with Ethiopia. Even assuming that there were some indigenous interest, language and religious distinctions would create tremendous hurdles for a legitimate association as spelled out in General Assembly Resolution 1541 (XV). On the other hand, an associated state relationship with the Somali

Republic is quite conceivable.

A species of association might involve more than the mere addition of an associate and could include reconstitution of the principal. It is possible to imagine an arrangement in which the Somali Republic would reconstitute itself as a federation, allowing a certain degree of autonomy to provincial or state components within its current territory. Western Somalia would then become a new state or province within such a federal arrangement, sharing certain powers with the federal government and reserving other powers for itself. The most successful model for this type of internal reconstruction is to be found in the 1972 Addis Ababa agreement which concluded the long and bitter Sudanese civil war. Under this agreement, Northern Sudan, the effective Metropolitan of a large and only partially subordinated region, reconstituted itself and allows a degree of autonomy and separate political organization to the southern region. Although the southern region is not an associated state in the international sense of the term, it partakes, from a functional standpoint, in a number of the actions of associate statehood as conceived in self-determination theory.

The third possibility under self-determination theory is integration. Here the self-determining unit voluntarily decides to incorporate itself totally either within the metropolitan state that formally exercised jurisdiction over it or with another state. The procedural requirements for a lawful integration, as envisaged in Resolution 1541 (XV), are stringent, for the invitation to abuse by a metropolitan power already exercising effective control in the territory is most seductive. The line between integration and annexation can be very fine indeed. Nonetheless integration is deemed a licit possibility. Self-determinations such as the Hawiian and Alaskan adherence to the American federal union or the incorporation of the British Cameroons with the former French Cameroon provide current examples of lawful integrations. Moroccan appropriation of the Western Sahara region appears to be an unlawful integration.

It is difficult to imagine Western Somalia voluntarily integrating itself into Ethiopia. Indeed, in the light of Imperial Ethiopia's violation of commitments given to the United Nations in the Eritrean association arrangement which David Pool discusses in the following chapter, one would be quite reluctant to contemplate an integration without substantial and continuing international protection of the Metropolitan's guarantee to the Western Somali component. However, an integration with the Somali Republic is quite feasible, given the cultural, linguistic and religious affinities. The critical factor would be an appropriate degree of international supervision to confirm that integration of the people of the territory into the existing state of Somalia was in fact a voluntary exercise of self-determination.

There are other institutional arrangements which might be adapted to implement the Western Somali self-determination. They may be expressed in variations on the three principle modalities of self-determination as determined by the United Nations General Assembly. The determination critical for the lawfulness of any scheme is popular support. Thus, the peace designer will face two preliminary issues: identification of the self-determining unit in Western Somalia and its internal structure and second, determination of the relationship between that unit or composite entity and the existing political communities of the region. The problem is not technical. If there is a shared political will to resolve this festering conflict, a territorial arrangement consistent with minimum order and human dignity can be devised.

Notes

1. Public Records Office (London), Foreign Office 1/32 Rodd to Salisbury, No 15, 4 May, 1897, quoted in full in Somali Information Services, *The Somali Peninsula* (86 (1962).
2. For convenient compilation of the texts of the agreements, see id at 79–128.
3. Hertslet, *The Map of Africa by Treaty*, 423–29 (3rd ed).
4. See generally I. M. Lewis, *The Modern History of Somaliland from Nation to State* 63–91 (1965).
5. T. Farer, *War Clouds over the Horn of Africa*, (6–4 (1976); J. Drysdale, *The Somali Dispute*, 65 (1964).
6. Hansard, 4 June, 1946, cols 1840–41.
7. Lewis, *op cit* at 83.
8. I. Kaplan, et al, *Area Handbook for Ethiopia*, 120, 301 (2nd ed 1971).
9. *Times* (London) 27 Oct, 1956.

9a. Silberman, *Frontiers of Somaliland* (Hammerskjold Library [no date]).

10. See General Assembly Resolutions 392 (V), 15 December, 1950; 854 (IX) 14 December, 1954; 947 (X), 15 December, 1955; 1608 (VI), 26 February, 1967; 1213 (XII), 14 December, 1957; 1345 (XIII), 13 December, 1958.
11. Drysdale, *op cit* at 29–30.
12. Hertslet, *The Map of Africa by Treaty*, 1223 (3rd ed).
13. For texts, see *The Somali Peninsula*, *op cit* supra note 1.
14. *ibid* at 99.
15. Silberman, *op cit*
16. S. Touval, *Somali Nationalism: International Politics and the Drive for Unity in the Horn of Africa*, 156 (1963).
17. Hertslet, *op cit* at 423–29.
18. Lewis, *op cit* at 59.
19. *Ibid* at 61.
20. Legal Consequences for States of the Continued Presence of South Africa in Namibia [1971] ICJ Reports paragraph 91.
21. H. Hopkinson, Minister of State for Colonial Affairs, *Parliamentary Debates*, House of Commons, fifth series, vol 546, col 907 (17 November, 1955) quoted in Touval at 158.

22. [1975] ICJ Reports 12, 43.
23. Drysdale, *op cit* at 56.

23a. Cayuga Indians Claim, *Annual Digest*, 246 (1925–26).

24. 2 UNRIAA 829, 867.
25. Chen and Reisman, 'Who Owns Taiwan', 81 *Yale L. J.* 599, 624 (1972).
26. See Menelik's Circular Letter, cited in Footnote 1 supra.
27. See D. J. Latham-Brown, 'The Ethiopia-Somaliland Dispute', 5 *International and Comparative Law Quarterly*, 245 (1956).
28. For historical review of these authoritative texts, see Western Sahara case, *op cit* supra n 22.
29. GA Res 2200 A (XXI), Annex 21 UNGAOR Supp 16, at 49–60, UN Doc A/6316 (1966). Both Covenants came into effect in 1976.
30. GA Res 1514, 15 UNGAOR Supp 16, at 66, UN Doc A/4684 (1960).
31. GA Res 1541, 15 UNCAOR Supp 16 at 29, UN Doc A/4684 (1960).
32. GA Res 2625 (XXV), 24 October, 1970. UNGAOR 25th Sess, Supp No 28 (A/8028), p 121.
33. [1971] ICJ Reports, paragraph 52.
34. [1975] ICJ Reports 31–33.
35. See pages 1 and 5 supra.
36. [1971] ICJ Reports supra note 20.
37. Cited in notes 30 and 31 supra.
38. See pages 1 to 5 supra.
39. Cited in note 32 supra.
40. For the text of the Resolution, see C. Legum, *Pan-Africanism: A Short Political Guide*, 229 (1962).
41. For text of the Charter, see 58 AJIL 873 (1964). On the equivocality see B. Boutros-Ghali, The Addis Ababa Charter, 546 *Int'l Conciliation* 29–30 (1964); Touval, 'The Organization of African Unity and Africa Borders', 21 *International Organization*, 102 (1967).
42. AHG/Res 17(1). The Resolution was immediately challenged by the Somali Foreign Minister and subsequently categorically rejected by the Somali Republic (*The Somali Republic and the Organization of African Unity*, *op cit* at 20–22). Significantly, President Nyerere of Tanzania, author of the Resolution, explained in the discussion following the Resolution that the purpose of the Resolution was as a guide for the future: 'its adoption should not prejudice any discussion already in progress.' Id at 24; McEwan, International Boundaries of East Africa, 25 (1971). Even with such authentic clarifications, the Resolution contains implications and ambiguities utterly alien to the basic policies on which independent Africa had reared itself. Consider the temporal problem, the reach through time of the Resolution. The critical date, for crystallization of boundaries, is the 'achievement of national independence'.